

2M Hospitality Group, LLC v Sahara Plaza, LLC

2024 NY Slip Op 32068(U)

June 13, 2024

Supreme Court, New York County

Docket Number: Index No. 651524/2024

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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2M HOSPITALITY GROUP, LLC	INDEX NO.	<u>651524/2024</u>
Plaintiff,	MOTION DATE	<u>05/10/2024</u>
- v -	MOTION SEQ. NO.	<u>002</u>
SAHARA PLAZA, LLC,		
Defendant.	DECISION + ORDER ON MOTION	

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92
 were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Upon the foregoing documents and for the reasons set forth on the record (*tr.* 6.13.24), 2M Hospitality Group, LLC (the **Plaintiff Tenant**)’s motion for summary judgment is granted.

Reference is made to a prior Decision and Order of this Court dated January 30, 2024, in the related case between the same parties, captioned *2M Hospitality Group, LLC v. Sahara Plaza, LLC*, Index No. 653345/2023 (the **Prior Decision**). Familiarity is presumed. In the Prior Decision, Sahara Plaza LLC (the **Defendant Landlord**) argued that pursuant to Article 63 of the Lease (NYSCEF Doc. No. 51, ¶ 63), the Plaintiff Tenant waived its rights to money damages. The court agreed. Subsequently, the Plaintiff Tenant brought this action for specific performance and sought a preliminary injunction. In its opposition papers, the Defendant Landlord argued that the preliminary injunction was inappropriate because in effect, the Plaintiff Tenant was seeking a mandatory injunction and the ultimate relief in the case. Relying on a Decision and Order of the court (Schecter, J.), dated July 28, 2022, in a case captioned *VLC the*
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Motion No. 002

Plaza, LLC v. Sahara Plaza LLC, Board of Managers of the Plaza Condominium (Index No. 652098/2022), the Court denied the Plaintiff Tenant's motion for a preliminary injunction (Mtn. Seq. No. 001) (NYSCEF Doc. No. 41). The Plaintiff Tenant now moves for summary judgment.

To show entitlement to specific performance, the Plaintiff Tenant must demonstrate that (i) it has substantially performed its contractual obligations under the Lease, (ii) that it is willing and able to perform its remaining obligations, and (iii) that it has no adequate remedy at law (*EMF Gen. Contr. Corp. v Bisbee*, 6 AD3d 45, 51 [1st Dept 2004]). Upon the foregoing documents and as set forth on the record (6.13.24), the Plaintiff Tenant has demonstrated *prima facie* its entitlement to specific performance, and the Defendant Landlord fails to raise an issue of material fact in response.

The Plaintiff Tenant complied with its obligations under the Lease, and ceased paying rent only after offered an abatement by the Defendant Landlord as a result of government restrictions put in place by virtue of the COVID-19 Pandemic. The Plaintiff Tenant indicates it will resume paying rent once it is able to return to the space (which it indicates the Defendant Landlord is preventing them from doing), have appropriate health inspections and insurance and otherwise comply with the Lease

In its opposition papers, the Defendant Landlord argues that summary judgment is inappropriate because (i) the Plaintiff Tenant has failed to show that it has a liquor license or the required insurance, and (ii) otherwise casts doubt on the Plaintiff Tenant's intentions to comply

with the Lease based on certain language contained in the Plaintiff Tenant's Memorandum of Law. The arguments fail.

First, the Lease does not require the Plaintiff Tenant to maintain a liquor license.

Article 2 provides that:

Subject to and to the extent permitted by the Condominium Documents, Tenant shall use and occupy the demised premises only as a dignified, first-class, upscale, high-end store selling prepared / made to order pasta and serving wine and beer, as permitted by Owner and subject to Owner's prior written approval of Tenant's Menu as defined and set forth herein, all in accordance with the High-End Retail Standards (as hereinafter defined), and the store must comport with first class, upscale, high end food establishments and shall in no event detract from the character, appearance and/or dignity of the Building. (collectively, the "Permitted Use") and for no other purpose.

(NYSCEF Doc. No. 51, ¶ 2). Article 79 of the Lease makes clear that maintaining a liquor license is an option, not an obligation, if the Plaintiff Tenant intends to serve alcohol on the premises:

79. Liquor License. Notwithstanding anything contained herein, Tenant, at its sole costs and expense, shall obtain all necessary permits and licenses required to operate its business as per the Permitted Use, including, without limitation, obtaining and maintaining a liquor license (*option but not an obligation*) for on premises consumption, which shall be Tenant's sole responsibility *and option*. Failure to obtain a liquor license or permit for the operation of Tenant's business shall not permit Tenant to vitiate its obligations under the Lease.

(*id.*, ¶ 79 [emphasis added]).

With respect to insurance, as is typical in a commercial lease, Article 51 of the Lease makes clear that the Plaintiff Tenant is required to maintain insurance. However, nothing in the record suggests that the Defendant Landlord requested a copy of the insurance, that the Plaintiff Tenant

did not have the required insurance, or that the Defendant Landlord ever served a notice of default in accordance Article 17 of the Lease as to this issue which they now – for the first time – bring up:

Default: 17. (1) If Tenant defaults in fulfilling any of the covenants of this lease other than the covenants for the payment of rent or additional rent; or if the demised premises become vacant or deserted; or if any execution or attachment shall be issued against Tenant or any of Tenant's property, whereupon the demised premises shall be taken or occupied by someone other than Tenant; or if this lease be rejected under Section 365 of Title 11 of the U.S. Code (Bankruptcy Code); or if Tenant shall have failed, after five (5) days written notice, to redeposit with Owner any portion of the security deposit hereunder which Owner has applied to the payment draw rent and additional rent due and payable hereunder, or if Tenant shall be in default with respect to any other lease between Owner and tenant; or if Tenant shall fail to move into or take possession of the demised premises within thirty (30) days after the commencement of the term of this lease, of which fact Owner shall be the sole judge; then, ***in any one or more of such events, upon Owner serving a written fifteen (15) day notice upon Tenant specifying the nature of said default, and upon the expiration of said fifteen (15) days; if Tenant shall have failed to comply with or remedy such default, or if the said default or omission complained of shall be of a nature that the same cannot be completely cured or remedied within said fifteen day period,*** and if Tenant shall not have diligently commenced curing such default within such fifteen (15) day period, and shall not thereafter with reasonable diligence and in good faith proceed to remedy or cure such default, ***then Owner may serve a written five (5) days notice of cancellation of this lease upon Tenant,*** and upon the expiration of said five (5) days, this lease and the term thereunder shall end and expire as fully and completely as if the expiration of such five (5) day period were the day herein definitely fixed for the end and expiration of this lease and the term thereof and Tenant shall then quit and surrender the demised premises to Owner, but Tenant shall remain liable as hereinafter provided.

(NYSCEF Doc. No. 51. ¶ 17 [emphasis added]). Thus, having never requested any such insurance certificates or policies from the Plaintiff Tenant, which the Plaintiff Tenant did not have (*i.e.*, there is no evidence that the Plaintiff Tenant lacked insurance when it was permitted to occupy the demised premises) or otherwise claimed a default, the Defendant Landlord cannot now claim an issue of fact preventing the award of summary judgment based on any purported speculation as to a lack of insurance – no evidence of which is in the record.

As to other preparations necessary to bring the Plaintiff Tenant's business back into operation, the Defendant Landlord must make commercially reasonable efforts to provide the Plaintiff Tenant with access to the demised premises per the terms of the Lease, which the Defendant Landlord fails to indicate it has done:

78. Access. Notwithstanding anything contained herein to the contrary, Owner shall use commercially reasonable efforts to provide Tenant with access to the Building on a twenty four (24) hour, seven (7) day per week basis, subject to Owner's security requirements, as may be amended, and subject to force majeure.

(NYSCEF Doc. No. 51, ¶ 78). Indeed, the Defendant Landlord's own submissions firmly establish that it has elected to close the space and violate the Lease following the lifting of the government restrictions put in place during the COVID-19 pandemic.

As discussed at oral argument (*tr.* 6.13.24), however, the Plaintiff Tenant must fulfill all of its obligations under the Lease necessary to operate in accordance with the Permitted Uses (including having appropriate insurance and having an appropriate health inspection). To the extent the Plaintiff Tenant fails to comply with these obligations, the Defendant Landlord may exercise its lawful remedies under the Lease, including, if appropriate by serving a notice of default pursuant to the terms of the Lease. What it can not do, however, is violate the Lease with impunity as it has attempted to do here.

The Defendant Landlord's specious attempt to cast doubt on the Plaintiff Tenant's intention to comply with the terms of the Lease because the Plaintiff Tenant, in its Memorandum of Law, states that it "plans to operate as a counter-service restaurant" and has "no intention of holding over," simply fails (*see* NYSCEF Doc. No. 91, at 10). These statements by the Plaintiff Tenant

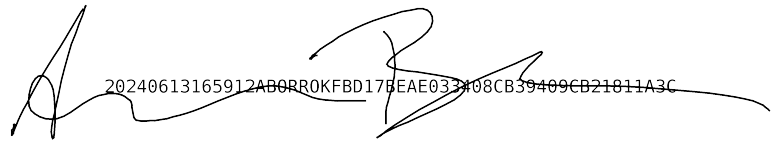
indicate the opposite – a willingness and intent to comply with the terms of the Lease. Nothing more. In any event, this too does not create an issue of fact for trial warranting the denial of summary judgment.

The Court has considered the parties’ remaining arguments and finds them unavailing.

Accordingly, it is hereby

ORDERED that the Plaintiff Tenant’s motion for summary judgment is granted; and it is further

ORDERED that the Plaintiff Tenant shall email the Court a proposed order which proposed order shall include that Plaintiff Tenant shall provide the Defendant Landlord with evidence of its insurance and that it has obtained the appropriate health inspection prior to re-opening for the Court’s signature.



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6/13/2024
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE