

WP Theater v Edison Ballroom, LLC
2020 NY Slip Op 33647(U)
November 3, 2020
Supreme Court, New York County
Docket Number: 652493/2020
Judge: Arthur F. Engoron
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARTHUR F. ENGORON **PART** **IAS MOTION 37EFM**

Justice

-----X

WP THEATER

INDEX NO. 652493/2020

Plaintiff,

MOTION DATE 09/30/2020

- V -

EDISON BALLROOM LLC,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT.

Upon the foregoing documents, plaintiff's motion for summary judgment in lieu of complaint in its favor against defendant is denied, and defendant's cross-motion to dismiss is denied, for the reasons stated hereinbelow.

Background

On August 19, 2019, plaintiff, The Women's Project and Productions, Inc., originally suing as "WP Theater," and defendant, Edison Ballroom LLC, entered into a contract (the "Contract") pursuant to which plaintiff would rent defendant's venue, located at 240 West 47th Street in Manhattan, for a fundraising gala scheduled for May 11, 2020 at 6:00 PM (NYSCEF Doc. 4, at 1). According to the Contract, plaintiff planned to welcome 185 guests to the event (NYSCEF Doc. 4, at 1). On June 16, 2020, plaintiff commenced the instant action against defendant, asserting that defendant is obligated to reimburse plaintiff for all payments that plaintiff made to defendant pursuant to the Contract. Plaintiff emphasizes the Contract's "ACT OF GOD" clause, which states the following:

Force Majeure. Neither party shall be responsible for failure to perform, and either party may terminate, this contract due [to] "Force Majeure or Acts of God," including, but not limited to Force Majeure, circumstances beyond its reasonable control, strike, governmental authority, terrorism, war in the United States, or unavailability of mass transportation, that make it illegal, impractical or impossible for the affected party to hold the event or enjoy the benefits of this contract.

Client has the right to use the paid funds to a rescheduled event within 12 months of the event date if there is a significant snowstorm that would alter transportation or make transportation hazardous.

For the Avoidance of doubt, in the event of any failure to perform or termination due to such Force Majeure or Acts of God, [defendant] shall promptly refund 100% of all payments made by Client to [defendant] including the otherwise non-refundable deposit, and Client shall have no further obligations to [defendant] unless the Client wishes to reschedule the event within 12 months of the event date as stated above.

(NYSCEF Doc. 1 and Doc. 4, at 12). Plaintiff asserts that it did not “attend” (hold?!) the event because of Governor Andrew Cuomo’s 10-point New York State PAUSE plan (the “PAUSE Plan”) in response to the COVID-19 pandemic, which stated the following, in pertinent part (plaintiff added the below emphasis):

1. Effective at 8 PM on Sunday, March 22, all non-essential businesses statewide will be closed;
2. *Non-essential gatherings of individuals of any size for any reason (e.g. parties, celebrations or other social events) are canceled or postponed at this time*

(NYSCEF Doc. 3, at 2). Plaintiff asserts that it would have violated the PAUSE Plan had it “attended” the event because that would have constituted a “non-essential gathering” at a “non-essential business.” Thus, by letter dated May 8, 2020, plaintiff requested that, within five days of said letter, defendant tender \$29,783.25 (the amount that plaintiff had paid to plaintiff for the event) to plaintiff and notify plaintiff of defendant’s intentions to comply with the subject letter (NYSCEF Doc. 7). By letter dated May 12, 2020 (the day after the event was scheduled to occur), defendant informed plaintiff that “while rescheduling the event is one option, a present refund of your client’s payment to date is not. The unprecedented shutdown of the national economy in general, and the New York economy in particular, has crippled everyone’s financial resources” (NYSCEF Doc. 8). While defendant’s response cited its need to “focus on its ability to reopen,” plaintiff asserts that “no industry has been more negatively affected by the novel pandemic than plaintiff’s, the theatre industry” (NYSCEF Doc. 3, at 3).

Plaintiff now moves (1) pursuant to CPLR 3213, for summary judgment in lieu of complaint in its favor against defendant in the amount of \$29,783.25, plus interest thereon at the statutory rate of 9% per annum; and (2) pursuant to 22 NYCRR § 130-1.1, for attorney’s fees, as defendant’s defense lacks merit (NYSCEF Doc. 2 and 16).

On August 6, 2020, defendant cross-moved, pursuant to CPLR 3211(a)(3), to dismiss the instant complaint (NYSCEF Doc. 11). Defendant asserts that it is attempting “to hold the contracted-for events in the future rather than to be forced into bankruptcy” (NYSCEF Doc. 12, at 2). On October 5, 2020, defendant’s general manager William Kaelblein affirmed that defendant “has made arrangements, once the emergency ends and restrictions are lifted, to have available all of the resources necessary to perform the contract between the parties. Only the present emergency has prevented performance” (NYSCEF Doc. 31).

Defendant asserts that plaintiff cannot bring a motion for summary judgment in lieu of complaint because (1) plaintiff is suing upon a contract rather than upon an instrument for the payment of

money only; and (2) plaintiff cannot sue because it is not a jural entity with a name that features “Corp.,” “Inc.,” “Partnership,” “LLC,” “d/b/a/” or the like (NYSCEF Doc. 14).

In reply, plaintiff asserts that defendant has been unjustly enriched and, thus, has prejudiced plaintiff, by breaching the Contract. Additionally, plaintiff claims that its use of its trade name, “WP Theater,” in the original caption, constituted a “ministerial error” and cites to CPLR 3025(a) (NYSCEF Doc. 28, at 7). The caption in plaintiff’s August 25, 2020 reply to defendant’s cross-motion names plaintiff as “The Women’s Project and Productions, Inc.” (NYSCEF Doc. 25). In support of its motion, plaintiff e-filed its subject checks for defendant, which bear the name “The Women’s Project and Productions, Inc.” (NYSCEF Doc. 29). Plaintiff asserts that, unlike in Provosty v Lydia E. Hall Hospital, 91 AD2d 658 (2d Dep’t 1982), which defendant cites in support of its cross-motion, plaintiff in the instant matter has never denied its separate jural existence (NYSCEF Doc. 28, at 7).

In reply, defendant cites to Weissman v Sinorm Deli, Inc., 88 NY2d 437 (1996), in which the Court of Appeals held, essentially, that if “outside proof” is required to make out a *prima facie* case for summary judgment in lieu of complaint, a court must deny such a motion (NYSCEF Doc. 33); defendant characterizes Governor Cuomo’s March 20, 2020 Executive Order and June 11, 2020 Guidance on Executive Orders as such “outside proof” (NYSCEF Doc. 33, at 2). Additionally, defendant cites to various cases in which a court extended the time in which parties could perform under a subject agreement in the wake of an unforeseeable event that precluded performance within the originally agreed-upon time. Defendant claims that neither party could have envisioned “a shut-down of the scope which the world has been undergoing,” and thus requests that this Court “[stop] the clock” on the Contract (NYSCEF Doc. 33, at 6).

Discussion

To establish that plaintiff is entitled to the requested CPLR 3213 judgment, plaintiff must submit “proof of the [instrument] and a failure to make the payments called for by its terms.” Boland v Indah Kiat Fin. (IV) Mauritius, Ltd., 291 AD2d 342, 343 (1st Dep’t 2002). Plaintiff has failed to comply with CPLR 3213, as it has failed to establish the existence of an instrument for the payment of money only. In support of the instant motion, plaintiff supplemented the Contract with “outside proof,” among which were Governor Cuomo’s Executive Order and guidance thereon and the subject checks. In Signal Plan, Inc. v Chase Manhattan Bank, 23 AD2d 636 (1st Dep’t 1965), the Appellate Division, First Department reversed the lower court’s ruling that had granted a CPLR 3213 motion and denied that motion on the ground that the subject action “[was] one for breach of contract.” Thus, plaintiff has failed to meet its burden to make out its *prima facie* case for summary judgment in lieu of complaint. Simply put, in the instant matter, plaintiff is not suing on an “instrument for the payment of money only.”

CPLR 3025(a) states the following: “Amendments without leave. A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.” Plaintiff has complied with CPLR 3025(a) by e-filing an amended notice of motion (NYSCEF Doc. 16) with plaintiff’s name listed as “The Women’s Project and Productions, Inc.” on August 25, 2020 following an adjournment (NYSCEF Doc. 15) of plaintiff’s time to reply to defendant’s cross-motion to September 2, 2020. Furthermore, this

Court presumably could invoke CPLR 2001 and deem plaintiff's name to be "The Women's Project and Productions, Inc." on all papers.

This Court has considered the parties' other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

Thus, for the reasons stated herein, the motion of plaintiff, The Women's Project and Productions, Inc., originally suing as "WP Theater," pursuant to CPLR 3213, for summary judgment in lieu of complaint in its favor against defendant, Edison Ballroom LLC, is hereby denied, and defendant's cross-motion to dismiss is also hereby denied.

This Court strongly encourages both parties to participate in a settlement conference, virtually or in person. An email to this Court (aengoron@nycourts.gov, copied to argreenf@nycourts.gov), with a copy to all parties can get the ball rolling.

If settlement seems impossible, the parties should please contact our part clerk Margie Ramos-Ciancio via email at mciancio@nycourts.gov to schedule a preliminary conference, remembering to copy all parties.



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11/3/2020

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

ARTHUR F. ENGORON, J.S.C.

NON-FINAL DISPOSITION

OTHER

GRANTED IN PART

REFERENCE

SUBMIT ORDER

FIDUCIARY APPOINTMENT