East 16th St. Owner LLC v Union 16 Parking LLC
2021 NY Slip Op 30151(U)
January 15, 2021
Supreme Court, New York County
Docket Number: 653839/2020
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH, *Justice* — PART IAS MOTION 14

INDEX NO. 653839/2020
MOTION DATE 01/13/2021
MOTION SEQ. NO. 002

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EAST 16TH STREET OWNER LLC,

Plaintiff,

- v -

UNION 16 PARKING LLC,TMO PARENT LLC

Defendant.

---X

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 42, 43, 44, 45, 46, 55, 56, 57, 58, 59, 60, 61

were read on this motion to/for DISMISS.

The motion by plaintiff for summary judgment and to dismiss defendants' affirmative defenses is granted.

Background

Defendants operate a parking garage at a building owned by plaintiff. Defendant Union 16 Parking LLC is the tenant and defendant TMO Parent LLC signed a good guy guarantee in connection with Union 16's lease. Plaintiff claims that the tenant has not paid rent since April 1, 2020 and now owes over $1 million to plaintiff through November 1, 2020. It argues that the lease does not permit the tenant to withhold rent under any circumstance. Plaintiff also observes that the lease does not contain a force majeure provision.

Defendants cite the ongoing pandemic as the reason they have been unable to pay rent. They claim that their monthly business was down 60 percent in August 2020. They also claim that since the pandemic began, they have lost revenue and incurred additional expenses to implement health and safety measures.

In opposition to the motion, defendants argue that plaintiff failed to meet its prima facie burden and that there are issues of fact with respect to plaintiff's motion. Defendants assert that the doctrine of frustration of purpose raises an issue of fact. They recount the fact that the ongoing pandemic drastically reduced the amount of people driving cars in Manhattan as people started working from home. Defendants claim that their parent company has lost 60% in revenue because of the pandemic.

They admit that while they were not required to shut down, they faced dramatic effects because of the pandemic. Defendants acknowledge that their monthly revenues were so low they were unable to pay the rent. They also argue that plaintiff's declaratory judgment cause of action should be dismissed because they have an adequate remedy: the breach of contract claim.

In reply, plaintiff disputes that the frustration of purpose doctrine has any application to this case. Plaintiff points out that the parking garage has remained open throughout the pandemic and continued to charge $500 per month for a single space. It also insists that it be granted judgment against both the tenant and the guarantor as both are liable for amount due.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York,* 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The doctrine of frustration of purpose requires that "the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense"(*Crown IT Services, Inc. v Koval-Olsen*, 11 AD3d 263, 265, 782 NYS2d 708 [1st Dept 2004]). "[T]his doctrine is a narrow one which does not apply unless the frustration is substantial"(*id*.).

The Court grants plaintiff's motion. There is no doubt that the ongoing pandemic has caused harmful effects on all types of businesses in New York City. Defendants appear to have suffered a dramatic downturn in revenue that made it difficult, if not impossible, for them to pay the full rent (although the Court notes that defendants have not argued they made any good faith attempt to pay any rent).

But the downturn in the tenant's business does not raise an issue of fact to defeat the instant motion. The undisputed fact is that defendants were not shut down by pandemic-related orders – they were permitted to keep their parking garage open throughout 2020. That their

customer base was reduced because of the pandemic is not a basis to find that the frustration of purpose doctrine should apply here.

It is critical to point out what the application of the frustration of purpose doctrine might entail in this case. It could potentially permit defendants to simply walk away from the lease and not have to pay anything to plaintiff despite the fact that they have been continuously operating a garage. The frustration of purpose doctrine was not intended to allow a tenant to avoid having to pay rent while running a business at the premises, even if business has slowed. Applying that doctrine here could justify applying it to every tenant who suffers a downturn in business, whether because of a pandemic or some other reason. Here, when the garage has been continuously up and running, the Court declines to permit defendants to run a garage rent-free.

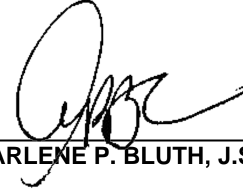
The Court also finds that defendants are correct to the extent that the declaratory judgment cause of action is moot. That claim sought a declaration that the Tenant is liable for ongoing rent—that was the subject of motion sequence 001.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by plaintiff is granted to the extent that defendants' affirmative defenses are severed and dismissed, the Clerk is directed to enter judgment in favor of plaintiff and against defendants jointly and severally in the amount of $1,028,104.36 plus interest from October 31, 2020 along with costs and disbursements upon presentation of proper papers therefor; and it is further

ORDERED that plaintiff's motion is denied to the extent it sought declaratory relief; and it is further

ORDERED that the issue of attorneys' fees and rent and additional rent that became due after October 31, 2020 is severed and there shall be a hearing to determine the reasonable attorneys' fees and other amounts due to plaintiff to be scheduled by the clerk of this part.



1/15/2021
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION		
		GRANTED		DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE