Fives 160th, L.L.C. v Qing Zhao
2021 NY Slip Op 31111(U)
April 6, 2021
Supreme Court, New York County
Docket Number: 155927/2020
Judge: Shawn T. Kelly

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 57

----------X

FIVES 160TH, L.L.C.,

Plaintiff,

- v -

QING ZHAO, XIANG LIN, ABC CORP., JOHN DOE, JANE DOE

Defendant.

INDEX NO. 155927/2020

MOTION DATE 01/04/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

----------X

HON. SHAWN TIMOTHY KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15
were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

In this commercial landlord-tenant action, Defendants Qing Zhao and Xiang Lin ("Defendants") move motion to dismiss the Complaint pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, and pursuant to CPLR § 3211(a)(8), for lack of personal jurisdiction over the defendant due to insufficient service of process. In opposition, Plaintiff Fives 160th LLC, the commercial landlord of the restaurant space where Defendants operated a restaurant, contends that Defendants have not met their burden to dismiss and further, that personal jurisdiction was properly obtained.

On a CPLR §3211(a)(7) motion to dismiss for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true" (*Alden Global Value Recovery Master Fund, L.P. v KeyBank National Association*, 159 AD3d 618, 621-22 [2018]). In addition, "on such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the

plaintiff" (*Id.* at 622). However, vague and conclusory allegations cannot survive a motion to dismiss (*see, Kaplan v Conway and Conway*, 173 AD3d 452, 452-53 [2019]; *D. Penguin Brothers Ltd. v City National Bank*, 270 NYS3d 192, 192 [2018] [noting that "conclusory allegations fail"]; *R & R Capital LLC, et al., v Linda Merritt*, 68 AD3d 436, 437 [2010]).

The criterion for establishing whether a Complaint should be dismissed pursuant to §3211(a)(7) is "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; s*ee also Foley v D'Agostino,* 21 AD2d 60, 64-65 [1964]). Whether the pleader will ultimately be able to establish the allegations in the pleading is irrelevant to the determination of a motion to dismiss pursuant to CPLR §3211(a)(7) (*see EBC I, Inc., v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]; *Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001][motion must be denied if "from [the] four corners [of the pleadings] factual allegations are discerned which taken together manifest any cause of action cognizable at law"]).

Force Majeure

Defendants contend that they were unable to satisfy the obligations under the Lease due to *force majeure* and commercial impracticability and impossibility and by exigent circumstances due to the COVID-19 pandemic and related government shutdowns and quarantine orders. Defendants acknowledge that though *force majeure* is narrowly construed, the extreme and extraordinary environment of government shutdown orders made it impossible for Defendants to operate their restaurant and meet their obligations to pay rent and additional rent under the Lease. In opposition, Plaintiff argues that *force majeure* clauses are narrowly applied and that the Lease itself does not contain a *force majeure* clause.

A *force majeure* provision will also be narrowly construed and is not intended to buffer a party against the normal risks of a contract. Generally, "only if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused" (*Kel Kim Corp. v Central Markets, Inc.*, 70 NY2d 900, 524 NYS2d 384 [1987]). In this case, the contract does not contain a *force majeure* clause and the court cannot imply that such a clause exists due to the current COVID-19 pandemic.

Impossibility/Impracticability

Defendants further allege that they should be excused from performing under the contract as their ability to pay rent and additional rent has been made impossible by the current COVID-19 pandemic and the effect it has had on their business.

"The excuse of impossibility is generally 'limited to the destruction of the means of performance by an act of God, vis major, or by law." (*Kolodin v Valenti*, 115 AD3d 197, 200 [1st Dept 2014]). The impossibility must be produced by an unanticipated event that could not be foreseen or guarded against in the contract (*Kel Kim Corp.*, 70 NY2d at 901). The law in New York is well settled that "once a party to a contract has made a promise, that party must perform or respond in damages for its failure, even when unforeseen circumstances make performance burdensome" (*Id.* at 902). Financial difficulty or economic hardship of the promisor, even to the extent of insolvency or bankruptcy, does not establish impossibility sufficient to excuse performance of a contractual obligation (*see 407 E. 61st Garage v Savoy Fifth Ave. Corp.*, 23 NY2d 275, 281 [1968]; *Stasyszyn v Sutton East Assocs.*, 161 AD2d 269, 271, 555 NYS2d 297 [1st Dept 1990]). Thus, parties to a contract have not been permitted to avoid contractual obligations due to unanticipated changes in financial condition (*Sassower v Blumenfeld*, 24 Misc3d 843, 878 NYS2d 602 [2009]; *Urb. Archaeology Ltd. v 207 E. 57th St. LLC*, 34 Misc 3d

1222(A), 951 NYS2d 84, *aff'd*, 68 AD3d 562, 891 NYS.2d 63 [2009]; *Victoria's Secret Stores, LLC v Herald Square Owner LLC*, 70 Misc 3d 1206(A), 136 NYS3d 697 [2021]; *Cinema Square, LLC v Jeffries Loancore, LLC*, No. 650645/2021, 2021 WL 537349 [2021]).

The contract here was entered into by commercial parties who could have anticipated the possibility that future events might result in financial disadvantage on the part of either party, even if the precise cause or extent of such financial disadvantage was not foreseen at the time the contract was executed (*see General Electric Co. v Metals Resources Group Ltd.*, 293 AD2d 417 [1st Dept 2002], *affd*, 68 AD3d 562 [1st Dept 2009]). Thus, under the circumstances extant at bar, the impossibility of performance doctrine does not relieve Defendants of their obligations under the Lease.

First Cause of Action- Ejectment

Defendants contend that the first cause of action for ejectment should be dismissed as Defendants already vacated the premises. Plaintiff concedes that its cause of action for ejectment is now moot. Accordingly, the first cause of action is dismissed as moot.

Personal Jurisdiction

Defendants move to dismiss pursuant to CPLR § 3211(a)(8), alleging that the court lacks personal jurisdiction over them as they were not personally served via personal delivery because they have not been in the State of New York since the Complaint was filed. Defendants further argue that they were not served via substituted service or nail and mail because the restaurant has been closed since June, and further that they have moved to Georgia on July 3, 2020, prior to the filing of the Complaint. Defendants further state that they surrendered the premises by mailing the keys to Plaintiff on August 18, 2020.

In opposition, Plaintiff submits the affidavit of service of the summons and complaint, which states that the process server attempted to serve the Defendants at the restaurant space on August 10, 2020, August 11, 2020, August 12, 2020 and on August 18, 2020. Upon being unable to personally serve Defendants, on August 19, 2020, the process server affixed five copies of the papers to the gate and sent by first class mail, and by certified mail return receipt, a copy of the papers to the restaurant space. Further, the affidavit of service states that the papers were mailed to the defendants' last known residential addresses.

Plaintiff additionally submits evidence that Defendants still had their signage on the premises indicating that a Chinese restaurant was operating at the premises in July and August 2020 and did not have any signs indicating that the restaurant was closing or out of business.

Plaintiff has sufficiently proven service by demonstrating that service was effectuated at Defendants' business, which was still subject to the lease between the parties and contained signage indicating the restaurant was still there. Plaintiff further showed that the summons and complaint were mailed to the last known residential addresses of Defendants. Accordingly, Defendants' motion to dismiss for lack of personal jurisdiction is denied.

Conclusion

Accordingly, it is hereby

ORDERED that Defendants' motion to dismiss is denied in its entirety, except that Plaintiff's First Cause of Action for Ejectment is dismissed.

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (access*ible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)].

4/6/2021
DATE

SHAWN TIMOTHY KELLY, J.S.C.

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