Ten W. Thirty Third Assoc. v A Classic Time Watch Co., Inc.
2021 NY Slip Op 31137(U)
April 9, 2021
Supreme Court, New York County
Docket Number: 151209/2021
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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TEN WEST THIRTY THIRD ASSOCIATES,

Plaintiff,

- v -

A CLASSIC TIME WATCH COMPANY, INC., JOSEPH SMOUHA

Defendant.

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INDEX NO. 151209/2021

MOTION DATE 04/08/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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 DISMISSAL.

Defendants' motion to dismiss is denied.

Background

In this commercial landlord tenant case, plaintiff contends that defendant A Classic Time Watch Company, Inc. ("Tenant") owes unpaid rent and other charges stemming from a lease that commenced on January 1, 2013. Plaintiff alleges that the Tenant vacated the premises in July 2020 but the lease expires on December 31, 2022. It also seeks recovery from defendant Smouha (the "Guarantor") for the charges that accrued up to, and including, the date the Tenant vacated the premises.

Defendants move to dismiss on the ground that the lease was frustrated and rendered impossible by governmental orders related to the ongoing pandemic. They argue that the shutdown of businesses, such as the one run by the Tenant should allow them to get out of the

contract. Defendants point to the common law principles of frustration of purpose and impossibility of performance as the basis upon which this Court should dismiss this case.

Defendants also contend that the personal guaranty against the Guarantor cannot be enforced due to recently passed City Council legislation that prohibits a landlord from seeking recovery based on a guaranty on an individual relating to a default caused by the pandemic.

In opposition, plaintiff contends that it has stated a clear cause of action for breach of contract. It also argues that the City Council provision does not apply here because plaintiff ran a business out of an office rather than a retail business as contemplated by this provision.

In reply, defendants claim that plaintiff is oblivious to the horrible effects of the pandemic. They point out that "the entire Smouha family was afflicted with the Covid virus" (NYSCEF Doc. No. 14 at 1). Defendants also complain about the fact that plaintiff purportedly attached settlement discussions between the parties as part of its opposition.[1]

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the [pleading] as true, accord [the proponent of the pleading] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994] [citations omitted]). "At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141, 75 NE3d 1159 [2017] [citation and internal quotations omitted]).

[1] The alleged settlement discussions played no role in this decision nor was the letter (NYSCEF Doc. No. 16) submitted by plaintiff considered as part of this motion.

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*.).

"Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract" (*Kel Kim Corp. v Cent. Markets, Inc.*, 70 NY2d 900, 902, 524 NYS2d 384 [1987]).

The Court denies the motion. Neither of the doctrines cited above justify permitting the defendants to simply walk away from a valid contract into which they entered, especially on a motion to dismiss. There is no dispute that defendants stopped paying rent under the contract or that the individual signed the guaranty. And, here, the decline in Tenant's business does not constitute a frustration of purpose or render its performance under the contract as impossible (*PPF Safeguard, LLC v BCR Safeguard Holding, LLC*, 85 AD3d 506, 924 NYS2d 391 [1st Dept 2011] [finding that Hurricane Katrina was not a sufficient basis to implicate the frustration of purpose doctrine to excuse payment in New Orleans-based self-storage contract]). Under defendants' view, anytime a business faces revenue problems due to factors outside its control, that business should be able to walk away from the contract. This Court disagrees.

The Court recognizes that the pandemic has decimated businesses around Manhattan and throughout the country. But that does not mean that the Court can ignore defendants'

obligations. The Court must also consider the rights of the other contracting party, which must still maintain buildings and pay taxes even though the Tenant has not paid rent for months.

To be clear, the Court does not endeavor to make any definitive comparisons about the pain caused by the pandemic on landlords and commercial tenants. There is undoubtedly more than enough difficulty to go around. The point is that the Court cannot just rip up a contract because a tenant faced financial hardship due to the pandemic.

To the extent that defendants claim that plaintiff failed to disinfect the building after a tenant became infected with Covid, that argument is denied because it was raised for the first time in reply. The Court makes the same finding with respect to plaintiff's failure to give the Guarantor proper notice—this was raised for the first time in reply and cannot be considered. The Court also declines to convert defendants' motion to one for summary judgment.

City Council Guarantor Provision

The subject provision provides that:

Personal liability provisions in commercial leases.

> A provision in a commercial lease or other rental agreement involving real property located within the city, or relating to such a lease or other rental agreement, that provides for one or more natural persons who are not the tenant under such agreement to become, upon the occurrence of a default or other event, wholly or partially personally liable for payment of rent, utility expenses or taxes owed by the tenant under such agreement, or fees and charges relating to routine building maintenance owed by the tenant under such agreement, shall not be enforceable against such natural persons if the conditions of paragraph 1 and 2 are satisfied:
>
> 1. The tenant satisfies the conditions of subparagraph (a), (b) or (c):
>
> (a) The tenant was required to cease serving patrons food or beverage for on-premises consumption or to cease operation under executive order number 202.3 issued by the governor on March 16, 2020;
> (b) The tenant was a non-essential retail establishment subject to in-person limitations under guidance issued by the New York state department of economic development pursuant to executive order number 202.6 issued by the governor on March 18, 2020; or

(c) The tenant was required to close to members of the public under executive order number 202.7 issued by the governor on March 19, 2020.

2. The default or other event causing such natural persons to become wholly or partially personally liable for such obligation occurred between March 7, 2020 and March 31, 2021, inclusive.

(Administrative Code of City of NY § 22-1005).

The Court denies the branch of the motion that seeks to dismiss the claims against the Guarantor. As an initial matter, defendants failed to attach an affidavit from the Guarantor or anyone with personal knowledge about whether this provision applies in their moving papers. And plaintiff pointed out in opposition that this provision should not apply because defendants did not run a retail business. Defendants did not specifically respond to this argument in reply. In any event, the Court is unable to find, at the motion to dismiss stage, whether the Guarantor is permitted to seek relief under this provision.

Accordingly, it is hereby

ORDERED that the motion by defendants to dismiss is denied and defendants are directed to answer pursuant to the CPLR.

Remote Conference: June 30, 2021.

4/9/2021
DATE

ARLENE P. BLUTH, 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