

<b>Prada USA Corp. v 724 Fifth Fee Owner LLC</b>
2021 NY Slip Op 31751(U)
May 21, 2021
Supreme Court, New York County
Docket Number: 657674/2019
Judge: Andrew Borrok
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. ANDREW BORROK **PART** **IAS MOTION 53EFM**

*Justice*

-----X

PRADA USA CORP.,

Plaintiff,

- v -

724 FIFTH FEE OWNER LLC, WHARTON PROPERTIES  
LLC, JEFF SUTTON

Defendant.

-----X

**INDEX NO.** 657674/2019

**MOTION DATE** 01/15/2021,  
01/19/2021

**MOTION SEQ. NO.** 002 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 85, 86, 87

were read on this motion to/for ENFORCE/EXEC JUDGMENT OR ORDER.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 65, 66, 67, 68, 69, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

Reference is made to this court's decision and order dated March 2, 2020 (the **Prior Decision**; NYSCEF Doc. No. 35). Capitalized terms used but not defined herein shall have the meaning set forth in the court's Prior Decision.

Prada's Order to Show Cause (Mtn. Seq. No. 002) is granted in part. As this court previously discussed, under the Lease, the parties agreed that in the event that the Owner exercised the Suspension provisions—because the Owner was contemplating a redevelopment of the Building—then, Prada's tenancy and rent would be suspended and Prada would receive as liquidated damages up to \$5,000,000 (depending on when the Suspension Date occurred) to compensate it for being displaced from its occupancy in the demised premises until the Anticipated

Reinstatement Date occurs. The Anticipated Reinstatement Date was to be not later than three years after the Suspension Date identified in the Suspension Notice. Additionally, the parties agreed that the Owner would be obligated, as part of the redevelopment of the Building, to rebuild Prada's demised premises based on Prada selecting a build out model from selections offered by the Owner (i.e., Prada would be given a replacement store). It is established that the Owner activated the Suspension provisions, and that Prada made the required selection, which ripened these provisions into an enforceable set of obligations. As previously discussed, prior to the time of the Prior Decision, the Owner decided that it was not redeveloping the Building because it is no longer feasible to do so. Prada, in turn, did not vacate the demised premises and instead continued to occupy the demised premises and pay rent.

Although the Suspension Notice is not revocable, Prada does not now have the right (based on the Lease or otherwise) to compel the Owner to redevelop the Building. Nor is Prada entitled to the \$5,000,000 liquidated damages provided for in the Lease if Prada's occupancy were to be suspended by the Owner because the suspension of Prada's tenancy, premised on the Owner's redevelopment, is not now going to occur. The money available under the Suspension provisions were negotiated liquidated damages designed to constitute the compensation that the parties agreed should be paid for the loss or injury flowing from an agreed suspension of their contract — which suspension would otherwise be a breach of Prada's tenancy (*Truck Rent-A-Center, Inc. v Puritan Farms 2nd*, 41 NY2d 420, 423-424 [1977]). To be enforceable, a liquidated damages clause cannot be a penalty (nor render a windfall), but must bear “a reasonable proportion to the probable loss” and the amount of actual loss must be impossible or difficult to precisely estimate (*id.*; *Rubin v Napoli Bern Ripka Shkolnik, LLP*, 179 AD3d 495 [1<sup>st</sup> Dept 2020]). Where the

amount fixed as liquidated damages ”is plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced” (*Truck Rent-A-Center*, 41 NY2d at 425). To determine whether a contractual provision constitutes liquidated damages or a penalty, the contract must be “interpreted as of the date of its execution, not the date of its breach” (*Vernitron Corp. v CF 48 Assocs.*, 104 AD2d 409, 409 [2d Dept 1984]). In other words, “the court must look to the anticipated loss discernible at the time of contracting and not the actual loss incurred by the breach to determine whether liquidated damages are reasonable or whether the damages [were] capable of calculation” (*id.*). The burden is on the party challenging the liquidated damages provision to show that such damages are an unenforceable penalty (*Rubin*, 179 AD3d at 496).

It is beyond cavil that enforcement of the \$5,000,000 liquidated damage provision that was intended solely to compensate Prada for a suspension of its tenancy in connection with a redevelopment of the Building that is not now occurring constitutes an unreasonable penalty. However, as discussed in the Prior Decision, the Suspension Notice was irrevocable, and Prada is entitled to the actual costs incurred by virtue of it being inconvenienced in connection with the same, including without limitation, any third party costs in connection with the review of the new store design proposals sent by the Owner to Prada. Put another way, the approximately \$5,000,000 liquidated damages were meant to put the parties in as close a position as they could be notwithstanding a redevelopment-related suspension. Neither party can profit from or arbitrate on a suspension notice that did not result in a surrender of occupancy or an actual renovation-related suspension or change to the premises. The only potential issue for trial is whether, in the absence of a renovation, Prada has suffered a demonstrable harm (e.g., third party

costs or other foreseeable reasonable costs incurred prior to receiving notice from the Owner of its intention not to proceed with the proposed Building redevelopment). The Lease provides that attorney's fees are recoverable and as such Prada is entitled to its reasonable attorney's fees associated with responding to the Owner's attempt to revoke the Suspension Notice.

The Owner's motion for partial summary judgment (Mtn. Seq. No. 003) must also be granted in part. Prada is not entitled to a declaration that it may terminate the Lease (third cause of action) and the Owner is not required under the Lease to redevelop the Building. On the record before the court, the Owner is not proceeding with the redevelopment because it has become not feasible to do so. However, for the reasons discussed above, Prada may not simply surrender its space, vacate the premises and demand liquidated damages in connection with a suspension that never occurred—and which the Owner has communicated is not going to occur. This is not what was bargained for. Therefore, Prada's second, third, fourth, and fifth causes of action must be dismissed.

Finally, the cause of action for breach of the implied covenant of good faith and fair dealing (seventh cause of action) must be dismissed as duplicative of the breach of contract claim. The gravamen of this issue is that the Owner failed to address the scaffolding that affects Prada's ability to operate and to do business with its customers. This is precisely the gravamen of the claim that certain credits are due to Prada by virtue of the scaffolding — a claim squarely within the four corners of the existing Lease. The claim based on tortious interference (eighth cause of action) also must be dismissed as duplicative. As noted, there are, however, issues of fact which preclude summary judgment as to Prada's claim for damages based on the scaffolding (sixth

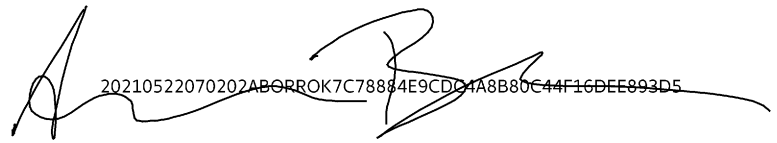
cause of action) including whether the Owner caused such scaffolding to be erected or maintained (*Yoon Peng Choo v Fiedler Cos.*, 123 AD.2d 529, 530 [1<sup>st</sup> Dept 2014]; CPLR 3212[f]).

Accordingly, it is

ORDERED that Prada USA Corp.’s motion (Mtn. Seq. No. 002) is granted solely to the extent that the Owner may not revoke the Suspension Notice and may be liable for Prada’s actual damages (subject to proof at trial), which flow from its unilateral attempt to withdraw the Suspension Notice, and for attorney’s fees, but the Owner is neither obligated to redevelop the Building nor pay liquidated damages, which were bargained for to compensate Prada for its actual displacement, which displacement is now not going to be caused by Owner; and it is further

ORDERED that 724 Fifth Fee Owner LLC’s motion for partial summary judgment (Mtn. Seq. No. 003) is granted to the extent of dismissing Prada’s second, third, fourth, fifth, seventh, and eighth causes of action.

5/21/2021  
DATE

  
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ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE

