Penfield TK Owner LLC v New York Style Bagels, LLC
2021 NY Slip Op 31961(U)
March 9, 2021
Supreme Court, Monroe County
Docket Number: Index No. E2020003872
Judge: Daniel J. Doyle
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STATE OF NEW YORK
SUPREME COURT MONROE COUNTY

PENFIELD TK OWNER, LLC,

Plaintiff,

-vs-

NEW YORK STYLE BAGELS, LLC,

Defendant.

Decision and Order

Index No.: E2020003872

Daniel J. Doyle, J.

In this breach of lease action, Plaintiff seeks renewal and reargument of the prior order of this Court , which effectuated the prior decision of Justice James A. Piampiano, which denied Plaintiff's motion for summary judgment (Piampiano, J.). Plaintiff has not established its entitlement to renewal under CPLR 2221. Plaintiff has established its entitlement to reargument and upon reargument, for the reasons set forth below, Plaintiff's motion for summary judgment is granted in part and denied in part, and upon a search of the record, Defendant is entitled to summary judgment on the specification of damages in the form of attorneys fees.

Plaintiff is the owner of a commercial shopping center in Penfield and the Defendant operates a Bruegger's Bagels shop. The parties and their predecessors in interest have a longstanding commercial relationship, with a lease dating back

to 1995, and four subsequent extensions of that lease. The most recent extension was executed in 2018 and is for a period of 5 years. Defendant's rent was $6,319. Claiming difficulties brought on by the COVID-19 pandemic, Defendant failed to make rent payments in April and June of 2020, and making reduced rental payments of $2,392 in May 2020, $4,517 in July 2020, and $5,417 in August 2020, before resuming making full payments in September 2020. Defendant does not dispute that it did not make the required payments between April and August, but argues that its non-performance under the contract is excused by the doctrine of frustration of purpose.

A party seeking summary judgment pursuant to CPLR 3212 must make a prima facie showing of entitlement to judgment as a matter of law and submit sufficient evidence to demonstrate the absence of any material issue of fact (*Iselin & Co. Inc v Landau*, 71 NY2d 420 [1988]). Summary judgment may only be granted when "it has been clearly ascertained that there is no triable issue of fact outstanding; issue finding, rather than issue determination, is its function" (*Suffolk County Dep't of Soc. Servs. v James M.*, 83 NY2d 178, 182 [1994]). However, once the proponent demonstrates entitlement to summary judgment, the burden then shifts to the opposing party to demonstrate, generally by admissible evidence, the existence of an issue of fact requiring a trial (*Zuckerman v City of*

New York, 49 NY2d 851 [1985]).

Where discovery has not yet been completed, summary judgment may be denied as premature when discovery has not yet been completed, and where the opponents of summary judgment have made an attempt to secure the discovery sought (*McGlynn v Palace Co.*, 262 AD2d 116, 117 [1st Dept 1999]). Also, in order for the non-moving party to prevail on the claim that summary judgment is premature, it has to "demonstrate that facts essential to oppose the motion were in" possession of the moving party's "exclusive knowledge and possession and could be obtained by discovery" (*Bd. of Managers of W. Amherst Off. Park Condominium v RMFSG, LLC*, 153 AD3d 1611, 1612–13 [4th Dept 2017]). Though the Defendants contend that summary judgment is premature, they identify no discoverable material that is in the Plaintiff's exclusive possession, nor do they demonstrate any attempt to secure the discovery they now claim to need (see *Franklin v Dormitory Auth.*, 291 AD2d 854, 855 [4th Dept 2002]).

The elements of a breach of contract cause of action are: (1) the existence of a contract; (2) the plaintiff's performance under the contract; (3) the defendant's breach of that contract; and (4) resulting damages (*WM. Schutt & Assoc. Eng'g & Land Surveying P.C. v St. Bonaventure Univ.*, 151 AD3d 1634, 1635 [4th Dept 2017], amended on rearg, 153 AD3d 1676 [4th Dept 2017]). A party's "obligation to

perform under a contract is only excused where the other party's breach of the contract is so substantial that it defeats the object of the parties in making the contract" (*Accadia Site Contr., Inc. v Erie County Water Auth.*, 115 AD3d 1351, 1353 [4th Dept 2014]).

Here, the Plaintiff established its entitled to summary judgment for the undisputed nonpayment and underpayment of rent between the months of April and August. The burden then shifted to the Defendant to establish a question of fact on the applicability

To establish frustration of purpose, a party must make three showings: (1) the purpose was the principal purpose in making the contract such 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 [1st Dept 2004]); (2) the frustration must be substantial (*Rockland Dev. Assoc. v. Richlou Auto Body, Inc.*, 173 AD2d 690 [2d Dept 1991]); and (3) the frustrating event must be unforeseen, so that its non-occurrence was a basic assumption underlying the contract (*Fifth Ave. of Long Is. Realty Assoc. v. KMO-361 Realty Assoc.*, 211 AD2d 695 [2d Dept 1995]).

In determining whether the purpose of the contract is frustrated, the Court must look to the entirety of the term of the agreement – in this case it is a five

year lease. Governor Cuomo's Executive Orders only limited in-person dining (see EO 202.6; EO 202.8), the executive orders did not entirely shut down the Defendant's business, and the Defendant does not allege it ceased to do business. Thus, it cannot establish that a curtailment of its business by government regulation for three months frustrated the purpose of the contract (see *Colonial Operating Corp. v Hannan Sales & Serv.*, 265 AD 411, 414 [2d Dept 1943]).

Even assuming, arguendo, that Defendant's business was entirely shut down until allowed to reopen when in-person dining was permitted on June 15, 2020, a three month disruption of a five year lease does not establish frustration of purpose (see *Greater New York Auto. Dealers Assn, Inc. v City Spec, LLC*, 70 Misc 3d 1209(A) [NY Civ Ct 2020] (holding a four-month closure out of a five-year lease due to COVID-19 did not frustrate the overall purpose of the lease); *BKNY1, Inc. v 132 Capulet Holdings*, LLC, 2020 N.Y. Slip Op. 33144[U], 3 [N.Y. Sup Ct, Kings County 2020] (holding a two-month closure of a restaurant out of a nine-year lease due to COVID-19 did not no frustrate the overall purpose of the lease)). Therefore, Plaintiff is entitled to summary judgment for rent and associated late charges permitted by the lease in the total amount of $19,636.32.

Plaintiff also moved for summary judgment on the claim that it is owed $5111.00 for legal fees and costs. The complaint alleges that Defendant is liable

for Plaintiff's attorneys fees, identifying paragraph 50 of the original lease as the source of its claim it is entitled to attorneys fees. Paragraph 50 of the lease is titled "Collection Costs" and states that:

> all costs charged to or incurred by Lessor in the collection of any amounts owed pursuant to this Lease shall be paid by Lessee; and, at the option of Lessor, shall be deemed to be additional rent hereunder and shall be due from Lessee to Lessor on the first day of the following month (NYSCEF Docket #3 at Paragraph 50).

It is a well-settled rule in New York that attorneys' fees are considered an incident of litigation and, unless authorized by statute, court rule or written agreement of the parties, are not recoverable (*Hooper Assocs. v AGS Computers*, 74 NY2d 487, 491 [1989]). The exception is where a statute or a contract explicitly provide for attorneys fees, and where there is no explicit statutory or contractual authority, "a right to attorneys fees will not be inferred" (*Campbell v Citibank*, N.A., 302 AD2d 150, 154 [1st Dept 2003]).

The provision relied upon here does not explicitly state "attorneys fees" are recoverable, only that "costs" are recoverable. The Court cannot be called upon to infer that the parties meant "attorneys fees" can be recovered on an action for back rent when the parties failed to use the words "attorneys fees," especially since in other provisions of the lease, the term "attorney fees" was used by the parties as a potential remedy for other types of breaches of the lease

(see NYSCEF Docket #3 at Paragraph 10[C][5] (provision for termination of the lease upon default); Paragraph 20[B] (indemnity provision) Paragraph 24[A][a] (exclusion of CAM charges for attorneys fees) Paragraph 53[E] (hazardous substances)). As the lease uses "attorneys fees" in other provisions, but not in Paragraph 50 pertaining to "collection costs," under the canons of contract construction, "when certain language is omitted from a provision but placed in other provisions, it must be assumed that the omission was intentional" (*Sterling Inv. Services, Inc. v 1155 Nobo Assoc., LLC*, 30 AD3d 579, 581 [2d Dept 2006]).

Thus, while the Plaintiff may be entitled to "costs" incurred, it is not entitled to attorneys fees and, as a result, is not entitled to summary judgment awarding it attorneys fees. Searching the record as the Court is permitted to do (see CPLR 3212[b]), the Court finds that the Defendant, as the non-moving party, is entitled to summary judgment dismissing the portion of the Plaintiff's complaint seeking damages in the form of attorneys fees (see CPLR 3212[e]). Plaintiff is entitled to recover "costs" in the form of court fees and costs, which the parties advise are in the amount of $476.50.

Based upon the foregoing, it is hereby

ORDERED that Plaintiff's motion for renewal of its summary judgment motion is denied; and it is further

ORDERED that Plaintiff's motion reargument of its for summary judgment motion is granted; and it is further

ORDERED that upon reargument, Plaintiff's motion for summary judgment is granted in part and denied in part as set forth above; and it is further

ORDERED that pursuant to CPLR 3212[b] and CPLR 3212[e], summary judgment is awarded to Defendant dismissing Plaintiff's claim for attorneys fees; and it is further

ORDERED that Plaintiff is entitled to a judgment in the amount of $19,636.32 for back rent and associated late charges, with statutory interest of nine percent from April 1, 2020; and it is further

ORDERED that Plaintiff shall have 10 days from the filing of this Decision and Order to submit evidence that it incurred costs in excess of $476.50, or else are entitled to a judgment in the amount of $476.50 with statutory interest of nine percent from April 1, 2020; and it is further

ORDERED that the parties settle the judgment within 60 days of the filing of this Decision and Order, and that such time may be extended by mutual consent.

Dated: March 9 ~~February~~ ___, 2021

The Honorable Daniel J. Doyle, J.S.C.