1st Ave. Enters. LLC v Love Picin Inc.
2021 NY Slip Op 32191(U)
November 5, 2021
Supreme Court, New York County
Docket Number: Index No. 650238/2021
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE BLUTH** **PART** **14**

Justice

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1ST AVENUE ENTERPRISES LLC,

Plaintiff,

- v -

LOVE PICIN INC., LILIAINA LOVELL

Defendants.

---X

INDEX NO. 650238/2021

MOTION DATE 10/14/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 50, 52, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 96, 97, 98, 99, 100, 101, 102, 103, 105, 106

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

The motion by plaintiff for summary judgment is granted in part and the cross-motion by defendants for summary judgment is denied.

Background

In this commercial landlord tenant case, plaintiff claims that defendant Love Picin Inc. (the "Tenant") rented a property owned by plaintiff and breached the lease by not paying the rent and by unilaterally vacating the premises on September 18, 2020. Plaintiff insists that defendants now owe over $900,000 in rent, additional rent and lease damages. Defendant Lovell guaranteed the lease (the "Guarantor").

In opposition and in support of its cross-motion for summary judgment, defendants assert that plaintiff mismanaged a construction project to renovate the building. They claim the construction continues to this day and that, eventually, they decided to leave the premises once they concluded that the construction was not going to finish. Defendants argue that the lease

contains no acceleration clause and that the late payment of ten percent is an unenforceable penalty. With respect to the Guarantor, defendants argue that she is only liable for any rent due after July 1, 2021 (the date through which Administrative Code § 22-1005 applies) or, if the Court accepts defendants' surrender, the Guarantor would not owe anything.

Defendants also point to their affirmative defenses of constructive eviction, breach of contract and frustration of purpose as grounds to deny the instant motion. They complain that the scaffolding in front of the building (due to the construction project) hid the bar that defendants operated. Defendants also complained about the frigid temperatures inside the bar and that its efforts to reach some sort of agreement to reduce the rent were rebuffed by plaintiff. Defendants point out that plaintiff received numerous Department of Buildings violations related to the construction. They assert the issues were so bad it justifies the rescission of the lease.

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 central issue on this motion is the interplay between the alleged construction and defendants' decision to vacate the premises. Plaintiff insists that the construction "defense" is a red herring that attempts to hide the fact that defendants wanted to leave because of the ongoing pandemic. It argues that the defendants agreed to the construction because part of it would have benefitted defendants, including the building of a new office, bathroom and rear yard. The construction started in 2019 and plaintiff readily admits that there were some issues.

However, the Court grants the motion because the second rider attached to the lease specifically contemplates that plaintiff would be doing the subject construction (NYSCEF Doc. No. 39 at 13). In fact, it mentions that defendants received a copy of the plans, which included the new bathroom, office and rear yard for the Tenant (*id.*). In other words, it's clear that the parties contemplated that there might be construction and the parties agreed that the "Tenant acknowledges that Tenant will not be entitled to any abatement or reduction of rent as a result thereof" (*id.*). This contractual provision compels the Court to reject defendants' affirmative defense of constructive eviction.

"[C]onstructive eviction exists where, although there has been no physical expulsion or exclusion of the tenant, the landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises. The tenant, however, must abandon

possession in order to claim that there was a constructive eviction" (*Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 83, 308 NYS2d 649 [1970]). Defendants cannot rely on this doctrine where they explicitly acknowledged that plaintiff would likely be doing construction—the Court is unable to find that the landlord engaged in wrongful acts under these circumstances. Although the construction was delayed (in part due the pandemic) and frustrating (as evidenced by the video of the premises [NYSCEF Doc. No. 65]), that does not mean the Court can simply ignore the parties' agreement.

The subject rider also compels the Court to dismiss the counterclaim for breach of contract. Although the rider suggests plaintiff would use best efforts to minimize disruption, there is no basis (on these papers) to find that defendants were justified in vacating the premises without permission and in breaching the lease.

Defendants' frustration of purpose argument is similarly without merit. 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.*). Courts have not recognized the ongoing pandemic as a blanket defense when a tenant fails to pay the rent (*Gap, Inc. v 170 Broadway Retail Owner, LLC*, 195 AD3d 575, 2021 WL 2653300 [1st Dept 2021]).

The facts submitted here show that defendants were unhappy with the pace and intensity of construction. However, nothing submitted on these papers justifies the application of the frustration of purpose doctrine. Defendants admit they were able to run their bar, they just complained about the construction's impact on the attractiveness of their establishment to

customers. This Court declines to hold that construction, which was delayed (and stopped) due to the pandemic, can justify rescinding a lease under these circumstances particularly where the parties contemplated the construction in the lease and the tenant waived claims relating thereto.

Administrative Code § 22-1005/ the Guaranty

There is no dispute that the guaranty is a "good guy guaranty" that limited the Guarantor's liability to 360 days after vacatur of the premises (NYSCEF Doc. No. 40). Plaintiff claims that defendants failed to meet the conditions of the good guy limitation because the Tenant did not give the required 360-day notice or acquire a surrender in writing. As an initial matter, the Court finds that plaintiff is correct that the defendants did not meet the conditions of the good guy guaranty.

Therefore, the question is whether Administrative Code § 22-1005 applies. The Court finds that it does. Plaintiff offered no argument as to why this Administrative Code section should not apply. Plaintiff seems to admit this in reply (NYSCEF Doc. No. 35) although it does not concede the point. Defendant Lovell is not liable for any amount coming due before June 30, 2021.

The next question is whether Lovell's liability is limited to all amounts due 360 days after the vacatur (factoring in the Administrative Code provision with the good guy guaranty). The Court finds that because defendants did not meet the conditions described above in order to invoke the good guy guaranty, defendant Lovell is liable for all amount due after June 30, 2021 (when the Administrative Code provision expired). The Court rejects defendants' attempt to limit her liability to $56,242.78 (defendants attached a check it sent to plaintiff for this amount [NYSCEF Doc. No. 97]). The fact is that defendants never sent the 360 notice of the intent to

vacate as required under the guaranty. Defendants vacated without any agreement in place with plaintiff and so Lovell cannot reap the benefit of the good guy guaranty.

Damages

The Court grants the branch of plaintiff's motion that seeks to conform the evidence adduced to the pleadings and awards plaintiff the $974,841.90 it seeks against the corporate defendant only. Defendants do not contest the total amount, except to argue that the late fee is an unenforceable penalty. This Court disagrees. The late fee—ten percent—is not an unenforceable penalty (*cf. TY Builders II, Inc. v 55 Day Spa, Inc.*, 167 AD3d 679, 90 NYS3d 47 [2d Dept 2018] [finding that a 79% penalty was unenforceable and observing that a late fee, while not technically interest, can be examined under that light]). The late fee at issue here does not exceed either the criminal or civil limits for usury.

The Court finds that there must be an inquest to determine the damages against Lovell that accrued after June 30, 2021. However, the request for legal fees is denied as plaintiff did not attach any invoices for legal fees or make a specific demand for these fees.

Summary

The Court recognizes that defendants were probably very frustrated with the slow pace of construction, combined with the effects of the pandemic. But the doctrines upon which they rely —constructive eviction and frustration of purpose—require more than dissatisfaction. Moreover, the facts submitted on this motion show that defendants simply packed up and left the premises (and allegedly reopened at another location nearby) without first reaching an agreement with plaintiff about a surrender. And this is a case where defendants knew about the construction and signed a rider as part of the lease about the potential work to be done. That work included

construction on the lease premises and, unfortunately, the ongoing pandemic delayed the completion of construction. This is not a situation where the construction completely shut down defendants' bar; rather it seems that defendants regret entering into a lease into a space that was about to undergo construction. That is not a basis to rescind the lease.

Plaintiff's request for legal fees is denied as it did not submit any invoices or include a specific demand. It may make a separate motion for such relief on or before November 19, 2021.

Accordingly, it is hereby

ORDERED that the motion by plaintiff is granted to the extent that it seeks to amend the pleadings to conform to the evidence adduced and for summary judgment on liability only against the guarantor defendant and plaintiff is directed to file a note of issue for an inquest against the guarantor on or before November 12, 2021, and the affirmative defenses and counterclaims by defendants are severed and dismissed; and it is further

ORDERED that plaintiff is awarded summary judgment on liability and damages, except for attorney fees, in the amount of $974,841.90 against the corporate defendant only; and it is further

ORDERED that the cross-motion by defendants is denied.

11/5/2021
DATE

ARLENE BLUTH, J.S.C.

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