Ponte Gadea Madison LLC v L3C Capital Partners LLC
2021 NY Slip Op 32383(U)
November 18, 2021
Supreme Court, New York County
Docket Number: Index No. 655176/2020
Judge: Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR ENGORON** **PART** **37**

Justice

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PONTE GADEA MADISON LLC,

Plaintiff,

- v -

L3C CAPITAL PARTNERS LLC,

Defendant.

---X

INDEX NO. 655176/2020

MOTION DATE 09/27/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

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

Upon the foregoing documents and for the reasons stated hereinbelow, plaintiff's motion for summary judgement in this coronavirus-complicated commercial lease dispute is granted.

Background

On April 1, 2018, plaintiff Ponte Gadea Madison LLC ("Landlord") leased to defendant L3C Capital Partners LLC ("Tenant") the 16th floor of 366 Madison Avenue, New York, New York ("the Premises") for a term of five years ("the Lease"). NYSCEF Doc. No. 2.

In March 2020, in an effort to curb the ongoing COVID-19 pandemic, the Governor of the State of New York issued a number of Emergency Executive Orders limiting the in-person use of certain spaces, including commercial offices. NYSCEF Doc. No. 26.

In April 2020 Tenant did not pay any rent. NYSEF Doc. No. 26 ¶ 26.

In a signed Letter Agreement dated April 20, 2020, Tenant agreed to Landlord's proposal for a rent deferral program allowing it to pay April rent in monthly installments from July through December 2020. NYSCEF Doc. No. 3.

In May 2020 Tenant did not pay any rent. NYSEF Doc. No. 26 ¶ 27.

In a signed Letter Agreement dated May 19, 2020, Tenant also accepted Landlord's offer to defer its May rental obligations from July through December 2020. NYSCEF Doc. No. 4.

Tenant has not paid Landlord any rent since March 2020. NYSCEF Doc. No. 26 ¶ 38 and 39.

On June 22, 2020, New York City entered "Phase 2 of Reopening," allowing offices to reopen. NYSCEF Doc. No. 27.

On July 2, 2020, Landlord served Tenant with a "Five (5) Day Notice to Cure Default" regarding defendant's nonpayment of rent. NYSCEF Doc. No. 19. Tenant did not cure. NYSCEF Doc. No. 26 ¶ 41.

On or about July 20, 2020, pursuant to the Lease, Landlord drew down on Tenant's $96,720.00 security deposit. NYSCEF Doc. No. 26 ¶ 42. In a letter dated August 24, 2020, Landlord served Tenant with a notice demanding that it replenish the security deposit. NYSCEF Doc. No. 20.

In a letter dated September 2, 2020, Landlord served Tenant with a "Five (5) Day Notice of Cancellation" that terminated the Lease effective September 10, 2020. NYSCEF Doc. No. 21.

The parties dispute whether or not Tenant still occupies the Premises. However, Tenant, in the affidavit of Executive Assistant Cara Saluppo, acknowledges that on "a single day in July 2020" it removed "all belongings that it wished to remove" and after returned for "a few sporadic visits to retrieve any mail." NYSCEF Doc. No. 41. And Landlord, in the affidavit of Property Manager Adam Gibeault, notes that Tenant never surrendered the Premises, never requested its keypad access be disabled, and that the daily visitor register for the building showed access to the Premises up to and including until January 28, 2021. NYSCEF Doc. No. 23. Significantly, neither party suggests the occurrence of a surrender of the Premises as defined by Article 25 of the Lease (written acceptance by Landlord).

On October 9, 2020, Landlord commenced the instant suit against Tenant, asserting two causes of action: (1) breach of contract; and (2) ejectment.

On December 4, 2020, Tenant filed an answer with general denials and 18 affirmative defenses: (1) failure to state a claim upon which relief may be granted; (2) failure to mitigate; (3) rescission; (4) reformation; (5) money owed; (6) no duty owed; (7) estoppel; (8) frustration of purpose; (9) failure of consideration; (10) impossibility; (11) illegality; (12) impracticability; (13) excuse; (14) lack of damages; (15) failure to comply; (16) unclean hands; (17) unilateral and bilateral mistake; and (18) failure of a condition precedent. NYSCEF Doc. No. 10. Tenant also filed six counterclaims: (1) breach of contract; (2) declaratory relief; (3) recission/cancellation of lease; (4) reformation of lease; (5) money had and received; (6) unjust enrichment. Id.

On December 23, 2020, Landlord, not to be outdone, replied to Tenant's counterclaims with 27 affirmative defenses of its own. NYSCEF Doc. No. 12.

On June 21, 2021, pursuant to CPLR 3212, Landlord moved for summary judgement dismissing Tenant's counterclaims and affirmative defenses, granting Landlord an award of damages for unpaid rent and holdover charges plus attorney's fees, and ejecting Tenant. NYSCEF Doc. No. 14.

Discussion

To prevail in a summary judgement action, the moving party must tender sufficient evidence to demonstrate the absence of any material issue of fact, and entitlement to judgement in its favor as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Ayotte v Gervasio, 81 NY2d 1062 (1993); CPLR 3212(b). Once the movant's initial burden has been met, the burden then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980); see generally American Sav. Bank v Imperato, 159 AD2d 444 (1st Dep't 1990) ("The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgement").

1. The Underlying Breach of Contract

The elements of a cause of action for breach of contract are "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." Harris v Seward Park Hous. Corp., 79 AD3d 425, 426 (1st Dep't 2010).

Here, Landlord has made a prima facie showing of breach of contract by providing: the relevant Lease (NYSCEF Doc. No. 2) (although Landlord's counsel appears to have only uploaded a portion of the lease with the instant motion, NYSCEF Doc. No. 16, it previously uploaded the same in full with the initial complaint and, further, Tenant's counsel also helpfully uploaded the entire instrument in its responsive papers, NYSCEF Doc. No. 40); an affidavit of Alina Toyos, the Vice President of Asset Management for Landlord's parent company Ponte Gadea USA, Inc., providing personal knowledge in support of the pleadings; an affidavit of Adam Gibeault, the Property Manager for the Premises, attesting to Tenant's continued use of the Premises and failure to surrender (NYSCEF Doc. No. 23); and the rent deferral agreements (NYSCEF Doc. Nos. 17 and 18).

It is undisputed that Tenant leased the Premises from Landlord, that Tenant took possession of the Premises, that Tenant stopped paying rent on the Premises starting in April 2020, and that Tenant's default has damaged Landlord. Tenant's belief that it was not obliged to pay rent from March 19, 2020, is, for the reasons explained below, incorrect.

Consequently, plaintiff is entitled to a summary judgement against defendant for breach of contract.

2. Tenant's Coronavirus Claims

Like many contemporary commercial landlord-tenant disputes, however, this case is complicated by the ongoing global COVID-19 pandemic and government actions related to it.

In March of 2020 the Governor of New York issued a number of Executive Orders, including Executive Order 202.6 (requiring, inter alia, all non-essential businesses to reduce their in-person workforce to 50% starting March 20) and Executive Order 202.8 (requiring, inter alia, all non-essential businesses to reduce their in-person workforce by 100% starting March 22), affecting the usability of commercial office spaces. Those mandated closures remained in effect for multiple months before being rolled back on June 22, 2020, when the City entered "Phase II" (allowing for the return of, inter alia, hair salons, in-store retail, outdoor dining, and offices).

Because the Lease here is explicitly for "executive and administrative offices" Tenant was therefore, by government mandate, essentially unable to utilize much of the Premises from March 22, 2020, until June 22, 2020. Tenant argues this effectively caused the Lease to be variously frustrated, impossible, impracticable, or illegal and, as such, supports its affirmative defenses and counterclaims.

Tenant specifically argues Executive Order 202.8 triggered Article 9 of the Lease, which contemplates "Destruction, Fire and other Casualty," and so entitled Tenant to a complete abatement of rent or at least a termination of the lease.

However, Article 9 of the Lease does not excuse non-payment, or entitle Tenant to rent abatement, or trigger the termination of the Lease. By its clear language Article 9 specifically refers to singular incidents causing *physical damage* to the Premises and does not contemplate a pandemic or government mandated lockdown. See Gap, Inc. v 170 Broadway Retail Owner, LLC, 195 AD3d 575, 577 (1st Dep't 2021).

Nor did the lockdown frustrate the purpose of the Lease. The First Department is clear that "the doctrine of frustration of purpose does not apply as a matter of law where, as here, the tenant was not completely deprived of the benefit of its bargain." Gap, 195 AD3d at 577 (internal quotations removed). "[F]rustration of purpose ... is not available where the event which prevented performance was foreseeable and provision could have been made for its occurrence." Center for Specialty Care, Inc. v CSC Acquisition I, LLC, 185 AD3d 34, 43 (1st Dep't 2020). Here, though a global pandemic was arguably not foreseeable, government preemption or restriction of purpose *was*. Tenant explicitly contracted out of any alleged government-based frustration or impossibility claims in the Lease, which states in Article 27: "the obligation of Tenant to pay rent hereunder ... shall in no way be affected, impaired or excused because Owner is unable to fulfill any of its obligations under this lease ... if Owner is prevented or delayed from so doing by reasons ... including, but not limited to, government preemption or restrictions."

Further, though the shutdown may have prevented Tenant from mostly using the Premises for three months out of a five-year lease, losing 5% of the Lease's term is not the same as having its performance rendered impossible. See generally 558 Seventh Ave. Corp., v Times Sq. Photo Inc., 194 AD3d 561 (1st Dep't 2021) (performance not rendered impossible where tenant reopened for curbside service).

Therefore, because the government mandated lockdown did not trigger Article 9's casualty clause, nor did it frustrate or make impossible, impracticable, or illegal the purpose of the Lease, Tenant's pandemic-based defenses and counterclaims fail.

3. Pre-Pandemic Problems

In addition to its pandemic-related claims, Tenant also alleges damages in its breach of contract counterclaim based upon issues with the Premises between June 2019 and September 2019 which Tenant says Landlord failed to address in a prompt fashion. Specifically, Tenant alleges Landlord failed to reimburse prorated rent after: (a) façade repair work caused Tenant to be deprived of use of its exclusive terrace for several months; (b) related construction noises

impaired Tenant's employee's ability to work; (c) the same also impaired Tenant's ability to host meetings; (d) issues with the use of a private express elevator by construction workers; (f) an air conditioner malfunction caused leaks and some damage; (g) and there was a disturbing and foul smell from a neighboring building.

Tenant's counterclaims arising out of the façade work and related construction noise are barred by Article 4 of the Lease, titled "Maintenance and Repairs," which says, "there shall be no allowance to Tenant for diminution of rental value and no liability on the part of [Landlord] by reason of inconvenience, annoyance or injury to business arising from [Landlord] or others making repairs, alterations, additions or improvements in or to any portion of the Building or demised Premises."

Article 9 also says Landlord will use "commercially reasonable efforts (which shall not include employing overtime or week-end labor) not to unreasonably disrupt Tenant's operation of its business."

Here, Tenant leased the entire top floor of the subject building, so it would have been difficult for Landlord's construction workers to perform maintenance on the building's roof and façade during the week without creating at least some contractually excused disturbances.

Tenant's counterclaim arising out of its inability to use the terrace is also undone by terms contracted to by both parties. Among other things, Article 70 of the Lease, titled "Terrace Space," says that "[n]o portion of the Base Rent or any additional rent hereunder is attributable to any of the Terrace Area and, therefore, there shall be under no circumstances any abatement, reduction or deduction of, or setoff or claim against, any Base Rent or additional rent as a result of Tenant or any Tenant Party not being able to use any portion of any of the Terrace Area for any reason."

And Tenant's counterclaim relating to broken air conditioners also comes up short against the terms of the Lease, Article 20 of which, titled "Building Alterations and Management," says that "[t]here shall be no allowance to Tenant for diminution of rental value and no liability on the part of Owner by reason of inconvenience, annoyance, or injury to business arising from Owner or other Tenants making any repairs in the Building."

Here, the Tenant's Exhibit D, containing email correspondence between Cara Saluppo and Landlord's building management firm, makes clear that the air conditioning issue was caused by a wait for a new compressor, that Landlord was aware of the issue and tried to mitigate, going so far as to offer "spot coolers in the interim." NYSCEF Doc. No. 45.

Tenant's argument seeking a rent abatement from Landlord for a foul odor caused by a third-party who was not an agent of the landlord is unpersuasive.

Therefore, Tenant's counterclaims for breach of contract fail by the terms of the Lease.

As for Tenant's remaining claims, Tenant has failed to support them with facts and this Court finds them unavailing for that and other reasons.

Conclusion

Plaintiff Ponte Gadea Madison LLC's motion, pursuant to CPLR 3212, for summary judgement against defendant L3C Capital Partners LLC is granted and defendant's affirmative defenses and counterclaims are dismissed.

The Clerk is hereby directed to enter a judgement against defendant on the first cause of action in the amount of $743,765.52, consisting of five and a third months of a base rent of $33,542.50 from April 2020 until the termination of the lease on September 10, 2020, plus $17,801.86 in "Additional Rent" as defined by Article 38(a)(ii) of the Lease, plus $635,922.52 in holdover rent as defined by Article 50 of the Lease [150% of the base rent for the first 30 days from termination of the lease and 200% thereafter], plus $7,867.81 in late charges at a rate of 4% of each payment due as defined by Article 51(a) of the Lease, less the $96,720.00 security deposit, plus interest at the contractually agreed upon rate of 5% per annum commencing March 15, 2020, and ending on the date of judgement plus statutory interest thereafter.

The Clerk is also directed to enter a judgement against defendant on the second cause of action ejecting Tenant from the Premises and allowing plaintiff to exercise all acts of ownership and possession of the 16th floor of 366 Madison Avenue, New York, New York, including entry thereto.

Finally, it is further ordered that plaintiff's request for attorney's fees is hereby severed, and plaintiff may obtain an inquest into said fees by presenting the Clerk with a Note of Issue with Notice of Inquest, a copy of this Decision and Order, and any necessary fees. Plaintiff must file such Note of Issue within 30 days from the date of this Decision and Order, and plaintiff's failure to do so timely shall result in automatic disposal of this action. Plaintiff is further directed, within 15 days of filing the Note of Issue, to contact chambers to schedule the inquest date.

11/18/2021
DATE

ARTHUR ENGORON, J.S.C.

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