Kerway Realty LLC v 304 Mulberry St. Operating Co., L.L.C.
2021 NY Slip Op 32451(U)
November 24, 2021
Supreme Court, New York County
Docket Number: Index No. 650672/2021
Judge: Laurence L. Love
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LAURENCE LOVE** **PART** **63M**

Justice

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KERWAY REALTY LLC

Plaintiff,

- v -

304 MULBERRY STREET OPERATING COMPANY, L.L.C.,

Defendant.

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INDEX NO. 650672/2021

MOTION DATE 10/15/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66

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

Upon the foregoing documents, it is

The following read on plaintiff's motion (sequence number two) for partial summary judgment, CPLR 3212, on the second cause of action – failure to pay fixed rent, sprinkler charges, and water charges for the sum of $116,917.71. Plaintiff filed an amended complaint on March 2, 2021 and defendant filed a pre-answer motion to dismiss on April 8, 2021. A July 21, 2021 decision denied said motion to dismiss. Defendant submitted an answer on September 3, 2021 with counterclaims for i) "declaratory judgment regarding defendant's purported restoration obligation," ii) "declaratory judgment regarding defendant's entitlement to the rent abatement," and iii) "abuse of process." (see NYSCEF Doc. No. 30).

Plaintiff is the owner and landlord of premises 65 – 69 Bleecker Street, New York, New York. Defendant leased a portion of the premises known as "East Store" and part of the basement for use as a showroom and sales office of condominium apartments.

There was an original written agreement of lease dated September 1, 2016; then a first amendment lease dated October 17, 2017; a second amendment to lease dated January 11, 2019,

and a third written amendment of lease dated January 22, 2020 for a term to end on May 31, 2020.

This Court is certainly aware of the impact of the Covid-19 pandemic and the ensuing disturbance to commerce.

CPLR § 3212 (b) states that, "the [summary] motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."

"The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact." *Alvarez v. Prospect Hospital*, 68 NY2d 320 (1986).

The affidavit from Larry Ellenberg, President and CEO of Shulsky Properties, Inc., managing agent for Kerway Realty LLC affirms,

> "Defendant would be obligated to pay annual fixed rent of $467,250.00, payable in monthly installments of $38,937.50, for the period commencing March 1, 2019 and ending on February 29, 2020. Plaintiff and Defendant agreed that the term of the Lease would be extended for the three month period from March 1, 2020 through and including May 31, 2020 (the 'Extension Period'). Defendant failed and refused to pay monthly installments of fixed annual rent and/or additional rent during the Extension Period. Monthly installments of fixed annual rent during the Extension Period amount to $116,812.77 ($38,937.50 x 3 = $116,812.50). No portion of the monthly installments of fixed annual rent for the Extension Period have been paid. The Lease, including Original Lease paragraph 28 also required Defendant to pay water charges. Unpaid water charges accrued during the period from October 11, 2019 through January 10, 2020 amount to $18.12 and water charges for the period January $18.12 for the period from January 10, 2020 through April 13, 2020 amount to $12.69, for a total of $30.81. No portion of the aforementioned water charges have been paid. The Lease, including Original Lease paragraph 29, also required Defendant to pay the sum of $24.80 per month for sprinkler charges. Sprinkler charges accrued during the Extension Period amount to $74.40. (24.80 X 3 = $74.40). No portion of the aforementioned

> sprinkler charges have been paid. All of the foregoing defaulted charges amount to $116,917.71" (see NYSCEF Doc. No. 43 Pars. 6 – 17).

"Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact." *Zuckerman v City of New York*, 49 NY2d 557 (1980).

The affidavit of Daniel Blanco, member of defendant 304 Mulberry Street Operating Company, LLC affirms,

> "On March 20, 2020, then-Governor Andrew Cuomo signed the 'New York State on PAUSE' Executive Order (the 'Closure Order'), which ordered all non-essential businesses statewide to close in-office personnel. The Closure Order expressly prohibited Tenant from operating its business – a showroom and sales office for condominium apartments, which was deemed to be non-essential – at the Premises and caused Tenant to suffer significant financial hardship. Tenant was unable to operate its business at the Premises or use the Premises through the end of the term of the Third Amendment. Additionally, protests, riots, and social unrest in response to the death of George Floyd began to take place throughout Manhattan on or about May 25, 2020. Substantial looting and property damage was occurring in the stores and businesses in the immediate surrounding area of the Premises during this time, but Landlord did not take any steps to protect the Premises. Despite being unable to access the Premises due to the Closure Order, Tenant took steps on its own initiative to protect its portion of the Premises by boarding up the exterior glass windows and door. Additionally, the affidavit of Larry Ellenberg … does not include a rent ledger to substantiate the amount of rent claimed to be owed. Finally, it is undisputed that Landlord continues to hold Tenant's security deposit in the amount $150,000, which more than off-sets the $116,917.71 claimed by Landlord on its second cause of action" (see NYSCEF Doc. No. 54 Pars. 3 – 7, 9 - 10).

Defendant submits photographs of damage and boarded up windows (see NYSCEF Doc. No. 56). The affidavit of Lucy Arcati states, "[t]he first photo … is not a photo of the building. The second photo is marked with the date May 27, 2020 but the plywood shown on the 59

Bleecker Street building was not installed until after I requested that a contractor do so on June 2, 2020" (see NYSCEF Doc. No. 60 Pars. 2, 4).

The Reply affidavit of Larry Ellenberg submits an accounting of "monthly installments of fixed annual rent @ 38,937.50 for period 3/01/2020 – 5/31/2020 $116,812.50; Sprinkler charge 24.80 per month for the period 3/01/2020 – 5/31/2020 $74.40; Water charges 10/11/2019 – 4/13/2020 $30.81; $116,917.71. Defendant has asked that its security deposit be applied to the rent sought in this motion. Such a request, however, ignores the fact that Defendant also owes use (sic) both amounts for the condition in which the Premises were belatedly returned to Plaintiff and occupancy for the months, following expiration of the Lease, that Defendant held over and refused to return possession of the Premises back to Plaintiff, which amounts are significantly more than the security deposit" (see NYSCEF Doc. No. 57 Pars. 2, 9).

Plaintiff's Reply Memorandum of Law highlights *Matter of Rebell*, [t]he doctrine of impossibility "… comes into play where 1) the contract does not expressly allocate the risk of the vent's occurrence to either party, and 2) to discharge the contractual duties of the party rendered incapable of performing would comport with the customary risk allocation" (see *Matter of Rebell v. Trask*, 220 AD2d 594, 589 [1995]; citing *407 E. 61st Garage*, 23 NY2d at 282; *U.S. v. General Douglas MacArthur Senior Village, Inc.*, 508 F.2d 377, 381 [2d Cir., 1974]).

The doctrine of frustrate of purpose, available to excuse a party's contractual duties only where an unforeseen event destroys the very reason that the contract was entered into is not available where provision for the occurrence is made in the contract (see *id*).

Plaintiff highlights paragraph 26 of the lease:

> "Obligations of Tenant to pay rent hereunder and perform all of the other covenants and agreements hereunder on part of Tenant to be performed shall in no wise be affected, impaired or excused … government preemption or restrictions or by reason of any rule,

> order or regulation of any department or subdivision of any governmental agency … by reason of any other cause beyond Owner's reasonable control" (see NYSCEF Doc. No. 66 P. 9).

Paragraph 6 of the Lease continues:

> "Tenant, at Tenant's sole cost and expense, shall promptly comply with all present and future laws, orders and regulations of all state, federal, municipal and local governments, departments, commissions and boards and any direction of any public officer pursuant to law … which shall impose any violations, order or duty upon Owner or Tenant with respect to the demised premises" (see NYSCEF Doc. No. 66 P. 9).

Through a review of all the memorandum and affidavits plaintiff has shown a valid lease agreement for real property between the parties. Although the court is certainly sympathetic to defendants plight due to the circumstances of COVID epidemic and the brief impact of the George Floyd protests, the doctrine of impossibility and the doctrine of frustration of purpose do not apply herein.

ORDERED that the branch of plaintiff's motion that seeks summary judgment in plaintiff's favor on the second cause of action of the complaint and a declaratory judgment with respect to the subject matter of that cause of action is granted; and it is further

ADJUDGED and DECLARED that plaintiff is entitled to $116,917.71; and it is further;

ORDERED that the balance of the action is severed and continued.

11/24/2021
DATE

LAURENCE LOVE, 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**