600 Broadway Partners LLC v 598 Broadway Realty Assoc., Inc.
2021 NY Slip Op 32795(U)
December 22, 2021
Supreme Court, New York County
Docket Number: Index No. 653679/2020
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 14

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600 BROADWAY PARTNERS LLC

Plaintiff,

- v -

598 BROADWAY REALTY ASSOCIATES, INC.,

Defendant.

INDEX NO. 653679/2020

MOTION DATE 11/12/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

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HON. ARLENE BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 50, 51, 53, 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, 80, 81, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105

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

Defendant's motion for summary judgment is denied and plaintiff's cross-motion for summary judgment is granted.

Background

This matter concerns a sidewalk shed spanning two neighboring Manhattan properties, 600 Broadway and 598 Broadway. In 2017, defendant erected a sidewalk shed in front of its property, which also extended in front of plaintiff's building. More than a year and a half later, in August of 2019, plaintiff complained that the shed was causing issues for its tenants and impacting its business, so these sophisticated parties, represented by counsel, negotiated a written agreement concerning the shed. On November 11, 2019, almost two years after the sidewalk shed was erected, the parties signed an agreement where plaintiff granted a license to

defendant with respect to the shed for $2,000 per month (NYSCEF Doc. No. 34). Article 4(f) of the agreement provided that the shed would be removed by March 1, 2020 and, if it was not, the "Licensee [defendant] will pay to Owner [plaintiff] the sum of $500 per day each day until the Property Protection on the Broadway-side of the Premises is so removed."

Defendant alleges that "soon after the Agreement took effect and work got under way, Defendant realized the shed would not be coming down by March 1, and dutifully notified Plaintiff" (NYSCEF Doc. No. 48 at 7). Defendant asked plaintiff if it would amend the agreement, and plaintiff refused. The shed was not removed until November 2020. According to the summons and complaint, defendant refused to pay the agreed-upon damages of $500 per day and plaintiff brought the instant action.

Defendant moves for summary judgment on its second counterclaim for a declaratory judgment, dismissing the complaint, and awarding it reasonable attorney's fees and costs. Defendant argues that the Article 4(f) is unenforceable because plaintiff's probable losses were calculable, and the stipulated sum is grossly disproportionate to the actual damages suffered by plaintiff. Defendant also argues that while the shed remained up, plaintiff leased space to two different parties, which demonstrates that plaintiff was not actually harmed by the shed and enforcing Article 4(f) would provide a windfall to plaintiff. Defendant also argues that plaintiff falsely represented that the shed was "hurting its bottom line, when the truth was that Plaintiff was actually trying to get rid of tenants" (NYSCEF Doc. No. 48 at 13). Defendant insists that plaintiff's misrepresentation is sufficient grounds to rescind the entire contract. Lastly, defendant claims that it is entitled to fees and costs because the agreement provides that, in the event of litigation, the prevailing party is entitled to fees.

In response, plaintiff cross-moves for summary judgment and dismissal of defendant's counterclaims. Plaintiff argues that in December 2017, defendant erected the shed which negatively impacted its tenants. In the November 2019 agreement, defendant agreed to remove the shed by March 1, 2020 or pay $500/day until it took the shed down. The shed was not removed until November 30, 2020, 274 days after the deadline. Plaintiff argues that defendant breached its agreement and refused to pay in accordance with the agreement. With respect to the alleged fraudulent misrepresentations, plaintiff argues that defendant withdrew its counterclaim for rescission with prejudice, defendant did not plead fraud in its answer, and fraud must be pled with particularity. Plaintiff also seeks its legal fees, acknowledging that the agreement provides that the prevailing party is entitled to fees.

In opposition to plaintiff's cross-motion, defendant argues that it entered into the agreement based on plaintiff's representation that the shed was causing it financial hardship. Defendant contends that it has since learned that plaintiff was not harmed by the shed, and so the provision is unenforceable. Defendant claims that plaintiff has refused to produce demanded documentation to prove its financial hardship as a result of the shed, and defendant is entitled to discovery into damages. Defendant argues that plaintiff has failed to rebut its argument that Article 4(f) was premised on a falsehood.

In reply, plaintiff argues that defendant has not shown that the liquidated damages provision is unenforceable. Plaintiff contends that defendant has not provided evidence on how plaintiff's damages could have been calculated, and that the parties could not have known how long the breach of contract would last. It maintains that defendant has no basis to reform Article 4(f) and any outstanding discovery should not be a basis to deny plaintiff summary judgment. Plaintiff points out that defendant simultaneously moves for summary judgment and claims that

it needs discovery, two conflicting positions. Plaintiff also argues that defendant has not asserted a cognizable counterclaim for fraud and its motion lacks any factual support or evidence of fraud.

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 [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 [1st Dept 2012]).

Breach of Contract

The elements of a breach of contract claim are "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." (*Markov v Katt*, 176 AD3d 401, 402-403 [1st Dept 1995]).

Here, it is undisputed that the parties entered into a contract on November 11, 2019. It is also undisputed that Article 4(f) of the contract provides that, if the shed was not removed by the earlier of "(i) one week after the Broadway-Side Expiration Date and (ii) March 1, 2020, Licensee [defendant] will pay to Owner [plaintiff] the sum of $500 per day each day until the Property Protection on the Broadway-side of the Premises is so removed" (NYSCEF Doc. No.

56). The shed was not removed until November 2020, well after the deadline set by the contract. Obviously, there was a contract and defendant breached it by not removing the shed from plaintiff's property by the date promised. Therefore, the real question here is whether the liquidated damages provision of the contract, negotiated by sophisticated parties represented by counsel, is enforceable.

Enforceability of the Liquidated Damages Provision

"Liquidated damages are an estimate, made by the parties at the time they enter into their agreement, of the extent of the injury that would be sustained as a result of breach of the agreement. A liquidated damage provision has its basis in the principle of just compensation for loss. Liquidated damages that constitute a penalty, however, violate public policy, and are unenforceable. A provision which requires damages 'grossly disproportionate to the amount of actual damages provides for [a] penalty and is unenforceable." (*Trustees of Columbia Univ. in the City of New York v D'Agostino Supermarkets, Inc.*, 36 NY3d 69, 74-75 [2020]) [internal citations and quotations omitted]).

The Court finds that the liquidated damages provision at issue here is enforceable and is not a penalty.

In its motion, defendant alleges that plaintiff "closed one of the biggest leases in the quarter with Target Corp." (NYSCEF Doc. No 48 at 2). According to defendant's opposition to plaintiff's cross-motion, "Target Corp. now pays $3.2 million annually – market rent" (NYSCEF Doc. No. 101 at 7).

Preliminarily, the fact that plaintiff found a tenant is not a defense to the agreement; in fact, the whole tenancy issue is a red herring. It doesn't matter how much the tenant pays.

Defendant, clearly the breaching party, would like it both ways. Suppose the new tenant provided an affidavit that it would have paid a million more a year if there was no sidewalk shed? Or a potential tenant had said that it didn't want to take the risk that the sidewalk shed would remain too long? Then defendant would likely argue that plaintiff would not be entitled to more damages because *the parties agreed in advance that the damages were $500 per day*. So, no, defendant cannot avoid its obligation by arguing that it turned out okay for plaintiff despite defendant's breach.

Fees for encroaching sidewalk sheds are routine and a good idea; it incentivizes the encroacher to remove the shed when promised and, if it is not removed, then the encroacher knows what the fees are; it eliminates the need for protracted and unpredictable litigation. If defendant didn't want to pay a daily amount, then perhaps it could have negotiated a higher monthly license fee, or a graduated step-up for as long as the shed remained, or one of many, many other possibilities. For understandable reasons, this defendant agreed to a very low monthly license fee and a date certain for the fee to go up to $500 per day if the shed remained. Apparently, defendant was confident that the shed would be gone by the deadline or very soon thereafter and wanted to save the costs and fees associated with an RPAPL 881 proceeding or other litigation, where it would likely have to pay a license fee anyway.

Defendant's argument that the damages to plaintiff resulting from the shed are calculable is unpersuasive. First, if they were calculable, then these sophisticated parties could have easily worked something out in the agreement – even if it was that the encroacher would pay all damages (or double the damages) plus counsel fees, if any. But as explained above, a liquidated damage provision is an estimate made and agreed to by the parties at the time they enter into their contract. At the time of the contract, the parties could not have known the length of time the

shed would remain past the deadline (if at all) or how current or prospective tenants would react to the shed. Attempting to calculate the losses from a sidewalk shed is objectively difficult—it can involve many elements, including evaluating decisions made by prospective or renewing tenants (who make decisions to rent or not rent, or how much they are willing to pay, for a variety of reasons). Picking a specific amount to be paid by defendant if the shed did not come down eliminated that time-consuming analysis and gave defendant a clear choice. It could remove the sidewalk shed or pay the agreed amount. Here, defendant chose not to remove the shed.

This is not a case where defendant left the shed up for an extra week or two and suddenly owes over a million dollars (*c.f. Trustees of Columbia v D'Agostino*, 36 NY3d at 76). This was a daily agreed-upon amount and the sooner defendant removed the shed, the sooner the daily fee would end. If defendant had been a week late, then the damages would be minimal. It is ***only*** because it took defendant 274 days to remove the shed, even though it knew the meter was running, that the damages are higher. The purpose of the daily fee was to encourage defendant to take the shed down promptly; here, if defendant prevails in its hollow argument, encroachers would have an incentive to allow the breach to last a really, really long time so they could argue that it is a lot of money. Simply put, because $500/day is reasonable and appropriate, the $137,000 it owes for that lengthy delay is also entirely reasonable and proportionate.

Defendant has failed to show that the damages resulting from Article 4(f) are grossly disproportionate to the damages actually suffered by plaintiff. $500 per day is not, objectively, an extraordinary amount for this valuable real estate. After all, Target is apparently willing to pay millions in rent for this space. In other words, the property at issue is clearly desirable and

the Court is satisfied that the relatively small daily fee at issue does not come close to an unenforceable penalty.

For the same reasons, discovery on plaintiff's losses is not appropriate. The fact is that these two sophisticated parties entered into an agreement with the express purpose of incentivizing defendant to remove the sidewalk shed by a date certain. The most logical way to do that is exactly what the parties did—include a specific damage amount in the event the shed was not removed. Nothing on these papers suggests that this amount is a penalty, especially given the size, value and location of the real estate at issue here.

Lastly, in its motion, defendant also argues that Article 4(f)'s enforcement would offend public policy because it is "expressly premised on a falsehood" (NYSCEF Doc. No. 48 at 8). Defendant claims that it entered into the agreement based on plaintiff's misrepresentation that the shed was hurting its business. According to defendant, plaintiff "was actually trying to get rid of tenants" (*id.*).

This argument makes no sense. Defendant's claim is, essentially, that it relied on plaintiff's subjective motivation for the agreement and this motive turned out not to be true. But defendant cannot establish that it justifiably relied on any misrepresentation by plaintiff when entering into the agreement. Plaintiff clearly wanted the sidewalk shed down and off its property; defendant agreed to do so or pay more. Why plaintiff wanted the shed down is besides the point. And defendant did not raise a material issue of fact regarding any misrepresentation by plaintiff whatsoever.

Summary

The Court sees no basis to find that the product of a negotiation between two sophisticated Manhattan property owners, represented by counsel, should be disregarded because defendant breached, didn't remove the shed until 274 days after it promised, and doesn't want to pay the $500/day that it agreed to pay. It is not up to this Court to rewrite the parties' agreement. They did not agree to what defendant wants here - that defendant could leave the shed in place until it was good and ready to remove it and then the plaintiff would have to prove actual damages. The parties agreed that if the shed was not removed from in front of a property that apparently has a market rent of over 3 million dollars annually, then defendant would pay a flat fee of $500 per day until the shed was removed. And the sooner it was removed, the better for both parties.

The Court observes that 274 days at $500 per day equals $137,000, which is not an unreasonable amount in the context of some of the most expensive real estate in one of the most expensive cities in the world: the SoHo neighborhood of Manhattan. Plaintiff is granted judgment for that amount, plus costs and expenses. The Court awards plaintiff interest from July 5, 2020 (the reasonable midpoint between when the shed was supposed to come down in March 2020 and when it actually came down in November 2020).

Attorneys' Fees

According to the agreement, "[i]n the event of any litigation between the parties regarding this Agreement, the prevailing party in any such litigation shall be entitled to recover reasonable attorneys' fees and disbursements and court costs from the non-prevailing party" (NYSCEF Doc. No. 56 at 14). Because plaintiff's motion is successful, it is entitled to legal fees

which will be determined at hearing to be scheduled by the clerk of this part (instructions concerning the hearing will be sent in the invitation to the parties).

The parties are reminded that if they settle the issue of legal fees, then please contact the Court as soon as possible so another matter can be scheduled for their assigned time slot.

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is granted and the Clerk shall enter a judgment in favor of plaintiff and against defendant in the amount of $137,000 plus statutory interest from July 5, 2020 along with costs and disbursements upon presentation of proper papers therefor; and it is further

ORDERED that the issue of reasonable legal fees is severed and the Clerk of this part shall schedule a virtual legal fees hearing.

12/22/2021
DATE

ARLENE BLUTH, J.S.C.

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