

81-01 37th Ave. LLC v New Covert Nail & Spa Inc.

2021 NY Slip Op 33090(U)

December 21, 2021

Supreme Court, Queens County

Docket Number: Index No. 702978/21

Judge: Carmen R. Velasquez

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38
Justice

-----x,
81-01 37TH AVENUE LLC,

Index No. 702978/21

Plaintiff,

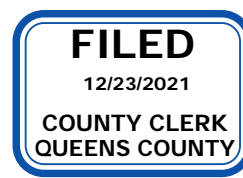
Motion

Date: August 2, 2021

-against-

M# 1

NEW COVERT NAIL & SPA INC.



Defendant.
-----x

The following papers numbered EF 7-27 read on this motion by the plaintiff (i) for an order granting summary judgment on its cause of action against defendant for unpaid rent and unpaid electric charges, (ii) for an order permitting service of an amended complaint and for judgment for additional rent and utility charges based upon the amended complaint and (iii) for an order dismissing the affirmative defenses and other relief.

Papers
Numbered

Notice of Motion - Affidavits - Exhibits	EF 7-22
Affirmation in Opposition - Exhibits.....	EF 25-26
Replying Affirmation.....	EF 27

Upon the foregoing papers, it is ordered that this motion by the plaintiff (i) for an order granting summary judgment on its cause of action against defendant for unpaid rent and unpaid electric charges, (ii) for an order permitting service of an amended complaint and for judgment for additional rent and utility chargers based upon the amended complaint and other relief is decided as follows:

Plaintiff, the owner of the subject commercial premises, entered into a 10-year lease with its prior tenant, Nail Salon and Fully Clothed Massaged Only, commencing on July 1, 2017 and ending on June 30, 2027. Pursuant to an agreement dated June 17, 2019, the lease was assigned to the defendant, as tenant, herein. Plaintiff commenced the instant action alleging that the

defendant ceased making rental payments under the lease due and owing since October 2020 through February 2021. The complaint also seeks unpaid electrical charges from October 2020 through December 2020. In addition, plaintiff states that since the filing and service of the complaint, additional charges have accrued. Plaintiff seeks to amend the complaint to recover those unpaid charges as well. Plaintiff now seeks, *inter alia*, summary judgment for the unpaid amounts due both before and after the filing of the complaint. Plaintiff seeks to amend the complaint to recover the unpaid charges that accrued subsequent to the filing of the complaint. Plaintiff also seeks to dismiss the affirmative defenses set forth in the Answer as without merit.

The branch of the motion for leave to amend the complaint is granted. It is well settled that applications for leave to amend a pleading under CPLR 3025(b) should be freely granted unless the proposed amendment would unfairly prejudice or surprise the opposing party or is palpably insufficient or patently devoid of merit. (*Favia v Harley-Davidson Motor Co., Inc.*, 119 AD3d 836, 836 [2d Dept 2014]; *Maldonado v Newport Gardens, Inc.*, 91 AD3d 731, 731-732 [2d Dept 2012]; *Longo v Long Is. R.R.*, 116 AD3d 676, 677 [2d Dept 2014].)

Here, plaintiff seeks to amend the complaint to include the updated amounts that are allegedly due and owing. Defendant will not be prejudiced by the proposed amendment, and defendant has not opposed the proposed amendment.

The court will now address the branch of the motion for summary judgment.

The proponent of a summary judgment motion 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. (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993].) Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. (*Peerless Ins. Co. v Allied Bldg. Prods. Corp.*, 15 AD3d 373, 374 [2d Dept 2005].)

The court will first address the argument and affirmative defense by the defendant that this action is barred by the doctrine of impossibility. Defendant contends that due to the unforeseeable COVID-19 pandemic, it was impossible for it to perform its rental obligations under the terms of the lease. Defendant explains that it has experienced unprecedented difficulty in bringing in customers because of the pandemic and social distancing requirements.

In order to utilize the defense of impossibility of performance of a contract, a party must show that the event rendering performance impossible was unforeseeable, the event destroyed the subject matter of the contract or the means of performance and it was the event that made the performance objectively impossible. (*Kolodin v Valenti*, 115 AD3d 197, 200 [1st Dept 2014].)

Although the plaintiff made a prima facie showing of entitlement to judgment as a matter of law, defendant has raised a triable issue as to whether it was able to perform its obligations under the lease terms. The COVID-19 pandemic has caused a major economic impact on many businesses. The forced shutdowns and social distancing requirements have significantly affected the ability of businesses to carry on their activities and generate revenue. In her affidavit, Hye J. Lee, the defendant's President, avers that her business, a nail salon, was forced to close for many months during the pandemic as it was a non-essential business. She also avers that her company has suffered "tremendously" from the loss of income. She explains that his company has experienced "unprecedented difficulty in bringing customers" and is "still struggling to get back to normalcy."

The branch of the motion to dismiss the first affirmative defense of failure to state a cause of action is granted. "No motion ... lies under CPLR 3211(b) to strike this defense ... as this amounts to an endeavor by the plaintiff to test the sufficiency of his or her own claim." (*Jacob Marion, LLC v Jones*, 168 AD3d 1043, 1044 [2d Dept 2019]; *Butler v Catinella*, 58 AD3d 145, 150 [2d Dept 2008].) Thus, this affirmative defense is lacking in merit.

The branch of the motion to dismiss the second affirmative defense alleging failure to serve the summons and complaint as

required by the CPLR is granted. An objection that the summons and complaint was not properly served is waived if, having raised such an objection in the Answer, defendant does not move for judgment on that ground within 60 days after serving the pleading. (*Qing Dong v Chen Mao Kao*, 115 AD3d 839, 840 [2d Dept 2014].) The motion herein was not served within 60 days as required by the statute. In any event, defendant fails to address this affirmative defense in the opposing papers.

The branch of the motion to dismiss the third affirmative defense, which alleges that the amount requested is not the amount on the current lease, is denied. Defendant avers that payments due were made in November 2020 that were not credited. Thus, the court cannot state, at this juncture, that this affirmative defense lacks merit.

The branch of the motion to dismiss the fourth affirmative defense, which alleges that the plaintiff has failed to comply with Administrative Orders for cases affected by COVID-19, specifically, AO/127/20, is granted. AO/127/20 applies to eviction proceedings pursuant to Article 7 of the Real Property Actions and Proceedings Law. This is an action for breach of contract a lease and is not an eviction proceeding under RPAPL Article 7.

The branch of the motion to dismiss the fifth affirmative defense, which alleges that the contract cannot be performed because of the doctrine of impossibility, is denied as set forth above.

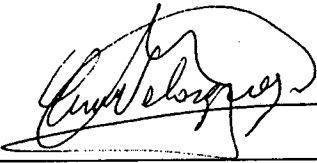
Accordingly, the branch of the motion for leave to amend the complaint is granted, and the proposed amended complaint, in the form annexed to the moving papers, is deemed timely and validly served.

The branch of the motion by plaintiff for summary judgment is denied.

The branch of the motion by plaintiff to dismiss the affirmative defenses is granted to the extent that the first, second and fourth affirmative defenses set forth in the Answer are dismissed.

The third and fifth affirmative defenses shall remain.

Dated: December 21, 2021



CARMEN R. VELASQUEZ, J.S.C.

