250-252 Elizabeth St. Partnership, L.P. v 250 Soho Cleaners Inc.
2022 NY Slip Op 30347(U)
February 10, 2022
Supreme Court, New York County
Docket Number: Index No. 153773/2021
Judge: Frank P. Nervo
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANK NERVO** **PART** **04**

Justice

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250-252 ELIZABETH STREET PARTNERSHIP L.P.,

Plaintiff,

- v -

250 SOHO CLEANERS INC.,RIZWAN MAHMOOD

Defendant.

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INDEX NO. 153773/2021

MOTION DATE 08/05/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER .

This matter was transferred to Part IV. On February 8, 2020, the Court held a conference on the instant motion. As relevant here, plaintiff seeks summary judgment for unpaid rent and dismissal of defendants' defenses. Defendants oppose contending, inter alia, issues of fact related to frustration of purpose of the parties' lease due to the COVID-19 pandemic preclude summary judgment, and the motion is therefore premature. Defendant Mahmood further opposes on the basis that NYC Administrative Code § 22-1005 precludes liability for personal guarantors of commercial leases.

On a motion for summary judgment, the burden rests with the moving party to make a prima facie showing they are entitled to judgment as a matter of law and demonstrate the absence of any material issues of fact (*Friends of*

Thayer lake, LLC v. Brown, 27 NY3d 1039 [2016]). Once met, the burden shifts to the opposing party to submit admissible evidence to create a question of fact requiring trial (*Kershaw v. Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]). "When a plaintiff moves for summary judgment, it is proper for the court to ... deny summary judgment if facts are alleged in opposition to the motion which, if true, constitute a meritorious defense" (*Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 NY2d 175 [1982]). However, a "feigned issue of fact" will not defeat summary judgment (*Red Zone LLC v. Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048 [2016]). A failure to make a prima facie showing requires the Court to deny the motion, regardless of the sufficiency of opposing papers (*Alverez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373 [2005]).

Here, plaintiff has established, through admissible evidence, the parties' obligations under the lease and guarantor agreements and defendants' failure to meets their contractual obligations (*see* lease agreement, guaranty, plaintiff's affidavit, and rent ledger; NYSCEF Doc. Nos. 7, 9-12). Consequently, plaintiff has met its burden on summary judgment and the burden shifts to defendants to raise an issue of triable fact (*see e.g. Alverez, supra.*).

Defendant contends that issues of fact exist related to frustration of purpose of the parties' lease agreement, force majeure, and impossibility of performance, and thus contend summary judgment is inappropriate. The Appellate Division has rejected these affirmative defenses, even where a tenant was required to shutter the business for a period of time due to COVID-19 (*558 Seventh Ave. Corp. v. Times Sq. Photo Inc.*, 194 AD3d 561 [1st Dept 2021]). Furthermore, frustration of purpose does not lie where, as here, the tenant was not "completely deprived of the benefit of its bargain" (*Center for Specialty Care, Inc., v. CSC Acquisition, I, LLC*, 185 AD3d 34, 43 [1st Dept 2020]; *see also Gap, Inc. v. 170 Broadway Retail Owner, LLC*, 195 AD3d 575 [1st Dept 2021]). Finally, the lease agreement's force majeure clause, by its express terms, applies only to landlord, the plaintiff in this action. Accordingly, defendants' affirmative defenses of frustration of purpose of the parties' lease agreement, force majeure, and impossibility of performance must be dismissed and fail to raise an issue of triable fact here.

Turning to defendant Mahmood's contention that NYC Administrative Code § 22-1005 prohibits entering judgment against him as a personal guarantor, ss relevant here, NYC Administrative Code § 22-1005 provides:

A provision in a commercial lease or other rental agreement involving real property located within the city, or relating to such a lease or other rental agreement, that provides for one or more natural persons who are not the tenant under such agreement to become, upon the occurrence of a default or other event, wholly or partially personally liable for payment of rent, utility expenses or taxes owed by the tenant under such agreement, or fees and charges relating to routine building maintenance owed by the tenant under such agreement, shall not be enforceable against such natural persons if the conditions of paragraph 1 and 2 are satisfied:

1. The tenant satisfies the conditions of subparagraph (a), (b) or (c):

(a) The tenant was required to cease serving patrons food or beverage for on-premises consumption or to cease operation under executive order number 202.3 issued by the governor on March 16, 2020;

(b) The tenant was a non-essential retail establishment subject to in-person limitations under guidance issued by the New York state department of economic development pursuant to executive order number 202.6 issued by the governor on March 18, 2020; or

(c) The tenant was required to close to members of the public under executive order number 202.7 issued by the governor on March 19, 2020.

2. The default or other event causing such natural persons to become wholly or partially personally liable for such obligation occurred between March 7, 2020 and June 30, 2021, inclusive.

(NYC Admin. Code § 22-1005).

However, no evidence has been proffered by defendants that: (1) the subject laundry business was required to cease operation under the Governor's executive order 202.3; (2) the subject laundry business was declared a non-essential establishment subject to limitations under the Governor's executive order 202.6; or (3) that the subject laundry business was required to cease serving members of the public under the Governor's executive order 202.3(c). To the contrary, plaintiff contends, and defendants do not dispute, that the subject laundry business remained open and operational during the COVID-19 pandemic. Defendants' failure to dispute that the business remained operational constitutes waiver of same (*Raia v. Potoschnig*, 170 AD3d 433 [1st Dept 2019]; *Wilmington Trust v. Sukhu*, 155 AD3d 591 [1st Dept 2017]). Consequently, §22-1005 does not provide defendant Mahmood protection from liability as a personal guarantor of the subject commercial lease.

Accordingly, it is

ORDERED that plaintiff's motion is granted; and it is further

ORDERED that plaintiff does recover against defendants 250 SOHO CLEANERS and RIZWAN MAHMOOD, jointly and severally, in an amount to be determined at inquest; and it is further

ORDERED that such inquest shall occur on April 12, 2022 at 2:30pm via Microsoft Teams; and it is further

ORDERED that all evidence intended to be introduced at inquest shall be submitted to the Court, via email to SFC-Part4-Clerk@nycourts.gov, no later than April 8, 2022; and it is further

ORDERED that defendants' affirmative defenses are stricken; and it is further

ORDERED that any requested relief not addressed herein has nevertheless been considered and is hereby denied.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

2/10/2022
DATE

FRANK NERVO, 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:	X	INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE