Classic Retail Equities LLC v Aminov
2022 NY Slip Op 32749(U)
August 12, 2022
Supreme Court, New York County
Docket Number: Index No. 653048/2021
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY BANNON** **PART** **42**

Justice

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CLASSIC RETAIL EQUITIES LLC

Plaintiff,

- v -

ARKADIY AMINOV,

Defendant.

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INDEX NO. 653048/2021

MOTION DATE 07/20/2022

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, 23, 24, 25, 26, 27

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

I. INTRODUCTION

In this action to recover damages for breach of a lease agreement, the plaintiff landlord, owner of commercial property at 129 East 82nd Street in Manhattan, moves pursuant to CPLR 3212 for summary judgment against the defendant tenant, who operated a hair salon on the premises. The plaintiff seeks (1) on the first cause of action, the sum of $103,989.27 for unpaid base rent and additional rent from January 2020 through the filing of this action in May 2021; (2) on the second cause of action, the sum of $128,526.48, for base rent through February 2023, when the lease term is to expire; (3) on the third cause of action, the sum of $7,232.53 for contractual attorneys' fees. The plaintiff further moves to dismiss the defendant's affirmative defenses. The defendant opposes the motion. The motion is granted in part.

II. DISCUSSION

A. Summary Judgment Standard

It is well-settled that the movant on a summary judgment motion "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), and the pleadings and other proof such as

affidavits, depositions, and written admissions. See CPLR 3212. The "facts must be viewed in the light most favorable to the non-moving party." Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986).

B. Plaintiff's Motion

In support of its motion, the plaintiff submits, *inter alia*, the pleadings, notice of termination, the subject lease agreement, invoices and a rent ledger. The plaintiff also submits an affidavit of Scott Klatsky, Director of Retail Leasing and Acquisitions for Time Equities Inc., the managing agent for the plaintiff, and an affirmation of Irina Svetlichnaya, Esq., counsel for plaintiff. The lease, dated February 13, 2013 and signed by defendant, provides that defendant agreed to rent the premises from plaintiff for a period of 10 years, beginning on March 1, 2013 and expiring on February 28, 2023. It also provides that defendant would pay 6% of any increase in that year's real estate taxes for the building, as well as all charges for water throughout the lease term. The plaintiff alleges that defendant defaulted in his obligations starting in January 2020, making only a partial payment thereafter.

The plaintiff's proof establishes, *prima facie*, its entitlement to relief on the first cause of action seeking unpaid rent and additional rent in the form of real estate taxes and water charges. The plaintiff's proof demonstrates (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendants' breach of that contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010); Flomenbaum v New York Univ., 71 AD3d 80 (1st Dept. 2009). It is well-settled that a lease is a contract which is subject to the same rules of construction as any other agreement. See George Backer Mgt. Corp. v Acme Quilting Co., Inc., 46 NY2d 211 (1978); New York Overnight Partners, L.P. v Gordon, 217 AD2d 20 (1st Dept. 1995), aff'd 88 NY2d 716 (1996). In its complaint, the plaintiff seeks $103,989.27 on this cause of action. However, the invoices and ledger submitted support only a judgment of $95,757.98.

In regard to the second cause of action for future base rent, "[t]he principle is firmly established that 'no suit can be brought for future rent in the absence of a clause permitting acceleration'." Utility Garage Corp. v National Biscuit Co., 71 AD2d 578, 579 (1st Dept. 1979)

quoting Maflo Holding Corp. v S.J. Blume, Inc. 208 N.Y. 570, 575 (1955); see 23 East 39th Street Dev., LLC v 23 East 39th Street Mgmt. Corp., 172 AD3d 964 (2nd Dept. 2019). The subject lease contains no such clause. Therefore, the plaintiff failed to meet its burden in the first instance as to the second cause of action. The denial is without prejudice to assert additional claims for rent allegedly due under the lease when and if those claims accrue.

In the third cause of action, the plaintiff seeks contractual attorney's fees pursuant to paragraph 24(A)(4) of the lease, which provides that the "tenant shall pay to landlord reasonable attorney's fees with respect to any successful lawsuit or action instituted by landlord to enforce the provisions of this lease." The plaintiff, the successful party in this action, has established entitlement to fees in the sum of $7,232.53, the amount stated on the invoice submitted with the motion. The court finds that sum to be reasonable.

C. The Defendant's Opposition

In opposition to the motion, the defendant submits, *inter alia*, his own affidavit and that of his attorney. Since counsel claims no personal knowledge of the underlying facts, the affirmation of the plaintiff's counsel is without probative value or evidentiary significance on this motion. See Zuckerman v City of New York, 49 NY2d 557 (1980); Trawally v East Clarke Realty Corp., 92 AD3d 471 (1st Dept. 2012); Thelen LLP v Omni Contracting Co. Inc., 79 AD3d 605 (1st Dept. 2010). In his own brief affidavit, the defendant argues that the doctrines of impossibility and frustration of purpose should apply and that there are material issues of fact in regard to his defenses that requiring a trial. This is insufficient to defeat the motion.

The defendant alleges that there was a mandated closure of hair salons starting in March 2020 and the nature of his business, hair styling, required close contact and was thus impossible to perform while maintaining safe social distancing. He does not state whether he continued to work but only that the pandemic has "taken a devastating toll on [his] ability to make a living." Although the plaintiff maintains that the defendant did not return the keys to the premises in April 2021, and had access up to that date, the defendant claims to have surrendered the keys in April 2020 and vacated at the same time. That appears to be the only factual issue presented, but it is not a material one since surrender of keys does not relieve the defendant of his obligations under the terms of the lease. Nor do his defenses present any triable issue of fact.

The frustration of purpose doctrine "offers a defense against enforcement of a contract when the reasons for performing the contract cease to exist due to an unforeseeable event which destroys the reasons for performing the contract." Structure Tone, Inc. v Univ. Svcs. Group, Ltd., 87 AD3d 909, 912 (1st Dept. 2011). "In order to invoke the doctrine of frustration of purpose, the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense." Center for Specialty Care, Inc. v CSC Acquisition I, LLC, 185 AD3d 34, 42 (1st Dept. 2020) (quoting Warner v Kaplan, 71 AD3d 1, 6 [1st Dept. 2009]) (quotation marks omitted). "Examples of a lease's purposes being declared frustrated have included situations where the tenant was unable to use the premises as a restaurant until a public sewer was completed, which took nearly three years after the lease was executed ... and where a tenant who entered into a lease of premises for office space could not occupy the premises because the certificate of occupancy allowed only residential use and the landlord refused to correct it." Id. at 42-43.

Importantly, frustration of purpose is not available "where the event which prevented performance was foreseeable and provision could have been made for its occurrence." Id. at 43 (quoting Warner v Kaplan, supra at 6) (quotation marks omitted). Moreover, economic hardship and reduced revenues alone, even if occasioned by an arguably unforeseeable circumstance such as a pandemic, do not warrant application of the frustration of purpose doctrine. See Gap, Inc. v 170 Broadway Retail Owner, LLC, 195 AD3d 575 (1st Dept. 2021); 558 Seventh Ave. Corp. v Times Square Photo Inc., 194 AD3d 561 (1st Dept. 2021). Therefore, having argued only that COVID prevented him from making lease payments, the defendant fails to demonstrate that the purpose of the lease was frustrated. Notably, the defendant defaulted in January of 2020, two months before any COVID-19 closures occurred. As observed by the plaintiff, the mandatory closure of hair salons was for only several months in 2020. Under the facts presented, the defendants fail to demonstrate that the purpose of the lease was frustrated.

Impossibility is a defense to a breach of contract action "only when … performance [is rendered] objectively impossible … by an unanticipated event that could not have been foreseen or guarded against in contract." Kel Kim Corp. v Central Markets, Inc., 70 NY2d 900, 902 (1987); see 407 East 61st Garage, Inc. v Savoy Fifth Ave. Corp., 23 NY2d 275, 281 (1968) ("[T]he excuse of impossibility of performance is limited to the destruction of the means of performance by an act of God, vis major, or by law."). Put differently, impossibility may excuse performance of a contract if such performance is rendered impossible by intervening

governmental activities, but only if those activities are unforeseeable. RW Holdings, LLC v Mayer, 131 AD3d 1228 (2nd Dept. 2015) (quoting Pleasant Hill Dev., Inc. v Foxwood Enters., LLC, 65 AD3d 1203 [2nd Dept. 2009]). The impossibility defense to contract performance should be applied narrowly, "due in part to judicial recognition that the purpose of contract law is to allocate risks that might affect performance and that performance should be excused only in extreme circumstances." Kel Kim Corp. v Central Markets, Inc., supra at 902. "[W]here impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused." 407 East 61st Garage, Inc. v Savoy Fifth Ave. Corp., supra at 281-82; see Valenti v Going Grain, Inc., 159 AD3d 645 (1st Dept. 2018) [failure to pay rent as agreed and ensuing eviction proceeding did not excuse performance under contract of sale]; Urban Archaeology Ltd. v 207 E. 57th Street LLC, 68 AD3d 562 (1st Dept. 2009) [economic downturn did not excuse tenant's performance under lease]. Here, the defendant cannot claim that the means of performance under the lease were completely destroyed either by the pandemic or attendant shutdown orders.

There is no merit to the defendant's argument that the motion is premature due to absence of discovery since he "fails to establish how discovery will uncover further evidence or material in the exclusive possession" of the plaintiff. Kent v 534 East 11th Street, 80 AD3d 106, 114 (1st Dept. 2010). It is well settled that "the party invoking CPLR 3212(f) must show some evidentiary basis supporting its need for further discovery" (Green v Metropolitan Transp. Auth. Bus Co., 127 AD3d 421, 423 [1st Dept. 2015]) and that mere hope or speculation that discovery may uncover evidence to defeat the motion is insufficient. See Reyes v Park, 127 AD3d 459 (1st Dept. 2015); Alcaron v Ucan White Plains Housing Dev. Fund Corp., 100 AD3d 431 (1st Dept. 2012); Kent v 534 East 11th Street, supra.

Generally, interest is computed "from the earliest ascertainable date the cause of action existed". CPLR 5001(b). In a breach of contract action, interest "accrues from the time of an actionable breach." Kellman v Mosley, 60 AD3d at 457 (1st Dept. 2009); see generally Brushton-Moira Cent. Sch. Dist. v Fred H. Thomas Assocs., P.C., 91 NY2d 256 (1998); Love v State of New York, 78 NY2d 540 (1991). Therefore, the plaintiff is entitled to statutory interest from January 31, 2020, as to the $95,757.98 sum awarded on first cause of action.

III. CONCLUSION

The plaintiff's motion is granted to the extent that it is awarded summary judgment on the first cause of action of the complaint, breach of contract, in the sum of $95,757.98, plus costs and interest, on the third cause of action, attorney's fees, in the sum of $7,232.53, and the defendant's affirmative defenses are dismissed.

Notwithstanding the judgment, the parties are encouraged to explore settlement.

Accordingly, upon the foregoing papers and after oral argument, it is

ORDERED that the plaintiff's motion is granted to the extent that it is awarded summary judgment (1) on the first cause of action of the complaint in the sum of $95,757.98, plus costs and statutory interest from January 31, 2020 , (2) on the third cause of action in the sum of $7,232.53, and (3) dismissing the defendant's affirmative defenses; and the motion is otherwise denied without prejudice, and it is further

ORDERED that the Clerk shall enter judgment in favor of the plaintiff and against the defendant in the sum of $95,757.98, plus costs and statutory interest from January 31, 2020, plus $7,232,53, as and for attorney's fees.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

8/12/2022
DATE

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
[ ] GRANTED [ ] DENIED [X] GRANTED IN PART [ ] OTHER