ESRT One Grand Central Pl., L.L.C. v Babbo Holding Corp.
2022 NY Slip Op 32845(U)
August 17, 2022
Supreme Court, New York County
Docket Number: Index No. 654428/2020
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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ESRT ONE GRAND CENTRAL PLACE, L.L.C.,

Plaintiff,

- v -

BABBO HOLDING CORP., PRONER & PRONER, ESQ., MITCHELL PRONER, MITCHELL PRONER, P.C., PRONER KIDS FOUNDATION

Defendant.

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INDEX NO. 654428/2020

MOTION DATE 04/29/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

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

Upon the foregoing documents, it is ORDERED that plaintiff's motion for summary judgment is granted as to liability, for the reasons set forth in the moving and reply papers (NYSCEF Doc. No. 23, 46), in which the Court concurs.[1] As more specifically set forth therein, plaintiff ESRT One Grand Central Place, L.L.C. ("landlord") establishes its entitlement to summary judgment by submitting the lease and its amendments, establishing that it performed thereunder, showing by the affidavit of its managing agent that defendant Babbo Holding Corp. ("tenant") and defendants Proner & Proner Esq., Mitchell Proner, Mitchell Proner, P.C., and Proner Kids Foundation (the "occupants") failed to vacate the premises following the expiration of the lease on February 28, 2020, and that landlord has been damaged thereby (*Harris v. Seward Park Housing Corp.*, 79 AD3d 425 [1st Dept 2010] [A breach of contract requires allegations of

[1] The Court notes that landlord failed to submit a Statement of Material Facts, as required by Uniform Rules for Trial Courts (22 NYCRR) § 202.8-g(a), but finds that the detailed affidavit of landlord's managing agent, with citations to relevant evidence, cures this defect, and defendants have not shown prejudice to any substantial right (CPLR 2001).

"the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages"]). The lease provides for holdover rent at three times the average of fixed rent and additional rent for the final six months of the lease term (NYSCEF Doc. No. 9, Article 11), as well as the recovery of reasonable attorneys' fees (*id.*, Arts. 6, 11, 20, 48; NYSCEF Doc. No. 11, Art. 8B). Moreover, while the amount of use and occupancy owed by the occupants pursuant to Real Property Law § 220 remains to be established, defendants offer no defense to their liability for same and do not deny that they are presently occupying the premises without paying rent. Indeed, the original lease provides that "if the demised premises or any part thereof be . . . occupied by anybody other than tenant, landlord may, after default by tenant collect rent from the . . . occupant" (NYSCEF Doc. No. 9, ¶ 45[A]).

In response to the motion, defendants fail to raise any triable issues of fact. The Court notes that, notwithstanding defendants' assertions of negotiations and conversations between landlord and tenant prior to and after the expiration of the lease, no written agreement extending or modifying the lease exists in the record. Executive Order 202.8, which defendants claim made it impossible to vacate the premises once the lease expired, was issued on March 23, 2020 (9 NYCRR 8.202.8), almost a month after the expiration of the lease, and defendants do not provide sufficient evidence explaining why they failed to vacate prior to the issuance of the Executive Order, or since the Executive Order expired. Even if defendants had been restricted from access to the building, the original lease provides that if landlord was unable to provide any service or fulfill any other obligation, "this lease and the obligations of tenant hereunder shall in no way be affected" (NYSCEF Doc. No. 9, ¶ 21; *see also id.*, ¶ 60 ["tenant is not entitled . . . to claim constructive eviction . . . or to receive any abatement or diminution of rent, or to be relieved in any manner of any of its other obligations hereunder" if landlord fails to fulfill its obligations as

set forth above"]). Defendants' invocation of impossibility of performance and frustration of purpose fail in light of the termination of the lease, as well as the numerous decisions of the Appellate Division, First Department holding that such defenses do not apply solely because of the coronavirus pandemic (*e.g. Valentino U.S.A., Inc. v 693 Fifth Owner LLC*, 203 AD3d 480 [1st Dept 2022] ["Here, the pandemic, while continuing to be 'disruptive for many businesses,' did not render plaintiff's performance impossible, even if its ability to provide a luxury experience was rendered more difficult, because the leased premises were not destroyed"]).

Finally, defendants assert that discovery is necessary, rendering the motion premature. "A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (*DaSilva v Haks Engineers, Architects and Land Surveyors, P.C.*, 125 AD3d 480, 482 [1st Dept 2015]). "[A] mere hope or speculation that discovery might turn up some evidence giving rise to a triable issue of fact" is insufficient (*id.*). Defendants' papers do not establish a need for discovery. Indeed, based on the record it appears that at least some of the information that defendants are seeking related to communications and negotiations between landlord and tenant is likely to be in defendants' possession; and it is further

ORDERED that defendants' cross motion to for summary judgment dismissing the fourth cause of action for use and occupancy alleged against the occupants is denied, for the reasons set forth above; and it is further

ORDERED that the amount of the judgment to be entered on plaintiff's claims shall be determined at the trial herein; and it is further

ORDERED that the parties are directed to appear for a status conference in Room 1166, 111 Centre Street on September 14, 2022 at 10:00 AM.

This constitutes the Decision and Order of the Court.

8/17/2022
DATE

LOUIS L. NOCK, J.S.C.

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