

96 Springs, LLC v Chefs Club NY, Inc.
2022 NY Slip Op 33143(U)
September 13, 2022
Supreme Court, New York County
Docket Number: Index No. 654445/2020
Judge: Frank P. Nervo
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANK P. NERVO PART 04

Justice

-----X

96 SPRINGS, LLC

Plaintiff,

- v -

CHEFS CLUB NY, INC.,

Defendant.

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INDEX NO. 654445/2020

MOTION DATE 04/19/2022

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115

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

Upon hearing oral argument in this matter on September 12, 2022 and the foregoing papers, the Court renders the following decision and order.

Plaintiff-landlord seeks summary judgment against defendant-tenant pursuant to a commercial lease. Defendant-tenant closed during the Covid-19 pandemic, stopped paying rent, and sought a rent abatement. Plaintiff-landlord did not agree to a rent abatement and sent notices of default in April, May, and July of 2020. Defendant-tenant failed to cure its default and stated it intention to surrender the premises. Thereafter, plaintiff-landlord re-let the premises incurring brokerage fees of \$90,326.88 and legal fees related to re-letting in the amount of \$19,394.74. Plaintiff, therefore, seeks judgment in the amount of

\$1,034,470.97, representing \$924,779.35 in unpaid rent plus brokerage fees of \$90,326.88 and legal fees of \$19,394.74. Plaintiff also seeks further attorney's fees in bringing the instant action. Defendant does not dispute these amounts, but contends that the doctrine of impossibility excuses its performance under the lease. Defendant further argues that its security deposit of approximately \$263,000.00 should reduce any judgment amount entered against it.

“Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible” (*Kel Kim Corp. v. Cent. Markets, Inc.*, 70 NY2d 900, 902 [1987]). However, the doctrine of impossibility does not apply where government restrictions merely result in economic distress for a party (*Staszyn, v. Sutton E. Assoc.*, 161 AD2d 269 [1st Dept 1990]). The Covid restrictions on defendant's restaurant did not prohibit its operation outright; instead, the restrictions prevented only in-person dining for a short period and defendant remained at liberty to provide take-out or delivery services. Under these circumstances, New York Courts have found that the doctrine of impossibility will not excuse performance (*see e.g. Gap, Inc. v. 44-45 Broadway Leasing Co. LLC*, 206 AD3d 503 [1st Dept 2022]; *see also Shmaltz Brewing Company, LLC v. Dog Cart Management LLC*, 202 AD3d 1349 [3d Dept 2022];

McLearen Sq. Shopping Ctr. Herndon, Co. L.P. v. BadaNara, LLC, 2022 NY Slip Op 04864 [4th Dept 2022]).

Turning to the issue of attorney's fees and whether the security deposit should be considered prior to the entry of judgment – i.e. reducing the judgment amount entered against defendant, these issues are referred to a special referee to hear and report.

To the extent that defendant contends the value of furniture left in the leased premises should also be applied in reducing any judgment amount, it is undisputed that plaintiff served the requisite notice to defendant regarding the abandonment of same and that defendant did not take any action related to the notice. Accordingly, the property is deemed abandoned.

Finally, defendant contends it is entitled to an offset of damages for August 2021 rent, to the extent that plaintiff received rent from the new tenant for same period. Plaintiff does not dispute that defendant is entitled to such offset. However, the amount of an offset is unknown on this motion. Likewise, it is unknown whether the \$924,779.35 in unpaid rent sought by plaintiff includes any offset for August 2021.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted to the extent of finding defendant breached the parties commercial lease and is liable to plaintiff for unpaid rent, and brokerage and legal fees incurred in re-letting the premises; and it is further

ORDERED that the amount due plaintiff for unpaid rent, brokerage and legal fees incurred in re-letting the premises, and legal fees in bringing this matter are referred to a Judicial Hearing Officer or Special Referee to hear and report

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

- (1) the amount of unpaid rent due plaintiff, including any offset for August 2021
- (2) the amount of brokerage and legal fees due plaintiff incurred as a result of re-leasing the premises

(3) the amount of legal fees due plaintiff as a result of bringing int he instant action;

and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the “References” link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff/petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the “References” link on the court’s website) containing all the information called for therein and that, as soon as practical

thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the plaintiff(s)/petitioner(s) shall serve a proposed accounting within 24 days from the date of this order and the defendant(s)/respondent(s) shall serve objections to the proposed accounting within 20 days from service of plaintiff(s)/petitioner's(s') papers and the foregoing papers shall be filed with the Special Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further

ORDERED that on the initial appearance in the Special Referees Part the parties shall appear for a pre-hearing conference before the assigned JHO/Special Referee and the date for the hearing shall be fixed at that conference; the parties need not appear at the conference with all witnesses and evidence; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified

above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the “References” link on the court’s website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

[continued on following page]

ORDERED that, unless otherwise directed by this court in any Order that may be issued together with this Order of Reference to Hear and Report, the issues presented in any motion identified in the first paragraph hereof shall be held in abeyance pending submission of the Report of the JHO/Special Referee and the determination of this court thereon; 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.

9/13/2022
DATE


HON. FRANK P. NERVO

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

J.S.C.
 OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE