

Tenth Ave. YY LLC v Care Realty Corp.

2022 NY Slip Op 33411(U)

October 5, 2022

Supreme Court, New York County

Docket Number: Index No. 656783/2020

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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TENTH AVENUE YYY LLC,		INDEX NO.	<u>656783/2020</u>
Plaintiff,		MOTION DATE	<u>N/A</u>
- v -		MOTION SEQ. NO.	<u>002</u>
CARE REALTY CORP.,			
Defendant.			

DECISION + ORDER ON MOTION

-----X

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 44, 45, 46, 47, 48, 49, 50, 51, 52, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 81, 82

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

In motion sequence number 002, defendant Care Realty Corp. (Landlord) moves, pursuant to CPLR 3212, for summary judgment on its counterclaims, and to dismiss plaintiff Tenth Avenue YYY LLC's (Tenant) claims and affirmative defenses. Landlord also seeks attorneys' fees.

Background

Tenant operates a Four Points by Sheraton hotel located at 444 Tenth Avenue, New York, NY (Hotel) and Landlord is the ground lessor of the Hotel. (NYSCEF Doc. No. [NYSCEF] 30, Compl. ¶¶ 2-3.) Landlord and Tenant entered into a 99-year lease dated March 15, 2013 (Lease), which was amended once in April 2014. (*Id.* ¶ 4; NYSCEF 34, Lease at 6; NYSCEF 35, First Amendment to Lease.)

Under Section 3.2 of the Lease, Tenant is obligated to pay Landlord \$607,244.40 in base rent a year,¹ or \$50,603.70 per month, and under Section 3.3, property taxes to the New York City (NYC) Department of Finance (DOF) for the Hotel. (NYSCEF 30, Compl. ¶¶ 19-20; NYSCEF 34, Lease at 19-20 [§§ 3.2 and 3.3] and 74 [Exhibit B to Lease, “Fixed Rent” for Year 8].) Section 3.1(c) of the Lease provides for the payment of interest on past due rent payments and, where Tenant fails to make rent payments twice in any consecutive twelve-month period, for a late charge. (See NYSCEF 34, Lease at 19.)

According to Masoud Kian, Landlord’s principal, the first payment of the 2020/2021 fiscal year property taxes for the Hotel was due on July 1, 2020. (NYSCEF 33, Kian aff. ¶ 23; NYSCEF 38, Tax Bill for Hotel.) The undisputed total amount of property taxes for 2020/2021 was \$667,534.86. (*Id.*; NYSCEF 30, Compl. ¶ 30.) As Tenant “did not pay the July 2020 Taxes,” Landlord “paid [to NYC DOF] directly on June 29, 2020” and “sought reimbursement from [Tenant].” (NYSCEF 33, Kian aff. ¶ 24.) Tenant paid Landlord \$100,000 toward the July 2020 property taxes (NYSCEF 30, Compl. ¶ 32; NYSCEF 33, Kian aff. ¶ 25), but argues that Tenant should not be required to reimburse Landlord the \$567,543.86² remaining balance because Landlord

¹ The annual rent differs from year to year; the Lease provides a schedule setting forth the applicable rental rates by year. (NYSCEF 34, Lease 74 [Exhibit B to Lease, “Fixed Rent”].)

² The amount of \$567,543.86 reflects the unpaid balance at the time Tenant filed its complaint in December 2020. The remaining unpaid property taxes as of March 29, 2021, the is \$267,543.86 as Tenant paid an additional \$300,000 in January 2021 pursuant to the court’s order. (NYSCEF 21, Decision and Order [mot. seq. no. 001].) As of August 27, 2021, the property taxes have been paid in full. (NYSCEF 81, tr at 4:1-4 [Aug. 27, 2021].)

“interfered with [Tenant’s] right to pay the real estate taxes on the [Hotel], or make payment arrangements” with the NYC DOF. (NYSCEF 30, Compl. ¶ 29.)

Tenant paid rent through October 2020 but did pay rent for November and December 2020. (NYSCEF 30, Compl. ¶ 27; NYSCEF 33, Kian aff. ¶ 26.) Tenant asserts that due to the COVID-19 pandemic it is “entitled to an abatement of rent for the period between March 2020 and continuing thereafter due to the COVID-19 pandemic,” (NYSCEF 30, Compl. ¶ 6) “as its rights were frustrated, made impossible, illegal, and or impractical by the pandemic and state-wide shutdowns. (See *id.* ¶¶ 34-35). Tenant alleges that it should not “be required to continue to pay base rent” for the months after its last payment in October 2020. (*Id.* ¶ 27.)

On November 23, 2020, Landlord sent Tenant a Notice of Default, claiming defaults under the Lease for nonpayment of (i) rent due November 1, 2020, in the amount of \$50,603.70 and (ii) the property taxes owed to the NYC DOF in the amount of \$567,534.86.³ (*Id.* ¶ 29; NYSCEF 39, Notice of Default.) On January 4, 2021, Landlord sent Tenant a demand to pay interest pursuant to Section 3.1(c) for the nonpayment of November and December 2020 rent. (NYSCEF 40, Demand.)

Procedural History

On December 6, 2020, Tenant initiated this action for breach of contract, declaratory judgment, and injunctive relief. (NYSCEF 30, Compl. ¶¶ 91-101.)

Tenant concurrently moved, by order to show cause, for a preliminary injunction enjoining and temporarily restraining Landlord from terminating, canceling or holding

³ See *supra* n 2.
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Tenant in default under the Lease, pursuant to *First National Stores, Inc. v Yellowstone Shopping Center, Inc.* (NYSCEF 11, Order to Show Cause [OSC] [mot. seq. no. 001].)

At argument on motion sequence number 001, counsel for Landlord consented to Tenant's application for the Yellowstone injunction pursuant to certain conditions. (NYSCEF 53, tr at 16:22-17:2 [Dec. 22, 2020].) The court granted on consent Tenant's motion for a Yellowstone injunction "conditioned upon the following:

1. Tenant paying Landlord \$300,000 within 3 business days of Landlord providing Tenant with wiring instructions for this payment of July 2020 taxes unless the parties agree otherwise to apply the payment differently; and
2. Tenant shall comply with the lease; and
3. Tenant shall request that NYC Department of Finance expedite Tenant's application for a payment plan to pay January 1, 2021 taxes; and
4. Landlord shall cooperate with Tenant's applications to the US Small Business Administration."

(NYSCEF 21, Decision and Order [mot. seq. no. 001]; NYSCEF 53, tr at 16:22-17:2, 20:2-6 [mot. seq. no. 001].) Landlord answered the complaint and counterclaimed for breach of contract for failure to pay property taxes (first counterclaim), nonpayment of November and December 2020 rent (second and third counterclaims), and for attorneys' fees (fourth counterclaim). (NYSCEF 31, Answer.)

Tenant answered and asserted affirmative defenses of equitable estoppel, laches, waiver, failure to state a cause of action, unclean hands, Landlord's culpable conduct, Landlord's wrongful doing, Tenant's denial of known liability, force majeure,

and Landlord's failure to "avail itself to payment plans available . . . for the payment of real estate taxes." (See NYSCEF 27, Reply to Counterclaims [Reply to CC] at 2-5⁴.)

Landlord moved for summary judgment. At argument on motion sequence number 002, Landlord informed the court that Tenant timely paid its rent for January through July 2021 and reimbursed Landlord for the remainder of property taxes since the conditional Yellowstone injunction was granted, but still "did not pay November, December [2020]. No rent that [Tenant] ha[s] paid us to date, starting in January [2021], has been applied to November and December. As we sit here today, November and December rent is not paid." (NYSCEF 81, tr at 5:20-25, 6:20-23 [Aug. 27, 2021].) Tenant contends that rent payments should have been applied to any outstanding amounts owed but conceded that it violated the Yellowstone injunction by failing to comply with the Lease. (*Id.* at 10:22-11:5.) Tenant also submitted the payment plan it entered into with the NYC DOF to pay the 2020/2021 property taxes in installments. (See NYSCEF 49, Installment Agreement.) The court granted Tenant a week to make current its rent payments to Landlord and adjourned the motion to September 3, 2021. (*Id.* at 11:14-18.) Additionally, Tenant waived its defenses of frustration of purpose and impossibility to its breach of contract for nonpayment of rent (NYSCEF 81 tr at 8:19-9:4, 14:6-7 [Aug. 27, 2021].)

On September 3, 2021, the parties informed the court that rent payments were current. (NYSCEF 82, tr at 2:15-18 [Sept. 3, 2021].) The remaining issue is attorneys' fees pursuant to Section 14.13 of the Lease which allows or attorneys' fees to the prevailing party. Section 14.13 of the Lease provides that:

⁴ Pages cited refer to NYSCEF generated pagination.
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“If either Landlord or Tenant shall bring an action or proceeding in any court of competent jurisdiction to enforce its rights or the other party's obligations under this Lease (including any proceeding brought by Landlord with respect to the collection of Rent), then the prevailing party in such action or proceeding shall be entitled to be reimbursed by the non-prevailing party for all reasonable attorneys' fees and disbursements incurred by the prevailing party in connection with such action or proceeding.”

(NYSCEF 34, Lease at 63.)

Each party now claims to be the prevailing party: Landlord contends that it should be awarded attorneys' fees and accrued default interest as the prevailing party for Tenant's nonpayment of the Hotel's property taxes and failure to pay rent for November and December 2020. Tenant claims the court should grant a declaratory judgment, its second cause of action, declaring its right to establish a payment plan with NYC DOF and that Landlord interfered with that right.

Discussion

Landlord's First Counterclaim for Nonpayment of Property Taxes

Tenant refers to Section 3.3(b) of the Lease for its authority to enter into an installment plan with NYC DOF. Section 3.3(b) states that

“Tenant shall pay and discharge, as Additional Charges, all Impositions not later than the due date thereof (or, if later, prior to the day that any fine, penalty, interest or cost may be added thereto as imposed by law for the non-payment thereof).”

“If by law, at the taxpayer's option, any Imposition may be paid in installments (whether or not interest shall accrue on the unpaid balance of such Imposition), Tenant may exercise the option to pay the Imposition in such installments and shall be responsible for the payment of such installments with interest.”

(NYSCEF 34, Lease at 20-21.)

In support of its position, Tenant submitted a “Property Collection Installment Agreement” between Tenant and the NYC DOF, which is an agreement to pay the property taxes in installments: \$25,000 down payment and \$13,167.15 each month, for five years (Installment Plan). (See NYSCEF 49, Installment Agreement at 2

On the other hand, Landlord contends that Tenant is only permitted to pay taxes in installments to the extent it has the option to do so “by law” under the express terms used in §3.3(b) of the Lease. It argues that “by law” refers to the rights arising under the NYC Charter. Landlord contends that under the NYC Charter, Tenant has the ability to pay its property taxes for the Hotel in two installments during a given fiscal year (on July 1 and then on January 1). (NYC Charter § 1519 [1] [b] [“[F]or the fiscal year commencing on the first day of July nineteen hundred eighty-three and for each fiscal year thereafter: all taxes upon real estate for each fiscal year shall be due and payable in two equal installments, the first of which shall be due and payable on the first day of July in such year, and the second of which shall be due and payable on the first day of January in such year.”].)

“The existence of ambiguity is determined by examining the ‘entire contract and consider[ing] the relation of the parties and the circumstances under which it was executed,’ with the wording to be considered ‘in the light of the obligation as a whole and the intention of the parties as manifested thereby.’” (*Kass v Kass*, 91 NY2d 554, 566 [1998] [citation omitted].) “A contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion.” (*Selective Ins. Co. of Am. v County of Rensselaer*, 26 NY3d 649,

655 [2016] [internal quotation marks and citation omitted] [brackets in original].) A contract is ambiguous if it is “susceptible of two reasonable interpretations.” (*Lend Lease U.S. Const. LMB Inc. v Zurich Am. Ins. Co.*, 136 AD3d 52, 56 [1st Dept 2015] [internal quotation marks and citation omitted], *affd* 28 NY3d 675 [2017][other grounds].)

Where there are two plausible interpretations of the contract, it is “appropriate for the [c]ourt to consider extrinsic evidence outside the four corners of the contract.” (See *Kolbe v Tibbetts*, 22 NY3d 344, 355 [2013] [citation omitted].) However, if the extrinsic evidence in the record is “insufficient to resolve the ambiguity, the parties’ intent must be determined at trial.” (*Chiusano v Chiusano*, 55 AD3d 425, 425 [1st Dept 2008] [citation omitted].) “[W]hen the meaning of the contract is ambiguous, and the intent of the parties becomes a matter of inquiry, a question of fact is presented which cannot be resolved on a motion for summary judgment.” (*Ruttenberg v Davidge Data Sys. Corp.*, 215 AD2d 191, 193 [1st Dept 1995] [internal quotation marks and citation omitted].)

Here, an ambiguity exists on the face of the contract. Section 3.3(b) of the Lease does not specify whether the tenant may enter into a payment plan with the NYC DOF nor does it say that “by law” means the NYC Charter. In other words, Section 3.3(b) is silent on where the “option to pay the Imposition in such installments” arises from, whether that be from the NYC Charter or from the NYC DOF and the term “installments” is undefined in the contract. The legal source of this option is of import as it affects the rights and conduct of the parties. Moreover, it is also unclear whether the sub-provision requiring Tenant to pay and discharge the property taxes no later than the “due date” applies if Tenant exercises its option to pay the property taxes in installments. (NYSCEF 34, Lease at 20-21.)

“Faced with ambiguity, [the court] turn[s] to extrinsic evidence for guidance as to which interpretation should prevail.” (*Evans v Famous Music Corp.*, 1 NY3d 452, 459 [2004].) The extrinsic evidence proffered by both parties to support their respective positions does not resolve the ambiguity presented by the agreement, nor does the evidence conclusively show that there can only be one reasonable interpretation. (*Cf. id.* at 459-460 [finding that, “in light of the extrinsic evidence,” “[t]he evidence strongly favors Famous” warranting summary judgment in its favor].) Here, the provision of the NYC Charter cited by Landlord does not conclusively show that its interpretation of Section 3.3(b) of the Lease can be the only reasonable interpretation as Tenant provided the 2021 Installment Plan for the payment of property taxes in monthly installments. However, Tenant has not supplied the court with evidence that supports Tenant’s argument that its ability to seek from the NYC DOF an installment plan for the payment of property taxes is “as of right.” (NYSCEF 78, tr at 18:14-19:1; *id.* at 20:9-21:20.) The Installment Plan also does not resolve the issue of whether the installment plan must be entered into prior to the “due date.”

In sum, the court cannot grant summary judgment to either party on Landlord’s breach of contract counterclaim nor grant Tenant’s declaratory relief as neither proffer of extrinsic evidence conclusively resolves all ambiguities in favor of either party; whether Tenant is permitted to seek an installment plan pursuant to the NYC Charter or pursuant to a payment plan with NYC DOF remains unclear, and further, whether the Tenant must obtain an approved installment plan prior to the “due date” of the property taxes or whether it the due date is waived by virtue of applying for a payment plan. Thus, Landlord’s motion for summary judgment to (i) dismiss Tenant’s claims with prejudice,

(ii) to award summary judgment on Landlord's first counterclaim, and (iii) award attorneys' fees for work performed related to Tenant's alleged default of Section 3.3(b) for nonpayment of property taxes is denied.

Second and Third Counterclaims for Nonpayment of November and December 2020 Rent⁵

Landlord's second and third counterclaims assert breach of contract claims against Tenant for failure remit November and December 2020 rent. Landlord argues that Tenant conceded the existence of the Lease and did not dispute its failure to pay its November and December 2020 rent payments. Initially, Tenant argued that it should be excused from making rent payments due to the doctrines of impossibility and frustration of purpose, but Tenant waived those defenses. (NYSCEF 81, tr at 8:19-9:5.)

To prevail on its counterclaims, Landlord must show the existence of the contract, that it performed under the contract, Tenant's breach of the contract, and damages. (See *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) There is no dispute that (i) the Lease is a binding contract between the parties, (ii) November and December 2020 rents were unpaid at the time of this motion, and (iii) that Landlord performed under the Lease. On the remaining issue of damages, because November and December 2020 rents have since been paid, damages amount to interest on the late rent payments and the late charge pursuant to Section 3.1(c). (See NYSCEF 31, Answer ¶¶ 36, 42.)

The court agrees that Tenant has conceded to not making its November and December 2020 payments despite its obligation under the Lease and, since Tenant has

⁵ The following supplements the court's oral decision on the record. (See NYSCEF 81, tr at 14-16.)

waived its defenses to its nonpayment of rents, the court grants Landlord's motion for summary judgment on its second and third counterclaims and grants attorneys' fees for work performed in connection with the Second and Third counterclaims only.

Tenant counters that Landlord should have applied all payments it received to satisfy past due rents first, i.e., that Tenant's payments should have been applied to overdue November and December 2020 payments. Tenant's argument is bereft of any supporting law or communications between the parties. Thus, on a summary judgment motion, Landlord has made its prima facie showing of a breach of contract and the burden shifts to Tenant to "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974].) Tenant has not submitted any evidence that rents should have been applied in this manner. Even had the payments been applied as Tenant contends, Tenant would still be in breach of the Lease for failing to make June and July 2021 payments.

Tenant's Affirmative Defenses

Under CPLR 3211(b), "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." The party moving to dismiss an affirmative defense "bears the burden of demonstrating that the defense is without merit as a matter of law." (*Mazzei v Kyriacou*, 98 AD3d 1088, 1088-1089 [2d Dept 2012] [internal quotations and citations omitted].) Moreover, affirmative defenses must provide the opposing party with the requisite notice. (*Scholastic Inc. v Pace Plumbing Corp.*, 129 AD3d 75, 79 [1st Dept 2015], citing CPLR 3013; CPLR 3014; *Matter of Kowalczyk v Vil of Monitcello*, 107 AD3d 1635 [3d Dept 2013].) If a defense is

too broad or conclusory, notice is defective and the defenses shall be dismissed. (See *Brown v State Farm Ins. Co.*, 237 AD2d 476, 476 [2d Dept 1997].)

Here, Landlord argues, and the court agrees, that the first through ninth affirmative defenses are unsupported by any allegations and are conclusory. The first, second, third, fifth, sixth, and seventh affirmative defenses (equitable estoppel, laches, waiver,⁶ unclean hands, Landlord's "own culpable conduct," Landlord's "own conduct or wrongdoing," respectively) are all inadequately pleaded; Tenant fails to allege even one fact to support any of these defenses. For example, the doctrine of unclean hands requires conduct that is "immoral" or "unconscionable." (See *National Distillers & Chemical Corp. v Seyopp Corp.*, 17 NY2d 12, 15-16 [1966].) There is no allegation of Landlord's immoral or unconscionable conduct. (See NYSCEF 27, Reply to CC ¶¶ 16-18.) The same reasoning applies to the sixth and seventh affirmative defenses for Landlord's culpable conduct or wrongdoing. (See *id.* ¶¶ 19-24.) Defenses of equitable estoppel, laches, and waiver are also unsupported by allegations that Landlord waived any right, delayed asserting any right, or made any false representations. (See *id.* ¶¶ 4-12.)

The eighth and ninth affirmative defenses, "denial of liability" and force majeure, which the court can only divine from the threadbare allegations to refer to Tenant's frustration of purpose and impossibility defenses defense are moot by virtue of Tenant's

⁶ The court acknowledges Tenant's argument that discovery will show that the parties negotiated modifications e.g. Relief from certain Lease provisions and waiver of Landlord's right to sue for property taxes owed allowing Tenant to seek relief from the City of New York and the Federal small Claims business Administration. However, plaintiff fails to mention anything in its list of affirmative defenses in its answer to the counterclaims.

waiver of those defenses. However, even without Tenant's waiver on the record, Tenant's eighth and ninth affirmative defenses are dismissed as conclusory.

Tenant's tenth affirmative defense, that Landlord failed to avail itself of payment plans, is not a legal defense and is contradicted by the evidence and therefore dismissed. (*See Kronish Lieb Weiner & Hellman v Tahari, Ltd.*, 35 AD3d 317, 319 [1st Dept 2016].)

Finally, Tenant's fourth affirmative defense, failure to state a claim, is likewise dismissed. (*Raine v Allied Artists Prods., Inc.*, 63 AD2d 914, 915 [1st Dept 1978] [dismissing a failure to state a cause of action affirmative defense if all other affirmative defense are found to be legally insufficient].)

Accordingly, it is

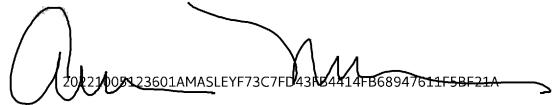
ORDERED that defendant's motion for summary judgment is granted, in part, as to its second and third counterclaims, and denied, in part, with respect to its first counterclaim; and it is further

ORDERED that Tenant's first through ninth affirmative defenses are dismissed; and it is further

ORDERED that counsel for the parties shall submit a joint proposed preliminary conference order with the court by email (SFC-Part48@nycourts.gov) and filing in NYSCEF by October 21, 2022. If the parties cannot agree to a schedule, then they may submit competing proposed orders; and it is further

ORDERED that counsel electronically file and email a proposed preliminary conference order within thirty days of this decision to NYSCEF and email the same to SFC-Part48@nycourts.gov; and it is further

ORDERED that as to attorneys' fees, Landlord may submit an affirmation of services by filing in NYSCEF and emailing SFC-Part48@nycourts.gov and Tenant shall have 10 days to oppose the calculation. If the parties cannot stipulate to an amount, then Landlord may request that the court determine the amount by inquest. Landlord must submit the affirmation of services no later than 30 days after the conclusion of this action.



10/5/2022

DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE