667 Madison Ave. DE, LLC v Paul & Shark Shops, Inc.
2022 NY Slip Op 33553(U)
October 12, 2022
Supreme Court, New York County
Docket Number: Index No. 656184/2020
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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667 MADISON AVENUE DE, LLC,

Plaintiff,

- v –

PAUL & SHARK SHOPS, INC. and DAMA S.P.A

Defendants.

----------X

INDEX NO. 656184/2020

MOTION DATE 07/18/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79

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

I. BACKGROUND

The plaintiff, owner of commercial property at 667 Madison Avenue in Manhattan, seeks, *inter alia*, to recover $3,040,847.80 in unpaid rent and additional rent due under a lease and guaranty agreement. The defendants Paul & Shark Shops, Inc., the tenant, an international luxury clothing retailer, and defendant Dama S.p.A., the guarantor on the lease, previously moved pre-answer to dismiss the complaint pursuant to, *inter alia*, CPLR 3211(a)(7). The court denied the motion by order dated January 8, 2021, finding, in part, that the complaint sufficiently pleads causes of action for breach of contract, breach of guaranty and contractual attorney's fees. In their separate answers, defendant tenant asserted affirmative defenses and counterclaims and defendant guarantor asserted affirmative defenses which included the doctrines of frustration of purpose and impossibility of performance. The plaintiff now moves for summary judgment on the complaint pursuant to CPLR 3212 and dismissal of the affirmative defenses and counterclaims. The defendants oppose the motion. The motion is granted.

II. DISCUSSION

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible

form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once the movant meets this burden, it becomes incumbent upon the party opposing the motion to come forward with proof in admissible form to raise a triable issue of fact. See Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra.

A. Summary Judgment on First and Second Causes of Action

In support of its motion, the plaintiff submits the pleadings, including a complaint verified by Lawrence Gard, Managing Director of the plaintiff, an affidavit of Glenn Frankel, Vice-President of the plaintiff, an affidavit of Joanne Podell, Vice-Chairman of Cushman & Wakefield, and an attorney's affirmation. The plaintiff also submits the subject lease and guaranty agreement, both dated June 28, 2011, two lease modifications dated September 30, 2011, and October 26, 2012, the latter adding basement storage space to the leased premises, and a lease assignment dated September 8, 2016, by which 667 Madison Avenue SPE, Inc. assigned the lease to 667 Madison Avenue DE LLC. The plaintiff also submits a surrender agreement it entered with defendant Paul & Shark Shops, Inc. dated June 2, 2020, and a rent ledger dated March 30, 2022, the day before the instant motion was filed, showing an outstanding balance of rent, additional rent and late fees of $3,040,847.80. The ledger reveals that the most recent monthly rent charged was $148,417.95, and the last payment made was a $93,674.46. wire transfer in September 2020.

The parties' lease indisputably provides, in part, that the tenant was obligated to pay rent and additional rent through the end of the lease term but in the event the tenant surrendered or vacated the property early, the landlord "shall use commercially reasonable efforts to re-let the demised premises" (Paragraph R25 of Rider). However, it also provides that the landlord's failure to re-let the premises or any part thereof "shall not release or affect tenant's liability for damages." (Paragraph 18[b] of Lease). The lease also lists particular actions which, if performed, create a rebuttable presumption that the plaintiff made "commercially reasonable" efforts to mitigate damages. The plaintiff could include the availability of the space in leasing flyers to brokers and on the plaintiff's website, hold an open house within 60 days of vacatur and/or engage a commercial real estate broker to re-let the premises. Furthermore, the parties' surrender agreement does not relieve the tenant of its obligations under the lease. Rather, it states that "the landlord expressly reserves all of its rights and remedies under the lease and

guaranty thereof; and the landlord is releasing neither the tenant nor the guarantor from their respective obligations under the lease and guaranty."

Frankel alleges in his affidavit that the defendant tenant defaulted on its obligations starting in April 2020 and failed to cure the defaults, and that the plaintiff thereafter applied the entire security line of credit to the outstanding balances for April, May and June of 2020. Frankel further alleges that the defendant tenant surrendered possession on June 25, 2020, after which the rent, additional rent and late fees continued to accrue through January 31, 2023, the end of the lease term. Frankel further alleges that the plaintiff attempted to but failed to re-let the premises, and that its efforts, which included sending marketing flyers to real estate brokers and hiring a commercial real estate broker, were hindered by the generally depressed real estate market conditions present at that time, the relatively short term remaining on the lease when the defendants vacated and the defendants removal of all installations and improvements to the premises upon their departure leaving nothing for any new short-term tenant to use.

In her affidavit, Joanne Podell alleges that her firm, Cushman & Wakefield, began working with the plaintiff in October 2020 to lease the entire first floor of the subject building, which included the defendants' space as well as several others all having leases co-terminating on January 31, 2023. However, the plaintiff and Cushman & Wakefield also remained open to renting the ground floor spaces on a temporary basis. Cushman & Wakefield learned that the defendants had hired Compass Commercial to list their space for $1,000 per square foot as a sublet, which endeavor was not successful. Podell explained that since the defendants had removed all installations and improvements from the retail space upon their departure, leaving the space "raw", any incoming tenant would be required to perform alterations and renovations and obtain all necessary building permits to do so. Podell further alleges that, while the defendants had questioned why no "open houses" had been conducted for its space, it is not customary in New York City for open houses to be held for retail spaces. Podell alleges that the industry standard is for a prospective tenant to request a private showing, but Cushman & Wakefield received no requests for a showing of the defendants' space.

The plaintiff's proof establishes, *prima facie*, the necessary elements of the first and second causes of action of the complaint. It establishes the breach of contract claim by showing (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's 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). 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). The plaintiff's proof also establishes that the defendant guarantor was liable for all unpaid rent and additional rent under the terms of the separate guaranty. It is well settled that "[w]here a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement." Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd., 97 AD3d 444, 446-447 (1st Dept. 2012), quoting National Westminster Bank USA v Sardi's Inc., 174 AD2d 470, 471 (1991). The defendants have failed to show any fraud, duress or other wrongful act on the part of the plaintiff, or otherwise raise any triable issue of fact as to the guaranty. Nor have the defendants raised any other triable issue to warrant denial of summary judgment on the breach of contract cause of action. See Alvarez, supra; Zuckerman, supra.

The defendants' submissions consist mainly of an affidavit of Rafaella Nasello, an employee of defendant guarantor based in Italy and various e-mail communications concerning the possibility of subleasing or re-letting the premises in 2020 and complaints made by defendant tenant about scaffolding that was constructed around the building in 2018 to facilitate the requisite NYC Local Law 11 façade remediation work. The defendants also submit the deposition testimony of Glenn Frankel which, as set forth below, favors the plaintiff.

Notably, the defendants do not dispute that the lease and guaranty agreement require them to pay all rent and additional rent through the end of the lease term in January 2023. Rather, they maintain in their Memorandum of Law that the plaintiff failed to make "commercially reasonable" efforts to mitigate damages by re-letting the premises during that term. However, they submit no proof in admissible form, such an affidavit of a real estate professional or expert, in response to the sworn affidavits of Frankel and Podell submitted by the plaintiff on that issue. As per the lease terns, the actions taken by the plaintiff in attempting to re-let the premises, sending out flyers to brokers and hiring a commercial broker, created a rebuttable presumption that plaintiff made "commercially reasonable efforts." The presumption was not rebutted on this motion. In that regard, the deposition testimony of Glenn Frankel, submitted by the defendant, supports the plaintiff's motion. He testified that the plaintiff was planning to honor the

defendant's lease and all others on that floor, including a Michael Kors boutique, through January 2023, and then renovate and upgrade the entire premises and lease it to a single tenant. He testified that the plaintiff was also desirous of renting to a temporary tenant in the defendants' existing space and to that end sent out regular e-mail blasts to brokers marketing the space as a possible pop-up shop. Frankel explained that, however, it can be difficult to find a new tenant willing to make the financial commitment necessary for just a short-term or temporary arrangement such as the two-years remaining on the subject lease. Most landlords and tenant are seeking a five-year, ten-year or much longer term.

B. Dismissal of Affirmative Defenses and Counterclaims

Initially, the court notes that the defendants are expressly precluded by Paragraph 25 of the lease from asserting counterclaims in this action. See 1035 Third Avenue LLC v Pure Green NYC 62nd Street Corp., 199 AD3d 505 (1st Dept. 2021). The defendants proffer no argument to the contrary. Furthermore, most of the affirmative defenses are subject to dismissal because they are improperly asserted in a conclusory manner without any detail or factual allegations. See Commissioners of State Ins. Fund v Ramos, 63 AD3d 453 (1st Dept. 2009); Manufacturers Hanover Trust Co. v Restivo, 169 AD2d 413 (1st Dept. 1991). To the extent that the defendant tenant expounds on its counterclaims premised on the doctrines of frustration of purpose and impossibility of performance, as correctly argued by the plaintiff, those defenses have been found to be unavailable under the circumstances presented here.

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). 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).

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."). 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 is not an excuse].
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The defendants also assert unjust enrichment as an affirmative defense and a counterclaim. However, as a general rule, where a plaintiff seeks to recover under an express agreement, no cause of action lies to recover for unjust enrichment. See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382 (1987); JDF Realty, Inc. v Sartiano, 93 AD3d 410 (1st Dept. 2012). There is no dispute here that the parties entered into an express agreement. The defendants' other equitable defenses and counterclaims fail for the same reason.

Any defenses or counterclaims are premised upon the plaintiff's obligation to re-let the premises are without merit for the reasons stated previously. The defendants' remaining arguments have been considered and found to be meritless.

Therefore, the defendants' affirmative defenses and counterclaims are dismissed.

C. Summary Judgment on the Third Cause of Action

In its third cause of action, the plaintiff seeks attorney's fees pursuant to the lease terms. Attorney's fees are recoverable, where, as here, there is a specific contractual provision for that relief. See Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010); Coopers & Lybrand v Levitt, 52 AD2d 493 (1st Dept. 1976). Paragraph 19 of the Lease provides

that the tenant shall pay the landlord's "reasonable attorney's fees in instituting, prosecuting or defending any actions or proceeding, and prevails in any such action or proceeding" and defines such attorney's fees as additional rent. The plaintiff is the prevailing party in this action. Furthermore, Paragraph 7(a) of the guaranty agreement provides that "if this guaranty is enforced by suit or otherwise, the guarantor will reimburse the landlord for all expenses it incurs in that connection, including but not limited to reasonable attorney's fees." Thus, the defedantn guarantor is also liable for the plaintiff's attorney's fees. The defendants proffer no cogent argument or proof in opposition to an award of attorneys' fees. However, the plaintiff has not submitted any affirmation, billing records or other proof to establish the amount of fees incurred in this action. The plaintiff may submit such supplemental papers, if so advised, within 60 days.

III. CONCLUSION

Accordingly, and upon the foregoing papers, it is

ORDERED that the plaintiff's motion for summary judgment is granted as to the first and second causes of action of the complaint, and the Clerk shall enter judgment in favor of the plaintiff, 667 Madison Avenue DE, LLC, and against the defendants, Paul & Shark Shops, Inc. and Dama S.p.A., jointly and severally, in the sum of $3,040,847.80, plus costs and statutory interest from March 30, 2022, and it is further

ORDERED that the plaintiff's motion for summary judgment is granted as to the third cause of action of the complaint on the issue of liability and the plaintiff is granted leave to submit supplemental proof to establish the amount of fees incurred, if so advised, within 60 days of the date of this order and shall notify the Part 42 Clerk of any such filing, and it is further

ORDERED that the defendants' affirmative defenses and counterclaims are dismissed.

This constitutes the Decision and Order of the court.

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

10/12/2022
DATE

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

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