

ESRT Empire State Bldg., LLC v. Radulescu LLP, 2022 WL 1620414 (2022)

2022 WL 1620414 (N.Y.Sup.), 2022 N.Y. Slip Op. 31681(U) (Trial Order)
Supreme Court of New York
New York County

****1** ESRT EMPIRE STATE BUILDING, LLC, Plaintiff,

v.

RADULESCU LLP, David Radulescu, Tigran Vardanian, Defendant.

No. 651452/2021.

May 23, 2022.

***1** Part 39TR


Motion Date 08/11/2021

Motion Seq. No. 001


Decision + Order on Motion


Present: Hon. Suzanne Adams, Justice.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44 were read on this motion to for SUMMARY JUDGMENT(AFTER JOINDER).

Upon the foregoing documents, and oral argument having been held virtually before the court on February 23, 2022, it is ordered that plaintiff's motion is granted and the cross-motion of defendant Radulescu LLP (the "Tenant") is denied. In this action to recover for breach of a lease agreement, plaintiff is the landlord of the building at 350 Fifth Avenue in Manhattan, and Tenant, a law firm, is the tenant of Suite 6910 at the building pursuant to a lease between them dated as of July 7, 2014. Defendants David Radulescu and Tigran Vardanian (the "Guarantors") executed a guarantee of said lease on or about July 10, 2014. Plaintiff now moves pursuant to  CPLR 3212 for summary judgment on its First, Third, Fourth, Fifth, Sixth, and Seventh Causes of Action, and for dismissal of defendants' affirmative defenses. Defendants oppose the motion. Tenant cross-moves to compel arbitration and stay the instant action. Plaintiff opposes the cross-motion.

It is well established that "the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence ****2** to demonstrate the absence of any material issues of fact."

 *Alvarez v. Prospect Hospital*, 68 N. Y.2d 320, 324 (1986) (citing *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985)). The party opposing a motion for summary judgment is entitled to all reasonable inferences most favorable to it, and summary judgment will only be granted if there are no genuine, triable issues of fact. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520, 521-22 (1st Dep't 1989).

Here, viewing the evidence in a light most favorable to the non-moving party, plaintiff has made a *prima facie* showing of entitlement to judgment as a matter of law. Defendants, while opposing the motion, fail to raise any triable factual issues sufficient to warrant its defeat. For example, the Tenant maintains that questions of fact as to the foreseeability of the Covid-19 pandemic would preclude summary judgment under the doctrines of impossibility of performance and frustration of purpose. The doctrine of impossibility or impracticability generally applies where performance is prevented by "the destruction of the means of performance by an act of God, *vis major*, or by law [citations omitted]."  *407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 281 (1968). "... [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 [citations omitted].” ¶ 407 E. 61st Garage, Inc., 23 N. Y.2d at 281. Further, “the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract [citations omitted].” ¶ Kel Kim Corp. v. Central Markets, Inc., 70 N.Y.2d 900, 902 (1987). The frustration of purpose doctrine applies where the frustrated purpose was “so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense.” Crown IT Servs., Inc. v. Koval-Olsen, 11 A.D.3d 263, 265 (1st Dep’t 2004). See also, PPF Safeguard, LLC v. BCR Safeguard Holding, LLC, 85 A.D.3d 506, 508 (1st Dept 2011) (frustration of purpose applies “when a change in **3 circumstances makes one party’s performance virtually worthless to the other, frustrating his purpose in making the contract”).

*2 Neither doctrine is applicable here. The subject lease (Affidavit in Support of Rodney Gomes, Exhibit A) specifically addresses the kind of circumstances occasioned by the pandemic, and sets forth the Tenant’s obligations at Article 21(A), which provides in pertinent part:

If, by reason of (i) strike, (ii) labor troubles, (iii) governmental pre-emption in connection with a national emergency, (iv) any rule, order or regulation of any governmental agency, (v) conditions of supply or demand, (vi) conditions affected by, or actions (including without limitation any evacuation or closure of the Building) taken by Landlord or others reasonably intended to assure the health, security or safety of the Building or any person in response to, war, any act of terrorism or violence (even if not directed at the Building or any occupant thereof), or other national, state or municipal emergency (whether or not officially proclaimed by any governmental authority), (vii) unavailability of power or any disruption of electrical or any other utility service, or (viii) any other cause beyond Landlord’s control, Landlord does not fulfill any obligation under this Lease or shall be unable to supply any service which Landlord is obligated to supply, this Lease and Tenant’s obligation to pay rent hereunder shall in no wise be affected, impaired or excused.

This lease provision contains a carve-out requiring the continued payment of rent in the instant situation, and as such defendant cannot use same to establish an issue of fact precluding summary judgment.

Nor are the Guarantors’ personal guarantees unenforceable pursuant to New York City Administrative Code § 22-1005(1)(b). Nothing in the “Declaration of legislative intent and findings,” which follow the statute, support a finding that the City Council considered a law firm to be a “non-essential retail establishment,” where the Council named non-food service establishments in the “retail trade sector” to include “the clothing stores industry, the furniture and home furnishings stores subsector, and the sporting goods, hobby, book, and music stores **4 subsector.” The court does not find that entities such as law firms were intended to be included as part of the “retail trade sector.” As such, the Guarantors’ reliance on this statute is misplaced.

Finally, Tenant’s cross-motion contends that plaintiff’s claims are subject to mandatory arbitration. However, the evidence before the court indicates that there is no basis for mandatory arbitration under the present circumstances. The subject lease provides arbitration as a remedy where Tenant disputes plaintiff’s statements as to any additional rent charges or real estate tax escalations, and Tenant gives notice to plaintiff of such dispute within 30 days of receiving such statements. (Gomes Affidavit, Exhibit A, Articles 2(C)(vii), 2(D)(iii)(d), 39) Tenant appears not to have given plaintiff timely notice of any dispute, and has not paid any disputed amounts pending resolution of the dispute. (Gomes Reply Affidavit, ¶¶ 13, 15) As such, mandatory arbitration is not mandated here.

The court has considered defendants’ additional contentions and finds them to be without merit. Accordingly, it is hereby

ORDERED that plaintiff’s motion is granted and the cross-motion is denied; and it further

*3 ORDERED that defendants’ affirmative defenses are dismissed, with prejudice; and it is further

ORDERED plaintiff's motion for summary judgment on the First, Third, and Fourth Causes of Action is granted, and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant Radulescu LLP in the amount of \$639,958.00, together with interest at the statutory rate from August 31, 2021, through the date of entry of judgment, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and the amount of Fixed Annual Rent that has accrued from the date of plaintiff's motion through the date of the hearing due from defendant Radulescu LLP, the amount **5 of Additional Rent due and owing from defendant Radulescu LLP from October 31, 2020, through the date of hearing, and the amount of attorneys' fees and costs incurred by plaintiff that are due and owing from defendant Radulescu LLP, as determined by a Special Referee as set forth hereinbelow; and it is further

ORDERED plaintiff's motion for summary judgment on the Fifth, Sixth, and Seventh Causes of Action is granted, and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants David Radulescu and Tigran Vardanian, jointly and severally, in the amount of \$58,178.00, together with interest at the statutory rate from October 31, 2021, through the date of entry of judgment, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and the amount of Additional Rent due and owing from defendants David Radulescu and Tigran Vardanian, jointly and severally, for October 2020, and attorneys' fees and costs incurred by plaintiff that are due and owing from defendants David Radulescu and Tigran Vardanian, jointly and severally, as determined by a Special Referee as set forth hereinbelow; and it is further

ORDERED that the amount of any further Fixed Rent, Additional Rent, and attorneys' fees to be assessed against defendants, as described hereinabove, is referred for determination to a Special Referee, and that within 60 days from the date of this order plaintiff shall cause a copy of this order with notice of entry, including proof of service thereof, to be filed with the Special Referee clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) to arrange a date for a reference to determine pursuant to CPLR § 4317(b); and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendants in accordance with the aforesaid award of damages with interest, costs, and disbursements, and the report of the Special Referee, without any further application.

**6 This constitutes the decision and order of the court.

5/23/2022

DATE

<<signature>>

SUZANNE ADAMS, J.S.C.

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