2022-07-15

# 18 E. 41st St. Partners LLC v. Gamlieli

# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. ALEXANDER M. TISCH** **PART** **18**

*Justice*

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18 EAST 41ST STREET PARTNERS LLC

Plaintiff,

- v -

ITAY GAMLIELI,

Defendant.

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**INDEX NO.** 153624/2021

**MOTION DATE** 06/11/2021

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26

were read on this motion to/for DISMISSAL.

Upon the foregoing papers, defendant moves to dismiss plaintiff's complaint pursuant to CPLR 3211 (a) subdivisions (1), (2), and/or (7)[1] on the grounds that the causes of action are barred by New York City Legislation Int. No 2083–A, which amended New York City Administrative Code 22–1005 ("Guarantor Legislation"), and for failure to state a claim.

The action arises out of plaintiff's lease dated December 15, 2016 with Gamlieli Zweig, Inc. ("Tenant") with respect to the real property on the 10th floor in the building located at 18 East 41st Street, New York, New York 10017 (see NYSCEF Doc No 1, complaint at ¶¶ 3, 5). By way of written guaranty dated December 12, 2016, defendant ("Guarantor") "guarantee[d] to

[1] Although defendant's notice of motion states that the motion is made pursuant to subdivisions (1) and (2), the papers in support of the motion fail to elaborate on how they are applicable. In any event, the Court finds that dismissal is not warranted under these subdivisions because an affidavit from Mr. Gamlieli and supporting documentation do not constitute "documentary evidence" within the meaning of CPLR 3211(a)(1) (*see Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651 [1st Dept 2011], citing, inter alia, *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1st Dept 2004]; *Fontanetta v Doe*, 73 AD3d 78, 86 [2d Dept 2010] ["it is clear that affidavits and deposition testimony are not 'documentary evidence' within the intendment of a CPLR 3211(a)(1) motion to dismiss"]). Additionally, defendant has not advanced any argument that the Supreme Court is without jurisdiction (*see Manhattan Telecom. Corp v H&A Locksmith, Inc.*, 21 NY3d 200, 203 [2013] ["lack of jurisdiction should not be used to mean merely that elements of a cause of action are absent, but that the matter before the court was not the kind of matter on which the court had power to rule"]; *Fry v Vil of Tarrytown*, 89 NY2d 714, 718 [1997] [the Supreme Court, as a court of general jurisdiction, "is competent to entertain all causes of action unless its jurisdiction has been specifically proscribed"]).

Landlord the payment and performance of Tenant's obligations under and in accordance with the [l]ease, including, without limitation, the payment of fixed and additional rent" (*id.* at ¶ 6).

Plaintiff's complaint asserts three causes of action to the Court. First, plaintiff alleges that Tenant has not paid rent since March 2020 and that as of April 2021 Tenant's present arrears total the sum of $332,501.91. Second, plaintiff alleges that it is entitled to the reimbursement of rent abatement in the sum of $290,012.66 pursuant Article 2(D) of the lease agreement. Finally, plaintiff alleges that pursuant to Article 16(C)(i) of the lease agreement, it is entitled to receive all attorney fees and costs incurred in commencing this action.

In its motion, defendant claims that plaintiff's causes of action are in violation of New York City Administrative Code § 22-1005 (hereinafter, guarantor law), which states the following:

> "A provision in a commercial lease or other rental agreement involving real property located within the city that provide for one or more natural persons who are not the tenant under such agreement to become, upon the occurrence of a default or other event, wholly or partially personally liable for payment of rent, utility expenses or taxes owed by the tenant under such agreement, shall not be enforceable against such natural persons if the conditions of paragraph 1 and 2 are satisfied:
>
> 1. The tenant satisfies the conditions of subparagraph (a), (b) or (c):
>
> (a) The tenant was required to cease serving patrons food or beverage for on-premises consumption or to cease operation under executive order number 202.3 issued by the governor on March 16, 2020
>
> (b) The tenant was a non-essential retail establishment subject to in-person limitations under guidance issued by the New York State department of economic development pursuant to executive order number 202.6 issued by the governor on March 18, 2020; or
>
> (c) The tenant was required to close to members of the public under executive order number 2.2.7 issued by the governor on March 19, 2020
>
> 2. The default or other event causing such natural persons to become wholly liable or partially liable for such obligation occurred between March 7, 2020 and June 30, 2021, inclusive."

Defendant argues that he is not liable for the Tenant's default on the lease because he qualifies under subsection 1 (b) and subsection 2 of the guarantor law. In addition, defendant claims that plaintiff has failed to state a sufficient cause of action due to the impossibility of Tenant's performance of the lease agreement and because plaintiff is liable for tenant harassment pursuant to New York City Administrative Code § 22-902 (a). In opposition, plaintiff argues that defendant is not a "non-essential retail establishment" and therefore does not qualify under § 22-1005(1)(b). Plaintiff further argues that performance of the lease agreement was not impossible and that plaintiff actions do not satisfy the requirements established under New York City's tenant harassment legislation.

Standard of Law

In deciding defendant's entitlement to dismissal under CPLR Rule 3211(a)(7), the "complaint is to be afforded a liberal construction. The facts as alleged in the [complaint] are accepted as true [and] the plaintiff is accorded the benefit of every possible favorable inference" (*Goldfarb v Schwartz*, 26 AD3d 462, 463 [2d Dept 2006]). "[T]he court's function is to determine only whether the facts as alleged fit within any cognizable legal theory" (*id.*) and not "[w]hether a plaintiff can ultimately establish its allegations" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]) or if "there is evidentiary support to establish a meritorious cause of action" (*W2007 Monday 230 Park Mezz II, LLC v Landesbank Baden-Wuerttemberg*, 38 Misc 3d 1209[A], 2013 NY Slip Op 50031[U], *3 [Sup Ct, New York 2013]).

The Guarantor Law

The defendant unpersuasively argues that it should not be liable for rent and additional rent that accrued between March 7, 2020 and June 30, 2021 pursuant to paragraph 1(b) of §22-1005 of the Guarantor Legislation. The Court finds that the Tenant, a real estate brokerage firm, is not a non-essential retail establishment within the meaning of the statute and therefore does

not qualify under paragraph 1(b) of §22-1005. Section D of the lease, titled "Permitted Uses," states that the property shall not be used as a retail establishment. In addition, the Certificate of Occupancy specifically states that the unit can only be used for office space. Accordingly, Tenant does not qualify as a non-essential retail establishment within the meaning of paragraph 1(b) of § 22-1005 of the Guarantor Legislation.

The Impossibility of Performance

The defendant maintains that it should be exempt from liability since it was impossible for Tenant to perform its contractual obligations under the lease agreement. An impossibility defense will "excuse 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 Central Mkts.*, 70 NY2d 900, 902 [1987]). More specifically, it has been held that the defense of impossibility of performance is generally or without merit when asserted by commercial tenants whose defense derives from a COVID-19 related rent nonpayment (*see Valentino U.S.A., Inc. v 693 Fifth Owner LLC*, 203 AD3d 480, 480 [1st Dept 2022] [finding that the COVID-19 pandemic did not result in plaintiff's performance impossible]; *RPH Hotels 51st St. Owners, LLC v HJ Parking LLC*, NY Slip Op 30286[U], *5, 2021 NY Misc 373 LEXIS [Sup Ct, NY County 2021] [finding that a decrease in business production due to the COVID-19 pandemic does not enable a defendant to successfully assert that performance was impossible]).

Defendant claims that Tenant's business has declined 80% since the onset of the pandemic. While that may be true, it has been established that a party will not qualify under the doctrine of impossibility due to a loss in profits (*see 55 Broadway Realty LLC v. Houston Upholstery Co., Inc.*, NY Slip Op 32608[U], *3, 2021 NY Misc 6318 LEXIS [Sup Ct, NY County 2021] [finding that a loss of profits is insufficient for a successful impossibility of

performance claim]). Although the pandemic was unforeseen and has disproportionately affected its business, Tenant has still been able to conduct business and use the leased unit albeit on a limited basis. Accordingly, the doctrine of impossibility is not applicable here.

Tenant Harassment Pursuant to the Guarantor Legislation

Defendant argues that plaintiff's filing of this case qualifies as tenant harassment pursuant to New York City Administrative Code §22-902(a)(11)(14), which prohibits landlords from "attempting to enforce a personal liability provision that the landlord knows or reasonably should know is not enforceable pursuant to section 22-1005 of the code." Because the Tenant does not qualify under 22-1005 of the Guarantor Legislation, §22-902(a)(11)(14) of the Administrative Code is not applicable here.

Conclusion

Accordingly, it is hereby ORDERED that the motion is denied; and it is further

ORDERED that defendant shall file and serve an answer to the complaint within twenty (20) days from service of this order with notice of entry.[2]

This constitutes the decision and order of the Court.

7/15/2022
DATE

ALEXANDER TISCH, J.S.C.

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

[2] After issue is joined, the parties should request a preliminary conference on NYSCEF and notify the Part 33 Clerk, as this matter has been reassigned to the Hon. Mary V. Rosado.