

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

-----X
EAST 16TH STREET OWNER LLC,

Plaintiff,

Index No. 653839/20

-against-

NOTICE OF APPEAL

UNION 16 PARKING LLC and TMO PARENT LLC,

Defendants.

-----X

C O U N S E L:

PLEASE TAKE NOTICE, that Defendants Union 16 Parking LLC and TMO Parent LLC hereby appeal to the Appellate Division of the Supreme Court of the State of New York, First Department, from the annexed Order of the Supreme Court, New York County (Bluth, J.), dated January 15, 2021 and entered in the Office of the New York County Clerk on January 15, 2021.

This appeal is taken from each and every part of that Order, as well as from the whole thereof.

Dated: New York, New York
February 16, 2021

Yours, etc.,

/s/ Heath Olnowich
Heath Olnowich, Esq.
Mavrides, Moyal, Packman & Sadkin, LLP
Attorneys for Defendants
276 Fifth Avenue, Suite 404
New York, NY 10001
(212) 396-4288
HBO@mmps.com

TO: New York County Clerk
60 Centre Street
New York, NY 10007

Menachem J. Kastner, Esq.
Cozen O'Connor
Attorneys for Plaintiff
45 Broadway, 16th Floor
New York, NY 10006
(212) 453-3811
mkastner@cozen.com

File: W:\1 - PERSONAL FOLDERS\Heath Olnowich\Active Files\Icon Parking Holdings, LLC\East 16th Street Owner v. Union 16 Parking\Notice of Appeal of 1-15-21 Order.wpd

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

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14

Justice

-----X

INDEX NO. 653839/2020

EAST 16TH STREET OWNER LLC,

MOTION DATE 01/13/2021

Plaintiff,

MOTION SEQ. NO. 002

- v -

UNION 16 PARKING LLC,TMO PARENT LLC

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 42, 43, 44, 45, 46, 55, 56, 57, 58, 59, 60, 61

were read on this motion to/for DISMISS.

The motion by plaintiff for summary judgment and to dismiss defendants' affirmative defenses is granted.

Background

Defendants operate a parking garage at a building owned by plaintiff. Defendant Union 16 Parking LLC is the tenant and defendant TMO Parent LLC signed a good guy guarantee in connection with Union 16's lease. Plaintiff claims that the tenant has not paid rent since April 1, 2020 and now owes over \$1 million to plaintiff through November 1, 2020. It argues that the lease does not permit the tenant to withhold rent under any circumstance. Plaintiff also observes that the lease does not contain a force majeure provision.

Defendants cite the ongoing pandemic as the reason they have been unable to pay rent. They claim that their monthly business was down 60 percent in August 2020. They also claim that since the pandemic began, they have lost revenue and incurred additional expenses to implement health and safety measures.

In opposition to the motion, defendants argue that plaintiff failed to meet its prima facie burden and that there are issues of fact with respect to plaintiff's motion. Defendants assert that the doctrine of frustration of purpose raises an issue of fact. They recount the fact that the ongoing pandemic drastically reduced the amount of people driving cars in Manhattan as people started working from home. Defendants claim that their parent company has lost 60% in revenue because of the pandemic.

They admit that while they were not required to shut down, they faced dramatic effects because of the pandemic. Defendants acknowledge that their monthly revenues were so low they were unable to pay the rent. They also argue that plaintiff's declaratory judgment cause of action should be dismissed because they have an adequate remedy: the breach of contract claim.

In reply, plaintiff disputes that the frustration of purpose doctrine has any application to this case. Plaintiff points out that the parking garage has remained open throughout the pandemic and continued to charge \$500 per month for a single space. It also insists that it be granted judgment against both the tenant and the guarantor as both are liable for amount due.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court’s task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d’Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The doctrine of frustration of purpose requires that “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”(*Crown IT Services, Inc. v Koval-Olsen*, 11 AD3d 263, 265, 782 NYS2d 708 [1st Dept 2004]). “[T]his doctrine is a narrow one which does not apply unless the frustration is substantial”(*id.*).

The Court grants plaintiff’s motion. There is no doubt that the ongoing pandemic has caused harmful effects on all types of businesses in New York City. Defendants appear to have suffered a dramatic downturn in revenue that made it difficult, if not impossible, for them to pay the full rent (although the Court notes that defendants have not argued they made any good faith attempt to pay any rent).

But the downturn in the tenant’s business does not raise an issue of fact to defeat the instant motion. The undisputed fact is that defendants were not shut down by pandemic-related orders – they were permitted to keep their parking garage open throughout 2020. That their

customer base was reduced because of the pandemic is not a basis to find that the frustration of purpose doctrine should apply here.

It is critical to point out what the application of the frustration of purpose doctrine might entail in this case. It could potentially permit defendants to simply walk away from the lease and not have to pay anything to plaintiff despite the fact that they have been continuously operating a garage. The frustration of purpose doctrine was not intended to allow a tenant to avoid having to pay rent while running a business at the premises, even if business has slowed. Applying that doctrine here could justify applying it to every tenant who suffers a downturn in business, whether because of a pandemic or some other reason. Here, when the garage has been continuously up and running, the Court declines to permit defendants to run a garage rent-free.

The Court also finds that defendants are correct to the extent that the declaratory judgment cause of action is moot. That claim sought a declaration that the Tenant is liable for ongoing rent—that was the subject of motion sequence 001.

Accordingly, it is hereby

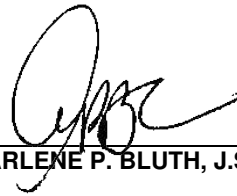
ORDERED that the motion for summary judgment by plaintiff is granted to the extent that defendants' affirmative defenses are severed and dismissed, the Clerk is directed to enter judgment in favor of plaintiff and against defendants jointly and severally in the amount of \$1,028,104.36 plus interest from October 31, 2020 along with costs and disbursements upon presentation of proper papers therefor; and it is further

ORDERED that plaintiff's motion is denied to the extent it sought declaratory relief; and it is further

ORDERED that the issue of attorneys' fees and rent and additional rent that became due after October 31, 2020 is severed and there shall be a hearing to determine the reasonable attorneys' fees and other amounts due to plaintiff to be scheduled by the clerk of this part.

1/15/2021

DATE



ARLENE P. BLUTH, 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

Supreme Court of the State of New York

Appellate Division: First Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.

EAST 16TH STREET OWNER LLC,

Plaintiff,

- against -

UNION 16 PARKING LLC and TMO PARENT LLC,

Defendants.

For Court of Original Instance

Date Notice of Appeal Filed

For Appellate Division

Case Type

- Civil Action
- CPLR article 75 Arbitration
- Action Commenced under CPLR 214-g
- CPLR article 78 Proceeding
- Special Proceeding Other
- Habeas Corpus Proceeding

Filing Type

- Appeal
- Original Proceedings
 - CPLR Article 78
 - Eminent Domain
 - Labor Law 220 or 220-b
 - Public Officers Law § 36
 - Real Property Tax Law § 1278
- Transferred Proceeding
 - CPLR Article 78
 - Executive Law § 298
 - CPLR 5704 Review

Nature of Suit: Check up to three of the following categories which best reflect the nature of the case.

<input type="checkbox"/> Administrative Review	<input type="checkbox"/> Business Relationships	<input checked="" type="checkbox"/> Commercial	<input checked="" type="checkbox"/> Contracts
<input type="checkbox"/> Declaratory Judgment	<input type="checkbox"/> Domestic Relations	<input type="checkbox"/> Election Law	<input type="checkbox"/> Estate Matters
<input type="checkbox"/> Family Court	<input type="checkbox"/> Mortgage Foreclosure	<input type="checkbox"/> Miscellaneous	<input type="checkbox"/> Prisoner Discipline & Parole
<input type="checkbox"/> Real Property (other than foreclosure)	<input type="checkbox"/> Statutory	<input type="checkbox"/> Taxation	<input type="checkbox"/> Torts

Appeal

Paper Appealed From (Check one only):

If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.

- | | | | |
|--|---|---|---|
| <input type="checkbox"/> Amended Decree | <input type="checkbox"/> Determination | <input checked="" type="checkbox"/> Order | <input type="checkbox"/> Resettled Order |
| <input type="checkbox"/> Amended Judgement | <input type="checkbox"/> Finding | <input type="checkbox"/> Order & Judgment | <input type="checkbox"/> Ruling |
| <input type="checkbox"/> Amended Order | <input type="checkbox"/> Interlocutory Decree | <input type="checkbox"/> Partial Decree | <input type="checkbox"/> Other (specify): |
| <input type="checkbox"/> Decision | <input type="checkbox"/> Interlocutory Judgment | <input type="checkbox"/> Resettled Decree | |
| <input type="checkbox"/> Decree | <input type="checkbox"/> Judgment | <input type="checkbox"/> Resettled Judgment | |

Court: Supreme Court

County: New York

Dated: 01/15/2021

Entered: 1/15/2021

Judge (name in full): Arlene P. Bluth, JSC

Index No.: 653839/20

Stage: Interlocutory Final Post-FinalTrial: Yes No If Yes: Jury Non-Jury

Prior Unperfected Appeal and Related Case Information

Are any appeals arising in the same action or proceeding currently pending in the court? Yes No
 If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.
 Unknown at this time. Have not received Appellate Division Case Number notification yet.
 Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:

Original Proceeding

Commenced by: Order to Show Cause Notice of Petition Writ of Habeas Corpus Date Filed:

Statute authorizing commencement of proceeding in the Appellate Division:

Proceeding Transferred Pursuant to CPLR 7804(g)

Court: Choose Court

County: Choose County

Judge (name in full):

Order of Transfer Date:

CPLR 5704 Review of Ex Parte Order:

Court: Choose Court

County: Choose County

Judge (name in full):

Dated:

Description of Appeal, Proceeding or Application and Statement of Issues

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.

This appeal is taken from the annexed Order of the Supreme Court, New York County (Bluth, J.), dated January 15, 2021 and entered in the Office of the New York County Clerk on January 15, 2021. By the subject Order, the Court granted Plaintiff's motion for summary judgment (a) dismissing Defendants' affirmative defenses and (b) directing the entry of a money judgment in favor of Plaintiff and against Defendants, jointly and severally, in the sum of \$1,028,104.36 plus interest from October 31, 2020, costs and disbursements.

Informational Statement - Civil

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

- (1) Whether the Court incorrectly granted Plaintiff's motion; and
- (2) Such other, further and different grounds on the facts and/or law as may become apparent upon a review of all papers comprising the record on appeal.

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	EAST 16TH STREET OWNER LLC	Plaintiff	Respondent
2	UNION 16 PARKING LLC	Defendant	Appellant
3	TMO PARENT LLC	Defendant	Appellant
4			
5			
6			
7			
8			
9			
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			

Attorney Information

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name: Cozen O'Connor (Menachem J. Kastner, Esq.)

Address: 45 Broadway, 16th Floor

City: New York State: NY Zip: 10006 Telephone No: 212-453-3811

E-mail Address: mkastner@cozen.com

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above): 1

Attorney/Firm Name: Mavrides, Moyal, Packman & Sadkin, LLP (Heath Olnowich, Esq.)

Address: 276 Fifth Avenue, Suite 404

City: New York State: NY Zip: 10001 Telephone No: 212-396-4288

E-mail Address: HBO@mmmps.com

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above): 2, 3

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No:

E-mail Address:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above): 6

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No:

E-mail Address:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No:

E-mail Address:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No:

E-mail Address:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

Informational Statement - Civil

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

Index No. 653839/20

EAST 16TH STREET OWNER LLC,

Plaintiff,

-against-

UNION 16 PARKING LLC and TMO PARENT LLC,

Defendants.

**NOTICE OF APPEAL
AND
APPELLATE DIVISION INFORMATIONAL STATEMENT**

Mavrides, Moyal, Packman & Sadkin, LLP
Attorneys for Defendants
276 Fifth Avenue, Suite 404
New York, NY 10001
(212) 396-4288