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

HUGO BOSS RETAIL, INC., Plaintiff,	:	Index No. 655166/20
-against-	:	*Mot. Seq No. 1*
A/R RETAIL, INC., Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S
MOTION FOR PARTIAL SUMMARY JUDGMENT

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT[1]

Defendant-landlord, A/R Retail LLC ("Landlord"), by its attorneys, Rosenberg & Estis, P.C., submits this memorandum of law in support of its motion, by Order to Show Cause, for an order, pursuant to CPLR 3212, awarding Landlord summary judgment dismissing all of the causes of action asserted by plaintiff-tenant, Hugo Boss Retail, Inc. ("Tenant") in its November 18, 2020 Amended Complaint ("Complaint"), except its sixth cause of action for breach of lease.

PRELIMINARY STATEMENT

Starting in May 2020, Tenant, the multi-billion dollar international and luxury apparel retailer, admittedly stopped paying its monthly rent in the amount of $692,026.07 for its very large, two-story "Hugo Boss" retail store in the luxury shopping center known as The Shops at Columbus Center (the "Store"), claiming that the COVID-19 pandemic and Governor Andrew Cuomo's temporary "Pause Orders" excused it from doing so.

To avoid its liability from May 2020 through the end of the Lease in December 2025, Tenant commenced the instant action. Tenant's Complaint asserts eight causes of action, seven

[1] All capitalized terms not defined herein shall have the meanings ascribed to them in the accompanying affidavit of Meredith B. Keeler ("Keeler Aff.")

of which claim the Lease was rescinded and/or terminated as a matter of law in March 2020 when Governor Andrew Cuomo, by his Executive Orders, or "Pause Orders," temporarily shut down all operations in its Store as a result of the COVID-19 pandemic.[2]

Notwithstanding the undisputed fact that Tenant reopened for business in September 2020 and continues to operate the Store during the holiday shopping season, Tenant's case is frivolous because the sophisticated parties and their attorneys clearly foresaw the possibility of a shutdown of the Store by the government when negotiating the Lease -- and negotiated a force majeure clause requiring Tenant to pay rent regardless of such an occurrence.

The Lease's force majeure clause explicitly states that if a force majeure event were to occur -- including an "order…by any governmental authority" -- Tenant is not excused from paying its rent. Simply, the sophisticated parties allocated the risk for an event such as this -- Tenant bears the risk and explicitly remains liable for all rent due as a result of the Governor's orders temporarily closing the Store. This controlling provision soundly defeats Tenant's claims and entitles Landlord to summary judgment. Tenant's claims can also be dismissed for other reasons.

Tenant's first two causes of action seeking to rescind the Lease based upon the doctrines of frustration of purpose and impossibility of performance, respectively, fail as a matter of law because a tenant who remains in possession cannot seek to rescind the Lease. By remaining in possession, Tenant has ratified the Lease, just as it did in April 2020 when it paid its rent. Tenant's frustration of purpose and impossibility of performance claims are also frivolous because the purpose of the Lease was not frustrated, as Tenant had occupied the space for many years prior to the shutdown and has since reopened.

[2] Tenant's sixth cause of action for breach of lease alleges that Landlord had overcharged Tenant for real estate tax escalations prior to the pandemic. The instant motion does not seek summary judgment on that claim.

Tenant's third and fourth causes of actions seeking a rent abatement or termination of the Lease, respectively, based upon the Lease's casualty provisions, are also without merit. Those provisions do not apply as a matter of law because there was no casualty. A casualty only occurs when there is physical destruction or damage to the Store.

Tenant's fifth cause of action for reformation of the Lease fails because it is barred by the statute of limitations and no mutual mistake was alleged.

Tenant's seventh and eighth causes of action are quasi-contractual claims -- "money had and received" and unjust enrichment, respectively -- and seek reimbursement of rents paid during the pandemic. Both causes of action fail because such types of claims are not viable when there is a contract between the parties.

In sum, as established below and the accompanying papers, the material facts are undisputed, and there is nothing in the Lease or law that excuses Tenant from paying rent through the end of the Lease term or provides for a rent abatement as a result of the Governor's temporary "Pause Orders." Accordingly, summary judgment is warranted.

FACTS

The relevant facts are set forth in the accompanying affirmations of Howard W. Kingsley, the accompanying Affidavit of Meredith B. Keeler ("Keeler Aff.") the exhibits thereto (collectively, "DX"), and Landlord's Rule 19-a Statement.

The following facts are undisputed:

- In 2012, Landlord and Tenant entered into a long-term lease by which Tenant leased the Store through May 31, 2025 (DX D, § 1.1(h));
- The Store was and is one of the largest retail stores in the Shops, consisting of almost 15,000 square feet, in a prime location at the entrance of the Shops right off of Columbus Circle (Keeler Aff., ¶ 7);
- The sophisticated Tenant was represented by counsel in connection with the negotiation and execution of the Lease (DX D, §§ 25.1, 26.3);

- Critically, parties (and their counsel) negotiated a force majeure clause that did not permit Tenant to avoid its rental obligations in the event of a government shutdown (DX D, §§ 1.2, 26.9);

- In or about the summer of 2013, the Store opened for business (Keeler Aff., ¶ 13);

- Since then, the Store has conducted business therein without any significant interruption until the Shops and the Store closed on March 17, 2020 as mandated by the Governor's Executive Orders (Landlord's Rule 19-a Statement of Undisputed Facts, ¶ 12);

- On March 25, 2020, Landlord billed Tenant rent and additional rent for April 2020 in the amount of $692,026.07 ("Undisputed Monthly Rent") (Keeler Aff., ¶ 15);

- Tenant paid the April 2020 Undisputed Monthly Rent in full (except for $373.89) without any reservation of rights (Keeler Aff., ¶ 16; DX E);

- The Governor's temporary "Pause" was lifted on September 9, 2020, and since then, the Store has been open (Keeler Aff., ¶ 18-19, Landlord's Rule 19-a Statement of Undisputed Facts, ¶¶ 18-19);

- Nevertheless, although the Store has been open for months Tenant has not paid rent since April 2020 (Keeler Aff., ¶ 17; DX B, 32).

ARGUMENT

POINT I

THE LEGAL STANDARDS ON SUMMARY JUDGMENT

CPLR 3212(b) provides, in pertinent part, that a motion for summary judgment:

> "shall be granted if, upon all papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."

On a motion for summary judgment the controlling consideration is whether or not any material questions of fact exist. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). The Court of Appeals clarified the circumstances under which summary judgment is appropriate in *Andre v Pomeroy*, 35 NY2d 361 (1974), explaining that:

> "Summary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims

> which can properly be resolved as a matter of law" (internal citation omitted).

Once a movant demonstrates "that it is entitled to a right to judgment…the burden then shifts to the non-movant, who must proffer evidence in admissible form establishing that an issue of fact exists warranting a trial." *GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 967-68 (1985). Unsupported, conclusory allegations do not create an issue of fact that warrants a trial, and such allegations will not defeat a motion for summary judgment. *Ehrlich v American Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255, 259 (1970).

As Landlord establishes below, there are no disputed issues of material fact and summary judgment is warranted.

POINT II

LANDLORD IS ENTITLED TO SUMMARY JUDGMENT DISMISSING TENANT'S SEVEN CAUSES OF ACTION BECAUSE TENANT EXPLICITLY AGREED THAT IT WOULD NOT BE EXCUSED FROM PAYING RENT IF THE GOVERNMENT SHUT DOWN ITS BUSINESS

A. Rules of Lease Construction

Under New York law, "a lease is subject to the rules of construction applicable to any other agreement." *George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211 (1978). As the Court of Appeals stated in *W.W.W. Assocs., Inc. v Giancontieri*, 77 NY2d 157, 162 (1990), which also involved real property:

> "A familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing. That rule imparts 'stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses…infirmity of memory…[and] the fear that the jury will improperly evaluate the extrinsic evidence.' Such considerations are all the more compelling

> in the context of real property transactions, where commercial certainty is a paramount concern'" (emphasis supplied; ellipses in original; internal citations omitted).

Thereafter, in a case involving a commercial lease, the Court of Appeals, in *Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 (2004), stated:

> "We have also emphasized this rule's special import 'in the context of real property transactions, where commercial certainty is a paramount concern, and where ... the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length.' In such circumstances, 'courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include.' Hence, 'courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing'" (internal citations omitted).

Moreover, "the parties' intention is to be ascertained from the language employed and, absent ambiguity, interpretation is a matter of law to be determined solely by the court" (citations omitted). *New York Overnight Partners, L.P. v Gordon*, 217 AD2d 20, 24-25 (1st Dept 1995), *aff'd* 88 NY2d 716 (1996).

B. The Controlling Force Majeure Clause

At the outset, it is important to note that the temporary shutdown of the Store was caused by the Governor's "New York State on 'PAUSE' Executive Order" (DX B, ¶¶ 2, 8, 33), not the pandemic in and of itself. Indeed, although the pandemic is still upon us and is spreading at a much faster pace than months ago since the Governor's "Pause Orders" were lifted on September 9, 2020,[3] Tenant has been open for business. Keeler Aff., ¶¶ 18-19.

The Lease's force majeure clause makes it crystal clear that the sophisticated parties contemplated the possibility of total or significant business interruption due to governmental

[3] https://www.nytimes.com/2020/11/09/nyregion/nyc-virus-spike.html

order or intervention and, in such event, Tenant nevertheless agreed that it was required to continue paying the rent due. In fact, the Lease's force majeure clause explicitly states that Tenant is not excused from paying rent if there is a force majeure event, such as an order from the Governor temporarily shutting down the Store. DX, D, § 26.9. *See Route 6 Outparcels v Ruby Tuesday*, 88 AD3d 1224, 1225 (3d Dept 2011) ("when the parties have themselves defined the contours of force majeure in their agreement, those contours dictate the application, effect, and scope of force majeure").

Courts have consistently found that a tenant is not excused from its obligation to pay rent when the parties allocated the risk if there is a force majeure event. In *35 East 75th Street Corp. v Christian Louboutin LLC*, 2020 WL 7315470 (Sup Ct. NY County), for example, plaintiff-landlord sought summary judgment on causes of action seeking rent, additional rent and legal fees against defendant-tenant, a high-end retail store. The tenant sought to avoid its rental obligations because "no one could have predicted that [the COVID-19 pandemic] would shut down the vast majority of businesses" and argued that because "its entire business was built on a highly visible and well trafficked retail location" its store is "no longer profitable because there are dramatically fewer people walking around due to the pandemic." The Court dismissed tenant's defenses, noting "that the parties included a force majeure clause for unforeseen events in the lease but this provision did not relieve defendant of its obligation to pay rent." (emphasis suppled). *Id* at 2.

In *Urban Archeology, Ltd. v 207 E. 57th St. LLC*, 2009 WL 8572326, at *5 (Sup Ct NY County), the plaintiff-tenant sought a declaration that it should be excused from paying rent based upon the commercial lease's force majeure clause since the devasting economic downturn in and about 2008 was not foreseeable. The Court rejected the tenant's argument, holding that:

> "The contract here was entered into by sophisticated commercial parties who could have anticipated the

> possibility that future events might result in financial disadvantage on the part of either party, even if the precise cause or extent of such financial disadvantage was not foreseen at the time the contract was executed. Thus, under the circumstances extant at bar the impossibility of performance doctrine does not relieve plaintiff of its obligations under the Lease.
>
> * * *
>
> A *force majeure* provision will also be narrowly construed and is not intended to buffer a party against the normal risks of a contract. Generally, 'only if the *force majeure* clause specifically includes the event that actually prevents a party's performance will that party be excused'. In this case, the *force majeure* clause does not specifically include plaintiff's inability to meet its obligations due to a severe economic crisis. In fact, following the catchall language 'from any cause whatsoever beyond Landlord or Tenant's reasonable control' contained in this provision is the exclusion 'other than Landlord or Tenant's financial hardship'. It would, therefore, appear that the parties to the Lease considered the possibility of a change in the financial circumstances of either party, even if not specifically anticipating the nature or extent of such economic downturn, and determined that this provision would not shield the parties from liability for any non-performance of their respective obligations on such basis" (internal citations omitted; italics in original; underscoring supplied).

The Appellate Division, First Department, affirmed (68 AD3d 562, 562 (1st Dept 2009)), holding that:

> "The force majeure clause of the parties' lease agreement contemplates either party's inability to perform its obligations under the lease due to 'any cause whatsoever' beyond the party's control-other than financial hardship. This clause conclusively establishes a defense to [the tenant]'s claim that it is excused from performing under the lease by reason of the effect that the downturn in the economy has had on it (*see* *Kel Kim Corp. v. Central Mkts.*, 70 NY2d 900, 902-903 [1987])."

In *One World Trade Ctr. LLC v Cantor Fitzgerald Sec.*, 6 Misc3d 382 (Sup Ct NY County), the plaintiff-landlord sued for unpaid rent due under the commercial lease. The

defendant-tenant sought to rescind the lease because the building was destroyed by the September 11, 2001 terrorist attacks. In response, the landlord claimed that the tenant was not excused by the lease's force majeure clause. The Court held that:

> "The court agrees with plaintiff that the force majeure clause bars defendants' counterclaims. Defendants' argument that their counterclaims are outside the operation of the lease because they equitably seek to rescind the lease on the contractual grounds of failure of consideration and unjust enrichment is unavailing.
>
> Defendants' counterclaims essentially seek a rent abatement for services that cannot be provided due to the destruction of the building. The court agrees with plaintiff that there is no language in the lease which can form the basis for a claim by defendants…The defendants are sophisticated commercial tenants and there is no reason to excuse them from the operation of the force majeure clause which they freely negotiated. Defendants bargained away their right to hold the lessor liable for nonperformance in the face of the tragic, unanticipated events which destroyed the building" (emphasis supplied). *Id*. at 385.

In *Trinity Centre, LLC v Wall St. Correspondents, Inc.*, 2004 WL 2127216 at *5 (Sup Ct NY County), the Court denied the tenant's summary judgment motion seeking to void its lease based upon the impossibility of performance after the 9/11 attacks, finding that "although the terrorist act caught the whole city by surprise, the lease between the parties in fact anticipated a potential casualty." *See also In re M&M Transp. Co.*, 13 B.R. 861, 871 (Bankr SDNY 1981) (rejecting a frustration of purpose defense on summary judgment because "a person who makes an absolute promise is not to be excused from performance when an event destroys the value of the stipulated consideration").

Here, Tenant explicitly agreed in the Lease that, if there was a force majeure event such as an "order…of or by any governmental authority," it would not be excused from paying rent. Simply, had Tenant wanted the protections of being able to avoid paying rent if there was a

governmental order requiring the Store to close or other force majeure protection, the sophisticated Tenant's counsel could have negotiated such protection or not signed the Lease.

Accordingly, Tenant's causes of action seeking rescission and other relief are frivolous based upon the clear terms of the Lease, and all of Tenant's claims fail on this basis alone. Other reasons why Tenant's claims are frivolous are established below.

POINT III

TENANT'S FIRST TWO CAUSES OF ACTION FOR RESCISSION MUST BE DISMISSED

Tenant's first and second causes of action seek rescission of the Lease based upon the doctrines of frustration of purpose and impossibility of performance, respectively.

A. The Remedy of Rescission is not Available to a Tenant that Does Not Vacate the Leased Premises

It is well-settled that a tenant cannot seek recession of a lease while remaining in the leased premises. As the Court of Appeals held in *Edgar A. Levy Leasing Co., Inc. v Siegel*, 230 NY 634, 637 (1921):

> "In case of real estate [a party] must surrender possession before [it] can maintain an action for rescission of the instrument under which [it] obtained possession."

The principal behind this rule is simple -- Tenant cannot have it both ways. It cannot claim that the Lease has been rescinded or terminated while still enjoying "the fruits of the contract." *Id*. Moreover, by remaining in possession of the Store, Tenant ratified and affirmed the existence of a binding Lease. *McKeever v Arnow*, 194 NYS 475 (1st Dept 1922); *Heller, Horowitz & Feit, P.C. v Stage II Apparel Corp.*, 270 AD2d 58 (1st Dept 2000) (holding plaintiff was not entitled to rescind an agreement based upon mutual mistake because it had "ratified… the agreement" by accepting payment thereunder after learning of the purported mistake).

More recently, in *Torpey v TJ Realty of Orange County Inc.*, 2015 WL 2401237 (Sup Ct Orange County), the plaintiff-tenants sought to rescind the Lease because they were having difficulty obtaining a liquor license for the premises -- a restaurant and bar -- as a result of the fraudulent conduct of the defendant-landlord. The court dismissed such claims on summary judgment because:

> "by remaining in the Premises, Plaintiff essentially affirmed the Lease and thereby undermined any potential rescission or reformation claim…put simply, Plaintiffs Tenants herein cannot have it both ways…[S]ince Plaintiffs remain in possession, they have elected to affirm the lease and seek damages. Since they are enjoying the benefits of remaining in the Premises -- deficient as they may allegedly be -- and operating their restaurant, they must bear the burden of complying with the Lease…Accordingly, during the pendency of this action, Plaintiffs are required to abide by the Lease's terms, including their obligation to pay to Defendants the monthly rent due under the Lease" (emphasis suppled). *Id*.

Here, it is undisputed that Tenant has been in possession since the Governor lifted the temporary shutdown and thus ratified or affirmed the Lease. Tenant also ratified the existence of a binding lease by voluntarily paying the April 2020 rent in the amount of almost $700,000 without reservation after the Governor's shut down. Keeler Aff.,¶ 16; DX E. Accordingly, Tenant's two causes of action seeking recession are completely without merit.

B. Tenant's First Cause of Action Fails Because the Purpose of the Lease was Not Frustrated

In *Center for Specialty Care, Inc. v CSC Acquisition I, LLC*, 185 A.D.3d 34, 42 (1st Dept 2020), the Appellate Division, First Department, recently stated:

> "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" (internal citations omitted).

The doctrine's application has been "limited to instances where a virtually cataclysmic, wholly unforeseeable event renders the contract valueless to one party" (emphasis supplied). *United States v Gen. Douglas MacArthur Senior Vill., Inc.*, 508 F2d 377, 381 (2d Cir. 1974) (*citing* *Alfred Marks Realty Co. v Hotel Hermitage Co.*, 170 AD 484, 485 (2nd Dept 1915)).

Several recent cases have rejected a tenant's frustration of purpose claims during the pandemic based upon the Governor's shutdown. In *BKNY1, Inc. v 132 Capulet Holdings, LLC*, 2020 WL 5745631, at *2 (Sup Ct Kings County), the tenant sought to avoid its rental obligations as a result of the shutdown. The Commercial Division held "inasmuch as the initial term of the lease…is for approximately nine years…a temporary closure of plaintiff's business…could not have frustrated its overall purpose" (emphasis supplied).

In another recent case where the tenant argued, like Tenant here, that the purpose of the Lease was frustrated because business has been slowed by the pandemic after the reopening, such argument was also rejected. In *Dr. Smood N.Y. LLC v Orchard Houston, LLC*, 2020 WL 6526996 at *2 (Sup Ct NY County), the plaintiff-tenant sought a preliminary injunction barring defendant-landlord from drawing down on its security deposit for non-payment of rent because the COVID-19 pandemic and the Governor's Executive Orders frustrated the purpose of the lease. In denying the motion, the Court, quoting *Robitzek Inv. Co. v Colonial Beacon Oil Co.*, 265 AD 749, 753 (1st Dept 1943), held that:

> "'for a party to avail itself of the frustration of purpose defense, there must be complete destruction of the basis of the underlying contract; partial frustration such as a diminution in business, where a tenant could continue to use the premises for an intended purpose, is insufficient to establish the defense as a matter of law'" (emphasis supplied).

Similarly, in *35 East 75th Street Corp.*, 2020 WL 7315470 at *2, the New York Supreme Court rejected a retail store's argument that the purpose of its lease was frustrated because of the pandemic, finding:

> "This is not a case where the retail space defendant leased no longer exists, nor is it even prohibited from selling its products. Instead, defendant's business model of attracting street traffic is no longer profitable because there are dramatically fewer people walking around due to the pandemic. But market changes happen all the time. Sometimes businesses become more desirable (such as the stores near the newly-completed Second Avenue subway stops) and other times less so (such as the value of taxi medallions with the rise of ride-share apps). But unforeseen economic forces, even the horrendous effects of a deadly virus, do not automatically permit the Court to simply rip up a contract signed between two sophisticated parties." (emphasis supplied).

See also Lantino v Clay LLC, 2020 WL 2239957, at *3 (SDNY) (rejecting a claim to avoid payment because of financial difficulty "arising out of the COVID-19 pandemic and the PAUSE Executive Order"); *Fisher v Lohse*, 181 Misc 149, 150 (Sup Ct Queens County 1943).

Tenant's frustration of purpose cause of action is completely without merit because Tenant has enjoyed the benefits of the 13-year Lease by operating the Store for many years before and after the foreseeable and temporary governmental shutdown explicitly contemplated by the Lease. In fact, the temporary shutdown was relatively short and Tenant admittedly has been open since September 9, 2020 (DX B, ¶¶ 56, 58; Keeler Aff., ¶¶ 18-19), despite the continuation and recent spike of the pandemic.

Lastly, claims of frustration of purpose (and impossibility of performance) fail when the risk complained of was foreseeable. *Gander Mountain Co. v Islip U-Slip LLC*, 923 FSupp. 2d 351, 360 (NDNY 2013). Here, the shutdown by governmental order was not only foreseeable as explicitly contemplated in the Lease's force majeure clause, but, contrary to Tenant's disingenuous claim, so was a pandemic. Tenant, part of an international, multi-billion-dollar

conglomerate, selling the well-known "Hugo Boss" brand of luxury apparel obviously could have foreseen the need to protect against a pandemic. In fact, many companies have sought such protection before the time when the Lease was executed in 2012. For example, following the SARS outbreak in 2003, most insurance companies adopted a standard exclusion in their policies for viral pandemics.[4] Certainly before the Lease was executed, the possibility and risk of a pandemic was well known. Indeed, the 2011 movie *Contagion* about the spread of a world-wide fatal disease was widely distributed. https://www.warnerbros.com/movies/contagion.

Accordingly, the first cause of action should be dismissed as a matter of law.

C. The Lease Was Not, and Is Not, Impossible to Perform

Tenant's second cause of action seeks rescission of the Lease based upon the common law doctrine of impossibility of performance.

In *Kel Kim Corp.* 70 NY2d at 902 (1987), the Court of Appeals stated:

> "Generally, once a party to a contract has made a promise, that party must perform or respond in damages for its failure, even when unforeseen circumstances make performance burdensome; until the late nineteenth century even impossibility of performance ordinarily did not provide a defense. While such defenses have been recognized in the common law, they have been applied narrowly, due in part to judicial recognition that the purpose of contract law is to allocate the risks that might affect performance and that performance should be excused only in extreme circumstances. Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract" (emphasis supplied).

[4] Laura J Hay, "*Do insurers have COVID-19 covered?*" available at https://home.kpmg/xx/en/home/insights/2020/03/do-insurers-have-covid-19-covered.html ("Most insurers learned the lessons from the SARS outbreak of 2003 and introduced exclusion clauses for communicable diseases and epidemics/pandemics into most non-life products such as business interruption and travel insurance").

In *Kel Kim*, the tenant alleged that it should be excused from performance under the commercial lease because performance was impossible. Special Term awarded summary judgment to the landlord. The Appellate Division affirmed and the case went to the Court of Appeals because the Appellate Division was split. The Court of Appeals affirmed, finding that tenant's failure to procure insurance was not unforeseen or it "could have been guarded against in the contract." *Id*.

Tenant's impossibility argument was also rejected in *BKNY1, Inc*. because "impossibility occasioned by financial hardship does not excuse performance of a contract." *BKNY1, Inc*., 2020 WL 5745631, at *2, *citing Urban Archaeology*, 68 AD3d at 562. *See also Stasyszyn v Sutton E. Assoc*., 161 AD2d 269, 271 (1st Dept 1990) (granting summary judgment dismissing the tenant's impossibility claim because "absent an express contingency clause in the agreement allowing a party to escape performance under certain specified circumstances, compliance is required even where the economic distress is attributable to the imposition of governmental rules and regulations") (emphasis supplied).

Likewise, in *35 East 75th Street Corp.*, 2020 WL 7315470 at *5, the Court also rejected a tenant's attempt to invoke the doctrine of impossibility because:

> "The subject matter of the contract--the physical location of the retail store--is still intact. And defendant is permitted to sell its products. The issue is that it cannot sell enough to pay the rent. That does not implicate the impossibility doctrine." (emphasis supplied).

As established above, Tenant's performance has not been rendered impossible and this frivolous cause of action should also be dismissed.

POINT IV

TENANT'S THIRD AND FOURTH CAUSE OF ACTION SEEKING RELIEF BASED UPON THE LEASE'S CASUALTY CLAUSES ARE WITHOUT MERIT

Tenant's third and fourth cause of action seek judgments declaring that it is entitled to a rent abatement or that the Lease was terminated in mid-March 2020, respectively, based upon certain casualty clauses in the Lease. These claims are completely without merit because neither the Governor's Orders nor the pandemic can constitute a casualty as a matter of law since the Store has not been physically damaged or destroyed.

Article 15 of the Lease is entitled, "Casualty," and governs the rights of the parties in such event. Lease § 15.1 is entitled "Restoration of the Premises" and addresses the rights of the parties when "the Premises are partially or totally destroyed or damaged by fire or other casualty." Section 15.2 is entitled "Landlord's and Tenant's Option to Terminate" the Lease under certain circumstances when there is a casualty and § 15.3, entitled "Tenant's Obligations Following Landlord's Restoration" of the Store after a casualty.

Generally, a "casualty" is "1. [a] serious or fatal accident. 2. [a] person or thing injured, lost, or destroyed." Black's Law Dictionary (11th ed. 2019). Consistent with that definition, in *Dr. Smood*, Supreme Court recently rejected this exact argument made by Tenant because the pandemic is not a casualty in that "there has been no physical harm to the demised premises" (emphasis supplied). *Dr. Smood N.Y. LLC* at *4. *See also 120 Wall St. Co., L.P. v Continental Ins. Co.*, 1994 WL 107885 at *2 (Sup Ct NY County) (finding that the presence of an airborne contaminant -- asbestos -- is not a "casualty," because a casualty is "a specific occurrence of catastrophic dimensions").

The result should be no different here. Tenant's third cause of action seeks a rent abatement pursuant to Lease § 15.1(d), which states that:

> "If the Premises are completely or partially destroyed or so damaged by fire or other hazard that the Premises cannot be reasonably used by Tenant or can only be partially used by Tenant…then rent shall be abated (in the case of substantial damage) or reduced proportionately (in the case of partial damage)" (emphasis supplied).

In an attempt to fabricate its third cause of action, Tenant claims that the pandemic is a "hazard." DX B, ¶ 87. However, such claim ignores the predicate that the Store must be "completely or partially destroyed or so damaged" by the event. Without any such destruction or damage, the clause is irrelevant and this disingenuous claim fails.

Tenant's fourth cause of action seeks a judgment declaring that the Lease is terminated pursuant to Lease § 15.2(i), which states that:

> "If (a) the Premises are (i) rendered wholly or substantially untenantable, or damaged as a result of any casualty which is not covered by the insurance required hereunder to be maintained by Landlord…; …, then in any of such events, Landlord and Tenant may elect to terminate this Lease by giving the other written notice of such election within ninety (90) days after the occurrence of such casualty event. If such notice is given, the rights and obligations of the parties shall cease as of the date of such notice (except for those obligations of Landlord and Tenant which are expressly stated herein to survive the termination or expiration of the Lease Term), and Base Rent and Additional Charges shall be adjusted as of the date of such termination. Except as expressly stated in this Lease, Tenant hereby waives any statutory rights of termination which may arise out of partial or total destruction of the Premises which Landlord is obligated to restore" (emphasis supplied).

As with the third cause of action, in an attempt to mislead the Court, Tenant mischaracterizes the language in such section. Like § 15.1(d), a predicate for Tenant to obtain any relief under Lease § 15.2(i) is a casualty. Again, without a casualty, this claim fails.

Moreover, assuming, *arguendo*, that there as a casualty, which was not the case, to invoke the protection afforded by this provision, Tenant was required to serve notice within 90

days of the event. Having failed to even allege, let alone actually serve such a notice, Tenant's claim must be rejected. *Marina Towers Assocs. by Hudson Towers Housing Co., Inc. v Stacy's Landing*, 2003 WL 22519603 (App Term 1st Dept 2003) (sustaining dismissal of tenant's affirmative defense where tenant failed to give the required notice under the commercial lease).

Based upon the foregoing, the casualty provisions set forth in Article 15 do not apply and both causes of action should be dismissed. As a result, the Court should declare on the third and fourth causes of action that, as a result of the Executive Orders and the pandemic, (a) Tenant is not entitled to any rent abatement, and (b) the Lease has not been terminated and is in full force and effect, respectively.

POINT V

TENANT'S FIFTH CAUSE OF ACTION SEEKING TO REFORM THE LEASE SHOULD BE DISMISSED

Tenant's fifth cause of action seeks to reform the Lease. As stated by the Appellate Division, First Department, in *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 29 (1st Dept 1992):

> "In order to obtain reformation of a written instrument it must be shown that 'the parties came to an understanding, but in reducing it to writing, through mutual mistake, or through mistake on one side and fraud on the other, omitted some provision agreed upon, or inserted one not agreed upon.' Reformation is not a mechanism to interject into the writings terms or provisions not agreed upon or suggested by one party but rejected by the other. Nor may it be used to relieve a party from 'a hard or oppressive bargain.'
>
> The burden upon a party seeking reformation is a heavy one since it is presumed that a deliberately prepared and executed written instrument accurately reflects the true intention of the parties: '[T]he proponent of reformation must show in no uncertain terms not only that mistake or fraud exists, but exactly what was really agreed upon between the parties'" (internal citations omitted; emphasis supplied).

See also Gould v Bd. of Educ. of Sewanhaka Cent. High Sch. Dist., 81 NY 2d 446, 453 (1993) ("[t]he mutual mistake must exist at the time the contract is entered into"); *Simkin v Blank*, 19 NY3d 46, 52 (2012); *313-315 West 125th St. L.L.C. v Arch Specialty Ins. Co.*, 138 AD3d 601, 602 (1st Dept 2016) (the burden is very high as Tenant "must establish by 'clear, positive and convincing evidence' that the agreement does not accurately express the parties' intentions" (emphasis supplied)).

This baseless cause of action fails for several reasons. First, Tenant has not alleged any mutual mistake or fraud or what the Lease was specifically supposed to say. *New York First Ave. CVS, Inc. v Wellington Tower Assocs., L.P.*, 299 AD2d 205 (1st Dept 2002).

Second, the claim is time barred because the statute of limitations for a reformation claim is six years (*Nichols v Regent Properties Inc.*, 49 AD2d 847, 847 (1st Dept 1975)) from the date "the subject lease was executed" (*Nat'l Amusements, Inc. v S. Bronx Dev. Corp.*, 253 AD2d 358, 358 (1998). *See also First Nat. Bank of Rochester v Volpe*, 217 AD2d 967, 967 (4th Dept 1995). Here, the statute started running from the date of the purported mistake, which was when the Lease was executed more than six years ago in December 2012 and is, thus, time barred.

Third, the terms of the Lease accurately set forth the parties' intent as evidenced by the clear and ambiguous Lease provisions discussed above (*see, e.g.*, §§ 26.9, 26.15). *See also* Point II(B), *supra*.

Simply, Tenant has failed to allege any viable claim and even if it did, Tenant cannot meet its very high burden. Accordingly, this cause of action cannot be sustained.

POINT VI

TENANT'S DUPLICATIVE SEVENTH AND EIGHTH CAUSES OF ACTION FOR REIMBURSEMENT OF THE APRIL RENT PAID DURING THE PAUSE SHOULD BE DISMISSED

Tenant's quasi-contract seventh and eighth causes of action seeking reimbursement of funds paid based upon the doctrines of "money had and received" and unjust enrichment, respectively, must be dismissed because, as the Court of Appeals stated in *Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 388 (1987):

> "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter."

See also G&G Investments, Inc. v Revlon Consumer Prods. Corp., 283 AD2d 253 (1st Dept 2001) (unjust enrichment claim "untenable" because a valid contract exists).

CONCLUSION

Based upon the foregoing, it is respectfully requested that the Court awarded Landlord summary judgment and dismiss all of Tenant's causes of action, except the sixth for breach of lease.

Dated: New York, New York
December 22, 2020

ROSENBERG & ESTIS, P.C.
Attorneys for Defendant

By: _____
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CERTIFICATE OF COMPLIANCE

I, Howard W. Kingsley, hereby certify that, pursuant to Rule 17 of the Commercial Division Rules, the foregoing Memorandum of Law contains a total of 6,139 words (as measured by the word processing system on which it was prepared), inclusive of point heading and footnotes and exclusive of pages containing the table of contents, table of authorities and this Certificate.

Dated: New York, New York
December 22, 2020

Howard W. Kingsley

CITATIONS

1994 WL 107885
Only the Westlaw citation is currently available.

NOT APPROVED BY REPORTER OF DECISIONS FOR REPORTING IN STATE REPORTS. NOT REPORTED IN N.Y.S.2d.

Supreme Court, New York County, New York, IAS Part 15.

120 WALL STREET COMPANY, L.P., PlaintifF,
v.
The CONTINENTAL INSURANCE COMPANY, Defendant.

No. 115279/93.
|
Feb. 9, 1994.

DECISION AND ORDER

MARTIN SCHOENFELD, Justice:

***1** In this commercial real estate non-payment action defendant-tenant The Continental Insurance Company now moves, pursuant to CPLR 2201 (Stay of Action) and 7503 (Compel Arbitration), to compel arbitration of the instant claim, asserted by plaintiff-landlord 120 Wall Street Company, L.P.

Background

Plaintiff rented commercial space to defendant pursuant to a lease dated June 4, 1985. In March of 1991 defendant notified plaintiff that due to an internal reorganization, defendant would be relocating the personnel then working at the premises, but would find other use for the space. Defendant made the space available to a group of outside auditors on a temporary basis and planned to make alterations to the premises. In August of 1991 defendant had an asbestos survey conducted in anticipation of the alterations, as required by local law. The survey detected some asbestos in the area. It is difficult to ascertain exactly what happened thereafter since the parties' versions of the facts diverge significantly.

Plaintiff contends that an asbestos assessment concluded that no special action was required since the only potential danger was if a particular section of the premises were subjected to construction. Plaintiff buttresses its contention that the asbestos in question was not hazardous with copies of reports and letters from an outside tester. In response, defendant submits an affidavit by its own consultant in which he states that he found "friable" asbestos (*i.e.,* asbestos whose fibers could become airborne) and that he questions the findings of plaintiff's consultant. Defendant claims to have asked plaintiff several times to either remove or encapsulate the asbestos and that plaintiff merely ignored the requests. Plaintiff claims to have offered to do the abatement if defendant's proposed alterations entailed disrupting the potentially hazardous area but that defendant never provided the needed design plans. Defendant disputes plaintiff's view of the asbestos hazard but does not dispute having failed to furnish the plans and does not offer any evidence showing that they even existed.

In any event, it is *undisputed* that defendant continued to house its temporary operation in the premises until October 8, 1991, well after its August 1991 survey results showed the presence of asbestos. Defendant continued to pay rent on the premises, although they remained vacant, and the parties continued to negotiate until March of 1993, when defendant stopped paying rent. By letter dated March 30, 1993, defendant notified plaintiff that defendant was exercising its right to terminate its lease and demanded the return of all rent paid since October of 1991. In June of 1993 plaintiff brought the instant action to recover rent and "additional rent" due from March 1, 1993 to present. Defendant then brought the instant motion by order to show cause, which extended defendant's time to answer the complaint pending resolution of the motion.

Discussion

***2** The lease has no provision regarding abatement of any asbestos hazard. Article 58 (which is dubbed "Addendum to Article 9", which in turn is entitled "Destruction, Fire and Other Casualty") provides, in part, as follows:
If the ... demised premises shall be so damaged by fire or other casualty so as to interfere substantially with the use

of the demised premises by tenant, and it shall have been mutually determined by Landlord and Tenant, no later than thirty (30) days from the occurrence of the event, that such damage cannot be repaired within six (6) months from the date of the occurrence of the event ..., then tenant shall have the right, by giving written notice to landlord ... within fifteen (15) days after [this determination] to terminate this lease ..., in which event the [rent] shall be prorated to the date of the occurrence of such damage.... *If there be any dispute between Landlord and Tenant with respect to the foregoing the issue shall be expeditiously submitted to the American Arbitration Association in New York City for determination* and the decision of the arbitrators appointed pursuant thereto shall be binding upon the parties, and may be entered as a judgment in any court having jurisdiction thereover.

Interestingly, the term "casualty" is not defined anywhere in the lease, and no other provision of the lease makes reference to arbitration.

Not surprisingly the parties address in considerable detail the issue of whether or not the asbestos in the premises posed a significant hazard. However, the sole issue before us on this motion is whether or not the parties agreed to arbitrate the instant dispute. "[A]rbitration can be had only upon the parties clear agreement to arbitrate the pertinent dispute." *In the Matter of the Arbitration between Capital Cities/ABC v. Writers Guild of America, East,* 188 A.D.2d 441, 441 (1st Dep't 1992).

A condition precedent for the invocation of Article 58's arbitration clause is that a "casualty" have occurred. Furthermore, "because this arbitration clause is very narrow in scope, the issue of noncompliance with the condition precedent is properly for the court to determine in the first instance". *Sucher v. 26 Realty Associates,* 160 A.D.2d 996, 996 (2nd Dep't 1990).

In determining whether the presence of asbestos is a "casualty" under the lease, we must keep in mind the "cardinal principle ... that the entire contract must be considered and, as between possible interpretations of an ambiguous term, that will be chosen which best accords with the sense of the remainder of the contract (*see, Rentways, Inc. v. O'Neill Milk & Cream Co.,* 308 N.Y. 342)" *Prime Realty Holdings Co. v. Station Plaza Co.,* 122 A.D.2d 141, 142 (2nd Dep't 1986). Applying this tenet, the Court finds that asbestos was not the type of casualty contemplated by the parties.

The precise time frames used in both Article 9 and Article 58 clearly indicate that a casualty is a specific occurrence of catastrophic dimensions. Fire and flood are the traditional examples used in "act of God" clauses, of which Article 58 is an example. Asbestos contamination might be considered a "casualty" if, for example, a boiler explosion, a structural renovation, or some other *convulsive* activity in the building spewed asbestos about the premises and made them-even arguably-immediately unoccupiable. Likewise, a determination by City health officials that the building was contaminated and could not be used *might* invoke the "casualty" provisions. Here, however, the premises remained occupied for a long period of time after the presence of asbestos was discovered. While this court would never minimize the deleterious effects of asbestos, which is a known carcinogen, on human health, the instant asbestos "problem" was more akin to a "condition." The parties could-and do-differ in their interpretations of this condition, but it did not result in the "destruction", to use a term from Article 9's title, of the rented premises.

***3** Furthermore, while not strictly necessary to the instant decision, we also note that, as plaintiff argues, defendant's course of conduct militates against the applicability of Article 58. Even after the discovery of the presence of asbestos, defendant made no attempt to follow the procedure set forth in Article 58, or to demand arbitration; rather, defendant continued to occupy the premises and pay rent. Indeed, it appears that the first mention of arbitration occurred in response to plaintiff's commencement of this action.

Conclusion

"In the absence of an unequivocal agreement between the parties to arbitrate their differences, it [would be an] error ... to grant the defendant's motion to compel arbitration." *National Bank of North America v. Bruno's on the Boulevard,* 100 A.D.2d 957, 957 (2nd Dep't 1984) (citations omitted).

Accordingly, defendant's motion to compel arbitration is denied. Defendant shall file an answer to the complaint within twenty (20) days of service of a copy of this order with notice of entry.

This opinion constitutes the decision and order of the Court.

All Citations

Not Reported in N.Y.S.2d, 1994 WL 107885

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138 A.D.3d 601
Supreme Court, Appellate Division, First Department, New York.

313–315 WEST 125TH STREET L.L.C., et al., Plaintiffs–Appellants,
v.
ARCH SPECIALTY INSURANCE COMPANY, Defendant–Respondent.
Katselnik & Katselnik Group, Inc., Defendant.
[And a Third–Party Action].

April 26, 2016.

Synopsis

Background: Building owner brought declaratory judgment action against general contractor's commercial general liability insurer, seeking coverage in underlying action brought by worker for injuries sustained while working on building's construction project. The Supreme Court, New York County, Carol R. Edmead, J., granted insurer's motion for summary judgment. Owner appealed.

The Supreme Court, Appellate Division, held that reformation of general contractor's commercial general liability policy based on mutual mistake was warranted.

Reversed.

Attorneys and Law Firms

****75** Rubin, Fiorella & Friedman LLP, New York (Paul Kovner of counsel), for appellants.

Goldberg Segalla LLP, Garden City (Brendan T. Fitzpatrick of counsel), for respondent.

FRIEDMAN, J.P., ANDRIAS, SAXE, RICHTER, JJ.

Opinion

***601** Order and judgment (one paper), Supreme Court, New York County (Carol R. Edmead, J.), entered March 27, 2015, which, to the extent appealed from as limited by the briefs, granted defendant-respondent's (Arch) motion for summary judgment declaring that plaintiffs 313–315 West 125th Street L.L.C. (313 West) and Plaza Circle Enterprises, LLC have no coverage under the Arch insurance policy at issue, that plaintiffs are precluded from reforming the underlying construction contract to name 313 West, rather than nonparty Solil Management LLC (Solil), as "Owner," and that plaintiffs are not third-party beneficiaries of that contract, granted Arch's motion for summary judgment dismissing defendant Katselnik & Katselnik Group, Inc.'s (K&K) cross claim against Arch for a declaration that plaintiffs are additional insureds under the Arch policy, and denied plaintiffs' motion for summary judgment on their contractual reformation claim and for summary judgment declaring that Arch must defend and indemnify them in the underlying action, unanimously reversed, on the law, ****76** without costs, Arch's motions denied, and plaintiffs' motion granted.

Plaintiff 313 West is the owner of the building where the plaintiff in the underlying Labor Law action was injured while working on a construction project. Solil, 313 West's managing agent, hired K&K as the general contractor for the project pursuant to a written form agreement that referred to Solil as "the Owner." The General Conditions of that agreement provided, inter alia, that K&K would indemnify and hold harmless "the Owner" and its agents to the fullest extent permitted by law against claims arising out of or resulting from performance of the work.

Arch issued a commercial general liability policy of insurance to K&K. When plaintiffs tendered their defense in the underlying action, Arch denied the tender on the ground that the underlying construction contract named Solil as the Owner ***602** and did not reference plaintiffs. As a result, plaintiffs commenced this declaratory judgment action seeking coverage. To the extent the agreement between Solil and K&K incorrectly identified Solil as the Owner, plaintiffs sought reformation of the contract.

Contrary to the motion court's conclusion, plaintiffs' contention that the agreement between Solil and K&K should be reformed to name 313 West rather than Solil as the "Owner" has merit.

"A claim for reformation of a written agreement must be grounded upon either mutual mistake or fraudulently induced unilateral mistake" (*Greater N.Y. Mut. Ins. Co. v. United States Underwriters Ins. Co.,* 36 A.D.3d 441, 443, 827 N.Y.S.2d 147 [1st Dept.2007]). To succeed, the party asserting mutual mistake must establish by "clear, positive and convincing evidence" that the agreement does not accurately express the parties' intentions or previous oral agreement (*Amend v. Hurley,* 293 N.Y. 587, 595, 59

N.E.2d 416 [1944][emphasis deleted]; *see also Nash v. Kornblum,* 12 N.Y.2d 42, 46, 234 N.Y.S.2d 697, 186 N.E.2d 551 [1962]). Parol evidence may be used (*see VNB N.Y. Corp. v. Chatham Partners, LLC,* 125 A.D.3d 517, 518, 5 N.Y.S.3d 367 [1st Dept.2015], *lv. denied* 25 N.Y.3d 910, 2015 WL 3605177 [2015]), and reformation is an appropriate remedy where the wrong party was named in the contract (*see e.g. EGW Temporaries, Inc. v. RLI Ins. Co.,* 83 A.D.3d 1481, 919 N.Y.S.2d 752 [4th Dept.2011]). On the record before us, plaintiffs clearly and convincingly established that K&K intended to indemnify the true owner, 313 West, and that, as a result of mutual mistake, the agreement misidentified Solil, the managing agent, rather than 313 West itself, as the "Owner" of the property where the work was to be performed.

The agreement was signed by Solil's director of commercial management, Joseph Grabowski, "As Agent." At his deposition, Grabowski testified that he "negotiated the price and ... signed the contract for the owner," by which he meant 313 West. Louisa Little, who had been "the Manager of Solil" since 2008, stated in an affidavit that Grabowski executed the contract "as agent for the Owner ..., 313–315 [313 West]," but that "[i]n reducing the parties' agreement to writing, Solil ... was erroneously inserted in the provision for 'Owner' ... through the mutual mistake of both parties." Numerous provisions in the agreement were structured around the true property owner, 313 West, as the real party in interest, for whose benefit the work was performed.

K&K's vice president, Arkadi Katselnik, confirmed that he agreed and intended to indemnify and procure additional insured coverage for 313 West. He stated in an ****77** affidavit that ***603** "[i]n accordance with" the agreement, K& K "procured all insurance policies required thereunder, as well as provided Solil with executed certificates of insurance which designated Solil and the 313–315 [313 West] Parties as additional insureds with respect to said insurance policies, to the extent permitted by applicable law." Numerous certificates of insurance naming 313 West as an additional insured on K&K's policies were offered to show the intent of the parties, i.e., that 313 West was to be protected by the indemnity clause in the agreement as the real party in interest.

Accordingly, the construction contract's provision requiring K&K to procure insurance covering "the Owner" as an additional insured referred to 313 West, rather than Solil, and the amendment of the insurance policy "to include as an additional insured those persons or organizations who are required under a written contract with [K&K] to be named as an additional insured" effectively names plaintiffs as additional insureds.

All Citations

138 A.D.3d 601, 30 N.Y.S.3d 74, 2016 N.Y. Slip Op. 03105

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170 A.D. 484
Supreme Court, Appellate Division, Second Department, New York.

ALFRED MARKS REALTY CO.
v.
HOTEL HERMITAGE CO.

December 10, 1915.

Synopsis
Appeal from Appellate Term, Second Department.

Action by the Alfred Marks Realty Company against the Hotel Hermitage Company. From an order of the Appellate Term, affirming a judgment of the Municipal Court for plaintiff, defendant appeals. Reversed, and complaint dismissed.

Attorneys and Law Firms

****179 *484** Ashton Parker, of New York City (Walter G. Gooldy, of New York City, on the brief), for appellant.

John C. Judge, of Brooklyn, for respondent.

Argued before JENKS, P. J., and CARR, MILLS, RICH, and PUTNAM, JJ.

Opinion

PUTNAM, J.

This appeal is from an affirmance of a judgment for plaintiff. In January, 1914, defendant contracted with plaintiff's assignor, the International Yacht Publishing Company, for insertion of its advertisement in a 'Souvenir and Program of International Yacht Races,' for which defendant agreed to pay 'upon publication and delivery of one copy of the same.' These books, priced at 25 cents, were to serve as an advertising medium. In the early part of August, some of the books were printed and bound, with defendant's hotel advertisement opposite the picture of a yacht. About 2,500 copies, at 25 cents each, were sold and distributed, and about 400 or 500 copies placed on news stands for sale.

About August 15th or 17th, the Yacht Club committee ***485** having charge of the races (in which this publication company had no voice or control) declared the same off, because of the war. The challenger, Shamrock IV, did not arrive till August 20th, and at this time three American ****180** yachts were having trials to ascertain which should be chosen to defend the cup in the September races. On August 25th plaintiff's assignor wrote defendant that a sample copy of Souvenir and Program of the International Yacht Races, with defendant's advertisement inserted therein, had been mailed.
'As you are no doubt aware, the cup races have been postponed until 1915 on account of European disturbances. Even without the races, the book as a souvenir is a good seller and a good advertisement. We expect an unprecedented sale before and after the races, many of which have already subscribed for cash in advance. We claim it is the best book ever for the price. The work will be placed on public sale later. Kindly remit us your check.'

Obviously defendant and the publishing company had in view the September cup racing. Defendant's advertisement was in connection with this contest. A program is for events to which it relates, and a souvenir 'cannot recall what has not taken place.' Alfred Marks Realty Co. v. 'Churchills,' 153 N. Y. Supp. 264, 265. The issue of the exhibit here, though styled program and souvenir, was anticipatory. Such an issue and sale for the convenience of plaintiff's assignor is not a 'publication' in the sense of this contract. A condition is implied of two contestants being named for the time and place of a race; and, where this feature is obvious, a failure, by giving up the expected contests, abrogates the contract. Lorillard v. Clyde, 142 N. Y. 456, 463, 37 N. E. 489, 24 L. R. A. 113.

This is not where a promisor has failed to guard himself against a vis major. It is not a performance on one side, the other having no appropriate clause to excuse default; but it is where the situation, as it turns out, has frustrated the entire design on which is grounded the promise. An advance issue of the programs cannot fairly be held to be what defendant was to pay for. The object in mutual contemplation having failed, plaintiff cannot exact the stipulated payment.

The order of the Appellate Term should be reversed, and the ***486** judgment of the Municipal Court for plaintiff reversed, with costs of the appeal, and the complaint dismissed, with costs. All concur.

All Citations

170 A.D. 484, 156 N.Y.S. 179

Alfred Marks Realty Co. v. Hotel Hermitage Co., 170 A.D. 484 (1915)

156 N.Y.S. 179

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35 N.Y.2d 361
Court of Appeals of New York.

Diane P. ANDRE, Appellant,
v.
Jean S. POMEROY, Respondent, et al., Defendants.

Nov. 21, 1974.

Synopsis

Action for injuries sustained in rear-end collision. The Supreme Court, Special Term, Westchester County, Anthony J. Cerrato, J., denied plaintiff's motion for summary judgment, and plaintiff appealed. The Supreme Court, Appellate Division, 44 A.D.2d 703, 354 N.Y.S.2d 685, affirmed, and thereafter certified question as to propriety of trial court's order. The Court of Appeals, Wachtler, J., held that negligence of host driver in respect to rear-end collision which injured passenger was conclusively established by driver's own uncontested admission that, while driving in heavy traffic, she took her eyes off the road to search for something in her purse and drove directly into vehicle in front of her; passenger was not contributorily negligent where it was conceded that she was simply sitting in rear of vehicle, reading, at time of collision.

Question answered in negative; order of Appellate Division reversed; and plaintiff's motion for summary judgment granted.

Breitel, C.J., dissented and filed opinion, in which Jasen and Samuel Rabin, JJ., concurred.

Attorneys and Law Firms

***362** ****132** ***853** Arthur N. Seiff and George A. Berkowitz, New York City, for appellant.

Gerald E. McCloskey and Rocco Conte, White Plains, for respondent.

Opinion

***363** ***854** WACHTLER, Judge.

Plaintiff in this personal injury action claims that she is entitled to summary judgment. We agree that on the facts of this particular case the motion should be granted.

The facts are uncontested. On November 6, 1969 the defendant, Jean Pomeroy, was driving her car on North Broadway in White Plains. It was early in the morning, and the traffic was heavy or as the defendant herself stated 'The traffic is turning here, turning there, turning somewhere else. I'm watching the car ahead of me.'

The car directly in front of her was owned by August Pitou. Mrs. Pomeroy followed the Pitou vehicle for approximately 200 feet and '(then) I looked down for a second to get a compact out of my purse, and when I looked up again this car was closer to me than I thought and I jumped on the brake.' The defendant made no effort to turn her wheel to the right or left and her car crashed 'straight on' into the rear of the Pitou vehicle, which at that time was either stopped or moving very slowly. As the cars collided, the defendant's daughter—the plaintiff in this action—who had been reading in the rear of the defendant's car, was thrust against the front seat and sustained injuries to her face, neck, back and knees.

At the scene of the accident the defendant admitted that the collision occurred in this manner, and she later filed an accident report to the same effect. After the plaintiff commenced this suit the defendant repeated this version at an examination before trial and the ****133** plaintiff moved for summary judgment. Special Term denied the motion because 'the relationship between the plaintiff and the above named defendant, to wit, mother and daughter, create(s) issues which, despite the examination before trial, must await a plenary hearing.' The Appellate Division affirmed without opinion. Justice Shapiro dissented because in his opinion 'there is not the semblance of a triable issue.'

On the appeal now before us—by leave of the Appellate Division—the defendant argues that summary judgment was ***364** properly denied because the negligence issue is essentially a jury question.

Summary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law. Since it deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues (Millerton Agway Co-op. v. Briarcliff Farms, 17 N.Y.2d 57, 268 N.Y.S.2d 18, 215 N.E.2d 341). But when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only

serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated.

Negligence cases, supplying the bulk of the Trial Calendar, are not exempt from this general policy. There is, in short, no absolute prohibition against granting summary judgment in such cases, as there was at one time in this State (see 4 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 3212.03). CPLR 3212 now permits summary judgment 'in any action'[1] and that includes personal injury suits (Whitely v. Lobue, 24 N.Y.2d 896, 301 N.Y.S.2d 635, 249 N.E.2d 476).

The statute directs that 'The motion shall be granted if, upon all the papers and proof submitted, the cause of action * * * shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.' (CPLR 3212, subd. (b).) Normally, if the facts are uncontested summary judgment is appropriate. However, this is not always so in negligence suits, because even when **855 the facts are conceded there is often a question as to whether the defendant or the plaintiff acted reasonably under the circumstances. This can rarely be decided as a matter of law.

Thus as a practical matter summary judgment continues to be a rare event in negligence cases. But this does not mean that the court is obliged, on policy grounds, to ferret out speculative issues 'to get the case to the jury,' where the trial may disclose something the pretrial proceedings have not. It simply means, as one learned ***134 treatise observes, that when the suit is *365 founded on a claim of negligence, the plaintiff will generally be entitled to summary judgment 'only in cases in which there is no conflict at all in the evidence, the defendant's conduct fell far below any permissible standard of due care, and the plaintiff's conduct either was not really involved (such as with a passenger) or was clearly of exemplary prudence in the circumstances.' (4 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 3212.03, op. cit.).

This is one of those rare cases which is ripe for summary judgment. There is no claim that the plaintiff was contributorily negligent, and indeed there could be none on this record since it is conceded that the plaintiff was simply sitting in the rear of the defendant's car, reading, at the time of the collision. As to the defendant's negligence, that was conclusively established by her own uncontested admission that while driving in heavy traffic she took her eyes from the road, to search for something in her purse, and drove directly into the car in front of her.[2] This could not be considered reasonable conduct under any standard and it does not take a trial to resolve that point.

The order of the Appellate Division should be reversed and the plaintiff's motion for summary judgment granted. The certified question should be answered in the negative.

BREITEL, Chief Judge (dissenting).

I dissent and would affirm the order of the Appellate Division. Defendant Pomeroy's negligence was not established as a matter of law, the only basis for granting summary judgment.

Professor Siegel has stated succinctly: 'The very question of whether the defendant's conduct amounts to 'negligence' is inherently a question for the fact-trier in all but the most egregious instances. Even the so-called 'rear-end' collision, the one most presumptively favorable to the plaintiff, can readily be shown to present factors necessitating trial' (Siegel, Practice Commentary to CPLR 3212, C3212:8, McKinney's Consol. *366 Laws of N.Y., Book 7B, p. 430; see, also, Hajder v. G. & G. Moderns, 13 A.D.2d 651, 213 N.Y.S.2d 880; 4 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 3212.03). The rule of course is especially applicable to automobile collision cases.

Indeed, appellate courts, recognizing the presence of issues of fact, have regularly denied summary judgment relief in rear-end collision ***135 cases (see, e.g., Guigliano v. Basirico, 33 A.D.2d 1045, 308 N.Y.S.2d 815; Bullard v. Graham, 33 A.D.2d 550, 304 N.Y.S.2d 492; Velten v. Kirkbridge, 20 A.D.2d 546, 245 N.Y.S.2d 428; Colosino v. Rosenstock, 15 A.D.2d 663, 223 N.Y.S.2d 736; Poulter v. Masullo, 13 A.D.2d 674, 213 N.Y.S.2d 548; Kind v. Barone, 12 A.D.2d 625, 208 N.Y.S.2d 147; Block v. Acerra, 12 A.D.2d 525, 207 N.Y.S.2d 845; see, a fortiori, **856 Small v. Tyres, 33 A.D.2d 1055, 308 N.Y.S.2d 730 (defendant's unattended automobile rolled downhill); Schneiderman v. Metzger, 30 A.D.2d 829, 292 N.Y.S.2d 570 (defendant, looking at traffic light in distance, hit plaintiff's car in rear); cf. Blixton v. MacNary, 23 A.D.2d 573, 574, 256 N.Y.S.2d 362, 363 (defendant, who admitted fault, driving on wrong side of road, collided head-on with plaintiff's car); Cicero v. Clark, 23 A.D.2d 583, 256 N.Y.S.2d 705 (defendant fell asleep at wheel); Schneider v. Miecznikowski, 16 A.D.2d 177, 226 N.Y.S.2d 944 (defendant, traveling at between 40 and 50 miles per hour, shifted car into reverse); Donahue v. Romahn, 10 A.D.2d 637, 196 N.Y.S.2d 887 (defendant driver fell asleep or 'blacked out'); Hatch v. King, 33 A.D.2d 879, 307 N.Y.S.2d 515 (plaintiff's car struck parked car in rear, directed verdict denied); contra, Opalek v. Oshrain, 33 A.D.2d 521, 305 N.Y.S.2d 675 (facts as in this case but

defendant admitted fault)).

The crucial question, which must be answered in the affirmative if plaintiff is to prevail, is whether defendant's conduct, under the circumstances, constituted negligence as a matter of law, that is, whether she failed to act as a reasonably prudent person would under the circumstances. And, in all but the most extraordinary instances, whether a defendant has conformed to the standard of conduct required by law is a question of fact (Sadowski v. Long Is. R.R. Co., 292 N.Y. 448, 455, 55 N.E.2d 497, 500; see Restatement, Torts, 2d, s 328B, subd. (b); Prosser, Torts (4th ed.), p. 207).

As the court stated in Sadowski v. Long Is. R.R. Co., 292 N.Y. 448, 455, 55 N.E.2d 497, 500, Supra 'Essentially, what is negligence in a given case is a question of fact. Each case depends upon its own peculiar circumstances. Decisions in other actions in which damages are sought for personal injuries furnish no criterion or guide for determination of what is or is not negligence in a ***367** particular case involving its own peculiar facts and circumstances. Under circumstances existing in one case the ordinary care required might not be the same as that required under other circumstances. Negligence arises from breach of duty and is relative to time, place and circumstances. Mink v. Keim, 291 N.Y. 300, 304, 52 N.E.2d 444, 446.'

Defendant, upon whose uncontradicted account plaintiff relies, described the collision in her motor vehicle accident report as follows: 'car No. 1 (defendant's vehicle) slowed down but was unable to stop in time because of wet road.' This description is consistent with her use *****136** of the term 'coasted' to characterize the motion of her vehicle prior to impact. She never admitted that she 'crashed' her vehicle into the Pitou car, and probably referred to a skidding on the wet road once she applied her brakes.

This court has held that whether skidding constitutes negligence is a question of fact for the jury (Pfaffenbach v. White Plains Express Corp., 17 N.Y.2d 132, 136, 269 N.Y.S.2d 115, 117, 216 N.E.2d 324, 325). The Pfaffenbach case held that skidding established on behalf of a passenger a prima facie case of negligence against an operator defendant and presented an issue of fact for the jury. In doing so, Pfaffenbach overruled prior cases which had held that mere skidding was not probative of negligence because of alternative innocent explanations for the skid. The effect of the holding by the majority in this case, if all defendant Pomeroy did was to skid, is now to raise skidding on a wet road into negligence as a matter of law. This is hardly a tenable view on the particular facts and does not accord with driving experience.

Moreover, it is not true that always, as a matter of law, an automobile operator's momentary glance away from the road is not the act of a reasonably prudent person. There is no requirement either of law or of good driving practice that an automobile operator must keep his eyes rigidly fixed on the road ahead. Indeed, such invariable conduct could itself be negligent. Apart from normal safety precautions, such as rear and sideview mirror checks, a reasonably ****857** prudent driver is repeatedly presented with familiar situations which involve a brief glance away from the road ahead, for example, securing change for a toll, reaching for a thruway toll ticket, putting on sunglasses, ***368** reaching for a roadmap, tuning in a radio station, handing an object requested by a passenger.

Perhaps the toll change situation is most similar to the instant case. Traffic often 'bunches up' at the approach to a toll booth, and the movement of the vehicles in line usually is 'stop-and-go'. A brief glance away from the road, to secure change from a handbag to pay the toll, hardly constitutes negligence as a matter of law.

Surely if the litigation situation were reversed, a court, and certainly not this court, would never find a driver, on the solitary fact of a momentary glance away from the road, guilty of contributory negligence as a matter of law. Yet the standard is the same in either facet of an automobile negligence case: Whether the driver acted as a reasonably prudent person under the circumstances (Restatement, Torts, 2d, s 464, subd. (1)). Notably, defendant was traveling at a very slow rate of speed, five miles per hour, when she momentarily looked away from the road. Her foot was off the accelerator. The Pitou car was slowing down or was stopped about a car-length away. *****137** Defendant jammed on the brakes, but her car 'coasted', she said, into the Pitou vehicle.

In stark contrast to the instant case are those in which the courts have found negligence as a matter of law: carrying a gun on one's shoulder in a city street; leaving a spirited horse unhitched in a street; sending out a train without brakes; sending dynamite by express without disclosing its contents; deliberately walking in front of a rapidly approaching automobile; crossing a city street or walking in front of an approaching train without looking (see Richardson, Evidence (10th ed.), s 120, and cases cited).

Whitely v. Lobue, 24 N.Y.2d 896, 301 N.Y.S.2d 635, 249 N.E.2d 476, in which this court sustained summary judgment in favor of a plaintiff in an automobile case, offers a perfect foil to this one. In that case, on a clear, dry day, the automobile operated by defendant, who stated that she must have looked away from the road for a moment, left the westbound lane of a multilane parkway, crossed the divider strip and crashed head-on into plaintiff's car in the

eastbound lane.

Besides the contradictory versions by Mrs. Lobue of the accident in her accident report, in the hearing before the Department ***369** of Motor Vehicles referee, and in her examination before trial, she admitted, in effect, to gross incompetence in her driving. She panicked, put the brakes on fast, and was stunned striking her head against the glass. Later she did not recall these details. On the motion for summary judgment she averred that she had been rendered unconscious by the accident, and that she signed the accident report without reading it. She had been traveling at 40 miles per hour.

The Whitely case presented no issues of fact. In truth, the Whitely case is a pristine classic for the granting of summary judgment. The only inference, if indeed any inference at all was necessary in the light of Mrs. Lobue's statements and testimony, was negligence as a matter of law.

Of course, it is realistic to recognize that the courts below were influenced by the relationship between plaintiff and defendant Pomeroy, namely, adult daughter and mother. Plaintiff's case is taken largely from defendant's own statements on examination before trial. Her testimony was bare of detail. The quoted excerpts reveal neither question nor answer to disclose the need to retrieve or the purpose in retrieving the compact from her handbag. Such recognition by Special Term of the family relationship should not and does not justify an overcorrection, if that it be, to find negligence as a matter of law. Of course, the case was 'suspect', as ****858** a practical matter. Reliance on or influence by the suspect aspect of the case does not alone make the *****138** determination below error as a matter of law, so long as that determination was correct.

Summary judgment is good when there is no issue to be tried. It is unauthorized when there is an issue. Negligence is one of the most relative terms in the jurisprudence. The identical act may or may not be negligent. Lapses from extraordinary standards are not negligence. Lapses from one's own ordinary usage are not Ipso facto negligence. Failure to do what another would or would not do in the same circumstances is not necessarily negligence. What would be negligence in retrospect is not negligence in prospect. It is only in prospect to fail to do what the reasonably prudent person would have done or not done in the circumstances relative to time, place, and community standards, absent defined statutory standards, that the law ***370** declares is negligent. It is for that reason that it is very rare indeed that the issue is not one of fact for the jury.

Always to be kept in mind is that contributory negligence is the converse of the acts under scrutiny. This court has said repeatedly that contributory negligence may almost never be found as a matter of law but presents a jury issue of fact. In Rossman v. La Grega, 28 N.Y.2d 300, 305—308, 321 N.Y.S.2d 588, 592—595, 270 N.E.2d 313, 315—318 it was said: 'Indeed, the general softening of the rigidities of the doctrine of contributory negligence in New York may be seen in recent cases where the injured person is himself suing and thus has the burden of showing he was not negligent. The tendency is to treat it almost always as a question of fact' (p. 306, 321 N.Y.S.2d p. 593, 270 N.E.2d p. 316).

Instances are innumerable. A few examples are illustrative (see Wartels v. County Asphalt, 29 N.Y.2d 372, 379, 328 N.Y.S.2d 410, 415, 278 N.E.2d 627, 631; Orwat v. Smetansky, 22 N.Y.2d 869, 870—871, 293 N.Y.S.2d 126, 127—128, 239 N.E.2d 749, 750—751; Luce v. Hartman, 6 N.Y.2d 786, 787—788, 188 N.Y.S.2d 184, 159 N.E.2d 677; Schuvart v. Werner, 291 N.Y. 32, 35, 50 N.E.2d 533; Tedla v. Ellman, 280 N.Y. 124, 134, 19 N.E.2d 987, 992; Wardrop v. Santi Moving & Express Co., 233 N.Y. 227, 229, 135 N.E. 272; Wagner v. International Ry. Co., 232 N.Y. 176, 182, 133 N.E. 437, 438).

Finally, the deluge of accident cases that for years encumbers the civil parts of the courts will not be perceptibly alleviated by the occasional disposition by summary judgment. It is not even a drop in the bucket, but at best a drop in the ocean of tort litigation. Indeed, the abuse of the summary judgment motion in negligence actions seems to have had the net effect of increasing expenditure of judicial energy (see 4 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 3212.03, p. 32—142.15, op. cit.). Moreover, as every litigation sophisticate in the negligence field knows, the great issue is not liability but the damages *****139** recoverable for injuries. Of course, the plaintiff would like to go to the jury solely on the issue of damages, of a dubious extent at best, and limit or preclude the inquiry into the cause of the accident which will create little sympathy for her in this mother-daughter litigation. To be realistic and candid juries often compromise liability issues by adjusting the damages recovery, but this is not a good reason for keeping them ignorant of the facts of liability, when, as a matter of law, they ought to pass on them.

***371** Accordingly, I dissent and would affirm the order of the Appellate Division and would answer the certified question in the affirmative.

GABRIELLI, JONES and STEVENS, JJ., concur with WACHTLER, J.

BREITEL, C.J., dissents and votes to affirm in a separate opinion in which JASEN and SAMUEL RABIN, JJ., concur.

Order reversed, with costs, and plaintiff's motion for summary judgment granted. Question certified answered in the negative.

All Citations

35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131

Footnotes

1 The statute only has limited application in matrimonial actions (CPLR 3212, subd. (d)).

2 We would note, as Justice Shapiro did at the Appellate Division, that if the defendant's carrier feels that the insured is concealing a valid defense, or otherwise obstructing the defense of the action brought by her daughter, the proper remedy is to disclaim liability on that ground (Coleman v. New Amsterdam Cas. Co., 247 N.Y. 271, 160 N.E. 367; Thrasher v. United States Liab. Ins. Co., 19 N.Y.2d 159, 278 N.Y.S.2d 793, 225 N.E.2d 503; Insurance Law, s 167, subd. 5).

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185 A.D.3d 34
Supreme Court, Appellate Division, First Department, New York.

CENTER FOR SPECIALTY CARE, INC., et al., Plaintiffs–Respondents,
v.
CSC ACQUISITION I, LLC, et al., Defendants–Appellants.

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ENTERED: JUNE 25, 2020

Synopsis

Background: Owners of surgical center brought action against acquisition limited liability company (LLC), management LLC, and doctor for money damages based on defendants' alleged breach of asset purchase agreement (APA), lease agreement, administrative service agreement (ASA), and a personal guarantee of lease after defendants allegedly defaulted on the APA, failed to pay rent and security deposit, failed to provide certificates of insurance, and failed to name property owned by defendant as beneficiary of doctor's life insurance policy. The Supreme Court, New York County, Charles E. Ramos, Senior Judge, granted owners' surgical center's summary judgment motion and denied defendants' summary judgment motion. Defendants appealed.

Holdings: The Supreme Court, Appellate Division, Mazzarelli, J., held that:

owners of surgical center did not prevent acquisition LLC, management LLC, and doctor from performing under lease of surgical center or guarantees;

purpose of lease between parties was not frustrated;

acquisition LLC, management LLC, and doctor materially breached APA;

owners of surgical center did not prevent acquisition LLC, management LLC, and doctor from timely filing for certificate of need (CON);

alleged misrepresentation by owners of surgical center could not prevent enforcement of APA; and

doctor's failure to perform under ASA was not reasonably justified and constituted a breach of the ASA.

Affirmed and appeal dismissed.

****8** Defendants appeal from the judgment of the Supreme Court, New York County (Charles E. Ramos, J.), entered January 16, 2018, to the extent appealed from, in plaintiffs' favor on liability as to breach of an asset purchase agreement, an administrative services agreement, a lease agreement, and a personal guarantee. Defendants also appeal from the order of the same court and Justice, entered January 8, 2018, which granted plaintiffs' motion for summary judgment and denied defendants' motion for summary judgment.

Attorneys and Law Firms

Kasowitz Benson Torres LLP, New York (Marc E. Kasowitz, Daniel R. Benson, Sarmad M. Khojasteh and Henry B. Brownstein of counsel), for appellants.

Manatt, Phelps & Phillips, LLP, New York (Ronald G. Blum, Prana A. Topper and Andrew Case of counsel), for respondents.

Dianne T. Renwick, J.P., Angela M. Mazzarelli, Ellen Gesmer, Cynthia S. Kern, JJ.

Opinion

MAZZARELLI, J.,

****9 *35** Plaintiff Center for Specialty Care, Inc. (CSC) operated an ambulatory surgical center located at 50 East 69th Street in Manhattan. CSC, a family business, was a leasehold tenant of plaintiff 50 East 69th Street Corporation (50 East), also controlled by the family, which owned the building that housed the surgical center. CSC held a Certificate of Need (CON)[1] from the Department of Health in accordance with Public Health Law article 28. In 2013, the family that owned CSC ***36** and 50 East decided to sell the business, and lease the building to a buyer that would operate the medical facility. They began to solicit bids in 2014.

A bid to purchase CSC was made by defendant Glen Klee Lau, M.D., and accepted by CSC. Lau is a surgeon who, since 1998, has acquired an ownership interest in around 20 surgical centers that he manages in California, Las Vegas, New York, and New Jersey. Lau's bid proposed a purchase price of $5 million and monthly lease payments of $100,000. The parties agreed to structure the transaction around four separate agreements: (1) an asset purchase agreement (APA); (2) a lease of the building; (3) an administrative service agreement (ASA); and (4) a personal guarantee of the Lease running from the individual defendants, doctors who joined Lau's venture, to CSC.

The overarching agreement was the APA, dated August 4, 2015, which was between CSC on the one hand, and defendants CSC Acquisition I, LLC and Midtown Fifth Avenue Management, LLC, entities set up by Lau, and Lau individually, on the other hand. The contract price for the sale required payment of a $500,000 deposit into an escrow account upon execution of the APA, with closing of the APA to take place on or before June 1, 2016. The APA contained standard integration and no waiver clauses. The parties also agreed to "take ... all such action as may reasonably be necessary or appropriate to achieve the purposes" of the APA.

Perhaps the most important action required of the parties would be to ensure that defendants could be issued their own CON, which would be necessary for them to operate the surgical center. To that end, CSC represented in the APA that it had "not been served with any notice by any governmental authority which ... requires the performance of any work or alterations on the Facility" such that would possibly impede the issuance of a CON to defendants, except as set forth in Exhibit M. Exhibit M, in turn, acknowledged that a DOH survey on July 9, 2014 had found that CSC "was not in compliance with certain structural requirements," but that "[r]emediation works undertaken to address the cited defaults were approved following a subsequent DOH survey on ... June 29, 2015, except for a life safety issue pertaining to remote means of egress." The representation further stated that CSC had worked with "a healthcare architect, ****10** a contractor and the DOH to address this remaining issue," and that CSC "currently contemplated that the DOH will waive this requirement in ***37** exchange for enhancement of existing safety measures through the installment of additional sprinklers, heat and smoke detectors," which were in the process of being designed.

For its part with respect to legalizing the arrangement, CSC Acquisition was obliged to:

> "obtain all necessary approvals from the DOH ... no later than June 1, 2016. Without limiting the foregoing, the Buyer shall file its [CON] application ... no later than September 1, 2015. Seller shall fully cooperate with the Buyer in its CON application process including by providing any information needed to complete such application which is in the Seller's control. The Buyer shall provide a copy of its proposed CON application ... as well as any and all other documents ... to the Seller no later than ten (10) days prior to the date that the Buyer intends to submit same to the DOH...."

Otherwise, Lau and his entities "jointly and severally" agreed that the APA "constitute[d] a legally valid and binding obligation of the Buyer, enforceable against the Buyer in accordance with its terms." Further, they represented that they had the financial wherewithal to perform under the APA and the Lease. They also represented that they "fully and completely investigated the Assets, the Contracts, the Permits, the Facility, the premises where the Facility is located, the books and records ... and the operations of the Seller and the Facility," and that none of them had "relied on any representations, warranties or outside agreements, whether written or oral, of the Seller other than as expressly set forth within this Agreement." Finally, the APA recited, "Dr. Lau has the financial ability, knowledge and skill necessary to perform his obligations under the [ASA]."

The APA required CSC Acquisition to enter into the Lease, which the former provided would take effect on September 1, 2015 (this date was ultimately extended to October 1). The Lease required CSC Acquisition to provide a $6 million security deposit or a letter of credit in that amount. Lau elected, as permitted by the Lease, to make this payment through the combination of a $3 million letter of credit, a $3 million insurance policy on the life of Lau naming 50 East as the beneficiary, and a signed guaranty from the four individual defendants.

The APA also required CSC and Lau to enter into the ASA, under which Lau would act as the administrator of CSC and ***38** "have substantial control over the operations and financial performance" thereof. Under the ASA, CSC retained Lau to be the "sole and exclusive Administrator" of the ambulatory surgery facility beginning September 1, 2015 and continuing through termination of, or closing under, the APA. The ASA noted that "consummation of the APA is subject to" DOH approval of the CON, which the parties anticipated would "take at least several months." Lau agreed in the ASA to make "advances" to CSC to cover its operations, in the form of, inter alia, the rent due under the Lease. The ASA provided that Lau would not be able to recover these advances if the APA did not close

before June 1, 2016 or was terminated for cause. Lau also warranted that the ASA "constitutes a legally valid and binding obligation ... enforceable against [him] in accordance with its terms."

The parties agreed in the APA that time was of the essence with respect to the performance of their respective obligations. The obligation of both sides to close was contingent upon receiving "[a]ll ****11** approvals required by applicable law to be obtained from any governmental or regulatory entity" before the closing date, "including, but not limited to, Buyer's receipt of a non-contingent, unconditional final approval" of the CON to operate the facility. The APA recognized that plaintiffs had considered multiple bids and that holding another bidding process if defendants defaulted was impracticable. Thus, the agreement provided that, if the closing did not take place, "the Seller shall suffer substantial losses and damages which shall be difficult to quantify," and that if the sale were not closed by June 1, 2016, defendants "shall pay to the Seller, as liquidated damages and not as a penalty, a sum equal to" the $500,000 APA deposit plus the $6 million security deposit under the Lease.

Even though the relevant documents were dated August 4, 2015, they did not become effective until September 10, 2015, when plaintiffs delivered them and declared them to be effective. When they delivered the executed documents, plaintiffs reminded Lau that occupancy under the Lease and operation under the ASA were conditioned on receiving the fully-executed guarantee and the security deposit represented by a $3 million letter of credit and evidence of the insurance policy on Lau's life in the same amount. Plaintiffs requested the documents "as soon as possible so that there can be a smooth transition on October 1st."

Lau ran into difficulty securing a potential letter of credit with a bank. According to defendant Chin's testimony at his ***39** deposition, bank representatives were concerned that Lau would have too little control over the surgical center and that there was no consideration for the Lease. Lau testified that the bank representative had said that the amount sought was "excessive for this kind of health care transaction." Because Lau could not procure the letter of credit, he was not able to satisfy the security deposit requirement of the APA. Further, he did not make the rental payment required on October 1, 2015, the effective date of the Lease, nor did he begin performance under the ASA. Lau also did not submit the CON application to DOH by September 1, 2015, as required by the APA.

On September 30, 2015, the day before the effective date of the Lease, Lau emailed plaintiffs' representatives to discuss the possibility of altering the Lease so it would go into effect after DOH approval of the CON. Defendants' counsel wrote separately to plaintiffs' counsel that they should have the new lease become operative after CON approval and upon closing on the APA. Lau testified that CSC Acquisition never paid rent to 50 East because they "never completed the transaction approved by the [DOH] [so] that I could lease the space." The parties conducted extensive negotiations seeking to amend the deal, but were unable to arrive at a satisfactory settlement.

By letter dated November 11, 2015, plaintiffs' counsel served defendants with a notice of default under the APA for violating the warranty concerning financial ability, failing to maintain financial solvency, and failing to take steps reasonably necessary to achieve the APA's purposes. By separate letter dated November 11, 2015, plaintiffs' counsel served a notice of default under the Lease, for failure to pay rent and the security deposit, failure to provide certificates of insurance, and failure to name 50 East as the beneficiary on Lau's life insurance policy. In a third letter dated November 11, 2015, plaintiffs' counsel served a notice of default under the ASA, for Lau's failure to make advances to cover operations and failure to commence his role as the facility administrator.

****12** Defendants did not cure the defaults cited by plaintiffs. By letter dated December 29, 2015, defendants' counsel terminated the APA and ASA based on CSC's refusal under APA § 7(b) to cooperate fully with their CON application. Defendants proposed to reinstate the contracts with various changes to the ASA, increase the rent beginning March 2016 with Lau guaranteeing payments under the ASA, and provide an 18–month period to seek CON approval. Alternatively, defendants ***40** sought a return of their $500,000 deposit. Nevertheless, plaintiffs terminated the APA, the ASA, and the Lease, citing defendants' failure to remedy their breaches.

Plaintiffs commenced this action for money damages based on defendants' alleged breach of each of the relevant contracts. In their answer, defendants alleged that Lau signed the contracts with plaintiffs "[b]elieving the signatures were simply part of the [CON] application process," and that plaintiffs breached the APA by not providing financial documents to support the CON application. Defendants moved for summary judgment dismissing the complaint, arguing that there was no meeting of the minds for any of the contracts. They also asserted frustration of purpose, because the premises could not be occupied under the Lease without issuance to them of a CON. Additionally, they claimed that plaintiffs failed to satisfy conditions precedent, since plaintiffs did not provide financial records for defendants' CON application,

nor did they remedy the life safety violations. Finally, they argued that plaintiffs were not entitled to liquidated damages, because recovery under that provision would be disproportionate to actual loss.

Plaintiffs also moved for summary judgment. They argued that defendants breached the Lease by failing to pay the security deposit and rent, and that the Lease was entered into after arm's-length negotiations between sophisticated, counseled businesspeople. Plaintiffs further argued that the guarantees were breached by the individual defendants' failure to ensure compliance with the Lease; that the APA was breached because defendants did not file the CON application by September 1, 2015; and that the ASA was breached because Lau never made advances to cover CSC's operating costs or managed the facility. The motion court denied defendants' motion and granted plaintiffs'.

Defendants argue on appeal that the contracts are not enforceable. First, they claim, the Lease was never intended to go into effect until the CON was transferred by DOH, and was only executed because DOH would not have processed the application without it. Indeed, they claim, it would have been impossible for defendants to operate as a surgical center without the CON. They further assert that, in any event, the entire arrangement was dependent on the issuance of the CON and that plaintiffs' own actions frustrated defendants' efforts to obtain the CON. Specifically, defendants argue, plaintiffs failed to disclose the nature of the various code violations imposed by ***41** DOH on the building, and abandoned attempts to obtain a waiver. Defendants further argue that plaintiffs prevented them from submitting the CON application before the September 1, 2015 deadline, because they did not even return executed documents to them until after that deadline had passed, and because, even after that date, they failed to share financial information that was necessary to support the application.

Plaintiffs argue that the contracts should all be enforced strictly according to their terms because they are clear and unambiguous, and were negotiated by sophisticated parties who were represented by counsel. They dismiss defendants' claim ****13** that performance under the Lease was impossible, pointing to the facts that the documents together anticipated that the CON would not be issued before the Lease became effective, and that the ASA was designed to permit the arrangement to go forward while the DOH application process progressed. As for the frustration argument, plaintiffs note that defendants did not request the financial information they contend was necessary for the application until two months after the Lease took effect. Finally, plaintiffs state that defendants' argument that the former did not seek a waiver of the life safety violations imposed by DOH despite representations to the contrary, is grounded in fraud, but that defendants did not plead fraud as an affirmative defense. In any event, plaintiffs argue, the record does not support defendants' position that plaintiffs abandoned attempts to address the violations.

Contracts "are construed in accord with the parties' intent," the "best evidence" of which "is what they say in their writing. Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v. Philles Records,* 98 N.Y.2d 562, 569, 750 N.Y.S.2d 565, 780 N.E.2d 166 [2002] [internal quotation marks and citations omitted]). "The rule has even greater force in the context of real property transactions, 'where commercial certainty is a paramount concern,' and where, as here, the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length" (*Matter of Wallace v. 600 Partners Co.,* 86 N.Y.2d 543, 548, 634 N.Y.S.2d 669, 658 N.E.2d 715 [1995], quoting *W.W.W. Assoc. v. Giancontieri,* 77 N.Y.2d 157, 162, 565 N.Y.S.2d 440, 566 N.E.2d 639 [1990]). Here, the language of the Lease unambiguously provided that the term was to commence, and CSC Acquisition was to begin paying rent, on October 1, 2015. Further, this was an arm's-length transaction negotiated over months between the parties and ***42** their attorneys. There is no evidence that the parties executed the Lease for the purpose of attaching it to the CON application. The last-minute, but futile, scramble by Lau and Chin to secure the letter of credit required by the Lease supports this conclusion.

Similarly without merit is the notion that plaintiffs prevented defendants from performing under the Lease or the guarantees. " '[U]nder the doctrine of prevention, when a party to a contract causes the failure of the performance of the obligation due, it cannot in any way take advantage of that failure' " (*Frank Brunckhorst Co., LLC v. JPKJ Realty, LLC,* 129 A.D.3d 1019, 1020, 12 N.Y.S.3d 241 [2d Dept. 2015], quoting 13 Richard A. Lord, Williston on Contracts § 39:3 [4th ed May 2015]). In other words, "a party to a contract cannot rely on the failure of another to perform a condition precedent where he has frustrated or prevented the occurrence of the condition" (*Kooleraire Serv. & Installation Corp. v. Board of Educ. of City of N.Y.,* 28 N.Y.2d 101, 106, 320 N.Y.S.2d 46, 268 N.E.2d 782 [1971]; *see Coby Elecs. Co., Ltd. v. Toshiba Corp.,* 108 A.D.3d 419, 420, 968 N.Y.S.2d 490 [1st Dept. 2013]). Here, nothing in the record suggests that plaintiffs prevented defendants from paying rent or paying the security deposit due under the Lease. Plaintiffs' purported late delivery of the signed contracts on September 10, 2015 did not prevent performance beginning October 1. Also, plaintiffs' asserted failure to secure DOH violation waivers

or cooperate with defendants' efforts to obtain the CON before June 1, 2016, under the APA, is not relevant to whether defendants were required to make the agreed-to payments under the Lease.

14 Nor do we accept defendants' argument that the purpose of the Lease was frustrated. "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" (*Warner v. Kaplan,* 71 A.D.3d 1, 6, 892 N.Y.S.2d 311 [1st Dept. 2009] [internal quotation marks omitted], *lv denied* 14 N.Y.3d 706, 899 N.Y.S.2d 755, 926 N.E.2d 260 [2010]]; *see Jack Kelly Partners LLC v. Zegelstein,* 140 A.D.3d 79, 85, 33 N.Y.S.3d 7 [1st Dept. 2016], *lv dismissed* 28 N.Y.3d 1103, 45 N.Y.S.3d 364, 68 N.E.3d 92 [2016]). Examples of a lease's purposes being declared frustrated have included situations where the tenant was unable to use the premises as a restaurant until a public sewer was completed, which took nearly three years after the lease was executed (*see Benderson Dev. Co. v. Commenco Corp.,* 44 A.D.2d 889, 355 N.Y.S.2d 859 [4th Dept. 1974], *affd* 37 N.Y.2d 728, 374 N.Y.S.2d 618, 337 N.E.2d 130 [1975]), and where a tenant who entered into a lease of premises for office space could not occupy the premises ***43 because the certificate of occupancy allowed only residential use and the landlord refused to correct it (*Jack Kelly Partners,* 140 A.D.3d 79, 33 N.Y.S.3d 7).

However, "frustration of purpose ... is not available where the event which prevented performance was foreseeable and provision could have been made for its occurrence" (*Warner,* 71 A.D.3d at 6, 892 N.Y.S.2d 311[internal quotation marks omitted]). Here, the parties accounted for the fact that the CON would not be available on October 1, 2015, the effective date of the Lease. The very purpose of the ASA, which was negotiated separately from the Lease but as part of the larger transaction, was to address the fact that defendants could not occupy the premises until they had the CON. Indeed, the working capital payments called for in the ASA included the payments required by the Lease, since the ASA permitted Lau to start deriving the benefits of the surgical center before his own entity could legally occupy it. Because the parties acknowledged, and planned for, the fact that CSC Acquisition would not be able to occupy the building on the effective date of the Lease, this case cannot be compared to cases such as *Jack Kelly Partners,* where the tenant was completely deprived of the benefit of its bargain. Indeed, the Lease itself cannot be divorced from the other agreements entered into by the parties, which universally addressed the anticipated delay in securing the CON.

The motion court was also justified in finding that defendants breached the APA. Plaintiffs are correct that this breach came about when defendants missed the deadline for filing the CON application, especially because time was declared in the agreement to be of the essence and the agreement contained a no-waiver clause. "Time is generally of the essence where a definite time of performance is specified in a contract, unless the circumstances indicate a contrary intent" (*Burgess Steel Prods. Corp.,* 205 A.D.2d at 346, 613 N.Y.S.2d 158 [1st Dept. 1994]). Further, the deadline was a material term, since the entire transaction depended on issuance of the CON before the APA closing date. By first submitting their application three months after the September deadline, defendants were unquestionably in material breach of the APA (see *Bisk v. Cooper Sq. Realty, Inc.,* 115 A.D.3d 419, 419, 981 N.Y.S.2d 408 [1st Dept. 2014]).

There is no merit to defendants' position that plaintiffs prevented a timely filing through their own actions and inactions. It is true that plaintiffs did not provide the fully executed contracts until ****15** September 10, 2015. However, defendants ***44** utterly fail to explain their three-month delay in submitting the application after that date. Also, even though plaintiffs were obliged to provide their financial records under the APA, defendants' failure to file a timely CON application and to perform under the Lease were "prior material breach[es]" constituting "an uncured failure of performance that relieved [plaintiffs] from performing [their] remaining obligations under the contract" (*U.W. Marx, Inc. v. Koko Contr., Inc.,* 124 A.D.3d 1121, 1122, 2 N.Y.S.3d 276 [3d Dept. 2015], *lv denied* 25 N.Y.3d 904, 2015 WL 1526546 [2015]).

With respect to the DOH violations, defendants cannot deny that those were disclosed in Exhibit M to the APA. They argue instead that plaintiffs represented in Exhibit M that they were negotiating a waiver of the violations but in reality had abandoned that effort. This argument is not supported by the record. The consultants who were shepherding the application through DOH testified that they understood the issues needed to be resolved before the CON was issued, but that at some point the focus shifted to obtaining the CON. They never testified that they abandoned the process. To the contrary, one of the consultants testified that even in December 2015 it was "an ongoing dialogue between [DOH] and CSC." Furthermore, and critically, that consultant stated that the consultants would not have continued their work on the CON transfer application had they thought the life safety issues could not ultimately be resolved and that approval was not possible.

Finally, Lau breached the ASA because, for all the reasons outlined above, his failure to perform under it was not

reasonably justified. Nor was the failure of the individuals to perform under the guarantees. Accordingly, summary judgment was also awarded to plaintiffs under those contracts. As to damages, the court correctly found that the liquidated damages clause of the APA is not a penalty, as it " 'bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation' " (*JMD Holding Corp. v. Congress Fin. Corp.,* 4 N.Y.3d 373, 380, 795 N.Y.S.2d 502, 828 N.E.2d 604 [2005], quoting *Truck Rent–A–Ctr. v. Puritan Farms 2nd,* 41 N.Y.2d 420, 425, 393 N.Y.S.2d 365, 361 N.E.2d 1015 [1977]; *see also Addressing Sys. & Prods., Inc. v. Friedman,* 59 A.D.3d 359, 360, 874 N.Y.S.2d 430 [1st Dept. 2009] [liquidated damages provision negotiated at arm's length is entitled to deference where parties to agreement are sophisticated businesspeople represented by experienced counsel]).

For all of the foregoing reasons, the court correctly granted summary judgment to plaintiffs.

***45** Accordingly, the judgment of the Supreme Court, New York County (Charles E. Ramos, J.), entered January 16, 2018, to the extent appealed from, in plaintiffs' favor on liability as to breach of an asset purchase agreement, an administrative services agreement, a lease agreement, and a personal guarantee, should be affirmed, with costs. The appeal from the order of the same court and Justice, entered January 8, 2018, which granted plaintiffs' motion for summary judgment and denied defendants' motion for summary judgment, should be dismissed, without costs, as subsumed in the appeal from the judgment.

All concur.

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered January 16, 2018, affirmed, with costs. The appeal from the order, same court and ****16** Justice, entered January 8, 2018,dismissed, without costs, as subsumed in the appeal from the judgment.

All concur.

Renwick, J.P., Mazzarelli, Gesmer, Kern, JJ.

All Citations

185 A.D.3d 34, 127 N.Y.S.3d 6, 2020 N.Y. Slip Op. 03631

Footnotes

1 "The Certificate of Need (CON) program is a review process, mandated under state law, which governs the establishment, ownership, construction, renovation and change in service of specific types of health care facilities," including ambulatory surgical centers (*www.health.ny.gov/facilities/CONS/more_information* [last accessed May 6, 2020]).

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McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 32. Accelerated Judgment (Refs & Annos)

McKinney's CPLR Rule 3212

Rule 3212. Motion for summary judgment

Effective: December 11, 2015

Currentness

(a) Time; kind of action. Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.

(b) Supporting proof; grounds; relief to either party. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. Where an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion.

(c) Immediate trial. If it appears that the only triable issues of fact arising on a motion for summary judgment relate to the amount or extent of damages, or if the motion is based on any of the grounds enumerated in subdivision (a) or (b) of rule 3211, the court may, when appropriate for the expeditious disposition of the controversy, order an immediate trial of such issues of fact raised by the motion, before a referee, before the court, or before the court and a jury, whichever may be proper.

(d) Repealed.

(e) Partial summary judgment; severance. In a matrimonial action summary judgment may not be granted in favor of the non-moving party. In any other action summary judgment may be granted as to one or more causes of action, or part thereof, in favor of any one or more parties, to the extent warranted, on such terms as may be just. The court may also direct:

1. that the cause of action as to which summary judgment is granted shall be severed from any remaining cause of action; or

2. that the entry of the summary judgment shall be held in abeyance pending the determination of any remaining cause of action.

(f) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

(g) Limitation of issues of fact for trial. If a motion for summary judgment is denied or is granted in part, the court, by examining the papers before it and, in the discretion of the court, by interrogating counsel, shall, if practicable, ascertain what facts are not in dispute or are incontrovertible. It shall thereupon make an order specifying such facts and they shall be deemed established for all purposes in the action. The court may make any order as may aid in the disposition of the action.

(h) Standards for summary judgment in certain cases involving public petition and participation. A motion for summary judgment, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation, as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law, shall be granted unless the party responding to the motion demonstrates that the action, claim, cross claim or counterclaim has a substantial basis in fact and law or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant preference in the hearing of such motion.

(i) Standards for summary judgment in certain cases involving licensed architects, engineers, land surveyors or landscape architects. A motion for summary judgment, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action in which a notice of claim must be served on a licensed architect, engineer, land surveyor or landscape architect pursuant to the provisions of subdivision one of section two hundred fourteen of this chapter, shall be granted unless the party responding to the motion demonstrates that a substantial basis in fact and in law exists to believe that the performance, conduct or omission complained of such licensed architect, engineer, land surveyor or landscape architect or such firm as set forth in the notice of claim was negligent and that such performance, conduct or omission was a proximate cause of personal injury, wrongful death or property damage complained of by the claimant or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant a preference in the hearing of such motion.

Credits

(L.1962, c. 308. Amended L.1963, c. 533, § 1; L.1965, c. 773, § 10; L.1973, c. 651, § 1; Jud.Conf.1973 Proposal No. 5; L.1978, c. 532, §§ 1 to 3; L.1984, c. 827, § 1. Amended L.1992, c. 767, § 5; L.1996, c. 492, § 1; L.1996, c. 682, § 3; L.1997, c. 518, § 3, eff. Sept. 3, 1997; L.2015, c. 529, § 1, eff. Dec. 11, 2015.)

70 N.Y.2d 382
Court of Appeals of New York.

CLARK–FITZPATRICK, INC., Appellant,
v.
LONG ISLAND RAIL ROAD COMPANY, Respondent, et al., Defendant.

Nov. 17, 1987.

Synopsis

Construction company brought action against municipal railroad, arising out of tract improvement project, for, inter alia, breach of contract, quasi contract, and negligence. On motion of railroad, the Supreme Court, Nassau County, Roncallo, J., dismissed causes of action sounding in quasi contract and negligence and dismissed part of complaint seeking punitive damages and construction company appealed. The Supreme Court, Appellate Division, 124 A.D.2d 534, 507 N.Y.S.2d 679, affirmed. On certified question, the Court of Appeals, Alexander, J., held that: (1) in light of essential public function served by railroad in providing commuter transportation and its public source of funding, railroad was immune from punitive damages, and (2) construction company could not maintain action on quasi contract or negligence theories.

Affirmed.

Attorneys and Law Firms

***383 ***654 **191** Robald P. Mysliwiec, Sheila M. Donohue and Edward B. Fitzpatrick, III, New York City, for appellant.

***384** Justin N. Feldman, Ingrid R. Sausjord, New York City and Thomas M. Taranto, Jamaica, for respondent.

***385 OPINION OF THE COURT**

ALEXANDER, Judge.

This litigation arises out of a multimillion dollar track improvement of the Port Jefferson branch of the Long Island Railroad by the addition of a second railroad track between Amott and Huntington. Construction on the contract, which defendant, Long Island Rail Road Company (LIRR), awarded to plaintiff, Clark–Fitzpatrick, Inc., as low bidder, began in September 1983. As alleged by plaintiff, the contract contained detailed engineering specifications that instructed plaintiff on how to proceed with construction. Plaintiff contends that, after construction began, it discovered that defendant was unprepared to proceed with the project—specifically, that the engineering design was flawed, thus requiring substantial design changes during the course of construction; that defendant had failed to acquire the rights to certain necessary properties bordering the construction sites; and that defendant had failed to locate and move various utility lines throughout the project that interfered with construction. Notwithstanding these difficulties, plaintiff proceeded with construction, which was completed in July 1986—almost one year after the scheduled completion date.

The various problems with project design and construction caused plaintiff, in November of 1984, to commence this action against the railroad and the railroad's parent, the Metropolitan ***386** Transportation Authority (MTA),[1] sounding in breach of contract, quasi contract, fraud, gross negligence and negligence. Alleging that defendant entered into the contract with full knowledge of the problems, but intentionally concealed them from plaintiff, plaintiff seeks to recover compensatory and punitive damages. Defendant moved to dismiss the causes of action sounding in negligence and quasi contract, and sought dismissal of the demand for punitive damages on the ground that, as a public benefit corporation, it was immune from such damages. Special Term granted the motion in its entirety. The Appellate Division unanimously affirmed 124 A.D.2d 534, 507 N.Y.S.2d 679 and granted leave to this court upon the certified question: Was the order properly made? We now affirm, answering the certified question in the affirmative.

I.

We find without merit plaintiff's contention that defendant—a public benefit corporation heavily supported by tax dollars and performing an essential government function in providing commuter transportation—may be subject to punitive damages.

We have held that the State and its political subdivisions are not subject to punitive damages (*Sharapata v. Town of Islip,* 56 N.Y.2d 332, 452 N.Y.S.2d 347, 437 N.E.2d 1104). In so holding, we recognized that the goals of punishment and deterrence are not served when punitive damages are imposed against the State, for in such circumstances, it ultimately is the innocent taxpayer who is punished *(Sharapata v. Town of Islip,* 56 N.Y.2d, at 338, *supra,* 452 N.Y.S.2d 347, 437 N.E.2d 1104). Although punitive damages may be appropriately imposed against a private profit-making corporation, a "municipality is different" because " '[i]t is not organized for any purpose of gain or profit, but it is a legal ***655** creation engaged in carrying on government **192** and administering its details for the general good and as a matter of public necessity' " (*Sharapata v. Town of Islip,* 56 N.Y.2d, at 337, 452 N.Y.S.2d 347, 437 N.E.2d 1104, *supra,* quoting*Costich v. City of Rochester,* 68 App.Div. 623, 631, 73 N.Y.S. 835).

The LIRR, of course, is not itself the State or one of its political subdivisions; rather, it is, pursuant to Public Authorities Law § 1266(5), a public benefit subsidiary corporation of the MTA. Although "public benefit corporations * * * created *387 by the State for the general purpose of performing functions essentially governmental in nature, are not identical to the State or any of its agencies, but rather enjoy, for some purposes, an existence separate and apart from the State, its agencies and political subdivisions" (*Grace & Co. v. State Univ. Constr. Fund,* 44 N.Y.2d 84, 88, 404 N.Y.S.2d 316, 375 N.E.2d 377 [State University Construction Fund]), we have held that a particularized inquiry is necessary to determine whether—for the specific purpose at issue—the public benefit corporation should be treated like the State *(see, Grace & Co. v. State Univ. Constr. Fund,* 44 N.Y.2d 84, 404 N.Y.S.2d 316, 375 N.E.2d 377, *supra).*

Applying this standard to the instant appeal, we hold, in light of the essential public function served by defendant in providing commuter transportation and the public source of much of its funding, that defendant should receive the same immunity from punitive damages as do the State and its political subdivisions. This conclusion proceeds inexorably from an examination of the enabling legislation creating defendant's parent organization, the MTA, and the purposes articulated therein of furthering the development of commuter services essential to the economic health of the State (Public Authorities Law § 1263, L.1965, ch. 324). Those purposes are specified by statute as being "in all respects for the benefit of the people of the state of New York", and the Legislature further commanded that "the authority shall be regarded as performing an essential governmental function" (Public Authorities Law § 1264[2]).

As a subsidiary of the MTA, defendant obviously plays a critical role in implementing this legislative goal and furthering this governmental purpose. Indeed, the Legislature clearly recognized this when, in explaining the urgent need for a transportation authority, stated that "[t]hrough [the MTA] the state [can] deal flexibly and efficiently with the differing financial, managerial and operational problems involved in insuring the continuation of such *essential commuter services as those presently being provided by the Long Island Rail Road* and the New York, New Haven and Hartford Railroad" (L.1965, ch. 324, § 1[7] [emphasis added]). Furthermore, the office of the State Comptroller, in a report analyzing selected aspects of defendant's five-year capital plan, found that it "provides a vital transportation link between the City of New York and the suburban counties of Nassau and Suffolk" and that "[o]n an average weekday, more than 700 trains carry in excess of 287,000 passengers", making defendant the busiest commuter railroad in the Nation (Off of State Comptroller, ***388** Long Island Rail Road: Selected Management Aspects of the Five–Year Capital Program, Report 84–S–135). Thus, the essential, public nature of defendant's role in providing commuter transportation cannot be seriously questioned. Burdening so important a public function by the imposition of punitive damages would therefore not be desirable.

Moreover, the record shows that defendant receives much of its funding from taxpayer revenues and that, at the time this action was commenced, 49% of defendant's total expenses were financed from outside subsidies, most of which were derived from public sources. The construction project at issue was also, in large measure, publicly financed. Thus, as was the case in *Sharapata,* the imposition of punitive damages against defendant would ultimately punish only the innocent taxpayers of New York State *(Sharapata v. Town of Islip,* 56 N.Y.2d 332, 338, 452 N.Y.S.2d 347, 437 N.E.2d 1104, *supra).* Accordingly, given the essential, ***656** governmental purpose that defendant **193** serves, and considering the public sources of much of its funding, we hold that defendant should be exempt from the imposition of punitive damages.

II.

Turning to plaintiff's cause of action sounding in quasi contract, we conclude that it was properly dismissed. The existence of a valid and enforceable written contract

governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter (*Blanchard v. Blanchard,* 201 N.Y. 134, 138, 94 N.E. 630; *see also,* 66 Am.Jur.2d, Restitution and Implied Contracts, § 6, at 949). A "quasi contract" only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment (*Parsa v. State of New York,* 64 N.Y.2d 143, 148, 485 N.Y.S.2d 27, 474 N.E.2d 235; *Farash v. Sykes Datatronics,* 59 N.Y.2d 500, 504, 465 N.Y.S.2d 917, 452 N.E.2d 1245; *Bradkin v. Leverton,* 26 N.Y.2d 192, 197, 309 N.Y.S.2d 192, 257 N.E.2d 643; *Smith v. Kirkpatrick,* 305 N.Y. 66, 73, 111 N.E.2d 209; *Grombach Prods. v. Waring,* 293 N.Y. 609, 615, 59 N.E.2d 425; *Miller v. Schloss,* 218 N.Y. 400, 407, 113 N.E. 337; *see also,* 1 Williston, Contracts § 3A [3d ed]; Calamari and Perillo, Contracts § 1–12, at 19 [2d ed]; 1 Corbin, Contracts § 19). Indeed, we have stated that: "Quasi contracts are not contracts at all, although they give rise to obligations more akin to those stemming from contract than from tort. The contract is a mere fiction, a form imposed in order to adapt the case to a given remedy * * * Briefly stated, a quasi-contractual obligation is one imposed by law *where* ***389** *there has been no agreement or expression of assent, by word or act, on the part of either party involved.* The law creates it, regardless of the intention of the parties, to assure a just and equitable result" (*Bradkin v. Leverton,* 26 N.Y.2d, at 196, 309 N.Y.S.2d 192, 257 N.E.2d 425, *supra* [emphasis added]).

Of course, a party may perform a contract under protest, and then sue for damages resulting from the second party's breach (*Borough Constr. Co. v. City of New York,* 200 N.Y. 149, 93 N.E. 480). Alternatively, where rescission of a contract is warranted, a party may timely rescind and seek recovery on the theory of quasi contract (*see, Soviero Bros. Contr. Corp. v. City of New York,* 286 App.Div. 435, 142 N.Y.S.2d 508, *affd.* 2 N.Y.2d 924, 161 N.Y.S.2d 888, 141 N.E.2d 918, *see also,* 22 N.Y.Jur.2d, Contracts, § 462, at 402). It is impermissible, however, to seek damages in an action sounding in quasi contract where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties (*see, Soviero Bros. Contr. Corp. v. City of New York,* 286 App.Div. 435, 142 N.Y.S.2d 508, *supra; see also,* 12 Williston, Contracts § 1459, at 69 [3d ed.]; 22 N.Y.Jur.2d, Contracts, § 465, at 410).

Here, it is undisputed that the relationship between the parties was defined by a written contract, fully detailing all applicable terms and conditions, and specifically providing for project design changes with adjustments in compensation contemplated in light of those changes. Notwithstanding plaintiff's claim that defendant breached the contract, plaintiff chose not to rescind the agreement, but instead to complete performance of the contract and sue to recover damages, which of course was plaintiff's right. Having chosen this course, however, plaintiff is now limited to recovery of damages on the contract, and may not seek recovery based on an alleged quasi contract.

Finally, we conclude that the two causes of action sounding in negligence were also properly dismissed. It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated (*Meyers v. Waverly Fabrics,* 65 N.Y.2d 75, 80 n. 2, 489 N.Y.S.2d 891, 479 N.E.2d 236; ****194** *North Shore Bottling Co. v. Schmidt & Sons,* 22 N.Y.2d 171, 179, 292 N.Y.S.2d 86, 239 N.E.2d 189; *Rich v. New York Cent. & Hudson Riv. R.R. Co.,* 87 N.Y. 382, 390). This legal ***657** duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract *(see, Rich v. New York Cent. & Hudson Riv. R.R. Co.,* 87 N.Y. 382, 398, *supra).*

***390** Here, plaintiff has not alleged the violation of a legal duty independent of the contract. In its cause of action for gross negligence, plaintiff alleges that defendant failed to exercise "due care" in designing the project, locating utility lines, acquiring necessary property rights, and informing plaintiff of problems with the project before construction began. Each of these allegations, however, is merely a restatement, albeit in slightly different language, of the "implied" contractual obligations asserted in the cause of action for breach of contract (*cf., Deerfield Communications Corp. v. Chesebrough–Ponds, Inc.,* 68 N.Y.2d 954, 510 N.Y.S.2d 88, 502 N.E.2d 1003 [fraud claim held to be dressed-up version of contract cause of action]).[2] Moreover, the damages plaintiff allegedly sustained as a consequence of defendant's violation of a "duty of due care" in designing the project were clearly within the contemplation of the written agreement, as indicated by the design change and adjusted compensation provisions of the contract. Merely charging a breach of a "duty of due care", employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim.

Based on the foregoing, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the affirmative.

WACHTLER, C.J., and SIMONS, KAYE, TITONE,

HANCOCK, and BELLACOSA, JJ., concur.

Order affirmed, etc.

All Citations

70 N.Y.2d 382, 516 N.E.2d 190, 521 N.Y.S.2d 653

Footnotes

1 Although the Metropolitan Transportation Authority is named as a defendant, the amended complaint states no causes of action against it, and it is not involved in this appeal.

2 Plaintiff's cause of action sounding in fraud was not challenged below and is not an issue on this appeal.

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230 N.Y. 634
Court of Appeals of New York.

EDGAR A. LEVY LEASING CO., Inc.,
v.
SIEGEL.

March 8, 1921.

Synopsis
Action by the Edgar A. Levy Leasing Company, Incorporated, against Jerome Siegel. From an order of the Appellate Division, First Department (194 App. Div. 482, 186 N. Y. Supp. 5) affirming an order of the Special Term denying plaintiff's motion for judgment on the pleadings, plaintiff appeals.

Affirmed.

****923 *634** Appeal from Supreme Court, Appellate Division, First department.

Attorneys and Law Firms

***635** Louis Marshall and Lewis M. Isaacs, both of New York City, for appellant.

Alfred L. Rose and Benjamin G. Paskus, both of New York City, for respondent.

William D. Guthrie and Julius H. Cohen, Sp. Deputy Atty. Gen., both of New York City.

Francis M. Scott, I. Maurice Wormser, and Julius H. Zieser, all of New York City, amici curiae.

Joseph J. Schwartz and A. H. Spigelgass, both of Brooklyn, for Kings County Taxpayers Association, amici curiae.

Opinion

The answer sets up two affirmative defenses: (1) That defendant executed the lease sued on under duress, and (2) that the rent reserved under the renewal lease is unjust, unreasonable and oppressive, the latter defense being predicated on chapter 944 of the Laws of 1920.

The following questions were certified: First. Is the first alleged affirmative defense pleaded in said answer sufficient in law on the face thereof? Second. Is the second alleged affirmative defense set forth in the answer sufficient in law upon the face thereof? Third. Is chapter 944 of the Laws of 1920, a constitutional act? Fourth. Does chapter 944 of the Laws of 1920 deprive the plaintiff of his liberty or property without due process of law, in violation of article 1, § 6, of the New York Constitution, and section 1 of the Fourteenth Amendment of the Constitution of the United States? Fifth. Does chapter 944 of the Laws of 1920 constitute the taking of private property belonging to the plaintiff for private use without just compensation, in violation of article 1, § 6, of the New York Constitution? Sixth. Does chapter 944 of the Laws of 1920 deny to the plaintiff the equal protection of the law, in violation of the Fourteenth Amendment of the Constitution of the United States? Seventh. Does chapter 944 of the Laws of 1920 impair the obligation of the contract between the plaintiff and the defendant, in violation of article 1, § 10, of the Constitution of the United States?

PER CURIAM.

Order affirmed, with costs, on opinion of Pound, J., in People ex rel. Durham Realty Corporation v. La Fetra, 230 N. Y. 429, 130 N. E. 601, and questions certified answered as follows: Nos. 1, 4, 5, 6, and 7, in the negative; Nos. 2 and 3, in the affirmative.

****924** HISCOCK, C. J., and HOGAN, CARDOZO, POUND, and ANDREWS, JJ., concur.

CRANE, J., concurs in result, on opinion in Guttag v. Shatzkin, 230 N. Y. 634, 130 N. E. 929.

McLAUGHLIN, J. (dissenting).

The complaint in this action alleged, in substance, that on the 26th of June, 1928, the plaintiff, a domestic corporation leased to the defendant an apartment in the city of New York for a period of two years commencing October 1, 1918, at an annual rental of $1,450, payable in equal monthly installments, on the first day of each month; that defendant went into and continued in possession under the lease until the expiration of the term therein provided; that on the 3d of May, 1920, the parties entered into a written agreement, renewing the lease for a further term of two years from the 1st of October, 1920, at an annual rental of

$2,160, payable in equal monthly installments on the first day of each month; that defendant neglected and refused to pay the rent falling due on the 1st of October, 1920, amounting to $180, which sum was due and owing the plaintiff, and for which judgment was demanded.

The answer admitted all the allegations of the complaint, except that the amount of rent was due and payable, which was denied. This denial did not raise an issue, since it was a mere legal conclusion. The answer then set up two affirmative defenses: First, that ***636** the parties executed the lease and renewal as mentioned in the complaint; that prior to the execution of the renewal plaintiff, with intent to coerce defendant into signing the same, stated in words or substance that unless he did so at the increased rental it would terminate his tenancy at the end of the then leased term, and he would be obliged to move; that 'defendant believed and relied upon said statement and was fearful that plaintiff would carry out said threat * * * and that defendant would be unable to secure any suitable or similar apartment, owing to the scarcity of such apartments;' 'that solely by means of such threats and coercion and duress the plaintiff induced defendant to sign the alleged renewal of lease above mentioned providing for such increased rental;' and that defendant had tendered and offered to pay the rent for the month of October, 1920, to the extent of $120.83, which was the monthly installment paid for said premises for the month of September, 1920.

The second affirmative defense realleged the facts set forth in the first, and in addition thereto alleged that the rent reserved in the instrument purporting to be the renewal lease, and claimed by plaintiff for the month of October, 1920, was 'unjust, unreasonable, and oppressive.'

The judgment demanded was that the alleged renewal lease be 'rescinded, vacated, and set aside' and that the complaint be dismissed.

After issue had been joined, plaintiff moved, under section 547 of the Code of Civil Procedure, for judgment on the pleadings. The motion was denied, an appeal taken to the Appellate Division, where the order was affirmed, two of the justices dissenting, and leave given to appeal to this court, certifying certain questions. Two of the questions certified were whether the affirmative defenses constituted a defense to the plaintiff's claim, and the others whether chapter 944 of the Laws of 1920 was constitutional.

The facts pleaded in the first affirmative defense were insufficient upon the face thereof, and in this all the members of the court agree. Such facts do not constitute ***637** duress, nor do they show that plaintiff was coerced into signing the renewal; on the contrary, they show that defendant voluntarily executed it with full knowledge of its contents. He had been told that unless he renewed the lease at the increased rental he would have to vacate and surrender the premises at the end of the term under which he was then in possession. He states that he relied upon what plaintiff told him and believed it would compel him to vacate the premises unless he executed the renewal. This is precisely what he agreed to do when he executed the lease and what the law obligated him to do. He does not allege as a fact that he had been unable to secure another apartment, or that he had made any effort at all in that direction. He alleges he was fearful plaintiff would terminate the lease, cause him to remove from the premises, and that he would, in that event, be unable to secure a similar apartment owing to the scarcity thereof; in other words, this allegation is based entirely upon what he feared might take place. There is no allegation that he had, at any time prior to the commencement of the action, claimed that the renewal lease was obtained by duress, or that he had attempted to have it rescinded on that account, nor did he offer to rescind; on the contrary, he continued in possession and sought to hold the same under the lease which he claims was obtained by duress. The defense of duress is predicated on the alleged threat of the landlord to exercise his lawful right to regain possession of the premises at the expiration of the term then in force. It never constitutes duress for a person to threaten to enforce his legal rights by lawful means. McPherson v. Cox, 86 N. Y. 472; Dunham v. Griswold, 100 N. Y. 224, 3 N. E. 76. If he ****925** had been coerced into signing the renewal, he could rescined for that reason, but in order to do so he had to surrender possession of the property. This is the general rule. A party cannot rescind while retaining the fruits of the contract. In case of real estate he must surrender possession before he can maintain an action for rescission of the instrument under which he obtained possession. ***638** Schieffer v. Dietz, 83 N. Y. 300; Tompkins v. Hyatt, 28 N. Y. 347, 353; Oregon Pacific R. R. Co. v. Forrest, 128 N. Y. 83, 28 N. E. 137.

The second affirmative defense realleges the facts set forth in the first, and then alleges that the rent reserved in the writing purporting to be a renewal lease, and claimed by plaintiff for the month of October, 1920, was 'unjust, unreasonable, and oppressive.' This defense is predicated on chapter 944 of the Laws of 1920. If that be valid, then the defense pleaded is good. If the act be void, it furnishes no defense; in other words, if the act be unconstitutional, it is not a law. 'It confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.' Norton v. Shelby County, 118 U. S. 425, 442, 6 Sup. Ct. 1121, 1125 (30 L. Ed. 178).

Appellant contends the act is unconstitutional, in that it impairs the obligation of the contract of lease (Const. U. S.

art. 1, § 10); deprives the plaintiff of its property without due process of law; denies to it the equal protection of the law (Const. U. S. Amend. 14); and takes private property for a private use without compensation (Const. New York, art. 1, § 6).

This act purports to amend, but is really designed to entirely supersede, chapter 136 of the Laws of 1920. It provides: That it shall be a defense to an action for rent accruing under an agreement for premises in a city of the first class, or in a city in a county adjoining a city of the first class, occupied for dwelling purposes, that such rent is unjust, unreasonable, and the agreement under which the same is sought to be recovered is oppressive. Section 1. That where the answer contains the defense mentioned in section 1, the plaintiff, within five days thereafter (unless upon good cause shown the time be enlarged), must file with the clerk of the court a verified bill of particulars setting forth certain specified facts, and if he does not, the complaint shall, upon motion of the defendant, be dismissed. Section 2. That where it ***639** appears that the rent has been increased over the rent as it existed one year prior to the agreement under which the rent is sought to be recovered, such agreement shall be presumptively unjust, unreasonable, and oppressive. Section 3. That the plaintiff may plead and prove in such action a fair and reasonable rent for the premises and recover judgment therefor. Section 4. That if the plaintiff recover judgment by default it shall contain a provision that if the same be not fully satisfied within five days after entry and service upon the defendant of a copy thereof, plaintiff shall be entitled to the premises and a warrant may be issued to put him in possession. Section 5. That in such action, if the defendant raise the issue of fairness and reasonableness of the amount of rent demanded, he must, at the time of answering, deposit with the clerk of the court such sum as equals the amount paid as rent during the preceding month, or such as is reserved as the monthly rent in the agreement under which he obtained possession. Section 6. That if judgment be taken by default, the court may, under certain conditions, open such default, vacate the judgment, and grant a new trial. Section 7. That if defendant appeals from the judgment he shall, pending the appeal, deposit with the clerk of the court the amount of the judgment and thereafter, monthly, until the final determination of the appeal, an amount equal to one month's rental, computed on the basis of the judgment. Section 8. That the act shall not apply to a room or rooms in a hotel containing 125 rooms or more, or to a lodging or rooming house occupied under a hiring of a week or less. Section 9. That the act shall not apply to a new building in the course of construction at the time the act takes effect, or commenced thereafter, and shall be in force until November 1, 1922.

I agree with the majority of the court that in determining whether or not the act be constitutional it must be considered in connection with chapters 942 and 947, passed at the same extraordinary session of the Legislature. These three acts, with others not here involved, indicate ***640** an intent on the part of the Legislature to regulate rents of dwellings until November 1, 1922. Chapter 942 amends certain sections of the Code of Civil Procedure by providing that summary proceedings shall not be maintained by a landlord to recover possession of leased premises until November 1, 1922, unless it be proved that the tenant holding over is objectionable, or the landlord wants to occupy the premises for a dwelling for himself or family, or intends to demolish the building for the purpose of building a new one, or has sold it to a co-operative ownership corporation. Chapter 947 also amends certain sections of the Code of Civil Procedure by prohibiting a landlord from obtaining, during ****926** the same period, possession of his premises by an action of ejectment, except in the cases specified in chapter 942. The purpose of chapter 944, when thus read and considered, was to make tenants in possession a preferred class until November 1, 1922, by denying to the landlord, until that time, the aid of the courts to obtain possession of the premises leased, where the tenant's lease had terminated or he had defaulted in the payment of rent, providing he were willing to pay a reasonable rent, to be determined in a judicial proceeding.

This brings us to the determination of the fundamental question already suggested: Is chapter 944, as applied to leases made prior to its passage, unconstitutional? I am of the opinion that it is.

First, it impairs the obligation of a contract, and is thus directly in conflict with the federal Constitution. Article 1, § 10. The defendant, several months prior to the passage of the act, freely, deliberately, and with full knowledge of what he was doing, entered into the renewal lease. But he can violate the agreement, because, according to the act, it is, presumptively, unjust, unreasonable and oppressive. The landlord, however, is bound. He cannot get possession of his property and must accept what the court finds to be the fair rental value. It is the substitution of a new contract which the parties never made, and to the terms of which they never agreed. Such ***641** substitution not only impairs the obligation of the contract of renewal, but destroys it, and therefore comes within the constitutional prohibition. Edwards v. Kearzey, 96 U. S. 595, 24 L. Ed. 793; Effinger v. Kenney, 115 U. S. 566, 6 Sup. Ct. 179, 29 L. Ed. 495; Barnitz v. Beverly, 163 U. S. 118, 16 Sup. Ct. 1042, 41 L. Ed. 93; Bradley v. Lightcap, 195 U. S. 24, 24 Sup. Ct. 753, 49 L. Ed. 75. But it is suggested that the contract of renewal was entered into subsequent to the passage of chapter 136 of the Laws of 1920, which chapter 944 of the Laws of 1920 purports to amend. The answer to this suggestion has

already been given. What purported to be an amendment, in fact operated if not as a repeal then certainly as the substitution of one statute for the other. The two acts, when examined, will show a well-defined legislative intent to eliminate chapter 136 by substituting in its place chapter 944.

Second. It deprives the plaintiff of its property without due process of law and denies to it the equal protection of the law. It binds the landlord to give to each tenant in possession when the act took effect the right to occupy the premises for at least two years if he so desires, but imposes no obligation to do so. The landlord must permit him to remain, while he is at liberty to depart whenever he sees fit. Not only this, but the landlord is compelled to take the rent which the court fixes as reasonable. This he must accept whether satisfied or not, and, if not satisfied, then he is denied the right to regain possession of his property. The tenant, if dissatisfied with the amount fixed, may refuse to pay, and without notice quit and surrender the premises. If this does not amount to depriving a landlord of his property without due process of law, it is difficult to imagine what would. People ex rel. Herrick v. Smith, 21 N. Y. 595; Matter of Tuthill, 163 N. Y. 133, 57 N. E. 303, 49 L. R. A. 781, 79 Am. St. Rep. 574. In determining what is due process of law, regard must be had to substance and not to form. Chicago, B. & Q. R. R. Co. v. Chicago, 166 U. S. 226, 235, 17 Sup. Ct. 581, 41 L. Ed. 979. The protection of property involves the protection of its value. Southern Ry. Co. v. Greene, 216 U. S. 400, 30 Sup. Ct. 287, 54 L. Ed. 536, 17 Ann. Cas. 1247; Ames v. Union Pacific Ry. Co. (C. C.) 64 Fed. 165. It is not difficult to see how the value of property ***642** occupied by tenants when the act went into effect might be very materially impaired or reduced. There is no way in which the landlord can obtain possession for upwards of two years. Indeed, he cannot sell it if required to give immediate possession.

The landlord is also denied the equal protection of the law. He must accept the fair rental value, irrespective of what the tenant has agreed to pay, while the owner of a building in process of construction, or one constructed after the passage of the act, may exact whatever rent he sees fit. The act therefore is not uniform upon the same class of persons. One class is compelled arbitrarily to retain tenants whether desired or not, and to accept what the court fixes as a fair rental, while the other class may select its tenants and fix the rent at an amount upon which the parties agree. It is perfectly obvious that under the provisions of the act one who becomes a tenant after its passage might, and probably would, pay substantially more than a tenant in possession of like property in the same locality, and surrounded by the same conditions. The act was not intended to be uniform in its operations. It affected property leased when it took effect in one way, and property not then ready to be leased in another. One class was to be benefited at the expense of the other. Willson v. McDonnell, 49 App. D. C. 280, 265 Fed. 432.

Third. It takes private property for a private use. The plaintiff and defendant are private citizens, engaged in a private business. The renting of property can no more ****927** be said to be for a public use in the city of New York than can the sale of food, clothing, or any other article. Of course the landlord is a 'vendor of space.' The baker is a vendor of bread; the butcher is a vendor of meat; the tailor is a vendor of clothes; indeed, every person who sells any kind of property is a vendor of the article sold; all are engaged in a private enterprise. But this does not give the state the right to fix the price at which the sale shall be made, unless it be for the public health, public morals, or the general welfare. If it does, ***643** there is little if anything left of the constitutional provisions relating to the protection of property and the right to contract with reference to it. The power to fix rental rates between private individuals is not analogous to nor controlled by the decisions which have upheld the power of the Legislature to fix rates for service where the owner has devoted the business affected to a public use.

In Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, chiefly relied upon by the respondent, the owner of a grain elevator had for years devoted it to a public use in handling grain for the public generally. The same principle is applied in German Alliance Insurance Co. v. Lewis, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189; Union Dry Goods Co. v. Georgia Public Service Corp., 248 U. S. 372, 39 Sup. Ct. 117, 63 L. Ed. 309, 9 A. L. R. 1420; Producers' Transportation Co. v. Railroad Commission, 251 U. S. 228, 40 Sup. Ct. 131, 64 L. Ed. 239, and other authorities cited by respondent's counsel. The renting of property for housing purposes in the city of New York, as I have already said, is a private business, and cannot be made public or impressed with a public interest merely by legislative fiat. Such interest cannot be created in this way or property rights be divested under the guise or pretense of the exercise of the police power. In Producers' Transportation Co. v. Railroad Commission, supra, Mr. Justice Van Devanter, speaking for the court, said:
'It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts and never was devoted by its owner to public use, that is, to carrying for the public, the state could not by mere legislative fiat or by any regulating order of a commission covert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the Fourteenth Amendment.' 251 U. S. 230, 40 Sup. Ct. 132, 64 L. Ed. 239.

The police power is not superior to the Constitution; on the contrary, it is subject to applicable constitutional limitations. Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U. S. 146, 40 Sup. Ct. 106, 64 L. Ed. 194.

***644** In Matter of Jacobs, 98 N. Y. 98, 108 (50 Am. Rep. 636), this court, referring to this power, said:
'The limit of the power cannot be accurately defined, and the courts have not been able or willing definitely to circumscribe it. But the power, however broad and extensive, is not above the Constitution. When it speaks, its voice must be heeded. It furnishes the supreme law, the guide for the conduct of legislators, judges and private persons, and so far as it imposes restraints, the police power must be exercised in subordination thereto.'

See, also, Slaughterhouse Cases, 16 Wall. 36, 87 (21 L. Ed. 394).

The statutes regulating interest are not analogous. No one would contend that the Legislature would have power to pass a statute reducing the rate of interest on outstanding obligations. When interest was reduced from 7 to 6 per cent., the statute was silent as to whether it applied to obligations outstanding at the time of its passage, but the courts held it did not apply to such contracts.

The statutes are not analogous in another respect, because there is no statute which compels a person to loan money unless he so desires. The statutes under consideration compel the leasing of property without the consent of the landlord and upon terms which the court itself determines. They are in many respects like the provisions of the act of Congress known as the 'Ball Rent Law,' for the relief of renants in the District of Columbia. This act was declared unconstitutional by the Court of Appeals of the District of Columbia. Hirsh v. Block, 267 Fed. 614, certiorari denied 254 U. S. 640, 41 Sup. Ct. 13, 65 L. Ed. 452.

In the recent case of Stell v. Mayor of Jersey City, decided by the Supreme Court of New Jersey, and reported in 111 Atl. 274, a resolution of a municipal corporation, providing that city money should be advanced to defend proceedings to dispossess tenants, was held illegal and void. Justice Swayze, speaking for the court, said:
'It is enough to say that any authority of the city government to protect property certainly cannot include authority to deprive ***645** owners of property of the beneficial use thereof. The general welfare and good government of the city requires that the city should see that, so far as it is concerned, all of the citizens are secured their rights, and it is a manifest perversion of the very object of the statute to use the power and money of the municipality for the protection of one class of citizens at the expense of another. No doubt it is desirable that there should be houses for all citizens, but ****928** they cannot be provided legally by using without leave or confiscating the property of house owners. Housing can only be provided either in the ordinary commercial way or by private charity.'

I am also of the opinion that the statute is unconstitutional in so far as it attempt to confer upon the municipal court equitable jurisdiction. Article 6, § 18, of the state Constitution, provides:
'The Legislature shall not hereafter confer upon any inferior or local court of its creation any equity jurisdiction or any greater jurisdiction in other respects than is conferred upon county courts by or under this article.'

This inhibition is not confined to local or inferior courts created after the adoption of the present Constitution. It is equally applicable to those theretofore created. Lewkowicz v. Queen Aeroplane Co., 207 N. Y. 290, 100 N. E. 796. The municipal court of the city of New York is a continuation of the old district court. Worthington v. London Guarantee & Accident Co., 164 N. Y. 81, 58 N. E. 102. It is a local court of legislative creation. While it is true that it has jurisdiction of equitable defenses to the extent of defeating a plaintiff's claim, it is nevertheless true that such defense must be a defense, pure and simple, and the test is the relief asked. This act clothes the municipal court (in which a large percentage of the rent cases is brought) with equitable powers. It may, in effect, proceed to vacate and set aside the lease under which a tenant is in possession and then determine what is a fair rental, and, having ascertained that fact, enter judgment accordingly. This is the exercise of equitable powers. Simon v. Schmitt, 137 App. Div. 625, 122 N. Y. Supp. 421.

***646** A statute ought not to be pronounced unconstitutional unless it clearly appears to be so. This, to me, does so appear. All citizens should have houses in which to live, but if there are not enough for all that is no reason why those who are in should be kept there and those who are out should be allowed to care and shift for themselves. The state has the same regard for one class as the other. Nor should one landlord be treated differently from another. All in the same class should be treated alike. This is what the state and federal Constitutions require. These safeguards cannot be overthrown by the exercise of the police power, a power which no one has as yet attempted accurately to define or state just where it commences or ends. It seems to me much better to adhere strictly to the Constitution, the anchor of good, safe, and sound government, rather than to

embark on the sea of paternalism, the dangers of which cannot be foreseen or the perils foretold.

Entertaining the views above expressed, I dissent, vote to reverse the orders of the Appellate Division and Special Term, and grant the motion for judgment on the pleadings.

All Citations

230 N.Y. 634, 130 N.E. 923

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26 N.Y.2d 255
Court of Appeals of New York.

Hannah EHRLICH, Respondent,
v.
AMERICAN MONINGER GREENHOUSE MANUFACTURING CORPORATION et al., Appellants.

March 5, 1970.

Synopsis

Action on demand note. The Supreme Court, Special Term, New York County, Emilio Nunez, J., denied plaintiff's motion for summary judgment, and plaintiff appealed. The Supreme Court, Appellate Division, First Judicial Department, March 27, 1969, 31 A.D.2d 922, 298 N.Y.S.2d 601, reversed the order and granted the motion without prejudice to any action defendant might be advised to take upon the counterclaim, and defendants appealed. The Court of Appeals, Jasen, J., held that plaintiff was entitled to summary judgment on note, although defendants contended that transaction was investment rather than loan, where every piece of documentary evidence, including books and statements of defendant corporation, conclusively inducated that transaction was loan and defendants, while explaining that transaction was made to appear as loan for 'tax reasons', did not disclose the reasons.

Affirmed.

Attorneys and Law Firms

***342 **891 *256** Max Schorr and Paul I. Stern, New York City, for appellants.

S. S. Goldsmith, New York City, for respondent.

Opinion

***257** JASEN, Judge.

In this action by the plaintiff to recover on a demand note made by the defendant corporation and guaranteed by the individual defendant, plaintiff was granted summary judgment from which the defendants appeal.

The individual defendant, Daniel R. Ehrlich, an officer and principal stockholder of the defendant corporation, American Moninger Greenhouse Manufacturing Corporation, was the brother of Sydney M. Ehrlich, plaintiff's deceased husband.

On May 22, 1961, while Sydney Ehrlich was still alive, plaintiff gave defendant Daniel Ehrlich a check for $40,000 drawn on her account and payable to the defendant corporation. Following Sydney's death, plaintiff asked defendant Ehrlich to repay the $40,000. Instead of repayment, the plaintiff received the corporation's note for $40,000 payable on demand with 6% Interest. The note, guaranteed personally ***343** by the individual defendant, recited that it was for value received. Between May 18, 1964 and June 16, 1967, the corporate defendant paid plaintiff $10,440 in interest and $10,000 in principal on the note. In the fall of 1967, defendants refused to make further payments on the note and on November 14, 1967, plaintiff commenced this action to recover the sum of $30,000, the balance due on the note.

In opposing plaintiff's motion for summary judgment, the defendants argued that notwithstanding the recitation of 'value received' on the note, there was actually no consideration ***258** therefor since the moneys transferred to the defendant corporation in the form of the $40,000 check represented an investment rather than a loan, such investment having been orally agreed upon by the individual defendant and his brother, plaintiff's decedent husband. Further, it was claimed the transaction was camouflaged as a loan for 'tax reasons'. Special Term's denial of plaintiff's motion for summary judgment was reversed on appeal to the Appellate Division.

In granting summary judgment, the Appellate Division held that the documentary evidence indicates that the transaction was a loan and that the parol evidence rule prevents the defendants from varying the 'definite terms of the instrument.' Moreover, the court went on to note that 'it is doubtful that any testimony as to the alleged oral agreement would be admissible in evidence (CPLR 4519).'

We agree that summary judgment was properly granted here. However, we are of the opinion that the Appellate Division's interpretation of the parol evidence rule and CPLR 4519, in the circumstances of this case, requires clarification.

CPLR 4519 bars testimony of an interested person in regard to a transaction ***892** with a decedent, in an action against the 'executor, administrator or survivor of a deceased person * * * or (against) a person deriving his title * * * through or under a deceased person'. Inasmuch as

plaintiff has brought this action in her individual capacity, and not as a representative of an estate or a survivor of a decedent, CPLR 4519 would not bar the defendant's proffered testimony about his dealings with the decedent Sydney Ehrlich. (See, generally, Weinstein-Korn-Miller, N.Y.Civ.Prac., pars. 4519.08—4519.11; Richardson, Evidence (9th ed.), s 417.)

Furthermore, the parol evidence rule may not be the basis for summary judgment in this case since under that rule the defendants would be entitled to rebut the recital of 'value received' on the note. The recitation of receipt of consideration is a 'mere admission of a fact which, like all such admissions, may be explained or disputed by parol evidence.' (Richardson, Evidence (9th ed.), s 585; ***344** Smith v. Dotterweich, 200 N.Y. 299, 93 N.E. 985; Baird v. Baird, 145 N.Y. 659, 40 N.E. 222; International Assets Corp. v. Axelrod, 245 App.Div. 300, 281 N.Y.S. 32.)

***259** However, while neither CPLR 4519 nor the parol evidence rule provide a basis for granting summary judgment in this case, the Appellate Division reached the proper result in holding for the plaintiff. In opposing plaintiff's motion for summary judgment, it was incumbent upon the defendants to do more than merely raise an issue of consideration. It was essential for the defendants, in claiming absence of consideration, to state their version of the facts in evidentiary form. 'Bald conclusory assertions, even if believable, are not enough.' (Kramer v. Harris, 9 A.D.2d 282, 283, 193 N.Y.S.2d 548; P.D.J. Corp. v. Bansh Props., 23 N.Y.2d 971, 298 N.Y.S.2d 988, 246 N.E.2d 749; Rafner v. Toplis & Harding, Inc., 25 A.D.2d 826, 269 N.Y.S.2d 661; Di Sabato v. Soffes, 9 A.D.2d 297, 193 N.Y.S.2d 184.)

A review of the record before us discloses that the allegations of the defendants fail to adequately raise a triable issue. Every piece of documentary evidence—the note, the entry in plaintiff's checkbook, and the books of account and financial statements of the defendant corportion—conclusively indicate that this transaction was a loan. Moreover, the explanation of defendants, that the transaction was made to appear as a loan for 'tax reasons', is not sufficient to overcome the overwhelming documentary evidence offered by the plaintiff. Just what these 'tax reasons' were and how disguising the transaction as a loan would have benefited any of the parties involved is not disclosed. Such would at least be needed to prevent summary judgment for the plaintiff.

Finally, we agree with the Appellate Division's disposition of a subsidiary issue raised by the defendants. It was claimed by defendants that the money in the account upon which the $40,000 check was drawn actually belonged to the late Sydney Ehrlich and, hence, the defendant Ehrlich should be allowed to assert counterclaims which he had against Sydney as a setoff. The Appellate Division disallowed such counterclaims without prejudice to defendant's raising them in another action.

The rule is well established that counterclaims against a plaintiff are restricted to the capacity in which he sues. (Merritt v. Seaman, 6 Barb. 330, revd. on other grounds, 6 N.Y. 168; cf. Thompson v. Whitmarsh, 100 N.Y. 35, 2 N.E. 273; CPLR 3019; see, also, Weinstein-Korn-Miller, N.Y.Civ.Prac., pars. 3019.08, 3019.28.) The reason for this rule is readily apparent in this case. Here, the action was instituted by the plaintiff in her individual ***260** capacity and not as a representative of her husband's estate. To allow the defendant Ehrlich to assert a counterclaim which he has against the estate of his deceased ****345** brother in the present litigation ***893** would, if successful, afford him a preference over other creditors of the estate.

The defendants, however, are not without a remedy. They may, if so advised, institute an action against the estate, name the plaintiff herein a party defendant in the suit, prove their contentions relative to the real party in interest on the note and, if successful, impress a constructive trust upon the proceeds of this instant proceeding. (See Latham v. Father Divine, 299 N.Y. 22, 27, 85 N.E.2d 168; and 61 N.Y.Jur., Trusts, ss 140—143, for a general discussion of the doctrine of constructive trusts.)

Accordingly, the order of the Appellate Division should be affirmed, with costs.

FULD, C.J., and BURKE, SCILEPPI, BERGAN, BREITEL and GIBSON, JJ., concur.

Order affirmed.

All Citations

26 N.Y.2d 255, 257 N.E.2d 890, 309 N.Y.S.2d 341

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217 A.D.2d 967
Supreme Court, Appellate Division, Fourth Department, New York.

FIRST NATIONAL BANK OF ROCHESTER, Respondent,
v.
James F. VOLPE, James J. Volpe, Appellants, et al., Defendants.

July 14, 1995.

Synopsis

Mortgagee bank sued mortgagors to foreclose mortgage on real property and to enforce promissory notes and guarantees. Both parties moved for summary judgment and mortgagee moved to amend complaint to state a cause of action in reformation. The Supreme Court, Ontario County, Harvey, J., denied both motions for summary judgment and granted mortgagee's motion to amend complaint. Mortgagors appealed. The Supreme Court, Appellate Division, held that: (1) proposed amendment to state a cause of action for reformation of contract was untimely; (2) proposed amendment to allege mistake in formation or articulation of contract did not relate back to original complaint alleging breach of obligation under notes and guarantees; and (3) genuine issues of material fact regarding real estate agreement precluded summary judgment on issue of what parties intended in executing series of documents.

Judgment modified and affirmed as modified.

Attorneys and Law Firms

****907** David A. White by Lisa Maguire, Fairport, for appellant, James J. Volpe.

Edwin R. Schulman, Rochester, for appellant, James F. Volpe.

Chamberlain, D'Amanda, Oppenheimer and Greenfield by Roy Rotenberg, Rochester, for respondent, First Nat. Bank of Rochester.

Before ***968** DENMAN, P.J., and GREEN, PINE, CALLAHAN and DAVIS, JJ.

Opinion

***967** MEMORANDUM:

James F. Volpe and James J. Volpe (defendants) appeal from an order that granted plaintiff's motion to amend the complaint to state a cause of action for reformation of the parties' "Modification and Extension Agreement" based on a theory of mutual mistake, and denied defendants' cross motion for summary judgment dismissing the complaint in this action to foreclose a mortgage on defendants' real property and to enforce promissory notes and guarantees executed by defendants. Defendants contend that the proposed amendment of the complaint is barred by the Statute of Limitations, is patently lacking in merit, has been pleaded with insufficient particularity, is barred by the doctrine of laches, and is precluded by the doctrine of law of the case. Defendants also contend that they are entitled to summary judgment because, pursuant to the express terms of the Modification and Extension Agreement, plaintiff is not entitled to call the loan until the year 2012 and defendants therefore are not in default.

The proposed amendment of the complaint should have been denied as untimely. CPLR 213(6) prescribes a six-year Statute of Limitations for "an action based upon mistake." That period began to run when the alleged mistake occurred, that is, when the written contract was executed (*see,* ****908** *Lauer's Furniture Stores v. Pittsford Place Assocs.,* 177 A.D.2d 942, 577 N.Y.S.2d 984, *lv. dismissed* 79 N.Y.2d 1040, 584 N.Y.S.2d 449, 594 N.E.2d 943; *Black v. Mill Rd. Assocs.,* 86 A.D.2d 621, 446 N.Y.S.2d 363), which in this case was May 15, 1987. Plaintiff did not seek to amend until 1994. Contrary to plaintiff's contention, this case does not fall within CPLR 203(g) because a cause of action based upon mistake is not one in which accrual is measured by actual or constructive discovery (*see,* CPLR 213[6]; *compare,* CPLR 213[8]). Moreover, contrary to plaintiff's assertion, the claim asserted in the proposed amended pleading does not relate back to the original complaint pursuant to CPLR 203(f). The original complaint alleged that defendants breached their obligations under the notes and guarantees, and thus did not give notice of the same transactions or occurrences sought to be proved by the proposed amendment, which alleges a mistake in the formation or articulation of the contract (*cf., Matter of SCM Corp. [Fisher Park Lane Co.],* 40 N.Y.2d 788, 789, 791–792, 390 N.Y.S.2d 398, 358 N.E.2d 1024; *Levy v. Kendricks,* 170 A.D.2d 387, 566 N.Y.S.2d 604; *Davis v. Davis,* 95 A.D.2d 674, 675, 463 N.Y.S.2d 462). In view of our conclusion that the proposed amendment is untimely, we need not consider defendants' other objections to it.

The court properly denied defendants' motion for summary judgment dismissing the complaint. There are triable issues of fact concerning what the parties intended by the series of documents executed on May 15, 1987, in particular, the conflicting provisions concerning the maturity date of the loan (*cf., Genrich v. Holiday Lady Fitness Ctr.,* 216 A.D.2d 897, 629 N.Y.S.2d 352).

Order unanimously modified on the law and as modified affirmed without costs.

All Citations

217 A.D.2d 967, 629 N.Y.S.2d 906

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181 Misc. 149
Supreme Court, Queens County, New York,
Special Term.

FISHER
v.
LOHSE.

May 13, 1943.

Synopsis

Action by Marie E. Fisher against William Lohse to recover $250 for five months' rent. On plaintiff's motion for summary judgment.

Motion granted.

Attorneys and Law Firms

****122 *149** Anthony J. Busicco, of New York City, for plaintiff, for the motion.

Cohalan & Levy, of Sayville (John P. Cohalan, Jr., of Sayville, of counsel), for defendant, opposed.

Opinion

COLDEN, Justice.

In an action by a landlord to recover from her tenant the sum of $250 for five months' rent under the provisions of a written lease, dated October 15, 1938, the plaintiff moves for summary judgment pursuant to Rule 113 of the Rules of Civil Practice.

By failure to deny any of the allegations of the complaint the defendant has admitted the execution of the lease and that no part of the five months' rent due to the plaintiff has been paid, although duly demanded. The answer consists solely of an affirmative defense wherein it is alleged, in substance, that the leased premises 'comprise what is commonly known as a roadside stand or restaurant'; that the lease 'specified that the said premises were to be used for restaurant purposes only'; that due to the war civilian consumption of essential materials, including food, food products, gasoline and rubber, has been curtailed by a rationing system and as a result the defendant was rendered unable to obtain the meats and products needed in his business, and the general public throughout the County of Suffolk, which constituted the bulk of his customers, was unable to patronize his establishment; and that by reason of the foregoing he has been deprived, by duly promulgated governmental regulations, of the beneficial use of the leased premises and was ***150** compelled to quit the same prior to the accrual of any installment of rent sought to be recovered herein.

The plaintiff contends that the government regulations referred to by the defendant do not prohibit the sale of refreshments in the demised premises; that the defendant could have continued to operate within the terms of the lease, though the volume of business may have suffered diminution as the result of the restrictions upon the use of automobiles; and that the primary purpose of the lease as to the use of the demised premises was not completely frustrated.

Unquestionably, had the governmental acts referred to completely frustrated the performance by the defendant of the lease in question, ****123** payment of rent would be excused as a matter of law. Matter of Kramer & Uchitelle, Inc., 288 N.Y. 467, 472, 43 N.E.2d 493, 141 A.L.R. 1497. But such was not the case. Although the volume of the defendant's business was substantially reduced because of the measures taken by the federal authorities to conserve food and materials necessary to the war effort, he could have continued to operate his refreshment stand, which incidentally is the sole purpose designated in the lease itself for which the premises were to be used and not the restaurant purposes alleged in the answer. However, whether the use of the premises was restricted to a refreshment stand or a restaurant is immaterial for it cannot be said that in either case was the performance of the lease rendered completely impossible by a governmental act.

In Robitzek Investing Co., Inc., v. Colonial Beacon Oil Company, 265 App.Div. 749, 40 N.Y.S.2d 819, 822, decided April 9, 1943, the Appellate Division, 1st Dept., said: '* * * Here there is not complete frustration. Defendant could have continued to operate the gasoline station at the demised premises within the terms of the lease though the volume of its business might have suffered substantial diminution because of the federal regulatory measures. See Byrnes v. Balcom, 265 App.Div. 268, 271, 38 N.Y.S.2d 801; Colonial Operating Corporation v. Hannan Sales & Service, Inc., 265 App.Div. 411, 39 N.Y.S.2d 217.'

In Colonial Operating Corporation v. Hannan Sales & Service, Inc., supra [265 App.Div. 411, 39 N.Y.S.2d 218], the Appellate Division, 2nd Dept., passed upon the

question whether orders of the Office of Production Management prohibiting with certain exceptions the sale of 1942 automobiles and of any automobiles that had been driven less than 1,000 miles, relieved the tenant from paying rent because the primary purpose of a lease, which restricted the use of the demised premises to 'a showroom for automobiles and automobile accessories' ***151** , was frustrated. In holding the tenant liable for the full rent reserved in the lease, the court said: 'Therefore the Federal orders in question *did not make illegal or prohibit absolutely* the showing and selling of both new and second-hand automobiles and accessories. It is clear, also, that nothing in the lease prevented the tenant from selling new automobiles to those within the exceptions above enumerated. Therefore it must be said as a matter of law that the primary purpose of the lease as to use was not frustrated, and likewise that the tenant was not relieved from continuing the use and occupation of the premises and from paying rent reserved in the lease.' (Italics supplied.)

Similarly, in Byrnes v. Balcom, supra [265 App.Div. 268, 38 N.Y.S.2d 803] the Appellate Division, 3rd Dept., said:

'* * * Respondent is not *entirely* prohibited by governmental decree from selling new cars. His right to do so is *restricted*.

'* * * A change in the law during the term of the lease, however, which merely restricts but does not wholly prohibit the conduct of the business carried on, does not release the tenant from his obligation to pay rent.' (Italics supplied.)

Some argument has been advanced that the defendant has not, as alleged in paragraph '11' of the answer, 'quit the said premises prior ****124** to the commencement of any of the periods for which any instalments of rent accrued as alleged in the complaint' and that as a matter of fact he has at all times remained in possession. This appears to be true, for no facts are alleged in the opposing affidavit showing the surrender of the premises. The defendant has merely stated that early in November 1942 he threw up the sponge, quit the business and took a job in a defense plant; that he told his two employees 'that they could continue the business if they wished. They continued thereafter up to and including almost the middle of November, 1942, when they also discontinued their efforts to keep the business functioning. Thus, since on or about the 15th day of November, 1942, the stand has been out of business.' The court is of the opinion that under the decision in the Byrnes case, supra, it is not material whether the premises were surrendered. In that case the premises were vacated on April 30, 1942, and the court permitted recovery in an action brought for rent due for the months of May and June. The defendant has also urged the denial of the motion on the ground that whether the primary purpose of the lease has been frustrated to such an extent as to render it no longer enforcible is a question of fact which cannot be decided without a trial. ***152** However the Appellate Division in the Byrnes case, supra, reversed an order denying summary judgment, holding that the sole issue before the court was one of law and hence summary judgment in favor of the landlord plaintiff was proper. So here the sole question is one of law and no factual issues have been shown to exist which would require a trial.

While this court has great sympathy for the plight in which this defendant finds himself due to conditions over which he had no control, the law, as enunciated in the most recent decisions of our appellate courts, supra, compels the result here reached. Paraphrasing the language of the Court of Appeals in Graf v. Hope Building Corporation, 254 N.Y. 1, 4, 171 N.E. 884, 885, 70 A.L.R. 984, the plaintiff 'may be ungenerous' in not bearing with the defendant's situation 'but generosity is a voluntary attribute' and forebearance cannot be enforced even by a court of equity. The motion must accordingly be granted. Settle order on notice.

All Citations

181 Misc. 149, 42 N.Y.S.2d 121

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283 A.D.2d 253
Supreme Court, Appellate Division, First Department, New York.

G & G INVESTMENTS, INC., et al., Plaintiffs–Appellants,
v.
REVLON CONSUMER PRODUCTS CORPORATION, Defendant–Respondent.

May 15, 2001.

Synopsis

Purchaser of equipment sued seller, seeking rescission of contract based on mutual mistake, unjust enrichment, and unilateral mistake of material fact. The Supreme Court, New York County, Beatrice Shainswit, J., granted seller's motion for summary judgment, and purchaser appealed. The Supreme Court, Appellate Division, held that: (1) purchaser's failure to test equipment before signing contract precluded rescission, and (2) cause of action for unjust enrichment was untenable.

Affirmed.

Attorneys and Law Firms

****411** William B. Mallin, for Plaintiffs–Appellants.

Robert Stephan Cohen, for Defendant–Respondent.

ROSENBERGER, J.P., MAZZARELLI, ANDRIAS, BUCKLEY and FRIEDMAN, JJ.

Opinion

***253** Order, Supreme Court, New York County (Beatrice Shainswit, J.), entered April 27, 2000, which, to the extent appealed from, granted defendant summary judgment dismissing the causes of action premised upon mutual mistake, unjust enrichment, and unilateral mistake of material fact, unanimously affirmed, with costs.

Plaintiffs decided not to complete testing of the equipment before signing an agreement that included a specific and express representation that they evaluated the entire system and its adequacy for their purposes. This was a failure of ordinary care that precludes plaintiffs' demand for rescission, whether the basis is mutual mistake (*see, Williamson Cent. School Dist. v. E & L Piping,* 261 A.D.2d 937, 938, 690 N.Y.S.2d 352, *lv. denied* 93 N.Y.2d 816, 697 N.Y.S.2d 563, 719 N.E.2d 924) or unilateral mistake (*see, Morey v. Sings,* 174 A.D.2d 870, 872, 570 N.Y.S.2d 864). Since a valid contract exists governing the subject matter in dispute, the cause of action for unjust enrichment is untenable (*see, G & S Custom Homes v. Holtz,* 179 A.D.2d 1025, 1026, 579 N.Y.S.2d 514). Plaintiffs' argument that summary judgment should be denied while further discovery is conducted ****412** is without merit (*see, Bailey v. New York City Tr. Auth.,* 270 A.D.2d 156, 157, 704 N.Y.S.2d 582).

All Citations

283 A.D.2d 253, 724 N.Y.S.2d 411, 2001 N.Y. Slip Op. 04370

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66 N.Y.2d 965
Court of Appeals of New York.

GTF MARKETING, INC., Appellant,
v.
COLONIAL ALUMINUM SALES, INC., Respondent.

Dec. 17, 1985.

Synopsis
Marketing company brought breach of contract action against aluminum siding company. The Supreme Court, Suffolk County, Paul T. D'Amaro, J., denied defendant's motion for summary judgment, and defendant appealed. The Supreme Court, Appellate Division, 108 A.D.2d 86, 488 N.Y.S.2d 219, reversed, and plaintiff appealed. The Court of Appeals held that marketing company was not entitled to recover from aluminum siding company where marketing company did not provide siding company with any "leads" under the agreement.

Affirmed.

Attorneys and Law Firms

***966 ***787 **755** Howard L. Blau, Garden City, for appellant.

Jessel Rothman, Mineola, for respondent.

OPINION OF THE COURT

MEMORANDUM.

The order of the Appellate Division, 108 A.D.2d 86, 488 N.Y.S.2d 219, should be affirmed, with costs.

****756** By letter agreement dated March 5, 1981 plaintiff (GTF Marketing) agreed to supply defendant (Colonial Aluminum Sales) with the names, addresses and telephone numbers of homeowners in Queens, Nassau and Suffolk Counties interested in Colonial's aluminum siding at a cost of $10 per "lead." According to the agreement, GTF would mail out about 200,000 data processing cards containing "screening questions" asking the recipients whether they were planning to buy aluminum siding and other products within six months. In its verified complaint, GTF alleged that it had supplied 12,463 "leads," and that Colonial had refused to pay the sum of $124,630 which was owing to GTF.

After joinder of issue, Colonial moved for summary judgment, ***967** contending that GTF was precluded based upon factual findings in two other cases in which GTF had sued other companies on similar contracts and lost. In support of its motion, Colonial submitted the affidavit of its president, Michael Longo, in which he discussed the other actions, and to which were annexed as exhibits copies of the oral decisions in those actions containing the allegedly preclusive factual findings. In his affidavit, Longo also swore that GTF had not supplied Colonial with any "leads" as required by the contract, and that "Colonial has received nothing which would entitle GTF to collect any money under the terms of the letter" agreement. In opposition, GTF submitted only the affidavit of its attorney purporting to set forth certain facts about the formation of the contract and reciting that "the issue of whether performance under or breach of the agreement has occurred is also a question of fact." Special Term denied the motion, but a divided Appellate Division reversed. The majority held that GTF was barred by the doctrine of third-party issue preclusion and, further, that GTF's papers in opposition were insufficient to raise a triable issue of fact. We conclude that, although collateral estoppel does not apply, the Appellate Division correctly dismissed the complaint due to the insufficiency of GTF's affidavit in opposition to summary judgment.

Although the contracts in the prior actions and in this one are different, Colonial argues that the performance was the same, and that the trial judge necessarily found that GTF had fraudulently failed to send out any data processing cards. It is not clear from the decision, however, whether the trial court specifically and necessarily decided that issue, and third-party issue preclusion therefore does not lie (*see, O'Connor v. G & R Packing Co.,* 53 N.Y.2d 278, 440 N.Y.S.2d 920, 423 N.E.2d 397). Because the decision was delivered orally immediately following trial, it contains a number of observations, none of which can be said with certainty to be dispositive of the issue before us. It would have been highly desirable for the trial court to have issued an opinion containing findings, particularly since the court knew at the time of its decision that this action was pending.

The opposing affidavit was, however, insufficient. A defendant moving for summary judgment has the initial burden of coming forward with admissible evidence, such as affidavits by persons having knowledge of the facts, reciting the material facts and showing that the cause of action has no merit (CPLR 3212[b]; ***788** *Zuckerman v. City of New York,* 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). ***968** However, once the moving party has satisfied this obligation, the burden shifts; "the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure so to do, and the submission of a hearsay affirmation by counsel alone does not satisfy this requirement" (*Zuckerman v. City of New York,* 49 N.Y.2d 557, 560, 427 N.Y.S.2d 595, 404 N.E.2d 718, *supra).*

Here, Colonial satisfied its burden. Longo's affidavit stated that, although GTF had provided names of homeowners to Colonial, Longo personally and Colonial in the ordinary course of its business determined that the names were useless and not **757 "leads." Some had never sent in data processing cards; others said they had been promised free gifts; many hung up, and others could not be called because GTF had not supplied telephone numbers. Longo concluded that he "could not make any use of the purported 'leads' supplied to us by GTF. They were just names, and definitely were not 'leads.' "

In the face of Longo's affidavit and allegations that GTF failed to perform, the affidavit of GTF's counsel submitted in opposition was insufficient. The allegation that a question of fact exists as to performance under the agreement is plainly not made upon personal knowledge. As we have previously noted, an affidavit or affirmation of an attorney without personal knowledge of the facts cannot "supply the evidentiary showing necessary to successfully resist the motion" (*Roche v. Hearst Corp.,* 53 N.Y.2d 767, 769, 439 N.Y.S.2d 352, 421 N.E.2d 844). "Such an affirmation by counsel is without evidentiary value and thus unavailing" (*Zuckerman v. City of New York,* 49 N.Y.2d 557, 563, 427 N.Y.S.2d 595, 404 N.E.2d 718, *supra).* Thus, on the papers submitted the uncontroverted fact is that GTF did not perform or provide Colonial with any "leads" under the agreement, and GTF's claim that Colonial breached the agreement by failing to pay for the services rendered should therefore be dismissed.

WACHTLER, C.J., and JASEN, MEYER, SIMONS, KAYE and ALEXANDER, JJ., concur.

TITONE, J., taking no part.

Order affirmed, with costs, in a memorandum.

All Citations

66 N.Y.2d 965, 489 N.E.2d 755, 498 N.Y.S.2d 786

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923 F.Supp.2d 351
United States District Court,
N.D. New York.

GANDER MOUNTAIN COMPANY,
Plaintiff,
v.
ISLIP U–SLIP LLC, Defendant.

No. 3:12–CV–0800 (MAD/DEP).
|
Feb. 11, 2013.

Synopsis
Background: Commercial tenant brought action against landlord seeking declaratory judgment and damages. Landlord moved to dismiss.

Holdings: The District Court, Mae A. D'Agostino, J., held that:

tenant failed to state a claim for declaration that its commercial purpose was frustrated, and

tenant failed to state a claim for fraudulent inducement.

Motion granted.

Attorneys and Law Firms

***354** Pope & Schrader, LLP, Alan J. Pope, Esq., of Counsel, Binghamton, NY, for Plaintiff.

Thompson Coburn LLP, Dudley W. Von Holt, Esq., Paul T. Sonderegger, Esq., of Counsel, St. Louis, MO, for Plaintiff.

Hinman, Howard & Kattell, LLP, Dawn J. Lanouette, Esq., Jeanette N. Simone, ***355** Esq., of Counsel, Binghamton, NY, for Defendant.

MEMORANDUM–DECISION AND ORDER

MAE A. D'AGOSTINO, District Judge.

INTRODUCTION

Plaintiff Gander Mountain Company ("plaintiff" or "Gander Mountain") commenced the within action seeking monetary damages, declaratory judgment and injunctive relief against defendant Islip U-slip LLC ("defendant"). Presently before the Court is defendant's motion to dismiss plaintiff's complaint in its entirety pursuant to Fed.R.Civ.P. 12(b)(6) and 12(b)(7). (Dkt. No. 14). Plaintiff has opposed defendant's motion. (Dkt. No. 19).

BACKGROUND[1]

Plaintiff operates a national retail network for stores for hunting, fishing, camping, marine products and accessories. In or around January 2004, plaintiff and Pathmark Stores, Inc. ("Pathmark") began negotiating a lease for the premises ("Premises") located at 528 Harry L. Drive, Johnson City, New York. The premises included a building consisting of approximately 47,500 square feet. The purpose of the lease ("Lease") was for the operation of a Gander Mountain retail store.

The Premises is in a location that is directly adjacent to Finch Hollow Creek, which is a tributary of the Susquehanna River. Finch Hollow Creek discharges into Little Choconut Creek which then discharges into the Susquehanna River. The Premises lie between Finch Hollow Creek (south) and Harry L. Drive (north). From 1986 through 2000, the area in and around Johnson City, New York experienced at least four severe flood events. In March 1986 and April 1993, the Susquehanna River, Little Choconut Creek and Finch Hollow Creek flooded the Premises. In January 1996, the Susquehanna River, Little Choconut Creek and Finch Hollow Creek flooded adjacent properties including the Premises. A significant portion of Harry L. Drive, the only means of ingress and egress from the Premises, was closed due to the January 1996 flood. In February 2000, the river and creeks again flooded the Premises.

From January 15, 2004 through April 15, 2004, plaintiff conducted its due diligence with respect to the Premises. During that time, plaintiff hired Certified Environment Services ("CES") to perform an Environmental Site Assessment. Part of the task of performing the assessment was to gather historical information on the Premises, including past use, zoning designation, flood plain designation and events of past flooding. On or around February 19, 2004, Pathmark reported that it did not possess any environmental reports for the Premises. On or about March 1, 2004, CES produced a map indicating that the Premises was located within a 500 year flood plain. CES sent Pathmark's Director of Real Estate a questionnaire which was to be completed before the Environmental Site Assessment was issued. On or about March 31, 2004, CES advised plaintiff that it had contacted Pathmark's Director of Real Estate on three occasions but that Pathmark was unresponsive. During the due diligence period, Pathmark failed to produce any information related to past flood events at the Premises. On or about April 9, 2004, CES sent it's Environmental Assessment to plaintiff without any additional information from Pathmark.

On April 16, 2004, plaintiff and Pathmark entered into the Lease whereby ***356** plaintiff agreed to lease the premises.[2] The initial term of the lease was fifteen (15) years. Section 12.2 of the Lease provides:

> *Tenant's Property Insurance*
>
> Tenant shall, commencing on the Commencement Date and continuing during the Lease terms, keep in full force and effect an all risk policy of insurance insuring (a) at least eighty percent (80%) of their full replacement value Tenant's merchandise, trade fixtures, furnishings, equipment and all other items of personal property of Tenant located on or within the Premises; and (b) to its full replacement value, all buildings and improvements on the Premises. Such insurance may be furnished by Tenant under any blanket policy carried by it, under a separate policy therefore or through Tenant's self-insurance. Upon request by Landlord, Tenant shall provide to Landlord a certificate of insurance naming Landlord an any fee mortgagee as additional insureds and providing that the applicable insurance may not be canceled without at least thirty (3) days written notice to Landlord.

On or about August 18, 2004, plaintiff began operating its retail store. In June 2006, the Susquehanna River caused massive flooding in Johnson City, New York, cresting at 33.66 feet. As a result, Little Choconut Creek and Finch Hollow Creek flooded the Premises. During June 2006, plaintiff's store on the Premises was filled with three to six feet of water which caused a complete loss of inventory. After the event, plaintiff's store on the Premises was closed for 92 days while a large construction and remodeling project was undertaken to restore the property for use as an operable commercial retail building.

On July 8, 2010, defendant purchased the Premises from Pathmark.[3]

In September 2011, Tropical Storm Lee struck the region with heavy rains. The Susquehanna River crested at 33.66 feet and caused Little Choconut Creek and Finch Hollow Creek to flood the Premises. The Premises had to be evacuated and the flooded region was declared a major disaster area. Plaintiff's store on the Premises was filled with five to eight feet of water which caused a complete loss of inventory.

From October 2011 until April 2012, plaintiff attempted to obtain insurance for an operating store that is necessary to continue business in Johnson City to satisfy Section 12.2 of the Lease. Plaintiff was unable to obtain insurance under an all-risk property insurance policy due to the previous history of flooding at the Premises. Plaintiff discontinued operations at the Premises. On May 15, 2012, plaintiff filed a complaint in the within action. On July 16, 2012, defendant filed a motion to dismiss on the following grounds: (1) plaintiff waived all claims against defendant based upon the Certificate of Estoppel; (2) the complaint fails to state a valid claim for frustration of purpose; (3) plaintiff's claims are barred by the applicable statute of limitations; (4) there is no fiduciary duty between a landlord and tenant; (5) the negligence claims are duplicative of the breach of contract claims; and (6) plaintiff failed to name an indispensable party. Plaintiff opposes defendant's motion and asserts that defendant improperly relies upon documents that are beyond the "four corners" of plaintiff's complaint.

***357 DISCUSSION**

I. STANDARD ON A MOTION TO DISMISS UNDER 12(B)(6)

A motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the party's claim for relief and pleadings without considering the substantive merits of the case. *Global Network Commc'ns v. City of New York,* 458

F.3d 150, 155 (2d Cir.2006); *Patane v. Clark,* 508 F.3d 106, 111–12 (2d Cir.2007). In considering the legal sufficiency, a court must accept as true all well-pleaded facts in the pleading and draw all reasonable inferences in the pleader's favor. *See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.,* 493 F.3d 87, 98 (2d Cir.2007) (citation omitted). This presumption of truth, however, does not extend to legal conclusions. *See Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citation omitted). "Generally, consideration of a motion to dismiss under Rule 12(b)(6) is limited to consideration of the complaint itself" unless all parties are given a reasonable opportunity to submit extrinsic evidence. *Faulkner v. Beer,* 463 F.3d 130, 134 (2d Cir.2006). In ruling on a motion to dismiss pursuant to Rule 12(b)(6), a district court generally must confine itself to the four corners of the complaint and look only to the allegations contained therein. *Robinson v. Town of Kent, N.Y.,* No. 11 Civ. 2875, 2012 WL 3024766, at *3–4 (S.D.N.Y.2012) (citing *Roth v. Jennings,* 489 F.3d 499, 509 (2d Cir.2007)).

To survive a motion to dismiss, a party need only plead "a short and plain statement of the claim," *see* Fed.R.Civ.P. 8(a)(2), with sufficient facts "to 'sho[w] that the pleader is entitled to relief[.]' " *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 557, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (quotation omitted). Under this standard, the pleading's "[f]actual allegations must be enough to raise a right of relief above the speculative level," *see id.* at 555, 127 S.Ct. 1955 (citation omitted), and present claims that are "plausible on [their] face." *Id.* at 570, 127 S.Ct. 1955. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal,* 556 U.S. at 678, 129 S.Ct. 1937 (citation omitted). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.' " *Id.* (quoting *Twombly,* 550 U.S. at 557, 127 S.Ct. 1955). Ultimately, "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief," *Twombly,* 550 U.S. at 558, 127 S.Ct. 1955, or where a plaintiff has "not nudged [its] claims across the line from conceivable to plausible, the [ ] complaint must be dismissed[.]" *Id.* at 570, 127 S.Ct. 1955.

The Second Circuit has held that, on a motion to dismiss, a court may consider "documents attached to the complaint as an exhibit or incorporated in it by reference, ... matters of which judicial notice may be taken, or ... documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit." *Brass v. Am. Film Tech. Inc.,* 987 F.2d 142, 150 (2d Cir.1993). The Second Circuit has clarified, however, that "[b]ecause this standard has been misinterpreted on occasion, we reiterate ... that a plaintiff's reliance on the terms and effect of a document in drafting the complaint is a necessary prerequisite to the court's consideration of the document on a dismissal motion; mere notice or possession is not enough." *Chambers v. Time Warner, Inc.,* 282 F.3d 147, 153 (2d Cir.2002) (citation and footnote omitted).[4]

***358 II. ESTOPPEL**

Defendant moves to dismiss plaintiff's entire complaint arguing that plaintiff waived and/or is equitably estopped from asserting claims against Islip based upon the Tenant Estoppel executed on July 7, 2010. Defendant claims that, "based upon the clear language of the Estoppel Certificate, Gander Mountain has agreed that it will not assert the claims against Islip".

On a Rule 12(b)(6) motion, the Court may consider: "(1) facts alleged in the complaint and documents attached to it or incorporated in it by reference, (2) documents integral to the complaint and relied upon in it, even if not attached or incorporated by reference, (3) documents or information contained in defendant's motion papers if plaintiff has knowledge or possession of the material and relied on it in framing the complaint, (4) public disclosure documents required by law to be, and that have been, filed with the Securities and Exchange Commission, and (5) facts of which judicial notice may properly be taken under Rule 201 of the Federal Rules of Evidence." *Caldwell v. Gutman, Mintz, Baker & Sonnenfeldt, P.C.,* 2012 WL 1038804, at *4 (E.D.N.Y.2012). "The plaintiff's failure to include matters, of which as pleaders, they had notice and which were integral to their claim—and that they apparently most wanted to avoid—may not serve as a means of forestalling the district court's decision on the motion." *Cortec Indus., Inc. v. Sum Holding L.P.,* 949 F.2d 42, 44 (2d Cir.1991).

In this matter, plaintiff argues that the Court should not consider the document within the context of the 12(b)(6) motion. The certificate/document was not attached or referenced in plaintiff's complaint but is annexed to defendant's motion papers. The document is signed by plaintiff and provides:

> Pathmark Stores, Inc. ("Landlord") has notified Gander Mountain Company ("Tenant") that it is under contract to sell the Premises to Islip U–Slip LLC ("Purchaser") and this certificate will be delivered to Purchaser in connection with such sale. Tenant hereby states and declares that, as of the date hereof and based on the

> current actual knowledge and information of Tenant's officers and directors, as follows: [...]

Plaintiff does not deny knowledge and/or possession of the document. However, plaintiff argues that even if the court accepts the document as part of the record, the certificate does not bar the claims asserted herein as it was "based upon facts now known". The Court agrees. The Second Circuit has explained that, "[t]he general purpose of an estoppel certificate is to assure one or both parties to an agreement that there are no facts known to one and not the other that might affect the desirability of entering into the agreement and to prevent the assertion of different facts at a later date." *Bank of New York Mellon Trust Co. v. Morgan Stanley Mortg. Capital, Inc.,* 2011 WL 2610661, at *6 (S.D.N.Y.2011) (citing *ReliaStar Life Ins. Co. of New York v. Home Depot U.S.A., Inc.,* 570 F.3d 513 (2d Cir.2009)). At this juncture, there are material, factual issues surrounding the document that preclude dismissal and cannot be resolved at the early stages of this litigation. Accordingly, defendant's motion to dismiss plaintiff's complaint based upon the Tenant Estoppel/Certificate of Estoppel is denied.

***359** In the alternative, defendant moves to dismiss plaintiff's individual causes of action based upon additional theories which the Court will discuss these requests/causes of action seriatim.

III. FRUSTRATION OF PURPOSE

In Count I of the complaint, plaintiff seeks a declaratory judgment against defendant and a finding that, due to the September 2011 flood event and plaintiff's inability to procure insurance to conduct its ongoing business operations on the Premises, the Lease is hereby terminated. Defendant argues that the inability to obtain an all risk insurance policy cannot frustrate the lease or render plaintiff's performance impossible.

The Restatement of Contracts (Second) § 265 (1981) provides:

> Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

Comment (a) of § 265 sets forth that three criteria must be met before courts will find frustration of purpose:

> First, the purpose that is frustrated must have been a principal purpose of that party in making the contract. The object must be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense. Second, the frustration must be substantial. It is not enough that the transaction has become less profitable for the affected party or even that he will sustain a loss. The frustration must be so severe that it is not fairly to be regarded as within the risks that he assumed under the contract. Third, the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made.

The doctrine of frustration of purpose is "a narrow one which does not apply unless the frustration is substantial". *Crown It Services v. Koval–Olsen,* 11 A.D.3d 263, 782 N.Y.S.2d 708 (1st Dep't 2004). "Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary". Restatement 2d of Contracts § 261.

Under New York law, the doctrine of frustration of purpose discharges a party's duties to perform under a contract where "an unforeseen event has occurred, which, in the context of the entire transaction, destroys the underlying reasons for performing the contract, even though performance is possible." *Sage Realty Corp. v. Jugobanka, D.D.,* 1997 WL 370786, at *1–2 (S.D.N.Y.1997) (citations omitted). "Frustration of purpose excuses performance when a 'virtually cataclysmic, wholly unforeseeable event renders the contract valueless to one party' ". *U.S. v. Gen. Douglas MacArthur Senior Vill.,* 508 F.2d 377, 381 (2d Cir.1974). It is not enough that the transaction has become less profitable for the affected party or even that he will sustain a loss. *Rockland Dev. Assoc. v. Richlou Auto Body, Inc.,* 173 A.D.2d 690, 691, 570 N.Y.S.2d 343 (2d Dep't 1991). "[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." *Bank of New York v. Tri* ***360** *Polyta Fin. B.V.* 2003 WL 1960587, at *4 (S.D.N.Y.2003) (citations omitted).

The relevant inquiry is, "whether the party seeking to avoid liability could have anticipated the frustrating event and guarded against it". *Sage Realty Corp. v. Jugobanka, D.D.,* 1998 WL 702272, at *4, n. 4 (S.D.N.Y. Oct. 8, 1998). Commercial frustration applies only where the parties

could not have provided for the frustrating event through contractual safeguards. *Id.* (citation omitted). "[I]f a party could reasonably foresee an event that would destroy the purpose of the contract, and did not provide for the event's occurrence, then that party will be deemed to have assumed the risk." *Id.* If a contingency is reasonably foreseeable and the agreement nonetheless fails to provide protection in the event of its occurrence, the defense of commercial frustration is not available. *Id.* at *3 (citations omitted).

In a case with similar facts and an analogous lease provision, the district court refused to relieve plaintiff from its obligation under the lease because the parties contemplated the contingency and allocated the risk between the parties. *See Portnoy v. Omnicare Pharm., Inc.,* 2004 WL 1535780, at *3 (E.D.Pa.2004). In *Portnoy,* the defendant/tenant entered into a fifteen year lease with the plaintiff/landlord for a two-story commercial property. In 2001, due to Tropical Storm Allison, the defendant sustained severe flood damage and ceased operations. *Id.* Pursuant to the lease, the defendant repaired portions of the exterior and the plaintiff repaired the interior of the building. *Id.* In Mid–2002, the defendant informed the plaintiff that it was vacating the building. As a result, the plaintiff commenced an action and the defendant asserted several affirmative defenses including frustration of purpose. *Id.* at *2. The defendant argued that the unforeseeable circumstances frustrated the purpose of the lease. Specifically, the defendant claimed that based upon the lease, the parties intended the property to be used for manufacturing, testing, analyzing, packing and the distribution of pharmaceutics and due to the history of flooding and strict FDA standards, the defendant could not longer operate. *Portnoy,* 2004 WL 1535780 at *2. On the parties' motions for summary judgment, the Court concluded that the lease was a detailed contract between two sophisticated parties in which the allocation for risk of casualty is distributed between the parties. *Id.* at *3. The lease included a provision for "Damage or Casualty" that mirrors the provision at issue herein. The Court held, "[t]he parties' agreement contemplated the event of a casualty. This court has to enforce the parties' agreement absent extreme circumstances. These facts do not amount to circumstances that warrant the application of frustration of purpose". *Id.*

In another case with strikingly similar facts, the District Court of Appeals of Florida held that the tenant failed to establish a *prima facie* defense of commercial frustration. *Home Design Ctr.–Joint Venture v. County Appliances of Naples, Inc.,* 563 So.2d 767 (1990). In the *Home Design* case, the defendant entered into a five-year lease with the plaintiff for a 3200 square foot space in January 1986. As a condition of the lease, the defendant agreed to procure and maintain liability insurance. *Id.* at 768. In October 1987, the insurance company declined to renew its policy. While the defendant was able to obtain insurance from Nationwide, the policy was canceled a few months later when Nationwide inspected the area. *Id.* The defendant began to look for replacement coverage however, the record did not contain any documents concerning the efforts after April 1988. *Id.* at 769.

The Court held that:

> ***361** The future availability of contractually required insurance at a reasonable price is clearly a business risk. The parties could have shifted the risk of expensive or unavailable insurance for either the liability coverage or the property coverage from the tenant to the landlord. They chose not to shift this risk by the terms of the contract. Thus, the issue in this case is whether the tenant is entitled to shift these risks to the landlord under principles of law which would override the allocation of risks in the parties' contract.

Home Design, at 769.

Noting that the doctrines of "impossibility of performance and commercial frustration" are "undoubtedly in [the] process of evolution and have been applied with "increasing liberality", the Court warned that the doctrines, should be employed with great caution if the relevant business risk was foreseeable at the inception of the agreement and could have been the subject of an express contractual agreement." *Id.* With respect to frustration of purpose, the Court held:

> Even under theories which permit a broader application of the doctrine of commercial frustration, the defense is not available concerning difficulties which could reasonably have been foreseen by the promisor at the creation of the contract. Although County Appliances may not have anticipated future problems with its insurance company or with its floor plan financier, it did not present substantial competent evidence to establish that such basic business risks were matters which it could not have foreseen at the time it negotiated the terms of this lease.

Id. at 770 (internal citations omitted).

The Court noted that the defendant failed to present any precedent, "in which a tenant was permitted to escape its obligations under a lease because of difficulties obtaining insurance." *Id.*

Here, plaintiff claims:

> From in or around October 2011 through April 2012, Gander Mountain attempted to obtain insurance for an

> operating store that is necessary to continue business in Johnson City, New York and which satisfies the requirements set forth in Paragraph 12.2. of the Lease.
>
> The term of Gander Mountain's 2011–2012 all-risk property insurance policy issued by Affiliated FM Insurance Company ended on May 1, 2012.
>
> In or around that time, Gander Mountain's insurance broker, Aon Risk Services Central, Inc., informed Gander Mountain, that after diligently pursuing insurance for an operable store at the Premises, no insurance company was willing to offer such insurance. The insurance broker confirmed that the Building's contents and inventory cannot be insured under an all-risk property insurance policy due to the previous history of flooding at the Premises. Accordingly, there are no other options available to Gander Mountain to operate an ongoing business concern on the Premises.

Pltf. Cmplt. at ¶ 45–47.

Plaintiff is a sophisticated business entity with knowledge of the real estate industry and clearly experienced in entering into written agreements of this nature. Plaintiff and Pathmark entered into a lease agreement that allocated their risks with respect to damage to the property.

Section 15 of the Lease is entitled Damage, Destruction and Restoration and provides:

> 15.1 *Repair and Restoration*
>
> If the premises (including, without limitation, the Building) shall be damaged or ***362** destroyed in whole or in part by fire or other casualty during the Lease term, Tenant shall promptly repair and restore the Premises to a condition equal to its condition immediately prior to such damage or destruction and in conformity with and pursuant to all applicable requirements of law and duly constituted governmental authority.

The subject event, flooding, was clearly foreseeable. The complaint contains factual averments pertaining to four floods from 1986 until 2000. Moreover, during the period of due diligence, plaintiff retained CES to perform an environmental evaluation with regard to flood issues. Based upon plaintiff's own admissions, it was aware of the flood risks associated with the property prior to executing the Lease. Plaintiff alleges that Pathmark failed to disclose "flood and/or related sewer back-ups in April 1993, and January 1996, or possibly in March 1986 and February 2000 as well". Assuming all of the allegations in the complaint to be true, plaintiff now seeks to have this court terminate the Lease even though plaintiff acquiesced in signing the lease despite Pathmark's failure to cooperate with CES. Because plaintiff was aware of the possibility of flood, plaintiff could not have assumed that all-risk insurance would be available. *See Twin Holdings of Delaware LLC v. CW Capital, LLC,* 26 Misc.3d 1214(A), 2010 WL 309022, at *6 (N.Y.Sup.2010) (the plaintiffs were certainly aware of the possibility of volatility in the financial markets and could not have assumed that banks would not become unwilling to extend credit). Plaintiff has failed to allege that it was unable to negotiate terms that would protect plaintiff from any flood occurrence. While it may be financially difficult or unprofitable for plaintiff to continue to operate their retail store, that does not excuse plaintiff's obligation to perform under the terms of the Lease.

Plaintiff argues that the unforeseeable event was the insurers' refusal to issue an all-risk policy for the site. The complaint and caselaw do not support plaintiff's assertions. The Court has reviewed the case cited by plaintiff in support of this cause of action. *See In re Agosta,* 122 Misc.2d 1091, 472 N.Y.S.2d 528 (N.Y.Sup.1983). The Court is not persuaded by the lower court holding in that case as the facts are inapposite to those at hand.[5]

In support of the motion, defendant cites to *Kel Kim Corp. v. Cent. Mkts. Inc.,* 133 Misc.2d 529, 507 N.Y.S.2d 359 (N.Y.Sup.1986). Plaintiff argues that *Kel Kim* does not apply because the decision was "based upon the doctrine of impossibility of performance" not frustration of purpose. *See* Dkt. No. 19, p. 8. While plaintiff properly notes this distinction, the underlying principle of both doctrines is foreseeability. "Impossibility and frustration of purpose refer to two distinct doctrines in contract law, but both require unforeseeability." *Beardslee v. Inflection Energy, LLC,* 2012 WL 5522912, at *6–7 (N.D.N.Y.2012). In *Kel Kim,* the Appellate Division noted:

> As to the "unanticipated, unforeseeable risk" element of the doctrine, given the caprices over the years of the liability insurance industry, the austere reality is that inability to obtain liability insurance, for the duration of a lease having an outside limit of 20 years which is dependent upon the cooperation of third parties, was, we think, foreseeable and should have been guarded against in the contract. In any event, the risk that the coverage might not be obtained should ***363** not be borne by the landlord but by the lessee who agreed to obtain it.

Kel Kim Corp. v. Central Markets, Inc., 131 A.D.2d 947, 949, 516 N.Y.S.2d 806 (1987).

Here, plaintiff is seeking to excuse it's performance from the Lease entirely and terminate the Lease. *Cf. Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co.,* 588 F.Supp.2d 919, 932–933 (S.D.Ind.2008) ("[u]nlike the defendants in the *Bank of New York* or *Kel*

Kim [*Corp. v. Central Markets, Inc.*, 70 N.Y.2d 900, 524 N.Y.S.2d 384, 519 N.E.2d 295 (1987)] cases, Hoosier Energy does not ask John Hancock to excuse its performance for an uncertain or unlimited period of time." [...] "John Hancock contends that it was not obligated to grant Hoosier Energy unlimited extensions. Unlimited extensions, no. But reasonable extensions, in a time of economic crisis and under the doctrine of temporary commercial impracticability, yes"). Plaintiff has not cited to any caselaw to support it's position. Moreover, the Court has conducted it's own research and can find no support for the claims asserted in Count I.

Given these circumstances, plaintiff's cause of action for frustration of purpose is dismissed. *See In re Merrill Lynch Auction Rate Sec. Litig.,* 2010 WL 1924719, at *9 (S.D.N.Y.2010) (holding that while LSED may have viewed as remote the possibility that FGIC would lose its triple-A ratings later in the life of the bonds, it cannot reasonably have believed that the possibility was nonexistent).

IV. FRAUDULENT INDUCEMENT and FRAUDULENT CONCEALMENT

In Count II of the complaint, plaintiff alleges:

> Prior to entering into the Lease, the Landlord had an obligation to disclose to Gander Mountain that the Premises were located in a flood plain and had a history of flooding.
>
> During the due diligence period—particularly from February 19, 2004 through April 9, 2004 as set forth above—the Landlord was asked repeatedly to provide information about the condition of the Premises. Yet, the Landlord remained silent and did not disclose to Gander Mountain any information about the Premises' high risk of flooding or prior flood events affecting the Premises.
>
> Because the Landlord remained silent and did not disclose to Gander Mountain any information about the high risk of flooding and prior flood events at the Premises, the Landlord intended to deceive Gander Mountain and fraudulently induce it into entering the Lease.
>
> Gander Mountain justifiably relied on the Landlord's representation that the Premises could be used as a retail store for the term of the Lease.
>
> The Landlord, as owner of the Premises, possessed unique and specialized expertise and knowledge regarding the Premises and held a special position of confidence and trust with Gander Mountain.
>
> Gander Mountain has filed this Complaint without unreasonable delay, in that it only recently discovered, after the most recent September 2011 flood event, that the Landlord withheld information from it that the Premises had a high pre–2005 risk and history of flooding.

Pltf. Cmplt. at 60, 61, 64–66, 71.

Similarly, in Count III, plaintiff added:

> Because the Landlord fraudulently concealed from Gander Mountain any information about the high risk of flooding and prior flood events at the Premises, ***364** the Landlord intended to deceive Gander Mountain.

Id. at 78.

With respect to Count II, plaintiff seeks an order rescinding the Lease due to the Landlord's fraudulent conduct in failing to disclose the Premises' prior flood events and history to Gander Mountain. With respect to Count III, plaintiff seeks a monetary judgment. Defendant argues that Counts II and III of the complaint must be dismissed because the claims are barred by the statute of limitations. In the alternative, defendant argues that the complaint fails to state a claim for fraud.

A. Statute of Limitations

A claim for rescission based on actual fraud is governed by the statute of limitations for claims based on fraud. *Certain Underwriters at Lloyd's v. Milberg LLP,* 2009 WL 3241489, at *4–5 (S.D.N.Y.2009) (citing *Abbate v. Abbate,* 82 A.D.2d 368, 441 N.Y.S.2d 506 (2d Dep't 1981)). Under N.Y. C.P.L.R. § 213(8), the applicable limitations period is "six years from the commission of the fraud or two years from the time the plaintiff discovered, or could with reasonable diligence have discovered, the fraud, whichever is later." *Id.*

Under New York law, a plaintiff "could, with due diligence, have discovered" the fraud when provided sufficient facts to place him on "inquiry notice." *Aldrich v. Marsh & McLennan Cos., Inc.,* 52 A.D.3d 435, 436, 861 N.Y.S.2d 30 (1st Dep't 2008) (citations omitted). "A party seeking to avoid the bar of the statute [of limitations] on account of fraud must aver and show that he used due diligence to detect it." *Abercrombie v. Andrew Coll.,* 438 F.Supp.2d 243, 266 (S.D.N.Y.2006) (citing *Moll v. U.S.*

Life Title Ins. Co. of N.Y., 700 F.Supp. 1284, 1293 (S.D.N.Y.1988)). "All that is needed to commence the running of the statute is 'knowledge of facts' sufficient 'to suggest to a person of ordinary intelligence the probability that he has been defrauded.' " *Id.* (citing *Renz v. Beeman,* 589 F.2d 735, 751 (2d Cir.1978)). While it typically is inappropriate to determine whether a plaintiff established that the action was brought within a reasonable time on a motion to dismiss, where a plaintiff does not sufficiently allege due diligence in the complaint, mere allegations of the same are insufficient to toll the statute of limitations. *Id.* "General assertions of ignorance and due diligence without more specific explanation ... will not satisfy the [ ] pleading requirements." *Philip Morris v. Heinrich,* 1996 WL 363156, at *12 (S.D.N.Y.1996).

Here, defendant claims that plaintiff was aware of flooding problems in June 2006. Therefore, using the two year statute of limitations, plaintiff's fraud and recision claims are barred. In the complaint, plaintiff summarily asserts that it, "only recently discovered, after the most recent September 2011 flood event, that the Landlord withheld information". In the brief in opposition to the motion, plaintiff does not offer any additional facts but vaguely asserts, "Gander Mountain alleges it discovered this fraud after the September 2011 flood event—less than eight months prior to filing this case" and "certainly within two years from discovery of the fraud".

Upon review of the entire complaint, the Court finds that plaintiff's claim is not plausible. The complaint is devoid of any reference to the 2006 flood in the context of the fraud claims. The 2006 flood event occurred two years after the Lease was executed and five years prior to the September 2011 flood. Plaintiff does not explain why the 2006 event did not cause plaintiff to "discover" Pathmark's alleged fraud or what steps, if any, plaintiff took to investigate the issue. From the facts, as ***365** alleged in the complaint, the delay in discovering Pathmark's alleged fraud may have been the result of plaintiff's ignorance with respect to the prior flood events, specifically the 2006 flood. *See New York Teamsters Conference Pension and Ret. Fund v. Hoh,* 554 F.Supp. 519, 526 (D.C.N.Y.1982) (the plaintiff failed to allege that its ignorance of the facts resulted from any fraudulent concealment by PepsiCo.). Plaintiff has not set forth any facts in connection with the 2011 flood that were not or could not have been revealed after the 2006 flood. *See Lighthouse Fin. Group v. Royal Bank of Scotland Group, PLC,* 902 F.Supp.2d 329, 347–48 (S.D.N.Y.2012) (the plaintiffs failed to point to any specific information subsequently revealed in connection with a loss that was previously unavailable to them, or could not have been discovered in the course of a reasonable investigation). Plaintiff has not properly plead facts explaining why they failed to inquire about flood issues after the June 2006 flood. While plaintiff alleges that it was able to conclude, in September 2011, that Pathmark withheld information, plaintiff has failed to allege any facts with respect to what was discovered at that time and specifically, how they discovered Pathmark's alleged wrongdoing such that despite due diligence, plaintiff could not have reasonably learned this information before the statute of limitations ran. *See Masters v. Wilhelmina Model Agency, Inc.,* 2003 WL 1990262, at *2 (S.D.N.Y.2003) (the plaintiffs failed to allege with adequate particularity the facts that were discovered during counsel's investigation and the inquiry performed to obtain those facts to show that the plaintiffs could not have been on notice of their causes of action before the statute of limitations period ran). As early as June 2006, plaintiff possessed "timely knowledge sufficient to place [it] under a duty to make inquiry and ascertain all the relevant facts prior to the expiration of the applicable Statute of Limitations". *See Abercrombie,* 438 F.Supp.2d at 266. Accordingly, plaintiff's second and third cause of action are dismissed as untimely.

B. Failure to State a Claim

In the alternative, defendant argues that Counts II and III should be dismissed for failure to state a claim. Specifically, defendant alleges that Pathmark, as the landlord, was not obligated to volunteer any information to plaintiff concerning the property. Moreover, defendant argues that plaintiff cannot establish a *prima facie* case against Islip based upon lack of intent or successor liability theory. Plaintiff claims that Pathmark possessed superior knowledge and thus a duty to disclose.

Federal Rule of Civil Procedure 9(b) sets forth a heightened pleading standard for allegations of fraud: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed.R.Civ.P. 9(b). The Second Circuit has explained that, in order to comply with Rule 9(b), "the complaint must: (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Mills v. Polar Molecular Corp.,* 12 F.3d 1170, 1175 (2d Cir.1993) (citation omitted).

Under Rule 9(b), "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed.R.Civ.P. 9(b). However, because the court "must not mistake the relaxation of Rule 9(b)'s specificity

requirement regarding condition of mind for a 'license to base claims of fraud on speculation and conclusory allegations,' ... plaintiffs must allege facts that give rise to a strong inference of fraudulent intent." *Acito v. IMCERA Group, Inc.,* 47 F.3d 47, 52 (2d Cir.1995) ***366** (internal citation omitted). "The requisite 'strong inference' of fraud may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." *Shields v. Citytrust Bancorp, Inc.,* 25 F.3d 1124, 1128 (2d Cir.1994) (citations omitted).

To prove fraudulent inducement, "a plaintiff must allege that: (1) the defendant made a material, false representation, (2) the defendant intended to defraud the plaintiff thereby, (3) the plaintiff reasonably relied upon the representation, and (4) the plaintiff suffered damage as a result of such reliance." *Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc.,* 98 F.3d 13, 19 (2d Cir.1996) (citing *Banque Arabe et Internationale D'Investissement v. Maryland Nat'l Bank,* 57 F.3d 146, 153 (2d Cir.1995)). On a claim for fraudulent concealment, plaintiffs must establish the elements of fraudulent misrepresentation, i.e., that the fraud is extraneous to the contract, but are also required to set forth that the defendant had a duty to disclose material information. *Swersky v. Dreyer and Traub,* 219 A.D.2d 321, 326, 643 N.Y.S.2d 33 (1996); *see also P.T. Bank Cent. Asia, New York Branch v. ABN AMRO Bank, N.V.,* 301 A.D.2d 373, 754 N.Y.S.2d 245 (1st Dep't 2003).

Where a plaintiff pleads both a fraud claim and a breach of contract claim, the plaintiff must distinguish the two by (1) demonstrating a legal duty separate from the duty to perform under the contract, (2) demonstrating a fraudulent misrepresentation collateral or extraneous to the contract, or (3) seeking special damages caused by the misrepresentation and unrecoverable as contract damages. *See Bridgestone/Firestone,* 98 F.3d at 20.

1. Duty

A claim for fraudulent inducement requires the plaintiff to allege that the defendant first had a duty to disclose material information. *Khindri v. Getty Petroleum Mktg., Inc.,* 33 Misc.3d 1208(A), 2011 WL 4904403, at *3 (N.Y.Sup.2011) (citing *E.B. v. Liberation Publ'ns, Inc.,* 7 A.D.3d 566, 777 N.Y.S.2d 133 (2d Dep't 2004)). In business transactions, a party is ordinarily under no duty to disclose material facts unless: (1) there is a fiduciary relationship between the parties; or (2) one party has superior knowledge that is not readily available/accessible to the other party and that party knows the other party is acting on the basis of mistaken knowledge. *Stevenson Equip., Inc. v. Chemig Constr. Corp.,* 170 A.D.2d 769, 771, 565 N.Y.S.2d 318 (3d Dep't), *aff'd,* 79 N.Y.2d 989, 584 N.Y.S.2d 434, 594 N.E.2d 928 (1992); *see also Jana L. v. West 129th Street Realty Corp.,* 22 A.D.3d 274, 277, 802 N.Y.S.2d 132 (1st Dep't 2005) (citations omitted) ("It is well established that, absent a fiduciary relationship between the parties, a duty to disclose arises only under the 'special facts' doctrine where 'one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair' "). To establish "superior knowledge", plaintiff must prove that the material fact was information peculiarly within the knowledge of the defendant, and that the information was not such that could have been discovered by the plaintiff through the "exercise of ordinary intelligence". *Jana L,* 22 A.D.3d at 277, 802 N.Y.S.2d 132 (citations omitted). A purchaser cannot rely upon conscious ignorance, for example, limited knowledge of a discoverable condition, as a basis for recovery under this theory. *Id.* (citing *Vandervort v. Higginbotham,* 222 A.D.2d 831, 634 N.Y.S.2d 800 (3d Dep't 1995)). Where there is no fiduciary relationship that would impose a duty to disclose, a ***367** party's mere silence without some act which deceived the other party cannot constitute a concealment that is actionable as fraud. *Mobil Oil Corp. v. Joshi,* 202 A.D.2d 318, 609 N.Y.S.2d 214 (1st Dep't 1994).

Here, plaintiff and Pathmark did not have a fiduciary or confidential relationship. Rather, they are sophisticated parties to an arm's length transaction. Based upon the remaining allegations in the complaint, plaintiff has failed to sufficiently plead that Pathmark had superior knowledge that would give rise to any duty to disclose. Plaintiff summarily argues that Pathmark had "superior knowledge," and impeded plaintiff's ability to conduct its own due diligence but does not allege that Pathmark persuaded plaintiff to refrain from conducting due diligence. *Interallianz Bank AG v. Nycal Corp.,* 1995 WL 406112, at *5 (S.D.N.Y.1995) (Because Nycal fails to allege a basis on which to impose a non-contractual duty to disclose on IBZ, all counterclaims that presume the existence of such a duty must fail). Plaintiff alleges that Pathmark, "possessed unique or specialized expertise and knowledge regarding the Premises and held a position of confidence and trust with Gander Mountain." However, plaintiff does not allege that it was required to place its trust and reliance on Pathmark. *See Scott v. Durham,* 2011 WL 8969, at *4 (N.D.Ind.2011). While plaintiff claims that Pathmark did not cooperate with CES, the complaint does not allege that Pathmark agreed to assist CES with it's questionnaire and if so, when and how such a promise was made. *See Clifford v. Hughson,* 992 F.Supp. 661, 670–671

(S.D.N.Y.1998) ("[a]lthough all contracts include an implied covenant of good faith, a breach of contract, even if committed in bad faith, does not necessarily involve an intent to defraud"). Similarly, plaintiff does not allege any facts with respect to what information Pathmark had that was not available to plaintiff, i.e., the prior flood events. *See Villa Marin Chevrolet, Inc. v. Gen. Motors Corp.,* 1999 WL 1052494, at *7 (E.D.N.Y.1999) (the plaintiff could have easily determined whether a certificate of occupancy—a public record—had been issued and thus, the landlord did not have superior knowledge of information that was not available to the plaintiff).

Plaintiff does not cite to any caselaw that would permit an inference that the plaintiff had the right to rely upon and trust Pathmark. Plaintiff cites to the *Young v. Keith,* 112 A.D.2d 625, 492 N.Y.S.2d 489 (3d Dep't 1985). However, the *Young* case is factually dissimilar. In that case, the purchaser of a mobile home park commenced a cause of action for fraud against the seller due to seller's failure to disclose deficiencies in the water and sewer systems. On a motion to dismiss, the Court stated that since the park was sold as an operating business and, "the sewer and water systems' deficiencies were known by defendants to require very expensive reconstruction and to pose a threat to the business' operating license", there was a duty to disclose. Moreover, the Court held:

> Plaintiff's complaint can be further read to allege that they could not have discovered the deficiencies through an ordinary inspection and that they would not have purchased the property had they known of them.

Young, 112 A.D.2d at 627, 492 N.Y.S.2d 489. Here, plaintiff was aware, before signing the Lease, that Pathmark did not respond to CES' inquiries. Despite that fact, plaintiff executed the Lease.

Plaintiff's reliance on *Magnaleasing, Inc. v. Staten Isl. Mall,* 428 F.Supp. 1039 (S.D.N.Y.1977) is similarly misplaced. In that case, the plaintiff leased space in a mall and alleged that the decision was based upon the defendant's representations ***368** regarding the volume and rate of leasing. On the defendant's motion to dismiss, the Court held that the defendant had "superior knowledge" and expressed an opinion that implied that the defendant knew the facts which supported that opinion. *Id.* at 1043. Conversely, in the matter at hand, defendant did not express any opinion to plaintiff that plaintiff claims that it relied upon when the Lease was signed.[6]

Even assuming the causes of action were timely, based upon the allegations set forth in the complaint, Counts II and III are dismissed for failure to state a claim.

V. NEGLIGENT OMISSION and NEGLIGENT MISREPRESENTATION

In Count IV entitled "Negligent Omission", plaintiff claims that Pathmark had an obligation to disclose the history of flooding. Plaintiff seeks injunctive relief terminating the lease and preventing defendant from enforcing the Lease terms against plaintiff. In Count VI, entitled "Negligent Misrepresentation", plaintiff alleges that Gander Mountain misrepresented that the Premises could be used as a retail store. As to both Counts IV and VI, plaintiff seeks an award of monetary damages.

Defendant contends that the negligence claims involve omissions and representations made at the time the Lease was executed and thus, the applicable statute of limitations tolled on April 16, 2010. Conversely, plaintiff claims that the causes of actions have different bases for accrual.

A. Negligent Misrepresentation

1. Statute of Limitations

Plaintiff argues that this cause of action accrued at the time of injury, September 2011. The parties agree that the negligent misrepresentation claim arises out of the same transaction and occurrence that underlie the fraud claim. Accordingly, the appropriate limitation period is six years. *See Calcutti v. SBU, Inc.,* 224 F.Supp.2d 691, 701–702 (S.D.N.Y.2002) (citations omitted). The statute of limitations for negligent misrepresentation starts on the date of the alleged misrepresentation. *Id.* (citing *Fandy v. Lung–Fong Chen,* 262 A.D.2d 352, 691 N.Y.S.2d 572 (2d Dep't 1999)); *see also Reilly Green Mountain Platform Tennis v. Cortese,* 28 Misc.3d 1234(A), 2007 WL 7263362, at *12 (N.Y.Sup.2007) (the cause of action accrues when the plaintiffs acted on the alleged representations by purchasing the paint in question); *see also Marchig v. Christie's Inc.,* 430 Fed.Appx. 22 (2d Cir.2011) (cause of action accrued when auction house sold consignor's pen-and-ink drawing that was mistakenly attributed to unknown nineteenth century artist when in fact it was done by Leonardo da Vinci at small fraction of its actual value). Accordingly, in this matter, plaintiff's cause of action for negligent misrepresentation accrued on the date that the Lease was executed, ***369** April 2004. As such, Count IV is time barred.

2. Failure to State a Claim

In the alternative, defendant argues that plaintiff has failed to state a claim for negligent misrepresentation because defendant owed no duty to plaintiff. Moreover, defendant argues that even assuming a duty existed, the breach of that duty was not the proximate cause of plaintiff's harm. Plaintiff argues that it has adequately plead a cause of action for negligence because plaintiff repeatedly asked the Landlord for information and the Landlord failed to provide highly relevant information. Moreover, as for proximate cause, plaintiff claims it would not have entered into the Lease if the Landlord disclosed material information.

The elements of a cause of action for negligent misrepresentation are: (1) awareness by the maker of a statement that the statement is to be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance. *M & T Bank Corp. v. LaSalle Bank Nat. Ass'n,* 852 F.Supp.2d 324, 336 (W.D.N.Y.2012) (citing *Credit Alliance Corp. v. Arthur Andersen & Co.,* 65 N.Y.2d 536, 551, 493 N.Y.S.2d 435, 483 N.E.2d 110 (1985)). A plaintiff may recover for negligent misrepresentation, "only where there is a special relationship of trust or confidence, which creates a duty for one party to impart correct information to another ... [t]he special relationship requires a closer degree of trust than that in an ordinary business relationship." *Id.* (citing *inter alia Wright v. Selle,* 27 A.D.3d 1065, 1066–67, 811 N.Y.S.2d 525 (4th Dept 2006)). A business relationship can give rise to a special relationship where "the requisite high degree of dominance and reliance existed prior to the transaction giving rise to the alleged wrong, and not as a result of it". *Id.* (citations omitted).

In this case, plaintiff has not alleged any special relationship with defendant or Pathmark beyond an ordinary business relationship. The parties are sophisticated business entities that engaged in an arm's-length transaction. Plaintiff has not alleged any "measurable disparity of influence". *Rared Manchester NH, LLC v. Rite Aid of New Hampshire, Inc.,* 693 F.3d 48, 56 (1st Cir.2012) (rejecting the plaintiff's request that the Court find that the term "special relationship" is expansive enough to include close business relationships as well as fiduciary and confidential relationships). Thus, even assuming the negligent misrepresentation claim was timely, plaintiff has failed to allege a viable cause of action.

B. Negligent Omission

Plaintiff argues that the negligent omission claim is based upon Pathmark's failure to disclose the site's past flood history and therefore, the cause of action accrued after September 2011, when plaintiff discovered facts indicating that the information was hidden. In support of this claim, plaintiff argues that the two year discovery rule tolls the limitations period because plaintiff has established that the "wrong is self-concealing". *See* Dkt. No. 19, P. 21. In addition, plaintiff alleges that it has sufficiently plead "self concealment" because "only the Landlord was in a position to know about past flood history" and concealed it.

The Court has reviewed the case cited by plaintiff in support of Count IV and finds the facts and holdings inapplicable to the case herein. In *S.E.C. v. Jones,* 476 F.Supp.2d 374 (S.D.N.Y.2007) and *S.E.C. v. Gabelli,* 653 F.3d 49 (2d Cir.2011), the ***370** courts discussed "self concealment" in relation to plaintiff's fraudulent concealment claims. Moreover, in support of the negligent omission cause of action, plaintiff relies upon the same contentions presented in support of the fraudulent concealment claim. *See* Dkt. No. 19, p. 21. Regardless of whether this claim is styled as a fraudulent concealment or a negligent omission, it is subject to the heightened pleading standards of Rule 9(b). *Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.,* 837 F.Supp.2d 162, 201 (S.D.N.Y.2011). In Part IV *supra,* the Court discussed and dismissed plaintiff's fraudulent concealment claims. Based upon the same analysis, plaintiff's negligent omission claim is also dismissed.

VI. BREACH OF CONTRACT

Under New York law, causes of action for breach of contract are subject to a six-year statute of limitations. C.P.L.R. § 213(2). A breach of contract cause of action accrues at the time of the breach, even if no damage occurs until later. *Ely—Cruikshank Co., Inc. v. Bank of Montreal,* 81 N.Y.2d 399, 402–03, 599 N.Y.S.2d 501, 615 N.E.2d 985 (1993) (refusing to postpone running of statute of limitations for contract action where plaintiff was allegedly unaware of the breach at the time it occurred).

Defendant argues that Count V of the complaint must be dismissed because it is barred by the statute of limitations. Specifically, defendant argues that the action accrued on the date that the Lease was executed. Plaintiff argues that

the Lease provides that the premises, "be used" as a hunting, fishing, and camping store and that this is a continuing representation. Plaintiff claims the consequences of the September 2011 flood give rise to the breach of contract claim and further assert that the action accrued in May 2012 when insurers refused to provide all-risk coverage. Moreover, plaintiff claims that even if the accrual date was the June 2006 food, that flood occurred less than six years before the complaint was filed. Therefore, plaintiff argues that under either theory, the action is timely. Plaintiff has failed to relevant cite to any caselaw in support of it's position.

Plaintiff's arguments lack merit. The representation as to the terms of plaintiff's tenancy status was false when made. *Lana & Edward's Realty Corp. v. Katz/Weinstein P'ship,* 26 Misc.3d 1238(A), 2010 WL 963564, at *3–5 (N.Y.Sup.2010). "[I]nasmuch as plaintiff had a remedy at the time of the execution of the contract, this is when plaintiff's breach of contract claim accrued". *Id.* (citing *W. 90th Owners Corp. v. Schlechter,* 137 A.D.2d 456, 458, 525 N.Y.S.2d 33 (1988)). Here, the statute of limitations on plaintiff's breach of contract cause of action against defendant began to run when the Lease was executed on April 16, 2004. Therefore, the six-year statute of limitations on this cause of action expired on April 16, 2010. *See Lazzarino v. Warner Bros. Entm't, Inc.,* 13 Misc.3d 1230(A), 2006 WL 3069276, at *8–9 (N.Y.Sup.2006).

VII. FAILURE TO JOIN AN INDISPENSABLE PARTY

As the Court has granted defendant's motion to dismiss plaintiff's complaint in its entirety, plaintiff's alternate request for relief pursuant to Fed.R.Civ.P. 12(b)(7) is moot.

CONCLUSION

Based upon the foregoing, it is

ORDERED, that defendant's motion for dismissal of plaintiff's complaint pursuant to Fed.R.Civ.P. 12(b)(6) (Dkt. No. 14) is **GRANTED** for the reasons set forth above.

***371** The Clerk is directed to close the case.

IT IS SO ORDERED.

All Citations

923 F.Supp.2d 351

Footnotes

1 The background information is taken from plaintiff's complaint and is presumed true for the purposes of this motion. These are not findings of fact by the Court.

2 The lease is annexed to the Complaint.

3 Defendant asserts that it purchased the premises from Pathmark's successor, The Great Atlantic and Pacific Tea Company, which acquired Pathmark on December 3, 2007.

4 At this early juncture, the Court declines to convert this motion to dismiss to one for summary judgment pursuant to Rule 12(d) of the Federal Rules of Civil Procedure. *See, e.g., Global Network Commc'ns, Inc.,* 458 F.3d 150, 155 (2d Cir.2006) (holding that "[t]he conversion requirement of Rule 12(b) ... deters trial courts from engaging in factfinding when ruling on a motion to dismiss and ensures that when a trial judge considers evidence [outside] the complaint, a plaintiff will have an opportunity to contest defendant's relied-upon evidence by submitting material that controverts it" (citations omitted)).

5 The parties disagree on whether the holding of *In re Agosta* is a correct statement of law. This Court takes no position on that issue.

6 Even assuming plaintiff could establish that Pathmark had superior knowledge, defendant argues that plaintiff cannot establish that Islip possessed the request intent under a successor liability theory. Generally, a corporation that purchases the assets of another corporation is not liable for the seller's torts. *Ortiz v. Green Bull, Inc.,* 2011 WL 5554522, at *5 (E.D.N.Y.2011) (citing *Schumacher v. Richards Shear Co.,* 59 N.Y.2d 239, 244–45, 464 N.Y.S.2d 437, 451 N.E.2d 195 (1983)). However, New York law recognizes four common-law exceptions to the rule that an asset purchaser is not responsible for the seller's liabilities, applying to: "(1) a buyer

who formally assumes a seller's debts; (2) transactions undertaken to defraud creditors; (3) a buyer who de facto merged with a seller; and (4) a buyer that is a mere continuation of a seller." *Id.* (citing *Cargo Partner AG v. Albatrans, Inc.,* 352 F.3d 41, 45 (2d Cir.2003)). At this juncture, the record lacks the necessary information to engage in an analysis of this theory.

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46 N.Y.2d 211
Court of Appeals of New York.

GEORGE BACKER MANAGEMENT CORP., Respondent,
v.
ACME QUILTING CO., INC., Appellant.

Dec. 7, 1978.

Synopsis

Lessor brought action against lessee to recover amounts due under rent escalation provision of lease. The Supreme Court, New York County, Hyman Korn, J., denied lessor's motion for summary judgment, and lessor appealed. The Supreme Court, Appellate Division, First Judicial Department, 55 A.D.2d 535, 389 N.Y.S.2d 111, reversed and remanded for assessment of damages. Upon stipulation of amount due, judgment was entered, and lessee appealed. The Court of Appeals, Fuchsberg, J., held that: (1) rent escalation clause based upon increase in employee wage rates was not qualified by any condition that lessor be party to collective bargaining contract schedule of wage rates; (2) wage rate escalation clause contravened no principle of public policy, nor was its effect so onerous as to shock the conscience; (3) escalation clause reflected precisely what lessor intended, and thus unilateral mistake of lessee would not suffice to invoke reformation, and (4) lessor's interpretation of escalation clause as limiting lessee's liability to about four or five percent of actual wage rate was expression of opinion or expectation, and thus could not form basis for claim of misrepresentation.

Affirmed.

Breitel, C. J., dissented and filed opinion in which Jones, J., concurred.

Attorneys and Law Firms

***213 ***136 **1063** Richard M. Zaroff, Stanley H. Schindler and Burton I. Manis, New York City, for appellant.

***214** Jay A. Kranis and Charles L. Sylvester, New York City, for respondent.

OPINION OF THE COURT

FUCHSBERG, Judge.

Early in 1970, appellant, Acme Quilting Company, entered into an agreement with the respondent, George Backer Management Corporation, for the rental of office space in the respondent's building. The lease the parties ultimately signed included an escalation clause under which increases are keyed to certain wage rate increases. The dispute in this case, in the main raising issues of ambiguity, mutual mistake, fraud and unconscionability, revolves about that clause.[1]

The clause is paragraph 39(b) of the lease. It provides that ***215** if, in any year of the lease, "the RAB (Realty Advisory Board) rate shall be greater than the RAB Labor Rate (for the period of 12 months prior to the commencement date), the Tenant shall pay to Landlord as additional rent * * * an amount equal to the product obtained by multiplying the Wage Rate Multiple by three-quarters (¾) of the number of cents * * * by which the RAB Labor Rate * * * exceeds the RAB Labor Rate for the Base year". The lease also tells us that "Wage Rate Multiple" shall mean the figure 7,245.

The RAB labor rate is defined in paragraph 39(b) as: "the aggregate of (a) the average of the minimum regular hourly wage rates for porters, handymen, elevator operators, starters and watchmen as applied to this building pursuant to an agreement between the Realty Advisory Board on Labor Relations, Incorporated (or any successor thereto) and Local 32-B of the Building Service Employees International Union, AFL-CIO (or any successor thereto) or, if no such agreement is in effect at such time, the average of the minimum regular hourly ****1064** wage rates then actually being paid by Landlord or by the independent contractors who furnish such services to the demised premises, (b) the total amount, computed on an hourly basis, of social security, unemployment and disability insurance and payroll and other taxes imposed upon or measured by such wages, and (c) the total amount, computed on an hourly basis, of all benefits required by law and/or such agreement to be paid to or for such personnel."

*****137** It is clear from the record that there was nothing routine about the way in which these provisions came into being. It would be impossible to argue that they contained any element of adhesion. Backer, by its treasurer, Arthur

Lukach, first submitted a proposed lease. It was then analyzed by Acme's vice-president, Richard Rattner, who was not only a member of the Bar but, perhaps more important in the present context, a corporate executive in the multimillion dollar business of his principal with 20 years of business experience behind him. Rattner did not rest on his analysis; he prepared a comprehensive memorandum on certain of its provisions, including the very clause with which we are now concerned.

Additionally, by happenstance, the course of the negotiations required both sides to repeatedly focus on it. For example, though the initial discussions were suspended because of uncertainty over whether the existing tenant would vacate within the time required for Acme to commence occupancy, ***216** they were thereafter resumed with renewed vigor when Acme's broker discovered other suitable space in the building. Again, a lease containing the identical escalation clause was reviewed by Acme, which this time offered to sign the lease but raised specific written objections to the escalation clause. Backer's response was to reject the offer. Shortly thereafter, a fresh series of negotiations was undertaken at the instance of another broker. Once more, the rent escalation provision merited special attention. But despite what Acme concedes were extensive discussions between Rattner and Lukach, while Acme succeeded in having certain changes incorporated into the lease, the escalation clause was completely intact when the document was executed. From beginning to end the discussions took roughly half a year.

The record also reveals that, since it was not a member of the owners' unit for which the Realty Advisory Board would act in negotiating industry-wide collective bargaining agreements with labor unions representing the classes of employees whose wages were involved here, Backer was not bound to, and in fact did not, accept the RAB's labor scale for its employees. The scale in effect at its building was a lower one.

After a period during which Backer had not billed Acme for increases responsive to the RAB standard, the time came when Acme, no doubt because the RAB had negotiated a new scale providing for a substantial increase in wages, refused to comply with Backer's demand that it remit payment in an amount reflecting the application of 39(b) to the RAB rate. Backer then commenced suit to recover the arrearages so computed. Acme, characterizing paragraph 39(b) as "shamefully ambiguous and unintelligible" and urging, by way of affirmative defense, that it was unconscionable, asserted that the clause should be read to limit the escalation to sums computed by reference to wage increases actually paid by the landlord. It further alleged that Lukach, on Backer's behalf, had expressly represented that the cost of any increase to Acme "in no event, would exceed an amount equal to four or five per cent of the base rate for any particular year". These grounds, according to Acme, entitled it to have the lease provision reformed under a theory of mutual mistake or, in the alternative, mistake on its part and fraud on the part of Backer.[2]

***217** The Supreme Court, finding the clause ambiguous and the facts controverted, entered ****1065** an order denying Backer's summary judgment motion.[3] The Appellate Division unanimously reversed on the law, granted the motion as to liability only and remanded for assessment of damages. The parties having stipulated on the amount due in lieu of assessment, final judgment was then entered ****138** by the Supreme Court. On this appeal by Acme, the order of the Appellate Division is now brought up for review pursuant to CPLR 5601 (subd. (d)). For the reasons hereinafter detailed, we believe the order should be affirmed.

Looking first at the claim of ambiguity, we observe that a lease is subject to the rules of construction applicable to any other agreement (Farrell Lines v. City of New York, 30 N.Y.2d 76, 82, 330 N.Y.S.2d 388, 361, 281 N.E.2d 162, 165). We also note that the lease in this case was entered into at arm's length and, ultimately, on terms most particularly those contained in the lease's rider where paragraph 39(b) is to be found which were the residue of suggestions and countersuggestions on which each of the two sophisticated parties had attempted to persuade the other to join it in a meeting of the minds. True, the language of the clause may seem dull and labored to the uninitiated, an unremarkable circumstance because it recites what is largely a mathematical formula to be applied on stated contingencies. But, taken step by step, any semblance of complexity disappears. Moreover, it was not a novel provision, but one commonly found in New York City commercial leases (see Romance Bridals v. 1385 Broadway Co., 1976, 43 A.D.2d 544, 349 N.Y.S.2d 707 (Fein, J.)).

Acme, however, going beyond the description of the formula which consumes most of the clause, contends that the words "as applied to this building" must limit the wage calculation to those employees working on the property itself. This interpretation, though, is at odds with the thrust of the remainder of that sentence of paragraph 39(b) which refers to the RAB collective bargaining contract's schedule of varying wage rates for employees of different classes of buildings. It seems obvious to us that the purpose of that reference was to relate additional rent increases to a fluctuating factor beyond ***218** the control of either party, namely, the RAB wage rate for particular employees; that undertaking is not qualified by any condition that Backer be a party to the RAB agreement.

Significantly, the lease contains no requirement that rent escalations be measured by actual costs as opposed to the common industry-wide criterion chosen by the parties here. Had that been their intention, surely no problem of draftsmanship would have stood in the way of its being spelled out. Language as simple as that in the first sentence of this paragraph would have served the purpose. Instead, 39(b) explicitly states that the actual wages paid to building employees are not to be considered unless no collective bargaining agreement is in effect.

Nor was the operation of the clause unconscionable. Acme assumed the precise risk of which it now complains that the RAB labor rate would rise so as to substantially increase its monthly rental payments. But parties are free to make their own contracts. Here Backer no doubt believed that it was to its economic advantage to tie the rent escalation clause to the RAB rate; though it needed no other reason, perhaps Backer also believed that if it were able to operate the building at lower than prevailing cost, it and not the tenants should be the beneficiary of its enterprise. Acme's view, fueled by its own self-interest, understandably would be the opposite.

Once a contract is made, only in unusual circumstances will a court relieve the parties of the duty of abiding by it. By no means did such circumstances exist here. Indeed, the indexing of rent or wage increases to outside factors, such as, for instance, the cost of living index, which may or may not directly affect particular parties, is commonplace. So, a cost of living ****1066** clause in a lease would certainly be enforceable though, by reason of a fixed long-term mortgage or fixed ground rent or stability in the real estate tax rate or all of these, a particular landlord is largely insulated from the effects of rising costs. Thus, the wage rate clause here contravened no principle of public policy nor is its effect so onerous as to shock the conscience (cf. Mandel v. Liebman, 303 N.Y. 88, 93-94, 100 N.E.2d 149, 153-54; Real Property Law, s 235-c). Hence, judicial interpretation will not relieve *****139** Acme of what it may now regard as a burdensome bargain.

We turn now to Acme's claim for reformation. Its allegation of mutual mistake or fraudulently induced unilateral ***219** mistake describes the classic grounds for such relief (Albany City Sav. Inst. v. Burdick, 87 N.Y. 40, 47, 3 Pomeroy, Equity Jurisprudence (5th ed.), s 870; Restatement, Contracts, ss 504, 505). The claim of mutual mistake need not detain us. The undisputed history of the negotiations demonstrates beyond cavil that the language of the clause that Lukach proposed and to which he resolutely adhered reflects precisely what the lessor intended, and the unilateral mistake of Acme would not suffice to invoke reformation (Curtis v. Albee, 167 N.Y. 360, 365, 60 N.E. 660, 663; 3 Pomeroy, Equity Jurisprudence (5th ed.), s 870a). Acme posits its alternate claim of fraudulently induced unilateral mistake on the oral misrepresentations allegedly made by Lukach to induce in Rattner a mistaken conception as to the operation of the wage rate escalation provision. On this theory, too, we must deny the requested relief.

Reformation is not granted for the purpose of alleviating a hard or oppressive bargain, but rather to restate the intended terms of an agreement when the writing that memorializes that agreement is at variance with the intent of both parties (Ross v. Food Specialties, 6 N.Y.2d 336, 341, 189 N.Y.S.2d 857, 860, 160 N.E.2d 618, 621; 13 Williston, Contracts (3d ed.), ss 1548, 1549). Equity evolved the doctrine because an action at law afforded no relief against an instrument secured by fraud or as a result of mutual mistake (see 5 Holdsworth, History of English Law, pp. 292-293, 327-328). But to overcome the heavy presumption that a deliberately prepared and executed written instrument manifested the true intention of the parties, evidence of a very high order is required (Christopher & Tenth St. R. R. Co. v. Twenty-Third St. Ry. Co., 149 N.Y. 51, 58, 43 N.E. 538, 541). And well that it is, for freedom to contract would not long survive courts' ready remaking of contracts that parties have agreed upon (Nash v. Kornblum, 12 N.Y.2d 42, 46, 234 N.Y.S.2d 697, 699, 186 N.E.2d 551, 553). All the more so when a litigant seeks to invoke the power of the court, not merely to sever the contractual relationship between the parties, but, as here, to continue that relationship in a modified form. It follows that a petitioning party has to show in no uncertain terms, not only that mistake or fraud exists, but exactly what was really agreed upon between the parties (Williston, Contracts (3d ed.), ss 1548, 1597).

The requisite standard of proof has been stated variously (Amend v. Hurley, 293 N.Y. 587, 595, 59 N.E.2d 416, 421 ("clear, positive and convincing evidence" so as to demonstrate not the probability ***220** by the certainty of error in the making of the contract); Porter v. Commercial Cas. Ins. Co., 292 N.Y. 176, 181, 54 N.E.2d 353, 355 ("evidence of the clearest and most satisfactory character"); Christopher & Tenth St. R. R. Co. v. Twenty-third St. Ry. Co., supra, 149 N.Y. p. 58, 43 N.E. p. 539 (proof of "the most substantial and convincing character")). Allowing for difference in expression, all the cases demand a high order of proof. It would serve no purpose to add yet another definition. Rather, the definitions may more easily be conceptualized for our present purposes if we think in terms of what is to be avoided. Viewed from that perspective, the evidentiary requirement " 'operate(s) as a weighty caution upon the minds of all judges, and it forbids relief whenever the evidence is loose, equivocal or contradictory' " (Southard v. Curley, 134 N.Y. 148, 151, 31 N.E. 330, 331).

**1067 As a matter of law, no showing free of contradiction or equivocation comes through from the affidavits submitted by Acme. The history of the lease negotiations between Backer and Acme discloses continuing awareness on the prospective tenant's part that the wage rate escalation provision might be potentially disadvantageous. The negotiations were conducted in a most businesslike, meticulous and unhurried manner by both sides. These produced substantial economic modifications to Acme's advantage. And, only a month before ***140 the culmination of the negotiations, when Rattner advised Lukach that he was not satisfied with the clause, the latter remained steadfast and the lease containing the now objectionable provision was accepted by the tenant in unchanged form.

Furthermore, patently, Lukach's purported oral interpretation of the clause as limiting Acme's liability to about "four or five percent" of the actual wage rate sets forth no reasonable ground for reliance. The very indefiniteness of the figures confirms this statement as an expression of opinion rather than of fact. Above all, it did not relate to a concrete fact or a past or existing event. At best, it was no more than an expression of expectations as to labor agreements which had not yet been negotiated and the outcome of which, as both parties knew, could not be foretold. As a matter of law, then, it cannot form the basis for a claim of misrepresentation (see Woodmere Academy v. Steinberg, 41 N.Y.2d 746, 751, 395 N.Y.S.2d 434, 438, 363 N.E.2d 1169, 1173).

Accordingly, mindful that this is an appeal from the disposition of a summary judgment motion, we conclude that the evidentiary facts put forth to defeat Backer's motion were insufficient to achieve that end. Even if, given the procedural *221 posture, we accept Rattner's credibility, Acme has not demonstrated a bona fide and substantial defense. (See Capelin Assoc. v. Globe Mfg. Corp., 34 N.Y.2d 338, 343, 357 N.Y.S.2d 478, 481, 313 N.E.2d 776, 779; Julien J. Studley, Inc. v. Goldner, 28 A.D.2d 1103, 284 N.Y.S.2d 236; 6 Carmody-Wait 2d, N.Y.Prac. s 39:33, p. 483.)

Therefore, the judgment appealed from and the order of the Appellate Division now brought up for review must be affirmed.

BREITEL, Chief Judge (dissenting).

I would reverse and deny summary judgment to plaintiff. Clause 39(b) of the lease is ambiguous. The reference to the Realty Advisory Board collective agreement is unclear. It does not make explicit whether the labor rates in that agreement apply to the building in question even if the landlord is paying lower rates than those provided for in the collective agreement. The clause is ambiguous, too, in using the word "applied" rather than "applicable" in subdivision (i)(a) of clause 39(b). The ambiguity is then compounded in that same subdivision by the alternative computation if "no such agreement is in effect" because that computation may apply if "no such agreement is in effect" in the industry or it may apply if there has been such agreement in the industry, but it is not in effect as to the building in question.

Given the ambiguity, the parol evidence tendered in the tenant's affidavit would not vary or contradict the written agreement, but would shed light on the meaning of the ambiguous terms. Moreover, the same evidence would certainly be admissible to justify reformation by establishing fraud on one side and misunderstanding on the other. This, of course, is not to say that I would conclude one way or another whether tenant's position should be accepted, but I do conclude that an issue of fact exists in the submissions.

Lastly, the reference to tenant's negotiator-representative as a lawyer is misleading. He practiced tort law for a brief period in California and for over two decades has been a businessman in various executive positions of middle rank with a series of financial and merchandising or manufacturing corporations. On the other hand, his contemporaneously made memorandum lends support to his version of the negotiations.

JASEN, GABRIELLI, WACHTLER and COOKE, JJ., concur with FUCHSBERG, J.

**1068 BREITEL, C. J., dissents and votes to reverse in a separate opinion in which JONES, J., concurs.

*222 Judgment appealed from and order of the Appellate Division brought up for review affirmed, with costs.

All Citations

46 N.Y.2d 211, 385 N.E.2d 1062, 413 N.Y.S.2d 135

Footnotes

1 All further references to an escalation clause in this opinion are to paragraph 39(b). Among its other provisions, the lease also contained a real estate tax escalation clause.

2 In the courts below, Acme also unsuccessfully argued that Backer's acceptance of the base rent in the first year of the lease constituted an estoppel against Backer demanding greater amounts. This point, however, is not raised by Acme on this appeal.

3 It did grant summary judgment as to Acme's additional rent liability under the separate real estate tax escalation clause as to which Acme admitted liability.

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81 N.Y.2d 446
Court of Appeals of New York.

In the Matter of Susan GOULD, Appellant, v. BOARD OF EDUCATION OF THE SEWANHAKA CENTRAL HIGH SCHOOL DISTRICT et al., Respondents.

June 10, 1993.

Synopsis

Teacher brought action seeking review of determination of board of education which accepted her resignation. The Supreme Court, Nassau County, Collins, J., reinstated teacher, and board appealed. The Supreme Court, Appellate Division, Second Department, 184 A.D.2d 640, 584 N.Y.S.2d 910, reversed, and appeal was taken by permission. The Court of Appeals, Hancock, J., held that: (1) Education Law section stating that probationary period shall not exceed two years in case of teacher who has been appointed on tenure at another school district within state and who was not dismissed automatically made teacher eligible to acquire tenure after two years, and (2) mistaken belief of teacher and school board at time she submitted her resignation that teacher was not tenured, when in fact she acquired tenure by estoppel after working two years, prevented teacher from losing her tenure rights by resigning.

Order of Appellate Division reversed.

Attorneys and Law Firms

***788 *447 **143** Janet Axelrod and Robert D. Clearfield, Albany, for appellant.

Douglas E. Libby, Elmont, for respondents.

James R. Sandner and Richard A. Shane, New York City, for New York State United Teachers, amicus curiae.

***449 OPINION OF THE COURT**

HANCOCK, Judge.

The issues are whether petitioner, a tenured elementary school teacher, acquired tenure by estoppel as a special education high school teacher and, if so, whether her resignation submitted to respondents under the parties' mistaken belief that she had not yet acquired tenure precludes her from regaining her teaching position. We conclude that petitioner acquired tenure by estoppel and that her resignation is without legal effect under the circumstances of this case. Accordingly, we reverse the order of the Appellate Division, 184 A.D.2d 640, 584 N.Y.S.2d 910.

I

Petitioner Susan Gould achieved tenure under the Education Law in 1965 as a "common branch" elementary school teacher in a New York City District. In her application to teach in respondent Sewanhaka Central High School District, she indicated that she had been previously tenured. On September 1, 1986, she was appointed to a three-year probationary term as a special education teacher at a high school in respondent District. By letter dated February 24, 1989, six months before the expiration of her three-year probationary term, petitioner was advised that at the April 25, 1989 School Board meeting the Superintendent of Schools would recommend that her probationary appointment be terminated as of June 23, 1989. Petitioner requested and later received a statement of reasons for the Superintendent's recommendation.

On April 12, 1989, petitioner met with the Superintendent to review the reasons for the denial of tenure. She asked "whether it was true that if she resigned, there would be nothing in her file" referring to the negative tenure recommendation. The Superintendent assured her that this was true and that she would have to submit her resignation with enough lead time for the Board to act upon it at its April 25 meeting. The next day, petitioner submitted her resignation for "personal reasons" effective June 30, 1989 and her resignation was accepted by the Board at its April 25, 1989 meeting.

When she submitted her resignation and when the Board accepted it, petitioner and respondents assumed that petitioner ***450** was resigning as a probationary teacher. None of the parties was aware that petitioner's New York City tenure had entitled her to a *****789 **144** reduction in her probationary term from three to two years by operation of Education Law § 3012 and that, therefore, she might already possess tenure by estoppel. By letter dated May 17, 1989—after her resignation was accepted, but before its effective date—petitioner's attorney notified the Board that petitioner had acquired tenure by estoppel. He asked it to rescind its acceptance of petitioner's resignation. The Superintendent and the School Board took no action on this request.

Petitioner commenced a CPLR article 78 proceeding seeking reinstatement as a teacher on the grounds that the Superintendent and the School Board had acted arbitrarily and capriciously in accepting petitioner's resignation and refusing to treat the resignation as a nullity. Supreme Court granted the petition and reinstated petitioner as a tenured teacher with back pay and benefits, reasoning that her resignation was of no legal effect because if "she had known the true facts, that she was already tenured, the resignation would have never been tendered". The Appellate Division reversed and dismissed the proceeding, stating that "absent a showing of fraud, duress, coercion, or other affirmative misconduct on the part of school officials which renders a resignation involuntary, a resignation cannot be withdrawn once it has been accepted by school authorities" (*Matter of Gould v. Board of Educ.,* 184 A.D.2d 640, 641, 584 N.Y.S.2d 910).

II

Education Law § 3012(1)(a) states:

> "Teachers * * * shall be appointed * * * for a probationary period of three years; provided, however, that in the case of a teacher who has been appointed on *tenure in another school district within the state,* * * * and who was not dismissed from such district or board * * * *the probationary period shall not exceed two years* " (emphasis added).

The language of the section is plain and the meaning unambiguous. Because of petitioner's previous tenure in New York City, the acquired term of her probationary service had been reduced from three years to two years. The statute itself is self-executing. It makes no difference that her tenured status ***451** was in a different tenure area in another school district or that she had left her tenured position more than 20 years before. Thus, after September 1, 1988, she was eligible to acquire tenure.

Tenure by estoppel "results when a school board fails to take the action required by law to grant or deny tenure and, with full knowledge and consent, permits a teacher to continue to teach beyond the expiration of [the] probationary term" (*Matter of Lindsey v. Board of Educ.,* 72 A.D.2d 185, 186, 424 N.Y.S.2d 575). Here, petitioner's required probationary period had unquestionably been reduced from three years to two years. Although the Superintendent and the Board had constructive knowledge of the facts pertaining to petitioner's 1965 tenure from the information contained in her application, they were presumably not cognizant of the legal implications of continuing to employ petitioner beyond September 1, 1988 when her two years of probation ended. Respondents were, however, concededly aware of the operative facts—petitioner's continuing service as a teacher in the District's employ. It is of no legal significance that respondents did not know that petitioner's continued employment would enable her to acquire tenure by estoppel (*see, Lindsey, supra; Matter of Dwyer v. Board of Educ.,* 61 A.D.2d 859, 402 N.Y.S.2d 67).

Respondents' principal contention is not that petitioner failed to acquire tenure by estoppel, but that her resignation was voluntary and, therefore, irrevocable. They argue that there is no claim of duress, coercion or fraud and that there is no other basis on which to nullify it. We disagree.

A tenured teacher has a protected property interest in her position and a right to retain it subject to being discharged for cause in accordance with the provisions of Education Law § 3020–a (*see, Kinsella v. Board of Educ.,* 378 F.Supp. 54, 59 [quoting *Perry v. Sindermann,* 408 U.S. 593, 601–602, 92 S.Ct. 2694, 2699–2700, 33 L.Ed.2d 570]). A teacher may, of course, *****790 **145** relinquish her tenured rights in her position voluntarily by resigning (*see, Matter of Girard v. Board of Educ.,* 168 A.D.2d 183, 186, 572 N.Y.S.2d 185; *Matter of Roman v. Tompkins–Seneca–Tioga Bd. of Coop. Educ. Servs.,* 98 A.D.2d 835, 836, 470 N.Y.S.2d 500). A teacher's resignation which has been obtained by fraud or which is the result of coercion or duress, however, does not represent a voluntary act and may be nullified (*see, Matter of Marland v. Ambach,* 79 A.D.2d 48, 436 N.Y.S.2d 360, *affd. on opn. below* 59 N.Y.2d 711, 463 N.Y.S.2d 422, 450 N.E.2d 228; *see also, Matter of Di Giacomo v. Ames,* 72 A.D.2d 562, 420 N.Y.S.2d 751). The question before us is whether a teacher should be ***452** held to have voluntarily relinquished rights in a tenured position where the teacher, the Superintendent and the Board mistakenly believe that the teacher is

resigning not from a tenured position but from an unprotected probationary position. We hold that, under the circumstances in this case, such a resignation *is ineffective* and may *be rescinded.*

Petitioner argues that her resignation is tantamount to a waiver of her protected tenure rights and to be effective must, under familiar principles, constitute a voluntary relinquishment of known rights (*see, Werking v. Amity Estates,* 2 N.Y.2d 43, 52, 155 N.Y.S.2d 633, 137 N.E.2d 321; *Matter of City of Rochester [Otis El. Co.],* 208 N.Y. 188, 197, 101 N.E. 875; *S. & E. Motor Hire Corp. v. New York Indem. Co.,* 255 N.Y. 69, 73, 174 N.E. 65; *see especially, Matter of Feinerman v. Board of Coop. Educ. Servs.,* 48 N.Y.2d 491, 497–498, 423 N.Y.S.2d 867, 399 N.E.2d 899; *Matter of Abramovich v. Board of Educ.,* 46 N.Y.2d 450, 455, 414 N.Y.S.2d 109, 386 N.E.2d 1077). It is a basic rule that a person may not knowingly relinquish rights that she does not knowingly possess (*see, Rochester, supra* ["knowledge, actual or constructive, of the existence of the right or condition alleged to have been waived is an essential prerequisite to its relinquishment" (*id.,* at 197, 101 N.E. 875)]). Thus, petitioner concludes that because she was unaware of her tenured status and resigned in good faith, believing that she was only probationary, she cannot be held to have voluntarily waived rights she had unknowingly acquired in her position.

These established waiver principles have been applied in various contexts (*see, e.g., Feinerman, supra,* at 497–498, 423 N.Y.S.2d 867, 399 N.E.2d 899 [waiver of teacher's right to be appointed to probationary term in tenure-bearing position]; *Abramovich, supra,* at 455, 414 N.Y.S.2d 109, 386 N.E.2d 1077 [waiver of protection afforded tenured teacher under Education Law § 3020–a]; *Werking, supra,* at 52, 155 N.Y.S.2d 633, 137 N.E.2d 321 [action to rescind tax deed, no waiver of tax collector's failure to comply with statute]; *Rochester, supra,* at 197, 101 N.E. 875 [action to set aside condemnation award, no waiver of objection to conflict of interest of condemnation commissioners]; *Miller v. Greyvan Lines,* 284 App.Div. 133, 136, 130 N.Y.S.2d 378, *affd.* 308 N.Y. 853, 126 N.E.2d 183 [no waiver of plaintiff's right to have goods stored in fire-proof warehouse]). These principles should apply with equal force to a resignation involving the relinquishment of a teacher's tenure rights, statutorily protected entitlements for which the Legislature has evinced its special concern (*see, e.g., Ricca v. Board of Educ.,* 47 N.Y.2d 385, 418 N.Y.S.2d 345, 391 N.E.2d 1322 ["(i)n order to effectuate these convergent purposes (fostering academic freedom and protection of competent teachers from capricious dismissal), it is necessary to construe the tenure system broadly in favor of the teacher" (*id.,* at 391, 418 N.Y.S.2d 345, 391 N.E.2d 1322)]; *Matter of Baer v.* ***453** *Nyquist,* 34 N.Y.2d 291, 299, 357 N.Y.S.2d 442, 313 N.E.2d 751 ["The tenure statutes are intended to protect the teacher and not become a trap to those not guileful enough to avoid it"]). We need not decide, however, whether waiver principles alone support this result. For, under the particular facts here, there is an additional related factor for this decision: respondents and petitioner both proceeded under the same misapprehension.

Generally, a contract entered into under a mutual mistake of fact is voidable and subject to rescission (*see, Coffin v. City of Brooklyn,* 116 N.Y. 159, 22 N.E. 227; ******791** *****146** *Schmidt v. Magnetic Head Corp.,* 97 A.D.2d 151, 159, 468 N.Y.S.2d 649). The mutual mistake must exist at the time the contract is entered into and must be substantial. The idea is that the agreement as expressed, in some material respect, does not represent the "meeting of the minds" of the parties (*see, Ryan v. Boucher,* 144 A.D.2d 144, 145, 534 N.Y.S.2d 472; *Brauer v. Central Trust Co.,* 77 A.D.2d 239, 243, 433 N.Y.S.2d 304, *lv. denied* 52 N.Y.2d 703, 437 N.Y.S.2d 1026, 418 N.E.2d 1327; *and see, Rosenblum v. Manufacturers Trust Co.,* 270 N.Y. 79, 84–85, 200 N.E. 587 [plaintiff may be entitled to have a court of equity *rescind* a contract even where the mistake is unilateral, not mutual, if failing to do so would result in unjust enrichment of defendant]; *see generally,* 13 Williston, Contracts §§ 1541, 1542, 1557, 1559, 1578 [3d ed. 1970]).

The Superintendent advised petitioner at their meeting on April 12, 1989 that if she submitted her resignation in time for the Board to act on it by April 25, 1989, no information regarding the tenure denial would remain in her employment file. To avoid having such material kept in her file, petitioner submitted her resignation the following day and the Board accepted it at its April 25 meeting. The discussion between petitioner and Superintendent on April 12 and the subsequent actions of petitioner in submitting her resignation and the Board in accepting it were all premised on a mutual mistake of fact as to a critical element: that petitioner was only a probationary employee. Where, as here, such a misconception concerning a critical aspect of petitioner's employment pervades the entire transaction, we conclude that the general principles of mutual mistake in the formation of contracts provide an additional related basis for treating petitioner's resignation as a nullity.

Respondents argue, however, that petitioner's resignation should be effective because they are blameless in the matter, there is no claim of fraud or duress, and because they, like petitioner, were totally unaware that by holding over in her ***454** position beyond September 1, 1988, petitioner was acquiring tenure by estoppel. But

respondents' good intentions do not matter in these circumstances where it is petitioner's protected tenure rights which are at stake. As we have noted, even " 'good faith' violations of the tenure system must be forbidden, lest the entire edifice crumble from the cumulative effect of numerous well-intentioned exceptions" (*Ricca, supra,* at 391, 418 N.Y.S.2d 345, 391 N.E.2d 1322).

Nor does respondents' innocent unawareness of the facts alter the effect of the critical point: that the resignation was submitted and accepted under a fundamental misassumption as to the position petitioner was relinquishing. Respondents' argument necessarily comes to this: as between petitioner and the Board, it was petitioner, rather than the Board, who had the responsibility of understanding the legal effect of Education Law § 3012 on her employment status. Respondents cite no authority for their proposition. The argument overlooks the fact that respondents gave nothing in return for petitioner's resignation and that the only rights to be lost as a consequence of the mistake were those of petitioner. To accept respondents' argument, we believe, would conflict with our Legislature's firm policy of safeguarding teachers' tenure rights (*see, Ricca, supra,* at 391, 418 N.Y.S.2d 345, 391 N.E.2d 1322; *Baer, supra,* at 299, 357 N.Y.S.2d 442, 313 N.E.2d 751).

The cases cited by respondents' are distinguishable (*see, Girard, supra; Roman, supra; Matter of Cannon v. Ulster County Bd. of Coop. Educ. Servs.,* 155 A.D.2d 846, 548 N.Y.S.2d 107) in that in each instance the resigning or retiring teacher was sufficiently aware of the operative facts to make a knowing, intelligent and voluntary decision about submitting a resignation.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the judgment of Supreme Court, reinstated.

KAYE, C.J., and SIMONS, TITONE, BELLACOSA and SMITH, JJ., concur.

Order reversed, etc.

All Citations

81 N.Y.2d 446, 616 N.E.2d 142, 599 N.Y.S.2d 787, 83 Ed. Law Rep. 1126

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270 A.D.2d 58
Supreme Court, Appellate Division, First Department, New York.

HELLER, HOROWITZ & FEIT, P.C., Plaintiff–Appellant,
v.
STAGE II APPAREL CORP., Defendant–Respondent.

March 9, 2000.

Synopsis

Law firm brought action against client to recover fees. The Supreme Court, New York County, Paula Omansky, J., granted client's motion for summary judgment, and law firm appealed. The Supreme Court, Appellate Division, held that: (1) circumstance that litigation matter entailed more legal work than had been expected when parties entered into fixed-fee agreement did not amount to mutual mistake warranting rescission of agreement; (2) fixed-fee agreement was binding and precluded firm's claims for additional fees for covered matters, including those for recovery in quantum meruit; but (3) genuine issues of material fact as to whether other matters were covered by fixed-fee agreement precluded summary judgment on causes of action for quantum meruit and account stated.

Affirmed as modified.

Attorneys and Law Firms

****241** Richard F. Horowitz, for Plaintiff–Appellant.

Barry R. Fertel, for Defendant–Respondent.

SULLIVAN, P.J., ELLERIN, LERNER and, BUCKLEY, JJ.

Opinion

MEMORANDUM DECISION.

***58** Order, Supreme Court, New York County (Paula Omansky, J.), entered on or about January 14, 1999, which granted defendant's motion for summary judgment dismissing the complaint in its entirety, unanimously modified, on the law, to reinstate plaintiff's causes of action for quantum meruit and account stated insofar as they are based upon invoices rendered in connection with plaintiff's work on "the Shorebreak matter" and "the Weiner matter", and otherwise affirmed, without costs.

Contrary to plaintiff's argument, the parties' March 5, 1997 agreement is not subject to rescission upon the ground of mutual mistake. The circumstance that the litigation involving the Goldman matter entailed more legal work than had been expected when the parties entered into the fixed-fee agreement does not amount to mutual mistake (*see, Hartford Fire Ins. Co. v. Federated Dept. Stores, Inc.,* 723 F.Supp. 976, 994; *Weissman v. Bondy & Schloss,* 230 A.D.2d 465, 660 N.Y.S.2d 115, *lv. dismissed* 91 N.Y.2d 887, 668 N.Y.S.2d 565, 691 N.E.2d 637). In any event, plaintiff ratified the March 5, 1997 agreement by sending invoices expressly referring to that agreement and quoting the terms of that agreement, and by then accepting payment on those invoices. Thus, since the agreement remains binding and, by its terms, precludes plaintiff's claims for additional fees for covered matters, such claims, including those for recovery in quantum meruit (*see, Knobel v. Manuche,* 146 A.D.2d 528, 536 N.Y.S.2d 779), were properly dismissed by the motion court.

However, because triable issues remain as to whether the "Shorebreak" and "Weiner" matters were covered under the March 5, 1997 agreement, summary judgment should not have been granted dismissing plaintiff's claims to recover in quantum meruit or upon an account stated ****242** theory for services rendered in those matters. We note in this latter connection that there are issues of fact as to whether defendant objected to the plaintiff's invoices with respect to the "Shorebreak" and "Weiner" matters (*see, Kaye, Scholer, Fierman, Hays & Handler, LLP v. L.B. Russell Chemicals, Inc.,* 246 A.D.2d 479, 667 N.Y.S.2d 753).

All Citations

270 A.D.2d 58, 704 N.Y.S.2d 240, 2000 N.Y. Slip Op. 02198

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13 B.R. 861
United States Bankruptcy Court, S.D. New York.

In re M & M TRANSPORTATION COMPANY, Debtor.
M & M TRANSPORTATION COMPANY, Plaintiff,
v.
SCHUSTER EXPRESS, INC., Defendant.
In re DRAKE MOTOR LINES, INC., Bankrupt.
John M. CHILCOTT, Trustee of Drake Motor Lines, Inc., Bankrupt, Plaintiff,
v.
NATIONAL RETAIL TRANSPORTATION, INC., Tel. Inc., and Walsh Trucking Co., Inc., Defendants.

Bankruptcy Nos. 77-B-122, 78-B-2201.
|
Sept. 2, 1981.

Synopsis
Debtor in possession and bankruptcy trustee of second debtor filed complaints against purchasers of debtors' motor carrier operating rights at open auction to recover balance due on judicially approved contracts of sale. On plaintiffs' motions for summary judgment, the Bankruptcy Court, Roy Babitt, J., held that principle of commercial frustration was inapposite to judicially approved contracts whereby bankruptcy debtors sold motor carrier's operating rights, the value of which was greatly diminished by deregulation of trucking industry, where, notwithstanding that purchasers determined their bids and entered into contracts in order to take advantage of restrictive regulatory structure, principal purpose was acquisition of operating rights not otherwise available to purchasers, purchasers knew that value of rights they bought depended on unchanged regulatory structure that always was and remained subject to change, and purchasers were knowledgeable businessmen in appraising value of their purchase and in inherent nature of their business.

Motions granted.

Attorneys and Law Firms

***862** Finley, Kumble, Wagner, Heine, Underberg & Casey, New York City, for plaintiff M & M Transportation Co.

Otterbourg, Steindler, Houston & Rosen, P. C., New York City, Brenner, Saltzman & Wallman, P. C., New Haven, Conn., for defendant Schuster Express, Inc.

Siegel, Sommers & Schwartz, New York City, for plaintiff Drake Motor Lines, Inc.

***863** Platzer & Fineberg, New York City, for defendants National Retail Transportation, Inc., Tel, Inc. and Walsh Trucking Co., Inc.

OPINION

ROY BABITT, Bankruptcy Judge:

I.

The issue central to both of these actions involves the allocation of the risk of financial loss on either the seller or the purchaser of property of estates in bankruptcy occasioned by subsequent events when the agreements of sale are silent as to the occurrence of those events.

The property touched by the events following their purchase at open auction sales, in keeping with accepted procedures in bankruptcy sales, are operating rights conferred on motor carriers in accordance with practices of the Interstate Commerce Commission (ICC), thereby authorizing such carriers to haul specific commodities between designated points on designated routes.

The event which concededly impacted adversely on the value of these properties occurred after they were sold but before the purchase prices were fully paid. This event was the enactment on July 1, 1980 of the Motor Carrier Act of that year, Pub.L. 96-296, 94 Stat. 793 et seq. This statute achieved a sweeping change in the trucking industry. It reversed nearly half a century of experience under prior legislation, 49 U.S.C. ss 1 et seq., by effectuating its policy of deregulation, a policy designed to lessen the national government's economic regulation of this industry.

The regulatory structure under prior law had the effect of severely limiting entry into the trucking industry, for it stringently limited the opportunity of a motor carrier to obtain operating rights from the ICC. An inevitable corollary of these restrictions was the benefit to those who were successful in procuring ICC granted operating rights of limited competition, for if no other rights were conferred, the successful carrier had a virtual monopoly. The value of such exclusivity was plain. Indeed, in recognition of the intrinsic value of these federally given operating rights, motor carriers carried them on their books as valuable assets. Apart from the benefit derived from a continued operation in a virtually competition free area, holders of these rights were also able to profit from the restrictive nature of the regulations governing the marketplace when the time came to sell their rights. Substantial profit could be had from a sale as it was easier for carriers to gain entry into a marketplace by the purchase of existing rights. While the ICC had to approve the sale, at least the routes, designated points and type of haulage had already undergone administrative scrutiny.

The deregulation flowing from the 1980 statute has changed the face of all this.[1] The new statutory and regulatory structure contemplates virtually unlimited entry and provides for a simple and expeditious grant of operating rights upon payment of a minimal fee. An existing operating right, previously valued at cost and subject to amortization, now must be written off as an extraordinary loss.[2] It is thus plain that the value of previously granted rights to operate on the nation's highways has been permanently impaired by the elimination of monopolistic benefits which, of course, impacted adversely on a profitable operation.

It is against this setting that the actions now to be dealt with must be considered. While both of the bankruptcy petitions were filed under the controlling provisions of the now repealed Bankruptcy Act of 1898, it appears that resolution of these disputes requires application of general principles of law seemingly applicable as ***864** well to bankruptcy sales within the scheme of the 1978 Bankruptcy Code.[3]

II.

THE FACTS

A. M & M TRANSPORTATION COMPANY v. SCHUSTER EXPRESS, INC.

On January 19, 1977, M & M Transportation Company, (M&M) filed its petition for an arrangement under Chapter XI of the 1898 Bankruptcy Act, Section 322, 11 U.S.C. (1976 ed.) s 722. Its plan was confirmed on November 6, 1978. M&M, in the business of intra and interstate transport, was the owner of ICC operating rights covering several territories.

In the course of the administration of its Chapter XI case, M&M decided to sell certain of its operating rights, and a public sale by auction was held before the court on June 22, 1977. Paul Schuster, President and chief executive officer of Schuster Express, Inc. (Schuster), successfully bid on a group of these rights, Group B, for $650,000. The parties then entered into a written agreement of sale (M&M agreement) pursuant to which Schuster made an initial $65,000 payment. This agreement, approved by this court on July 6, 1977, was made "under the rules and regulations of the ICC", and it envisioned full payment upon final ICC approval of the sale of these operating rights. Pursuant to paragraph 3(b) of the agreement,[4] lease rental payments were made for the period of October, 1977 through September, 1980, in the total amount of.$289,250. During this period, Schuster operated under temporary authority.[5]

Approval was obtained by ICC order on March 27, 1980, and it became effective thirty days later. The M&M agreement provided for a closing to be held within 65 days of this order and ICC regulations required Schuster to complete the purchase within ninety days of the effective date of the ICC order.[6] The July 1, 1980 enactment of the Motor Carriers Act then intervened and, as seen, drastically changed the regulatory climate, thus diminishing the value of the rights Schuster bought. Counsel for Schuster then notified M&M that it would not honor the court approved contract of sale, and refused to pay the $295,750. balance due as Schuster believed it was excused from all further performance as its purpose in entering into the M&M agreement had been frustrated by the enactment of the 1980 statute.

On November 19, 1980, M&M filed its complaint in this court to recover the balance due on the contract. Bankruptcy Rules 701(1) and 703; 411 U.S. 1068, 93 S.Ct. 3147, 37 L.Ed.2d lxvi et seq. Schuster, the defendant, answered and raised the defense of commercial frustration, based on the deregulation statute and the destruction of the value of the purchased rights. The essence of Schuster's position is that at the time of the execution of the agreement

of sale, it believed the then existing regulatory framework would remain in existence, and as the change in the regulatory climate could not be foreseen, it should now be relieved from further performance. Schuster also interposed a counterclaim for the $65,000. paid as a deposit.

***865** M&M then moved for summary judgment in its favor pursuant to Rule 56, F.R.Civ.P., made applicable to this adversary proceeding by Bankruptcy Rule 756, 411 U.S. 1084, 93 S.Ct. 3159, 37 L.Ed.2d lxxii. The statement of the undisputed material facts, called for by District Court Rule 3(g), was annexed with affidavits and documents, all permitted by Rule 56. Schuster did not submit a statement controverting M&M's statement of the material facts, but did submit affidavits in opposition.

B. DRAKE MOTOR LINES, INC. v. NATIONAL RETAIL TRANSPORTATION, INC.

On December 5, 1978, Drake Motor Lines, Inc. (Drake), a transporter of goods over both intra and interstate lines, was adjudged a bankrupt under the 1898 Bankruptcy Act. John M. Chilcott was elected and has qualified as trustee. Pursuant to his obligation to liquidate the estate, he determined it most beneficial to sell Drake's ICC operating rights at public auction, an auction held on January 25, 1979. Prior to this date, numerous articles appeared in both industry-wide and general circulation publications reporting the proposed changes under study by Congress and the ICC, including out-and-out deregulation of the trucking industry.[7] Indeed, the specter of almost certain industry-wide change weighed heavy on those with an interest in the trucking industry. The press of this concern, in the context of this dispute, is illustrated by the fact that at the January 25 auction, there was discussion amongst the bidders as to the possible impact of reform on the value of the operating rights to be sold by Drake's trustee. The affidavits and documents submitted by the trustee indicate that the rights were offered and sold at a deflated value, a factor directly linked to the rumors of possible change.[8]

At this auction, Walsh Trucking Co., Inc. (Walsh) and Tel, Inc. (Tel), successfully bid on various packages of operating rights. Tel entered into an agreement (Drake agreement) with the trustee to purchase certain rights for a total of $6,000., with $900. paid as a deposit. Walsh executed a similar agreement to purchase rights for $322,000, and $48,300. was paid on deposit. These sales were subject to final approval by the ICC, and closings were to be held within 65 days of the ICC final order of approval. Nowhere did these agreements provide for the contingency of change in the ICC regulatory framework. Both agreements were subsequently confirmed by order of this court.

On January 25, 1979, the same day as the auction, Tel assigned its interest in a portion of the rights to National Retail Transportation, Inc. (NRT). This assignment did not release Tel from liability. Walsh assigned its entire right to the newly acquired rights to NRT, and similarly, was not released from liability.

Thereafter, NRT did all required of it pursuant to applicable law and the agreement of sale to gain the requisite ICC approval. On September 5, 1979 temporary operating authority was granted by the ICC to NRT,[9] and on May 12, 1980 that agency issued its final order approving the transfer ***866** which became administratively final on June 2, 1980.

As the Drake agreements called for closing after the issuance of the final order of approval, plaintiff made repeated demands for payment of the outstanding balance on defendants NRT, Walsh and Tel, but they refused to comply. This prompted Drake's trustee, the plaintiff, to file a complaint with this court against Walsh, Tel and NRT to recover $274,250, the balance owing on the agreement.[10] Rule 701(1), 703, 411 U.S. 1068, 93 S.Ct. 3147, 37 L.Ed.2d lxvi et seq. Defendants Walsh, NRT and Tel answered. They denied the allegations of the complaint and interposed the defense of commercial frustration, resting on the conceded fact that deregulation had totally destroyed the value of the rights purchased and thus effectively frustrated defendants' purpose of entering into the Drake agreement at all. They alleged that rescission was warranted, and counterclaimed for a refund of the $48,300 paid upon the contracts.

The Drake trustee has moved for summary judgment, Bankruptcy Rule 756, 56 F.R.Civ.P., and has filed the statement required by District Court Rule 3(g), affidavits and supporting documents. Defendants oppose this motion, submitting a statement of the material facts which they say necessitates a trial, and supporting affidavits were also filed on the claimed issue of the material facts.

III.

THE SUMMARY JUDGMENT MOTIONS

And so the court turns to the appropriateness of summary judgment in light of the above-mentioned facts. Summary judgment, Rule 56 F.R.Civ.P., is a tool to facilitate the most expeditious administration of justice, allowing the court to smoke out those cases not requiring a trial. S.E.C. v. Research Automation Corp., 585 F.2d 31 (2d Cir. 1978). It is the moving parties' burden to demonstrate the absence of genuine issue as to the facts material to the litigation. Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). As this court is thus sensitive to the strict adherence to the prerequisites for doing away with a litigant's right to an evidentiary hearing, all materials submitted have been carefully scrutinized.

Both movants[11] followed the command of District Court Rule 3(g) and have submitted comprehensive statements of those material facts not in dispute, and when read with the other moving papers, they do not set forth a factual dispute warranting a trial.

Defendant Schuster, in the M&M suit, has not submitted its opposing view of the facts, and therefore, it is deemed to agree with those facts outlined in M& M's moving papers. A thorough reading of the affidavits Schuster submitted reinforces the view that there is general agreement as to the controlling facts described by the plaintiff moving party.

The defendants NRT and Walsh have submitted opposing papers in full compliance with the law, facially controverting the factual setting as seen by Drake's trustee. However, these materials do not contain the requisite particulars to raise an ***867** issue of material fact. Applegate v. Top Assoc. Inc., 425 F.2d 92 (2d Cir. 1970). They merely contain unsubstantiated speculations and conclusions of fact and law, all insufficient bases to defeat this motion. It is concluded that these defendants have advanced no feasible basis to warrant a trial, Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438 (2d Cir. 1980), and that the only issues are legal ones which the court may resolve without the necessity to have the curtain ascend on a trial, Heyman v. Commerce & Industry Insurance Co., 524 F.2d 1317, 1319 (2d Cir. 1975).

IV.

THE LEGAL ISSUES

A. THE BANKRUPTCY COURT'S POWER TO SET ASIDE A CONFIRMED JUDICIAL SALE

The first legal issue raised in these disputes concerns the reach of the power of this court to set aside a previously confirmed judicial sale. Plaintiffs correctly point to the general policy of the bankruptcy courts to uphold regularly conducted sales so as to engender and maintain their stability and the integrity of the process, 4B Collier on Bankruptcy (14th ed.) P 70.98, for it is the "policy of the law to maintain judicial sales and every reasonable inducement will be indulged to uphold them". Manson v. Duncanson, 166 U.S. 533, 17 S.Ct. 647, 41 L.Ed. 1105 (1897).

And in pursuance of this policy, courts apply the doctrine of caveat emptor to a confirmed judicial sale as such a sale is presumed to be final. Plaintiffs believe it would be inequitable to the creditors of these companies to permit a purchaser who speculates upon the value of the property purchased, and whose bid reflects his underlying reasons to bid as he does, to be relieved of his obligations because the expectations did not materialize. In short, plaintiffs insist that the quantum and extent of the rights of the defendants are governed solely by the terms of the sales.

But the policy behind the integrity of the judicial sale system is not an inexorable command, unyielding and implacable in all cases. Manifestly, blind adherence to the most laudable policy in the face of egregious facts surrounding a sale could also impact adversely on the integrity of the system. Thus, sales tainted by fraud or misrepresentation will not be enforced. Moreover, in its general power to oversee the process that is bankruptcy, this court must possess the general power to police such sales, and to set them aside "if the grounds are sufficient to invalidate a similar private transaction on equitable grounds". In re Burr Mfg. Co., 217 F. 16 (2d Cir. 1914); 6 Remington on Bankruptcy s 2563. A decision to do this lies within the sound discretion of the bankruptcy judge, In re Lamont, 453 F.Supp. 608 (N.D.N.Y.1978); aff'd 603 F.2d 213 (2d Cir. 1978), for the intrinsic structure of the sales which are the subject of these actions is "within the zone of interests which the Bankruptcy Act seeks to protect and to regulate". In re Harwald Co., 497 F.2d 443, 444-5 (7th Cir. 1974). See also, In re Beck Industries, Inc., 605 F.2d 624 (2d Cir. 1979).

This court, as it has been so frequently reminded, sits as a court of equity, Bank of Marin v. England, 385 U.S. 99, 87 S.Ct. 274, 17 L.Ed.2d 197 (1965), and examines the facts before it with such principles in mind, for its equitable

power extends to more than the typical dispute, e. g., Pepper v. Litton, 308 U.S. 295, 304-5, 60 S.Ct. 238, 244, 84 L.Ed. 281 (1939), and "pervades bankruptcy administration", In re Beck Industries, Inc., supra, at 634. Although most cases in which bankruptcy sales have been set aside involved defects in the sale process, the court may set aside a sale where there is an egregious disproportion between the sale price and the value of the contract sold so as to "shock the conscience of the court". In re Jewett & Sowers Oil Co., 86 F.2d 497 (7th Cir. 1936). The court "engaged as a court of equity in the administration of a bankrupt's estate (sic) will not stand on any niceties of pleading where the facts are all before the court and cry out for relief". Id. at 498. In the proper circumstances, this court may therefore set ***868** aside a confirmed sale and discharge the purchaser from further obligation where events subsequent to confirmation strip the assets of value and make the purchase worthless.

As it is clear, therefore, that the power exists, a power to be sparingly used where the facts cry out for relief, the court now turns to these sales to ascertain how plaintive those cries are and whether, on the defendants' theory, those cries should be heeded.

B. COMMERCIAL FRUSTRATION

The defendants proceed on a common theory arising out of the 1980 enactment which deregulated an industry they thought they had to themselves. They call their theory commercial frustration and insist that if applicable principles support this theory, then these are instances in which the court's power should be exercised benignly in their favor.[12] In simple terms, defendants ask this court to act in their favor because what they bought for the price they bargained for has become considerably less valuable. Plaintiffs view things differently. They characterize the fact of statutory deregulation as an element of ordinary business risk generally assumed in such contracts, and considered in the purchaser's determination of how much the property is worth to him. What is not disputed is the fact that the intrinsic value of the ICC rights the defendants bought is now, to all intents and purposes, nil if the defendants hoped by their purchase at the prices paid to have a monopoly to the exclusion of others. If the court concludes that the defendants must be held to their bargains, they will be forced to pay in full for something which no longer justifies the prices they bid.

There is no dispute that these defendants were represented at the sales by knowledgeable businessmen, all cognizant of the risks involved and mindful of the industry. A policy of deregulation was considered by the national legislature as far back as 1971, when the Nixon Administration introduced the Transportation Regulation Modernization Act.[13] That these rights were at all times subject to regulation by the ICC or by the legislature cannot be questioned. Although defendants protest, raising the absence of certainty as to ensuing change, absolute knowledge is not the standard. It would be futile for the courts to require absolute certainty in the weighing of risks assumed in a contract. Equity should not intrude itself where knowledgeable parties contract and where they have not been overborne by actions of the other party. If anything, the plaintiffs, as vendors of property, were subject to the superior knowledge of these vendees as to the value of the operating rights to be sold and the possibility that there might be few or even no bidders. Mindful of all this, the court can only reaffirm the observation that the legal process and the equity process do not necessarily lead to the same result. Haller v. Esperdy, 397 F.2d 211 (2d Cir. 1968). And under the facts here, the stability of the process and the public policy inherent in upholding the validity of freely negotiated contracts outweigh the call to do equity merely because the defendants find less hidden treasure in what they bought than they hoped for.[14]

***869** Under the principle of commercial frustration, a party responsible for an otherwise lawful contractual obligation is discharged from performance, where that performance, although possible, is rendered undesirable or oppressive because of supervening events. 6 Corbin on Contracts s 1322 (1962). This principle is an offshoot of the twentieth century's rejection of a judicial hands-off policy towards contracts. It reflects increased judicial involvement in private contracts. See generally, Speziale, The Turn of the Twentieth Century as the Dawn of Contract Interpretation, 17 Duquesne L.R. 555 (1978). It is an affirmation of the reality that there are situations where society's needs are best served by not enforcing the performance of senseless contracts.

The principle of commercial frustration, thus, is of comparatively recent development and it focuses on events which materially affect the consideration one party receives for performance. As now understood, at least in law school contract courses, it was applied in Krell v. Henry, (1903) 2 K.B. 740 (C.A.), one of the celebrated "coronation cases", which arose out of the illness of King Edward VII on coronation day. There, the court excused the renter of a flat overlooking the procession from paying the balance of the agreed price on the theory that cancellation of the coronation procession excused further

performance.

From then, a line of cases has evolved excusing a party from performance when the motivation for assuming the obligation is foiled. Essentially, the principle of commercial frustration affords a means by which courts allocate risk in order to decide who is to bear the burden of any event not provided for by the parties' agreement. And, although the courts have attempted to outline its components, it actually involves the balancing of interests in light of the facts involved and society's customs and mores. Murray on Contracts, s 202 (1974). The basic test is whether the parties contracted on a basic assumption that a particular contingency would not occur. Murray, s 202, supra. An analysis of the facts is crucial for the proper application of this doctrine. Krell v. Henry, supra; Farlou Realty Corp. v. Woodsam Assoc. Inc., 49 N.Y.S.2d 367 (Special Term 1944), aff'd, 249 N.Y. 846, 62 N.E.2d 396 (1945).

With these guiding principles in mind, the court now turns to the law of New York, the governing law as the parties agreed.[15] New York, to a large extent, follows the principle of commercial frustration, as outlined in the Restatement (Second) of Contracts s 285 (Tent. Draft No. 9, April 8, 1974) in these words:

"DISCHARGE BY SUPERVENING FRUSTRATION.

> Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary".

See Strauss v. Long Island Sports, Inc., 60 A.D.2d 501, 401 N.Y.S.2d 233 (2d Dept. 1978).

The Restatement breaks this rule down into three inquiries: (1) the purpose that is frustrated must have been a principal purpose of that party in making the contract. Here, there is no doubt that the defendants determined their bids and entered into these contracts in order to take advantage of the restrictive regulatory structure which made it virtually impossible for others to obtain operating rights directly from the ICC. Although the plaintiffs stress that literal performance is still possible, and that the defendants have, in fact, received the operating rights and have and will continue to operate thereunder, the court is not blind to the fact that contracting parties have more significant motivations for doing what they do and in what fashion. See ***870** Murray on Contracts, supra ; 6 Corbin on Contracts, s 1353 (1962). (2) The frustration must be substantial. This element is to ensure that the defense of commercial frustration will not be accepted in cases where performance has become merely less profitable. To be sure, there is no dispute that the change achieved by the 1980 law substantially lessened the value of the rights purchased. However, the new accessability to others is remote from the major objective of these sales. These contracts involved the purchase and sale of ICC operating rights and defendants, in fact, received the benefits of both a temporary authority to operate and a final authority. These rights are still viable, although the earlier restrictiveness has been extinguished. On a continuum, the profitability associated with restrictive regulations was an objective far removed from the principal purpose of the sale which was to acquire operating rights not otherwise available to these defendants. The lessened profitability occasioned by the 1980 statute is no different than a change in fashion and the impact of such change on the profits of the purchaser of let us say mini or maxi dresses. The final element, (3), is that the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made. This makes the foreseeability of the event a factor in the determination. Generally,

> "(T)he continuation of existing market conditions and of the financial situation of the parties are ordinarily not such assumptions, so that mere market shifts or financial inability do not usually effect discharge under the rules stated in this section".

Restatement, Second, supra s 281.[16]

It is this third factor, more than any other upon which New York cases have generally focused, i. e., whether or not the supervening event was within the contemplation of the parties and might have been guarded against. 119 Fifth Avenue, Inc. v. Taiyo, supra; Raner v. Goldberg, 244 N.Y. 438, 155 N.E. 733 (1927); Frenchman & Sweet, Inc. v. Philco Discount Corp., 21 A.D.2d 180, 249 N.Y.S.2d 611 (4th Dept. 1964). A careful reading of the record in these cases discloses that it is this factor that is fatal to defendants' defense.

Raner v. Goldberg, supra, is the New York case closest on its facts to the instant actions. Raner involved a lease of premises to be used as a dance hall. At the time the parties entered into the lease, it was understood that a license was required to operate the premises as a dance hall. The agreement was silent as to the rights and remedies of the parties should the required license be denied. The license was subsequently denied and the lessee brought suit for reimbursement of the rent paid under the lease as well as a return of the deposit. The court refused to release the lessee from its obligation as all the circumstances showed that the parties understood that the procurement of a license, a factor essential to the contemplated use of the premises, rested in the discretion of a public officer, but that the

lessee nevertheless made an absolute promise.

> "It is clear that a person who makes an absolute promise to pay may not be excused from performance because of the happening of a contingency which destroys the value of the stipulated consideration for such payment where inference is reasonable that an express condition so providing would have been inserted in the contract had the parties so intended. Where the promisor has knowingly chosen to make an absolute promise, he may not afterwards claim relief because subsequent events show that the choice was ill-advised. The test seems to be whether the event ... was or might have been guarded against."

Id., at 441, 155 N.E. 733. The parties, aware that the grant or denial of the license was uncertain, could have conditioned performance on its grant. Instead, the lessee chose to assume an absolute obligation, and the court found no basis upon which to relieve the lessee from that obligation. ***871** A person who makes an absolute promise is not to be excused from performance when an event destroys the value of the stipulated consideration and when a reasonable inference may be drawn that an express condition would have been inserted had the parties so intended.

The Contracts Restatement Second, s 285, supra, also points to a line of cases with facts similar to those now before this court. Restatement (Second) of Contracts, s 285 (Tent. Draft No. 9, April 8, 1974) Illustration 7 and Comment a. In Megan v. Updike Grain Corporation, 94 F.2d 551 (8th Cir. 1938), plaintiff, trustee of the property of the Chicago & North Western Railway Company under Section 77 of the Bankruptcy Act as it then stood, 11 U.S.C. s 205, sought to recover unpaid and accruing rental under a written lease for a grain elevator in Omaha, a public grain market. When the parties had entered into the lease, there were in existence favorable rates and tariffs encouraging the movement of grain products through the Omaha market which made the operation of grain elevators a profitable business. Thereafter, the North Western Railway joined with other railroads in procuring ICC approval of different rates which had the effect of diverting large quantities of grain from the Omaha market. This change rendered the lease nearly worthless to the lessee.

Under these facts, the court concluded that the principle of commercial frustration was inapplicable, noting that nothing in the agreement linked the viability of the lease to the continued existence of favorable rates and tariffs. Additionally, the court observed that these changes were in no way unanticipated as railroad rates and tariffs always remain subject to regulation by the ICC. Moreover, these changes were found to have followed lengthy investigation and public hearing.[17] These factors support this court's conclusion that the principle of commercial frustration is inapposite to the facts here. Under the facts here it cannot be said that the supervening event was not contemplated by the parties. 6 Corbin on Contracts s 1355 (1962).

Here, the defendants made their agreements knowing full well that the value of the rights they bought depended on an unchanged regulatory structure, but one that always was and remained subject to change. Although these buyers bargained on the benefits they would derive from limited competition, the contracts of sale were silent as to the omnipresent possibility of adverse change.

It can hardly be refuted that at the time M&M's operating rights were sold to Schuster, there was national focus on the proposed changes in the trucking industry. In the case of Drake's rights, the possibility of deregulation was openly discussed by those attending the sale. In both cases, deregulation, in some form, in some measure, and at some time, was a not impossible eventuality.

No one could claim ignorance of the fact that the very nature of these operating rights and the involvement of government in their structure played a part in their value. These defendants are knowledgeable businessmen, not only in appraising the value of their purchase and therefore their bidding price in a bankruptcy sale, but also in the inherent nature of their business. They were surely aware that theirs is a business subject to governmental approval and regulation. With all this in mind and without more, it is only fair that the risk of change should be placed on the purchasers.

***872** Although defendants argue against the foreseeability of deregulation, the facts belie the premise. The affidavit submitted by Paul Schuster in opposition to the summary judgment motion by M&M in relevant part says:

> "In June 1977, and for years previously thereto, the undersigned is aware that there had been discussions in Congress about the possibility of some changes in the Interstate Commerce Act, but these discussions had never materialized into any concrete proposal with any realistic prospect of adoption by Congress, and many of the proposals given the most serious consideration did not contemplate the substantial elimination of the limited entry into the marketplace which had always been incident to ICC operating rights."

This affidavit demonstrates ample knowledge of the possibility of deregulation. That defendants chose to disbelieve or to dismiss the possibility as a serious threat was a personal assessment. That defendants bid as they did with knowledge of a potential deregulation was a matter of their business judgment. For all that appears their bids

might have been pitched not only to the possibility of diminished profits but to the judgment that their expectations would measure up to their investment even if deregulation, in fact, were to come. Given the possibilities, these defendants could have insisted that if deregulation were to come within a set period, the sales would be nullified. They chose not to and the court must assume this is how they would have it. Surely the contracts they did enter into could have dealt with deregulation. In those portions of the contracts dealing with ICC approval of the transfers, provision is made for modification or termination of the agreements if the ICC were to either materially change or deny the rights.[18]

Here, there is no escape for these defendants, and it is reasonable to leave them where their agreements place them. The only condition upon performance was final ICC approval. The agreements and this court's orders are clear as to this. The parties should not be excused from what has become a bad bargain under the principle of commercial frustration. Here, the only frustration is the defendants' in that known risks they assumed have turned out to their disadvantage. This is a case where provision could have been made for what actually occurred. Commercial frustration is no defense where no unusual or unforeseeable event prevented performance and where provision could readily have been made for what actually occurred. Frenchman & Sweet, Inc. v. Philco, supra. Deregulation was not an event, the non-occurrence of which was the basis for the bargain. The risk of change in the regulatory framework of the trucking industry was assumed by defendants, and they cannot now be released from valid legal obligations.

V.

Each plaintiff is entitled to the grant of summary judgment for the relief sought by the complaints and to the dismissal of defenses and counterclaims interposed by the defendants. Settle a separate order in each case on five days notice.

All Citations

13 B.R. 861, 24 C.B.C. 489

Footnotes

1 See generally, Sheler, Why Teamsters Union Is Running Scared, U.S. News and World Report, August 3, 1981; Congress Clears Major Bill Cutting Trucking Regulation, 38 Cong. Q. Weekly Rep., No. 26, p. 1806 (June 28, 1980).

2 See generally, Statement of Financial Accounting Standards No. 44, Accounting for Intangible Assets of Motor Carriers, December 1980 ; published by the Financial Accounting Standards Board.

3 Although the 1898 Act was repealed effective October 1, 1979, as provided for by Section 401(a) of Title IV of the 1978 statute, Pub.L. 95-598, 92 Stat. 2682, the former will continue to control the disposition of bankruptcy petitions filed before October 1, 1979, as here. Section 403(a), 92 Stat. 2683, makes this clear.

4 Paragraph 3(b) provides:
"Buyer shall pay to seller as rental for said temporary lease of said operating rights, the sum of $6,500.00 per month for the first eighteen months after court approval of the lease and $9,750.00 per month thereafter which shall be applied against and in reduction of the purchase price if the application under Section 5 is approved".

5 These payments were paid as rental for these operating rights, as Schuster leased them from M&M while the applications for ICC approval were pending with that agency. Schuster does not seek to recover any portion of these payments in this action.

6 Schuster obtained an ex parte 60-day extension from the ICC for consummation of the sale.

7 See, Waiting for D Day, Forbes, December 25, 1978 at 41; Burck, Truckers Roll Toward Deregulation, Fortune, December 18, 1978 at 74; Dereg, Transportation's Sunrise or Sunset ?, Fleet Owner, December, 1978 at 88; Major Reform of Trucking Industry Appears Almost Certain, Handling and Shipping Management, December, 1978 at 10.

8 The Drake operating rights were appraised by William Becker, Esq., a transportation attorney. His January 5, 1979 appraisal states:
"Recent administrative action of the ICC and recent legislative proposals to reduce or eliminate entry restrictions in the motor carrier industry make it difficult to estimate prices which may be derived from the sale of Drake's operating authority. There also is enclosed a compilation of recent administrative action which indicates that there will be reduced entry limitations and that increased

competition will be encouraged in the industry. This recent policy emphasis clearly has had a depressant effect on the value of motor carrier operating rights certificates. As a result, the prices that will be derived from the sale of the Drake rights will be materially less than what could have been obtained even six months ago".

9 Paragraph 3 of the Drake Agreement provides:
"(a) If by its administratively final and effective order, the ICC shall grant (temporary operating authority), the buyer shall, on a date ('Temporary Authority Date') designated by it, but within the period prescribed in said order, commence to operate under a temporary lease of the operating rights ...
(b) The buyer shall pay to the seller, as rental for said temporary lease of said operating rights, during the first eighteen (18) months of temporary operations, the sum of one (1%) per cent per month for operations under temporary authority and the sum of 1.5% per month thereafter until consummation or termination of this agreement, whichever sooner occurs. All rental payments shall be applied against, and in reduction of, the purchase price if the application under Section 5 is approved."

10 This outstanding balance reflects a credit for a group of rights determined to have been dormant and nontransferrable by the Massachusetts Department of Public Utilities, Commercial Motor Vehicle Division. (Intra-state operating rights).

11 Although plaintiff M&M is a Chapter XI debtor and debtor in possession, it has the same power as does Drake's trustee to do what he has done. Section 342, 11 U.S.C. (1976 ed.) s 742, makes this plain.

12 The Courts are not consistent in their discussions of this doctrine. It is discussed under the headings of frustration of purpose, Haas v. Pittsburgh National Bank, 495 F.Supp. 815 (W.D.Pa.1980), frustration of performance, 119 Fifth Avenue, Inc. v. Taiyo Trading Co., 190 Misc. 123, 73 N.Y.S.2d 774 (Special Term 1947), or impossibility, Transatlantic Financing Corp. v. United States, 363 F.2d 312 (D.C.Cir.1966). For consistency, this opinion will keep to the phrase commercial frustration.

13 See generally, We Can Do More Than Just Talk About Motor Carrier Regulatory Reform, 46 ICC Practitioners Journal 669 (1978).

14 If a call to do equity is to be heard because a vendee overbid, or guessed wrong, or read the appropriate signs wrong, it should follow that a trustee should ask the bankruptcy court to set aside a sale because, as things emerged later, the vendee made too great a profit. Neither course will do but the trustee can, at least, point to the creditors whose losses might be relieved if more could be garnered in sales of a bankrupt's or debtor's property.

15 Paragraph 7(a) of these agreements states that:
"This agreement shall be governed by the laws of the State of New York;"

16 Section 285, Discharge by Supervening Frustration, refers back to Section 281, comment b: "Impracticability" for general rules on determining foreseeability.

17 Accord, Essex-Lincoln Garage, Inc. v. City of Boston, 342 Mass. 719, 175 N.E.2d 466, (Mass.1961), which was an action by the lessee of public parking facility for rescission of lease after a change in traffic regulations made continued operation less profitable. The court held that the lessee assumed the risk that the City, the lessor, might change the regulations, as it is well known traffic regulations are subject to change. In Didonato v. Reliance Standard Life Insurance Co., 433 Pa. 221, 249 A.2d 327 (Pa.1969), purchasers of real estate sued for rescission because of the adverse impact of a subsequent zoning change. The court held that risk of such change, in the absence of some expression to the contrary, is to be allocated to the purchaser.

18 See Paragraph 3(c) of the Drake Agreements and Paragraph 3(c) and 3(d) of the M&M Agreement.

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70 N.Y.2d 900
Court of Appeals of New York.

KEL KIM CORPORATION et al.,
Appellants,
v.
CENTRAL MARKETS, INC., et al.,
Respondents.

Dec. 21, 1987.

Synopsis
Lessee of roller skating rink brought action for declaration of its rights and obligations under lease. The Supreme Court, Saratoga County, Doran, J., 133 Misc.2d 529, 507 N.Y.S.2d 359, held for lessor, and lessee appealed. The Supreme Court, Appellate Division, 131 A.D.2d 947, 516 N.Y.S.2d 806, affirmed, and lessee sought further appeal. The Court of Appeals held that lessee's inability to procure and maintain liability coverage, as required under lease, would not be excused either under doctrine of impossibility or under contractual force majeure clause.

Affirmed.

Attorneys and Law Firms

***901 ****384 **295** Paul Pelagalli and Richard C. Miller, Jr., Albany, for appellants.

John P. Miller, Albany, for respondents.

OPINION OF THE COURT

MEMORANDUM.

The order of the Appellate Division, 131 A.D.2d 947, 516 N.Y.S.2d 806, should be affirmed, with costs.

In early 1980, plaintiff Kel Kim Corporation leased a vacant supermarket in Clifton Park, New York, from defendants. The lease was for an initial term of 10 years with two 5–year renewal options. The understanding of both parties was that plaintiff would use the property as a roller skating rink open to the general public, although the lease did not limit use of the premises to a roller rink.

The lease required Kel Kim to "procure and maintain in full force and effect a public liability insurance policy or policies in a solvent and responsible company or companies * * * of not less than Five Hundred Thousand Dollars * * * to any single person and in the aggregate of not less than One Million Dollars * * * on account of any single accident". Kel Kim obtained the required insurance coverage and for six years operated the facility without incident. In November 1985 its insurance carrier ****385** gave notice that the policy would expire on January 6, 1986 and would not be renewed ***296** due to uncertainty about the financial condition of the reinsurer, which was then under the management of a court-appointed administrator. Kel Kim transmitted this information to defendants and, it asserts, thereafter made every effort to procure the requisite insurance elsewhere but was unable to do so on account of the liability insurance crisis. Plaintiff ultimately succeeded in obtaining a policy in the aggregate amount of $500,000 effective March 1, 1986 and contends that no insurer would write a policy in excess of that amount on any roller skating rink. As of August 1987, plaintiff procured the requisite coverage.

On January 7, 1986, when plaintiff's initial policy expired and it remained uninsured, defendants sent a notice of default, directing that it cure within 30 days or vacate the premises. Kel Kim and the individual guarantors of the lease then began this declaratory judgment action, urging that they should be excused from compliance with the insurance provision either because performance was impossible or because the inability to procure insurance was within the lease's *force* ***902** *majeure* clause.* Special Term granted defendants' motion for summary judgment, nullified the lease, and directed Kel Kim to vacate the premises. A divided Appellate Division affirmed.

Generally, once a party to a contract has made a promise, that party must perform or respond in damages for its failure, even when unforeseen circumstances make performance burdensome; until the late nineteenth century even impossibility of performance ordinarily did not provide a defense (Calamari and Perillo, Contracts § 13–1, at 477 [2d ed. 1977]). While such defenses have been recognized in the common law, they have been applied narrowly, due in part to judicial recognition that the purpose of contract law is to allocate the risks that might affect performance and that performance should be excused only in extreme circumstances (*see,* Wallach, *The Excuse Defense in the Law of Contracts: Judicial*

Frustration of the U.C.C. Attempt to Liberalize the Law of Commercial Impracticability, 55 Notre Dame Law 203, 207 [1979]). Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract (*see, 407 E. 61st Garage v. Savoy Fifth Ave. Corp.,* 23 N.Y.2d 275, 296 N.Y.S.2d 338, 244 N.E.2d 37; *Ogdensburg Urban Renewal Agency v. Moroney,* 42 A.D.2d 639, 345 N.Y.S.2d 169).

Applying these principles, we conclude that plaintiff's predicament is not within the embrace of the doctrine of impossibility. Kel Kim's inability to procure and maintain requisite coverage could have been foreseen and guarded against when it specifically undertook that obligation in the lease, and therefore the obligation cannot be excused on this basis.

For much the same underlying reason, contractual *force majeure* clauses—or clauses excusing nonperformance due to circumstances beyond the control of the parties—under the common law provide a similarly narrow defense. Ordinarily, only if the *force majeure* clause specifically includes the event that actually prevents a party's performance will that party ***903** be excused. (*See, e.g., United Equities Co. v. First Natl. City Bank,* 41 N.Y.2d 1032, 395 N.Y.S.2d 640, 363 N.E.2d 1385; Squillante & Congalton, *Force Majeure,* 80 Com.L.J. 4 [1975].) Here, of course, the contractual provision does not specifically include plaintiff's inability to procure and maintain insurance. Nor does this inability fall within *****386** the catchall "or other similar causes beyond the control of such party." The principle of interpretation applicable to such ****297** clauses is that the general words are not to be given expansive meaning; they are confined to things of the same kind or nature as the particular matters mentioned (*see,* 18 Williston, Contracts § 1968, at 209 [3d ed. 1978]).

We agree with the conclusion reached by the majority below that the events listed in the *force majeure* clause here are different in kind and nature from Kel Kim's inability to procure and maintain public liability insurance. The recited events pertain to a party's ability to conduct day-to-day commercial operations on the premises. While Kel Kim urges that the same may be said of a failure to procure and maintain insurance, such an event is materially different. The requirement that specified amounts of public liability insurance at all times be maintained goes not to frustrated expectations in day-to-day commercial operations on the premises—such as interruptions in the availability of labor, materials and utility services—but to the bargained-for protection of the landlord's unrelated economic interests where the tenant chooses to continue operating a public roller skating rink on the premises.

WACHTLER, C.J., and SIMONS, KAYE, ALEXANDER, TITONE, HANCOCK and BELLACOSA, JJ., concur.

Order affirmed, with costs, in a memorandum.

All Citations

70 N.Y.2d 900, 519 N.E.2d 295, 524 N.Y.S.2d 384

Footnotes

* The clause reads: "If either party to this Lease shall be delayed or prevented from the performance of any obligation through no fault of their own by reason of labor disputes, inability to procure materials, failure of utility service, restrictive governmental laws or regulations, riots, insurrection, war, adverse weather, Acts of God, or other similar causes beyond the control of such party, the performance of such obligation shall be excused for the period of the delay."

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2020 WL 2239957
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Michael LANTINO and Joanne Cabello, on behalf of themselves and all others similarly situated, Plaintiffs,
v.
CLAY LLC et al., Defendants.

1:18-cv-12247 (SDA)
|
Signed May 8, 2020

Attorneys and Law Firms

Orit Goldring, The Goldring Firm, New York, NY, for Plaintiffs.

Douglas Brian Lipsky, Sara Jacqueline Isaacson, Lipsky Lowe LLP, New York, NY, for Defendants.

OPINION AND ORDER

STEWART D. AARON, UNITED STATES MAGISTRATE JUDGE:

***1** Pending before the Court is a motion by Plaintiffs Michael Lantino ("Lantino") and Joanne Cabello ("Cabello") (collectively, "Plaintiffs") for entry of a Consent Judgment against Defendants The Gym at Greenwich, LLC; The Gym at Port Chester, Inc.; and The Gym at Union Square, Inc. (collectively, the "Corporate Gym Defendants"), as well as individual Defendants Seth Hirschel ("Hirschel"), Stefan Malter ("Malter") and Barnet Liberman ("Liberman") (collectively, the "Individual Defendants"). (Pl. 4/29/20 Not. of Mot., ECF No. 98.) Defendants resist entry of the Consent Judgment, claiming that their performance under the Settlement Agreement that permits entry of the Judgment was rendered impossible by the COVID-19 pandemic and the resultant "New York State on PAUSE" Executive Order signed by New York Governor Andrew M. Cuomo that became effective on March 22, 2020 (the "PAUSE Executive Order"). For the reasons set forth below, Plaintiffs' motion is GRANTED.

BACKGROUND

This case, which was commenced on December 27, 2018, alleged violations of the Fair Labor Standards Act ("FLSA") and the New York Labor Law.[1] (Compl. ¶ 1.) Plaintiffs asserted that the Corporate Gym Defendants and the Individual Defendants routinely and knowingly operated their fitness businesses without sufficient funds to cover employee payroll. (*See id.* ¶¶ 49-57.) They alleged that Defendants routinely paid their employees later than their regularly scheduled pay date and, on many occasions, because the corporate bank account was not sufficiently funded, employees' paychecks would bounce, leaving employees with no timely payment of wages and a bounced check fee. (*See id.*) They also alleged that at some point Defendants altogether stopped paying their employees for their time worked. (*See id.* ¶¶ 44-48.)

After the Complaint was filed by Lantino and Cabello, 38 other employees filed Consents to Sue in order to opt-in as Plaintiffs to assert FLSA claims against Defendants, and Plaintiffs filed a motion for conditional certification, pursuant to 29 U.S.C. § 216(b). (Pl. 6/19/19 Not. of Mot., ECF No. 70.) While this motion was pending, the parties appeared before me for a settlement conference on September 9, 2019 and reached a settlement in principle.

On September 9, 2019, an Order was issued on the parties' consent, pursuant to 28 U.S.C. § 636(c), referring all proceedings in this case to me, including the entry of judgment. (Order of Reference, ECF No. 84.) On October 3, 2019, Plaintiffs submitted a letter to me with regard to the fairness of the proposed settlement, along with the proposed Settlement Agreement (which had not yet been fully executed). (Pl. 10/3/19 Ltr., ECF No. 90.) In their letter, Plaintiffs explained that, although they had calculated the total damages for the named and opt-in Plaintiffs to be $3,686,515.98, they had agreed to a total settlement fund in the amount of $300,000.00, to be paid out over 25 months, but, in the event of a default, the settlement amount would be increased to $1,000,000.00, pursuant to a Consent Judgment. (*Id.* at 1-2.)

***2** On October 4, 2019, the Court entered an Order preliminarily approving the settlement, stating that final approval must await submission of a fully executed

Settlement Agreement. (10/4/19 Order, ECF No. 91.) On November 5, 2019, the Settlement Agreement was filed with the Court, executed by the 40 Plaintiffs and opt-in Plaintiffs, as well as the Corporate Gym Defendants and Individual Defendants. (Settl. Agmt., ECF No. 92.)

The Settlement Agreement provides that Defendants shall pay the $300,000.00 Settlement Amount by an initial payment of $50,000.00, plus monthly installments of $8,695.65 (less applicable withholdings) for 23 months. (Settl. Agmt. at 2.) The Settlement Agreement has annexed to it a form of Consent Judgment executed by the Corporate Gym Defendants and the Individual Defendants. (Settl. Agmt. Ex. A, ECF No. 92, at 50 to 53 of 57.) In the event of default in payments under the Settlement Agreement, the Consent Judgment provides for the entry of judgment in the amount of $1,000,000.00, less any payments previously made. (*See id.*) The Settlement Agreement states that, if Defendants are in default, "Plaintiffs' Counsel may enter the Consent Judgment, without further notice." (Settl. Agmt. at 3.)

On April 17, 2020, Plaintiffs filed their form of Consent Judgment without any supporting letter or motion. (Consent Order, ECF No. 94.) On April 20, 2020, Defendants filed a letter requesting a conference regarding the Consent Judgment "to address why Defendants did not make the required settlement payment" (Def. 4/20/20 Ltr., ECF No. 95, at 1), and the Court scheduled a telephone conference for April 28, 2020. (4/20/20 Order, ECF No. 96.) After the April 28 conference, the Court entered an Order providing that Plaintiffs were to file their motion for entry of the Consent Judgment by April 29, 2020; that Defendants were to file their opposition by May 6, 2020; and that Plaintiffs were to file any reply by May 8, 2020.[2] (4/28/20 Order, ECF No. 97.)

On April 29, 2020, Plaintiffs timely filed their motion for entry of the Consent Judgment, which is the motion presently pending before the Court. (*See* Pl. 4/29/20 Not. of Mot.; Goldring Decl., ECF No. 99.) Plaintiffs submitted evidentiary proof that Defendants had paid to date the sum of $76,086.49,[3] but that the Defendants were in default under the Settlement Agreement. (*See* Goldring Decl. ¶¶ 10-12.) Plaintiffs thus seek entry of the Consent Judgment in the amount of $923,913.51 (*i.e.*, $1,000,000.00 less the $76,086.49 previously paid). (*See id.* ¶ 14.)

***3** On May 6, 2020, Defendants filed their papers in opposition to Plaintiffs' motion. Their papers included an opposition memorandum of law (Opp. Mem., ECF No. 103), as well as Declarations from each of the three Individual Defendants, *i.e.*, Hirschel, Malter and Liberman, regarding their financial condition. (Declarations, ECF Nos. 104-06.) Defendants do not contest that they are in default under the Settlement Agreement, but argue that their performance should be excused based upon the doctrine of impossibility because of their inability to pay, ostensibly as a result of the COVID-19 pandemic and Governor Cuomo's PAUSE Executive Order. (*See* Opp. Mem. at 7-10.)

On May 7, 2020, Plaintiffs filed their reply. (Reply, ECF No. 107.) In their reply, Plaintiffs note that the Individual Defendants' Declarations make no "mention of their net worth, of their assets, of any trusts they control or are beneficiaries of, [of] companies they control, or [of] assets of companies they control." (*Id.*)

LEGAL STANDARDS

"A settlement agreement is a contract that is interpreted according to general principles of contract law." *Omega Eng'g, Inc. v. Omega, S.A.*, 432 F.3d 437, 443 (2d Cir. 2005) (citations omitted). "[U]nder New York law,[4] impossibility (which is treated synonymously with impracticability) 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 the contract.' " *Axginc Corp. v. Plaza Automall*, Ltd., 759 F. App'x 26, 29 (2d Cir. 2018) (alteration in original) (quoting *Kel Kim Corp. v. Cent. Mkts., Inc.*, 70 N.Y.2d 900, 902 (1987)).

"[T]he excuse of impossibility of performance is limited to the destruction of the means of performance by an act of God, vis major,[5] or by law." *407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 281 (1968). "Thus, where 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." *Id.*; *see also Ebert v. Holiday Inn*, 628 F. App'x 21, 23 (2d Cir. 2015) ("Economic hardship, even to the extent of bankruptcy or insolvency, does not excuse performance.").

DISCUSSION

It is undisputed that Defendants are in default under the Settlement Agreement. They failed to make a payment

when due under the Settlement Agreement after notice and an opportunity to cure. (*See* Goldring Decl. ¶ 12.) By the express terms of the Settlement Agreement, Plaintiffs were entitled to entry of the Consent Judgment without even providing notice to the Defendants. (*See* Settl. Agmt. at 3.) At best, Defendants have established financial difficulties arising out of the COVID-19 pandemic and the PAUSE Executive Order that adversely affected their ability to make the payments called for under the Settlement Agreement. As such, Defendants' performance under the Settlement Agreement is not excused. *See Ebert*, 628 F. App'x at 23.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion is GRANTED. The Court shall forthwith enter the Consent Judgment in the amount of $923,913.51.

SO ORDERED.

All Citations

Slip Copy, 2020 WL 2239957

Footnotes

1 Although the Complaint purports to bring claims on behalf of a class of persons similarly situated, pursuant to Fed. R. Civ. P. 23 (*see* Compl., ECF No. 1, ¶¶ 34-42), no motion for Rule 23 class certification was filed prior to this case being settled, and it was settled as an FLSA collective action, and not on behalf of a Rule 23 class. (*See* 10/4/19 Order, ECF No. 91.)

2 Defendants were granted a slight modification of the briefing schedule due to the personal circumstances of one of the Individual Defendants, *i.e.*, Malter. (5/4/20 Order, ECF No. 102.) The Court ordered that (1) Defendants' opposition was to be filed by May 6, 2020, as previously scheduled and that, thereafter, no later than May 7, 2020, Malter could file a declaration regarding his financial condition, as well as a supplemental letter setting forth any additional arguments he wished to make, and (2) Plaintiffs reply was to be filed no later than May 9, 2020, at 12 noon, but could be filed earlier. (*See id.*) As set forth below, Malter filed his opposition declaration on May 6, 2020, and Plaintiffs filed their reply on May 7, 2020.

3 Plaintiffs offer two different figures as to the total amounts previously paid by Defendants. In paragraph 14 of the Goldring Declaration (*see* Goldring Decl. ¶ 14), and Plaintiffs' previously-submitted form of Consent Judgment (*see* Consent Order at 2), Plaintiffs state that Defendants paid a total of $76,086.95. However, in paragraph 10 of the Goldring Declaration, Plaintiffs state that Defendants paid a total of $76,086.49. (*See* Goldring Decl. ¶ 10.) The total of the four payments made by Defendants, as set forth in subparagraphs 10(a) through 10(d), is $76,086.49. Thus, the Court uses this lower amount to calculate the amount due under the Consent Judgment. In addition, the Court notes that subparagraphs 10(c) and 10(d) erroneously refer to certain payments having been made in calendar year 2019, when they in fact were made in 2020.

4 The Settlement Agreement provides that it is governed by New York law. (Settl. Agmt. at 5.)

5 "Vis major" means a "greater or superior force; an irresistible force." *Black's Law Dictionary*, at 1410 (5th ed. 1979).

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2003 WL 22519603

NOT APPROVED BY REPORTER OF DECISIONS FOR REPORTING IN STATE REPORTS. NOT REPORTED IN N.Y.S.2d.

Supreme Court, Appellate Term, New York, First Department.

MARINA TOWERS ASSOCIATES BY HUDSON TOWERS HOUSING CO., INC. as General Partner, Petitioner-Landlord-Respondent,
v.
STACY'S LANDING a/k/a Steamers Landing, Respondent-Tenant-Appellant.

570134/03.
|
Decided Oct. 27, 2003.

Tenant appeals from an order of the Civil Court, New York County, entered September 30, 2002 (Cynthia S. Kern, J.) which, inter alia, granted a motion by landlord to dismiss tenant's fourth and ninth affirmative defenses and first, second and third counterclaims in a nonpayment summary proceeding.

Present: Hon. WILLIAM P. McCOOE, Hon. WILLIAM J. DAVIS, and Hon. PHYLLIS GANGEL-JACOB, Justices.

Opinion

PER CURIAM.

***1** Order entered September 30, 2002 (Cynthia S. Kern, J.) affirmed, with $10 costs, for the reasons stated by Cynthia S. Kern, J. at Civil Court.

We sustain the dismissal of tenant's fourth affirmative defense insofar as it sought recovery of a total rent abatement pursuant to paragraph 41(B)(ii) of the parties' commercial lease, in view of the tenant's demonstrated failure to give the written notice unambiguously required by the lease terms to trigger the benefits of that provision (*see, Milltown Park Inc. v. American Felt and Filter Co.,* 180 A.D.2d 235, 584 N.Y.S.2d 927). In affirming, we express no view as to tenant's entitlement to recover a rent abatement under lease paragraph 41(A), whose provisions contain no comparable notice requirement.

This constitutes the decision and order of the court.

All Citations

Not Reported in N.Y.S.2d, 2003 WL 22519603, 2003 N.Y. Slip Op. 51361(U)

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194 N.Y.S. 475
Supreme Court, Appellate Term, New York,
First Department.

McKEEVER
v.
ARONOW et al.

June 9, 1922.

Synopsis

Appeal from Municipal Court, Borough of Manhattan, Ninth District.

Summary proceeding by Florence G. McKeever, landlord, against Harry Aronow and another, doing business as Aronow Bros., tenants. Judgment for the defendants, entered on verdict, and plaintiff appeals. Judgment reversed.

Attorneys and Law Firms

***475** Norwood & Walsh, of New York City (Thomas L. Walsh, of New York City, of counsel), for appellant.

Jacob J. Lazaroe, of New York City (Arthur C. Mandel, of New York City, of counsel), for respondents.

Argued May term, 1922, before GUY, BIJUR, and MULLAN, JJ.

Opinion

PER CURIAM.

In this summary proceeding for nonpayment of rent of a loft for the month of December, 1921, the tenants set up as a defense that the lease was made as the result of the fraudulent representation of the landlord that another tenant of the same building had agreed to pay $8,500 a year for the tenants' loft, and that by reason of such representation the tenants agreed to renew the lease at said annual rental of $8,500. Under the renewal lease the tenants paid rent from February to December, 1921, when, as claimed, they learned that the representation was untrue. A counterclaim for damages for the alleged fraud was withdrawn on the trial.

Assuming that the jury was authorized in finding that the alleged representation was fraudulent, the tenants could have availed of the fraud as a defense by rescinding the contract. To effect such rescission, however, it was necessary for them to give up possession of the premises. A party, while he may retain possession and obtain his damages for fraud, cannot rescind while retaining the fruits of the contract. Pryor v. Foster, 130 N. Y. 171, 29 N. E. 123; Edgar A. Levy Leasing Co. v. Siegel, 230 N. Y. 634, 637, 130 N. E. 923; Stayton Realty Corporation v. Rhodes, 200 App. Div. 108, 192 N. Y. Supp. 683; Driggs v. Hendrickson, 89 Misc. Rep. 421, 151 N. Y. Supp. 858. In the case at hand the tenants did not give up possession, claiming that it was sufficient to offer to restore possession to the landlord, and in this position they were sustained by the court below.

Final order reversed, with $30 costs, and final order directed in favor of the landlord, with costs, without prejudice to the tenants' alleged counterclaim.

All Citations

194 N.Y.S. 475

End of Document

253 A.D.2d 358
Supreme Court, Appellate Division, First Department, New York.

NATIONAL AMUSEMENTS, INC., Plaintiff–Respondent,
v.
SOUTH BRONX DEVELOPMENT CORP., Defendant–Appellant.

Aug. 6, 1998.

Synopsis
Tenant brought declaratory judgment action against landlord involving method by which tenant's share of landlord's common area charges and taxes were to be calculated under lease. The Supreme Court, New York County, Leland DeGrasse, J., dismissed one of landlord's affirmative defenses and landlord's counterclaim for reformation as time-barred. Landlord appealed. The Supreme Court, Appellate Division, held that underlying claim of mistake was untimely and was not subject to discovery accrual.

Affirmed.

Attorneys and Law Firms

****166** Leo T. Crowley, for plaintiff-respondent.

Rand J. Levin, for defendant-appellant.

Before MILONAS, J.P., WALLACH, RUBIN, MAZZARELLI and SAXE, JJ.

Opinion

MEMORANDUM DECISION.

***358** Order, Supreme Court, New York County (Leland DeGrasse, J.), entered July 18, 1997, which, in a declaratory judgment action by plaintiff tenant against defendant landlord involving the method by which plaintiff's share of defendant's common area charges and taxes are to be calculated under the parties' lease, insofar as appealed from, dismissed defendant's second affirmative defense and second counterclaim for reformation as time-barred, unanimously affirmed, without costs.

The IAS court correctly held that the underlying claim of mistake is untimely, having accrued when the subject lease ***359** was executed (*see, Matter of Wallace v. 600 Partners Co.,* 86 N.Y.2d 543, 634 N.Y.S.2d 669, 658 N.E.2d 715; *Arrathoon v. East N.Y. Sav. Bank,* 169 A.D.2d 804, 565 N.Y.S.2d 172, *lv denied* 77 N.Y.2d 808, 570 N.Y.S.2d 488, 573 N.E.2d 576), and, notwithstanding our comment in *Davis v. Davis,* 95 A.D.2d 674, 675, 463 N.Y.S.2d 462, was not subject to a discovery accrual (*see, First Natl. Bank v. Volpe,* 217 A.D.2d 967, 968, 629 N.Y.S.2d 906). Defendant's other arguments with regard to timeliness are without merit. In view of the foregoing, it is unnecessary to reach the parties' other contentions.

All Citations

253 A.D.2d 358, 676 N.Y.S.2d 166, 1998 N.Y. Slip Op. 07294

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299 A.D.2d 205
Supreme Court, Appellate Division, First Department, New York.

NEW YORK FIRST AVENUE CVS, INC., Plaintiff–Appellant,
v.
WELLINGTON TOWER ASSOCIATES, L.P., et al., Defendants–Respondents.

Nov. 14, 2002.

Synopsis
Action was brought seeking declaratory relief and reformation of commercial lease. The Supreme Court, New York County, Richard Braun, J., granted defendant's motion to dismiss, and plaintiff appealed. The Supreme Court, Appellate Division, held that unilateral mistake would not support reformation of lease agreement.

Affirmed as modified.

Attorneys and Law Firms

****587** Gia L. Morris, for Plaintiff–Appellant.

Lawrence C. McCourt, for Defendants–Respondents.

WILLIAMS, P.J., NARDELLI, TOM, and LERNER, JJ.

Opinion

***205** Order, Supreme Court, New York County (Richard Braun, J.), entered April 1, 2002, which granted defendants' motion to dismiss the complaint, seeking declaratory relief and reformation of a commercial lease, unanimously modified, on the law, to declare in defendants' favor that plaintiff is liable for increases in taxes over the base taxes as defined in paragraph 40A of the rider to the parties' lease, and otherwise affirmed, without costs.

Although mutual mistake may furnish grounds for reforming a written agreement, there is a " 'heavy presumption that a deliberately prepared and executed written instrument [manifests] the true intention of the parties' " and the "proponent of reformation 'must show in no uncertain terms, not only that mistake or fraud exists, but exactly what was really agreed upon between the parties' " (*Chimart Assocs. v. Paul,* 66 N.Y.2d 570, 574, 498 N.Y.S.2d 344, 489 N.E.2d 231, quoting *Backer Management Corp. v. Acme Quilting Co.,* 46 N.Y.2d 211, 219, 413 N.Y.S.2d 135, 385 N.E.2d 1062). The party resisting pre-trial dismissal of a reformation claim must tender a " 'high level' " of proof in evidentiary form, " 'free of contradiction or equivocation' " (*Chimart Assocs., supra,* quoting *Backer, supra,* at 220, 413 N.Y.S.2d 135, 385 N.E.2d 1062).

Plaintiff correctly states that extrinsic evidence is admissible in a reformation action even if there is no ambiguity in the contract (*see Chimart Assocs.,* 66 N.Y.2d at 574, 498 N.Y.S.2d 344, 489 N.E.2d 231; *Gramercy 222 Residents Corp. v. Gramercy Realty Assocs.,* 209 A.D.2d 181, 618 N.Y.S.2d 275), and ***206** a general merger clause does not bar an action to reform a contract (*Barash v. Pennsylvania Term. Real Estate Corp.,* 26 N.Y.2d 77, 86, 308 N.Y.S.2d 649, 256 N.E.2d 707). However, plaintiff's submissions, even ****588** when viewed in the light most favorable to it, failed to establish a mutual mistake that would support a reformation claim. At most, plaintiff's submissions establish a unilateral mistake on its part.

The motion court properly held that the provisions of the lease with respect to the base tax year are unambiguous. While plaintiff points to an apparently missing paragraph in the lease, the general merger clause precludes plaintiff from arguing that the executed lease does not contain the full agreement of the parties. We modify only to declare in defendant's favor (*see Lanza v. Wagner,* 11 N.Y.2d 317, 334, 229 N.Y.S.2d 380, 183 N.E.2d 670, *cert. denied* 371 U.S. 901, 83 S.Ct. 205, 9 L.Ed.2d 164).

Finally, we note that the decision of the motion court cannot be construed as ruling on the issue of whether plaintiff is entitled to the benefit of a tax abatement allegedly received by defendant since the amended complaint did not seek such relief. We have considered plaintiff's remaining arguments and find them unavailing.

All Citations

299 A.D.2d 205, 750 N.Y.S.2d 586, 2002 N.Y. Slip Op. 08238

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New York First Avenue CVS, Inc. v. Wellington Tower..., 299 A.D.2d 205 (2002)

750 N.Y.S.2d 586, 2002 N.Y. Slip Op. 08238

88 N.Y.2d 716
Court of Appeals of New York.

NEW YORK OVERNIGHT PARTNERS, L.P., Respondent,
v.
Joan GORDON et al., Appellants.

Oct. 15, 1996.

Synopsis
Lessee brought declaratory judgment action seeking legal construction of term "appraised value of the land" used in lease to set rent when renewing lease of land underlying hotel. Lessor counterclaimed also seeking interpretation of terms in lease. The Supreme Court, New York County, Lowe, J., dismissed complaint. Lessee appealed. The Supreme Court, Appellate Division, Tom, J., 217 A.D.2d 20, 633 N.Y.S.2d 288, reversed. Lessor sought review, and leave to appeal was granted, 224 A.D.2d 1043, 638 N.Y.S.2d 303. The Court of Appeals, Ciparick, J., held that term "appraised value of the land" required that appraiser determine value of land as though vacant, without improvements, and subject to current zoning regulations.

Affirmed.

Attorneys and Law Firms

***929 *717 **124** Jay Goldberg, P.C., New York City (Jay Goldberg and John A. Kornfeld, of counsel), for appellants.

***718** Sidley & Austin, New York City (John G. Hutchinson, James D. Arden and John J. Kuster, of counsel), for respondent.

OPINION OF THE COURT

CIPARICK, Judge.

Respondent, owner of the Ritz–Carlton Hotel at 112 Central Park South, New York City, leases the land underlying the hotel from appellants, owners of the land. When the parties deadlocked on the meaning of the lease term "appraised value of the land" during negotiations for the lease renewal, they agreed to seek a judicial interpretation of that term to settle their dispute. Appellants now challenge so much of the Appellate Division order which held that the appraiser must determine the value of the land as though vacant, without improvements, and subject to current zoning regulations. They argue that the court improperly directed the appraiser to disregard the effect of the hotel on the value of the land. Because the lease expressly provides that the appraiser value the land ***719** as unimproved, without regard to the existence of the hotel, we affirm the order of the Appellate Division.

A.

The impasse over the meaning of "appraised value of the land," a term critical for establishing the rental amount for the first 15–year renewal term, resulted from respondent's interpretation that the lease required an appraiser to value the parcel of land as though vacant and unimproved, whereas under appellants' construction the appraiser would consider the "benefit" any improvement "imparts" to the land, even if that improvement constitutes a legally nonconforming use.[1] The parties stipulated to resolve their dispute in court. Respondent thus proceeded with this action for declaratory and injunctive relief seeking a judgment declaring the meaning of the term "appraised value of the land," and appellants counterclaimed seeking a declaration of the meaning of the word "land" as used in that phrase.[2] Thereafter, respondent moved for summary judgment on the complaint and appellants cross-moved for summary judgment on their counterclaim. Supreme Court denied respondent's motion, granted appellants' cross motion and dismissed the complaint.

Respondent appealed, and the Appellate Division reversed, on the law, granted respondent's motion for summary judgment and denied appellants' cross motion (*see, New York Overnight Partners v. Gordon,* 217 A.D.2d 20, 633 N.Y.S.2d 288). The Appellate Division ruled that the "clear and unambiguous ***930 **125** terms of the ***720** Lease [provide] that the 'appraised value of the land' may be determined only by reference to the raw land designated as 112 Central Park South, exclusive of the building and all 'Improvements' " (*id.,* at 29, 633 N.Y.S.2d 288). While recognizing that land should be appraised for the best, most advantageous use, the court opined that in this case the

land's fair market value must be determined by the terms of the lease, taking into account any restrictions or encumbrances affecting the land. The court then directed the appraiser to determine the value of the land as if vacant and unimproved, subject to current zoning restrictions and contractual limitations, and to consider the effect of the lease on the value of the land (*see, id.,* at 30, 633 N.Y.S.2d 288). The court further granted appellants' motion for leave to appeal to this Court and certified the question "Was the order of this Court, which reversed the order of the Supreme Court, properly made?" Because the order of the Appellate Division is final, we need not answer the certified question.

B.

In an effort to avoid the consequences of the legal determination that the land must be valued as if vacant and unimproved, appellants argue that the Appellate Division exceeded the scope of the limited review governing arbitration and appraisal proceedings by directing the appraiser to consider the land as "vacant, without improvements, and subject to current zoning restrictions" (217 A.D.2d 20, 30, 633 N.Y.S.2d 288, *supra*) when the ground lease does not so dictate. While appellants do not challenge the Appellate Division's determination that the term "land" as employed in the phrase "appraised value of the land" does not include improvements on the land, appellants nevertheless maintain that "it is a more advantageous use of the land for it to be valued as *a parcel of property permitting usage of a building containing 152,000 square feet of floor space thereon,* rather than as a theoretically vacant and unimproved parcel" (emphasis in original). Otherwise, appellants contend, the appraisal will reflect a parcel of land that is "much less valuable than economic reality dictates." They further assert that current zoning regulations, which limit the size of new construction, are inapplicable because the owners of the land are legally entitled to continue the nonconforming use that is alleged to be the best and most advantageous use. Because the Appellate Division decision bars the appraiser from valuing the land at its highest and best use given its directive that the appraiser disregard the hotel, appellants claim that the decision should be reversed. We disagree.

***721** C.

When the language of the lease so dictates, appraisals must take into consideration all restrictions—including current zoning regulations—and encumbrances on the land, as well as the lease term (*see, United Equities v. Mardordic Realty Co.,* 8 A.D.2d 398, 187 N.Y.S.2d 714, *affd* 7 N.Y.2d 911, 197 N.Y.S.2d 478, 165 N.E.2d 426; *Plaza Hotel Assocs. v. Wellington Assocs.,* 55 Misc.2d 483, 285 N.Y.S.2d 941, *affd* 28 A.D.2d 1209, 285 N.Y.S.2d 267, *affd on opn at Special Term* 22 N.Y.2d 846, 293 N.Y.S.2d 108, 239 N.E.2d 736, *rearg. denied* 22 N.Y.2d 972, 295 N.Y.S.2d 1032, 242 N.E.2d 498). Distilled to its essence, the argument pressed on this appeal amounts to nothing more than an attempt to enjoin appraisal of the "land" as raw and unimproved—the very term submitted for legal interpretation—on the theory that the Appellate Division decision precludes appraisal of land at its highest and best use.

Although there is no question that it is the appraiser who must determine which of the myriad factors are relevant to a particular valuation and how such factors impact the valuation of the parcel of land (*see generally,* Appraisal Institute, The Appraisal of Real Estate ch 4 ["The Valuation Process"], ch 12 ["Highest and Best Use Analysis"], ch 13 ["Land or Site Valuation"] [10th ed 1992]), without interference or direction from the court, this case required a threshold legal interpretation of the scope of the very subject of the appraisal. Thus, the Appellate Division determined that the drafters of the lease intended the term "land" to mean only the vacant and unimproved land, subject to *****931 **126** contractual limitations and current zoning regulations, which presently would permit construction of a smaller building. This determination properly discharged the court's legal function, rendering the matter ripe for appraisal.

The precedents firmly establish that in addition to construing disputed terms of a lease in advance of an appraisal proceeding, it is also within the province of the court to identify those factors the lease expressly designates or excludes in the valuation process.

For example, in *Plaza Hotel Assocs. v. Wellington Assocs. (supra),* Supreme Court rejected the appraisers' valuation premised on the land's highest and best use, free of the lease restrictions (*see,* 55 Misc.2d 483, 285 N.Y.S.2d 941, *supra*). The court indicated that such valuation violated the express language of the lease requiring that the appraisal account for the lease restriction that the land be used for a hotel, a less profitable use (*see, Plaza Hotel,* 55 Misc.2d, at 486–487, 285 N.Y.S.2d 941; *accord, United Equities v. Mardordic Realty Co., supra,* 8 A.D.2d, at 400, 187 N.Y.S.2d 714 [lease specified ***722** that fair market value

of land be determined by reference to the renewal options and their terms contained in the lease and any restrictions affecting the land]; *185 Lexington Holding Corp. v. Holman,* 19 Misc.2d 521, 189 N.Y.S.2d 269, *affd* 10 A.D.2d 569, 197 N.Y.S.2d 404, *affd* 8 N.Y.2d 965, 204 N.Y.S.2d 345, 169 N.E.2d 8 [rental for renewal term based on value of land only, without improvements, under express terms of the lease]; *see also, Madison Murray Assocs. v. Perlbinder,* 215 A.D.2d 204, 204–205, 626 N.Y.S.2d 180).

Similarly, in *Ruth v. S.Z.B. Corp.,* 2 Misc.2d 631, 636–637, 153 N.Y.S.2d 163, *affd* 2 A.D.2d 970, 158 N.Y.S.2d 754, the court ruled that because the lease unambiguously provided that the land be valued "free of lease," the drafters could not have intended that the arbitrator "might give heed to the very lease which so declared" otherwise and ruled that the land must be valued without considering the lease restrictions.

Consistent with these cases is the determination by the Appellate Division that the language of the lease unequivocally excludes the hotel from the valuation of this parcel of land—a determination not challenged on this appeal—and that the land's valuation is subject to current zoning restrictions, contractual limitations and the lease itself. No less significant is the fact that this determination does not infringe on the appraiser's discretion and judgment nor does it foreclose a valuation of the land for its highest and best use under different circumstances. Pursuant to the express terms of the lease, the parties did not intend the land to be appraised for its highest and best use to establish the rental rate for the renewal term.

That the unambiguous terms of the lease—dictating that a prime parcel of land in midtown Manhattan be appraised as vacant and unimproved for purposes of setting the rental rate for the next 15 years—strike appellants, the successors-in-interest to the original lessor and fee owner of the land, as a poor bargain 33 years after execution of the lease does not constitute a basis for recasting the agreement under the guise of judicial interpretation. Indeed, as fee owners of the land, the lessors will acquire title to the hotel structure and all "Improvements" on the land upon expiration of the last renewal option; it is not until then that the lessors will be poised to reap the economic advantages of the "legally nonconforming use."

Accordingly, the order of the Appellate Division insofar as appealed from should be affirmed, with costs, and the certified question not answered upon the ground that the order appealed from is final and the certified question is thus unnecessary.

***723** KAYE, C.J., and SIMONS, TITONE, BELLACOSA, SMITH and LEVINE, JJ., concur.

Order, insofar as appealed from, affirmed, etc.

All Citations

88 N.Y.2d 716, 673 N.E.2d 123, 649 N.Y.S.2d 928

Footnotes

1 Article I, § 1.03 of the lease defines the demised premises as the land acquired by the lessor as described in Article II, § 2.01. As pertinent, Article II, § 2.01 describes the subject land as "[a]ll that certain plot, piece or parcel of land, without the buildings and improvements thereon erected, situate, lying and being in the Borough of Manhattan * * * [s]aid Premises now be known as and by the Street Number 112 Central Park South". "Improvements" is defined in Article I, § 1.04 as "[a]ny and all buildings being premises known and described as 112 Central Park South * * * and the structures and improvements now or at any time hereafter erected, constructed or situated upon said premises or any part thereof. The Improvements shall include such buildings, structures and improvements and the foundations and footings thereof * * * EXCEPTING the land and Demised Premises hereinafter described in Article II, Section 2.01."

2 We note that the lease contemplates arbitration when the parties fail to agree on the appraised value of the land as a "matter of fact or of value" (Lease Agreement, art XXX, § 30.02). Because the parties submitted the dispute over the legal meaning of the term "land" to the court, this case does not implicate the nature or scope of an arbitration or appraisal proceeding (*cf., Matter of Dimson [Elghanayan],* 19 N.Y.2d 316, 325, 280 N.Y.S.2d 97, 227 N.E.2d 10).

New York Overnight Partners, L.P. v. Gordon, 88 N.Y.2d 716 (1996)

673 N.E.2d 123, 649 N.Y.S.2d 928

217 A.D.2d 20
Supreme Court, Appellate Division, First Department, New York.

NEW YORK OVERNIGHT PARTNERS, L.P., Plaintiff and Counterclaim–Defendant–Appellant,
v.
Joan GORDON, Alice S. Kandell and Donald Trump, Defendants and Counterclaimants–Respondents.

Nov. 9, 1995.

Synopsis

Lessee brought declaratory judgment action seeking legal construction of terms in lease and lessor counterclaimed also seeking interpretation of terms in lease. Both parties filed for summary judgment. The Supreme Court, New York County, Lowe, J., denied lessee's motion and granted lessor's motion and lessee appealed. The Supreme Court, Appellate Division, Tom, J., held that: (1) term appraised value of "land" used in lease did not include improvements on site, and (2) value of land must be determined subject to terms of lease, current zoning restrictions, and encumbrances.

Reversed.

Attorneys and Law Firms

**289 *22 John G. Hutchinson, of counsel (Sidley & Austin, attorneys), for plaintiff and counterclaim-defendant-appellant.

John A. Kornfeld, of counsel (Jay Goldberg, P.C., attorneys), for defendants and counterclaimants-respondents.

Before KUPFERMAN, J.P., and ASCH, WILLIAMS and TOM, JJ.

Opinion

TOM, Justice.

The issue raised in this appeal is whether the term "land", as utilized in a certain Ground Lease Agreement, includes the Hotel and improvements situated on the site, for the purpose of setting rent for the renewal lease terms.

The Ground Lease Agreement in question (the Lease) was executed on or about December 30, 1963 between Massachusetts Mutual Life Insurance Company, as lessor, and Louis Berry and F.B.M. Manufacturing Company, as lessees, and concerned the premises designated as 112 Central Park South, New York, New York. The building located on the site was known at that time as the Navarro Hotel and is currently known as the Ritz–Carlton Hotel. Plaintiff and counterclaim defendant-appellant New York Overnight Partners, L.P. is the successor-in-interest to the original lessee and defendants and counterclaimants-respondents Joan Gordon, Alice S. Kandell and Donald Trump are the successors-in-interest to the original lessor.

The lease provides for an initial term of thirty-years with an annual rental rate of **290 $78,000. Article VI of the Lease further provides that the lessee shall have the right to extend the Lease term for four successive fifteen-year periods at a rental based upon "the appraised value of the land [at the time of each renewal] but to be not less than Seventy Eight Thousand ($78,000) Dollars annually".

Plaintiff asserts in its complaint that in October 1993, or three months prior to the expiration of the Lease, representatives of the parties to the Agreement commenced negotiations in an attempt to agree on the "appraised value" of the land *23 and to set an appropriate rental amount for the first renewal term. It was, and is, plaintiff's position that the term "land" as used in the Lease refers to the vacant parcel of land, exclusive of the hotel and all other improvements, and subject to current governmental restrictions, including zoning regulations, as well as restrictions set forth in the Lease. Defendants, on the other hand, maintain that the land should be appraised free and clear of all encumbrances and restrictions contained in the Lease and free and clear of all governmental ordinances and zoning restrictions, but with the benefit of the fully constructed hotel and all other improvements on the site.

On or about July 27, 1994, plaintiff Overnight Partners commenced the underlying declaratory judgment action seeking, *inter alia,* a legal construction of the term "the appraised value of the land" as it is used in Section 6.01(b) and throughout the Lease for the purpose of fixing rent for the renewal terms. On or about September 23, 1994, defendants answered the amended complaint and interposed a counterclaim which seeks a declaratory judgment interpreting the phrase "the appraised value of the land".

The parties, who wished "to expedite the resolution of this dispute", entered into a Stipulation dated September 21, 1994 (the Stipulation)[1] pursuant to which plaintiff agreed to withdraw, without prejudice, its first, second, fourth *and* fifth causes of action, leaving the third cause of action, which sought declaratory relief with respect to the proper legal construction of the terms of the Lease. The parties further agreed that plaintiff would move, and defendants would cross-move, for summary judgment within a scheduled time-frame and would refrain from instituting any appraisal or arbitration proceeding regarding the construction of the language of the Lease "pending the entry of a final judgment from which all rights of appeal, including an appeal to the Court of Appeals, have been exhausted or waived".

Consistent with the terms of the Stipulation, the summary judgment motions were filed, with plaintiff relying exclusively on the language of the Lease and defendants also relying on other documentation, including an agreement entitled "Landlord Consent" prepared by plaintiff's counsel and executed by the parties on September 17, 1992.

***24** The IAS court, in a handwritten, one-page decision entered March 21, 1995, denied plaintiff's motion, granted defendants' cross-motion, and dismissed the complaint. The court, relying exclusively on a proposition set forth in a pre-Civil War Court of Appeals case decided in 1848, and failing to make any reference to the language of the Lease, wrote:

> The plaintiff lessee contends that the word "land" should be construed to mean only the raw or naked ground, and not to include the building constructed on that land, or any other improvements. The contrary has long been established. In 1848, in the first volume of official reports by the highest court of this state, it was held that unless defined to the contrary, "land" includes not only the soil but everything attached by nature or man, including the trees and buildings. *Mott v. Palmer,* 1 N.Y. 564, 572–3. That principle has constantly been restated. *Eg., City of New York v. Mississippi Holding, Ltd.,* 126 Misc.2d 865, 866, 483 N.Y.S.2d 956. Further, it is ridiculous to hold that the original lessor would have entered into the case upon the construction urged by the present ****291** plaintiff. Rather, the land should be appraised in view of the highest and best and most advantageous use to which it can be put.

The primary issue before us concerns the use of the word "land" as employed in Section 6.01(b) of the Lease. Section 6.01(b) provides in pertinent part:

> That each extended term shall be upon the same terms, covenants and conditions as in this lease provided, except that *the net annual basic rental for each fifteen (15) year extended term shall be at the rate of six and one-half (6 ½) per cent of the appraised value of the land* but to be not less than Seventy Eight Thousand ($78,000) Dollars annually, payable in the manner and in accordance with the provisions of Section 3.01 of Article III hereof. Such appraised value is to be determined as of the date any such extended period commences. (emphasis added).

Plaintiff avers that the word "land" is unambiguously defined within the four corners of the Lease and, therefore, the IAS court erred when it relied on a common-law definition of the word "land" which is directly at odds with the meaning of the word as employed in the Lease.

It is clear that lease interpretation is subject to the same rules of construction which are applicable to other agreements (*Backer Mgt. Corp. v. Acme Quilting Co.,* 46 N.Y.2d 211, 217, 413 N.Y.S.2d 135, 385 N.E.2d 1062; *Matter of Wallace v. 600 Partners Co.,* 205 A.D.2d 202, 205, 618 N.Y.S.2d 298; *Matter of Cale Dev. Co., Inc. v. Conciliation and Appeals Bd.,* 94 A.D.2d 229, 234, 463 N.Y.S.2d 814, *aff'd* 61 N.Y.2d 976, 475 N.Y.S.2d 278, 463 N.E.2d 619). As such, the parties' intention is to be ***25** ascertained from the language employed and, absent ambiguity, interpretation is a matter of law to be determined solely by the court (*W.W.W. Assocs., Inc. v. Giancontieri,* 77 N.Y.2d 157, 162–163, 565 N.Y.S.2d 440, 566 N.E.2d 639; *Chimart Assocs. v. Paul,* 66 N.Y.2d 570, 572, 498 N.Y.S.2d 344, 489 N.E.2d 231; *Hartford Acc. & Ind. Co. v. Wesolowski,* 33 N.Y.2d 169, 171–172, 350 N.Y.S.2d 895, 305 N.E.2d 907; *Louis R. Morandi, P.C. v. Charter Mgmt. Co.,* 159 A.D.2d 422, 423, 166 A.D.2d 286, 553 N.Y.S.2d 663).

In *Mott v. Palmer, supra,* the case upon which the IAS court relied, the court did not hold differently as it recognized that its definition of "land" would not be applicable had the parties to the deed agreed, in writing, that improvements would be excluded from the "land" in issue (*id.,* at 572–573, *see also, Kinkead v. United States,* 150 U.S. 483, 491, 14 S.Ct. 172, 37 L.Ed. 1152).

A review of the various provisions of the Lease supports plaintiff's position. Initially, it must be noted that the word "land" is not specifically defined in the "Definitions" section of the Lease. Section 1.04 of the Lease defines "Improvements" as:

> Any and all buildings being premises known and described as 112 Central Park South, sometimes also known as Navarro Hotel, New York, and the structures and improvements now or at any time hereafter erected,

> constructed or situated upon said premises or any part thereof. *The Improvements shall include such buildings, structures and improvements ... that is to say, including all but the land. The above described structures and equipment are herein called "Improvements".*
>
> *EXCEPTING the land and Demised Premises hereinafter described in Article II, Section 2.01.* (emphasis added).

Section 2.03 of the Lease makes it clear that the plaintiff lessee owns title to the Improvements and provides, in pertinent part:

> The parties acknowledge that Lessee holds title to the Improvements *and has the right to maintain the Improvements on the Demised Premises* subject to the terms of this lease. (Emphasis added.)

Thus, by its own terms, the Lease distinguishes the "Improvements", owned by the plaintiff, and the "Demised Premises" or "land", owned by the defendants. The Lease also provides a mechanism by which the ownership of the "Improvements" will be transferred to the defendants upon the termination of the Lease. Section 6A.01(c) of the Lease states, in relevant part:

> ****292** The Lessee covenants and agrees not to execute and deliver or release any new sublease to a sub-tenant which would extend beyond the terms of this lease, it being the intention of the parties that *the Lessor at the termination of this* ***26** *lease shall be the sole owner of the Improvements as well as the land (Demised Premises),* not subject to any lease. (emphasis added).

Again, it is clear from this section that "Improvements" and the "land" are separate and distinct, and that land is synonymous with "Demised Premises". "Demised Premises" is defined in Section 1.03 of the Lease as follows:

> *The "Demised Premises" shall mean the right, title and interest of Lessor* acquired by Lessor by deed of even date herewith, intended to be recorded contemporaneously herewith, *in the land described in Article II* Section 2.01. (Emphasis added).

Article II, Section 2.01, entitled "Premises Demised–Term" states, in pertinent part:

> All that certain plot, piece or parcel of land, without the buildings and improvements thereon erected, situate, lying and being in the Borough of Manhattan, City, County and State of New York, bounded and described as follows:
>
> Said Premises now being known as and by the Street Number 112 Central Park South (formerly 112 West 59th Street).
>
> Excepting therefrom:
>
> 1. Any and all buildings, structures and improvements now or at any time hereafter erected, constructed or situated upon said land or any part thereof. The Improvements shall include such buildings, structures, and improvements and the foundations and footings thereof ... *that is to say, including all but the land,* together with any and all renewals or replacements of buildings, structures or improvements or any of the above referred to property, being hereinafter sometimes collectively called the "Improvements". (emphasis added).

As set forth above, the right, title and interest acquired by the Lessor in the land *expressly excludes* any right, title or interest in the improvements on that land, as the Lessor will not acquire any such rights for up to an additional sixty-years. Indeed, the only term in the Lease which can be construed to encompass both the land and the improvements is the term "Property" which is defined in Section 1.05 of the Lease to mean "the Demised Premises and the Improvements ... collectively."

It is also noteworthy that the terms "land" and "Improvements" are used to the exclusion of each other throughout the Lease; that the term "Property", not "land", is used to describe the "Improvements" together with the "Demised Premises"; ***27** and that the phrase "Demised Premises" is used synonymously (*see, e.g.,* quoted above, Section 6A.01[c]) with the term land. The foregoing, read together with the above quoted provisions, makes it clear that the term land, as demised to the Lessee, and as referenced in the phrase "appraised value of the land" (Section 6.01[b]) alludes, as it does throughout the Lease, to the raw land absent any improvements. Had the drafters intended to include the improvements, by their own definition, the term "Property" would have been used instead of "land". The drafters did not do so.

The IAS court's reliance on *Mott v. Palmer, supra,* is misplaced for a number of reasons. In the first instance, as we previously noted, the court in *Mott* expressly held that the improvements will not be considered part of the land as long as "the reservation be in writing" (*id.,* at 570). Indeed, neither *Mott,* nor any other authority, establishes a universally applied common-law meaning for the word "land" that supersedes the parties' intentions and the language employed in the Lease.

The law is well-settled that clear and unambiguous terms

in a lease should be interpreted in their plain, ordinary and nontechnical sense and circumstances extrinsic to the agreement should not be considered when the intention of the parties can be ascertained from the four-corners of the instrument (*United States Fid. & Guar. Co. v. Annunziata,* 67 N.Y.2d 229, 232, 501 N.Y.S.2d 790, 492 N.E.2d 1206; *Marine Midland Leasing Corp. v. Chautauqua Airlines,* ****293** *Inc.,* 175 A.D.2d 643, 644–645, 572 N.Y.S.2d 573). *See also, Rosenfeld v. Aaron,* 248 N.Y. 437, 162 N.E. 478, where the Court of Appeals, adopting the rule set forth in *Anzolone v. Paskusz,* 96 App.Div. 188, 89 N.Y.S. 203, held that the parties to a lease may expressly attach a certain meaning to a term which, then, overrides the technical, common-law meaning of the word. In the matter at bar, the parties clearly manifested their intent in the Lease that the word "land" was not intended to encompass the "Improvements".

Secondly, and to the extent that a definition of "land" could be found at common-law, then *MacMillan, Inc. v. CF Lex Assocs.,* 56 N.Y.2d 386, 452 N.Y.S.2d 377, 437 N.E.2d 1134, a case decided approximately one hundred and thirty-four years after *Mott,* is superseding. In *MacMillan,* the Court of Appeals, in construing the phrase "tract of land" in the New York City Zoning Resolution, held:

> We conclude that the phrase "tract of land" refers only to the underlying surface land and does not embrace buildings on that land. After remarking that the phrase "tract of land" is not defined in the zoning resolution, we base our conclusion on several convergent ***28** considerations. In the first place, the denotation of the word "tract" is "a region or stretch (as of land) that is usu. indefinitely described or without precise boundaries", or "a precisely defined or definable area of land" (Webster's Third New International Dictionary) and *the word "land" means "the solid part of the surface of the earth in contrast to the water of oceans and seas" (id.). Neither alone nor in combination do these words in their lexigraphic sense connote buildings or improvements. Moreover it is significant that the draftsmen of the resolution chose not to use the familiar and readily available "land and improvements".* Second, as used elsewhere in the zoning resolution we find nothing to suggest that a broader connotation was intended to be attached to the phrase. (emphasis added).

(*id.,* at 391–392, 452 N.Y.S.2d 377, 437 N.E.2d 1134; *see also,* Marcus, Air Rights in New York: TDR, Zoning Merger and the Well–Considered Plan, 50 BklynLRev 867, 907). Accordingly, and contrary to defendants' argument, the land does not include the improvements.

Lastly, the holding in *Mott* was expressly limited to conveyances of real property by deed and has no application to the within Lease. In *Mott,* the court was concerned with a fence which was affixed to the raw land when the deed was drawn, but was removed at approximately the time the buyer took possession of the land. The court held:

> The word land, *when used in a deed,* includes not only the naked earth, but every thing within it, and the buildings, trees, fixtures and fences upon it.... *A deed* passes all the incidents to the land as well as the land itself.... Fixtures belongings to the owner of the land, being part of the land, cannot be reserved by parol when the land is conveyed; the deed conveys them to the grantee unless the reservation be in writing. (emphasis added).

(*Mott v. Palmer, supra,* at 569–570).

The court continued, however, that where the land is subject to a leasehold estate, "[b]uildings and fixtures erected by a tenant for the purposes of trade belong to him, and are removable without the consent of his landlord". (*id.,* at 570). In view of all of the foregoing, we find that the IAS court's reliance on *Mott v. Palmer, supra,* was misplaced.

It is also worthy of note that since the plaintiff is the sole owner of the "Improvements" during the duration of the Lease, as provided by the Lease, and since defendants acquired a deed only to the land, it then follows that plaintiff should pay rent for the value of the land only and not for the improvements which it owns.

Defendant's reliance on a Stipulation executed by the parties on or about September 17, 1992 concerning the value of ***29** renovations to the Hotel in calculating rent; and on their assertion that plaintiff is not entitled to summary judgment because it prevented defendants from obtaining certain information and documents from Hospitality Valuation Services, which previously conducted an appraisal of the Lease for a prior tenant, is without merit as these materials constitute ****294** extrinsic evidence that cannot be used to contradict the unambiguous terms of the Lease (*Brainard v. New York Cent. R.R. Co.,* 242 N.Y. 125, 133, 151 N.E. 152; *Teitelbaum Holdings, Ltd. v. Gold,* 48 N.Y.2d 51, 56, 421 N.Y.S.2d 556, 396 N.E.2d 1029; *Matter of Wallace v. 600 Partners Co., supra,* at 205, 618 N.Y.S.2d 218; *Matter of Cale Dev. Co., Inc. v. Conciliation and Appeals Bd., supra,* at 234, 463 N.Y.S.2d 814).

Accordingly, we find that pursuant to the clear and unambiguous terms of the Lease, that the "appraised value of the Land" may be determined only by reference to the raw land designated as 112 Central Park South, exclusive of the building and all "Improvements".

As part of its motion for summary judgment, plaintiff also sought a declaration that subsequent appraisal proceedings would take into account limitations regarding potential uses of the land as proscribed by the provisions of the Lease, as well as any applicable legislative, administrative and regulatory restrictions, not limited to zoning regulations. The IAS court, while not expressly ruling on this issue, stated that "the land should be appraised in view of the highest and best and most advantageous use to which it can be put." Thus, it appears that the IAS court concluded that it would permit an appraisal of the land that takes into account the right to continue the present non-conforming use, as the present structure was built prior to current zoning laws, which would increase the appraised value.[2] We disagree.

While we agree that the value of the land should be appraised for the best, most advantageous use that it can be put to (*United Equities, Inc. v. Mardordic Realty Co.,* 8 A.D.2d 398, 400, 187 N.Y.S.2d 714, *aff'd* 7 N.Y.2d 911, 197 N.Y.S.2d 478, 165 N.E.2d 426; *Moore v. Eadie,* 245 N.Y. 166, 170, 156 N.E. 653), the fair market value must be determined by the terms of the Lease and restrictions or encumbrances, if any, affecting the land (*United Equities, Inc. v. Mardordic Realty Co., supra,* at 400, 187 N.Y.S.2d 714; *Plaza Hotel Assocs. v. Wellington Assocs., Inc.,* 55 Misc.2d 483, 487, 285 N.Y.S.2d 941, *aff'd* ***30** 28 A.D.2d 1209, 285 N.Y.S.2d 267, *aff'd* 22 N.Y.2d 846, 293 N.Y.S.2d 108, 239 N.E.2d 736; *see also, Kernochan v. Manhattan Railway Co.,* 161 N.Y. 339, 349, 55 N.E. 906).

With regard to appraisals performed in situations similar to that found herein, it has been noted in a publication entitled The Appraisal of Real Estate (at 291–292 [10th ed]), commonly known as the "Appraiser's Handbook", that:

> In most nonconforming use situations, the property value estimate reflects the non-conforming use. *Land value, however, is based on the legally permissible use, assuming the land is vacant.* The difference between the property value and the land value reflects the contribution of the existing improvements and possibly a bonus for the nonconforming use. (emphasis added).

Defendants' argument that vacant land must be appraised by giving effect to the non-conforming improvements on the land is without merit as it ignores the distinction between an appraisal of property (land plus the improvements) and the valuation of the raw land (absent the improvements and subject to the various encumbrances and restrictions found both in the Lease and government enacted ordinances and regulations). As we have concluded above, the Lease requires the appraiser to determine the value of the raw land, not the property, hence the value of the land must be determined as though it were vacant, without improvements, and subject to current zoning restrictions and contractual limitations as well as the effect of the Lease itself on the value of the land.

Accordingly, the order of the Supreme Court, New York County (Richard Lowe III, J.), which was entered on March 21, 1995, denying plaintiff's motion for summary judgment and granting defendants' cross-motion for summary judgment on their counterclaim, is unanimously reversed, on the law, ****295** without costs, plaintiff's motion is granted and defendants' cross-motion is denied.

Order, Supreme Court, New York County (Richard Lowe III, J.), entered March 21, 1995, reversed, on the law, without costs, plaintiff's motion for summary judgment granted and defendants' cross-motion denied.

All concur.

All Citations

217 A.D.2d 20, 633 N.Y.S.2d 288

Footnotes

1 The Stipulation was executed two days prior to defendants' filing of their answer and counterclaim, and stated "Defendants intend to answer the Plaintiff's First Amended Complaint and file a Counterclaim for declaratory relief regarding the meaning of the word 'land' ".

2 The Ritz–Carlton Hotel, which is currently located on the Demised Premises, comprises approximately 152,000 gross square feet. Current ordinances, laws or regulations enacted pursuant to governmental authority would permit the construction of a new building of only approximately 82,500 gross square feet.

New York Overnight Partners, L.P. v. Gordon, 217 A.D.2d 20 (1995)

633 N.Y.S.2d 288

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49 A.D.2d 847
Supreme Court, Appellate Division, First Department, New York.

S. E. NICHOLS, etc., et al., Plaintiffs-Appellants,
v.
REGENT PROPERTIES INC. et al., Defendants-Respondents.

Oct. 21, 1975.

Synopsis

Action was brought seeking reformation of lease based on alleged mutual mistake. The Supreme Court, Special Term, New York County, Edward J. Greenfield, J., dismissed, and plaintiff appealed. The Supreme Court, Appellate Division, held that since cause of action was based solely on mutual mistake, with no claim of fraud, the cause accrued on execution and delivery of the lease, regardless of when it was discovered and, hence, six-year limitation period began to run on execution and delivery.

Affirmed.

Attorneys and Law Firms

****613** L. W. Wagman, New York City, for plaintiffs-appellants.

D. S. Snider, New York City, for defendants-respondents.

Before STEVENS, P.J., and MURPHY, TILZER, LANE and NUNEZ, JJ.

Opinion

PER CURIAM.

***847** Order, Supreme Court, New York County, entered on February 24, 1975, unanimously affirmed. Respondents shall recover of appellants $60 costs and disbursements of this appeal.

Special Term properly granted defendants' cross-motion to dismiss plaintiffs' third cause of action for reformation of a lease based upon an alleged mutual mistake on the ground that it is barred by the six-year statute of limitations, CPLR s 213. Since plaintiffs' cause of action is based solely upon mutual mistake with no claim ***848** of fraud, the cause accrued upon execution and delivery of the lease, regardless of when it was discovered. With limited exceptions not ****614** here applicable, the general rule is that the statute of limitations begins to run when the mistake is committed, not when it is discovered. See McKinney's Consolidated Laws Annotated, Book 7B (CPLR c. 213:6 at p. 328); Metcalf v. Metcalf, 196 Misc. 842, 92 N.Y.S.2d 767, Aff'd 276 A.D. 1068, 96 N.Y.S.2d 490, Aff'd 302 N.Y. 822, 100 N.E.2d 33; Northerly Corporation v. Hermett Realty Corp., 15 A.D.2d 888, 225 N.Y.S.2d 327.

All Citations

49 A.D.2d 847, 373 N.Y.S.2d 613

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6 Misc.3d 382
Supreme Court, New York County, New York.

ONE WORLD TRADE CENTER LLC, Plaintiff,
v.
CANTOR FITZGERALD SECURITIES, Cantor Fitzgerald, L.P. and Cantor Fitzgerald Incorporated, Defendants.

Oct. 7, 2004.

Synopsis
Background: Landlord of building destroyed by terrorists sued tenant for unpaid rent. Tenant counterclaimed, and landlord moved for summary judgment on counterclaims.

Holdings: The Supreme Court, New York County, Debra A. James, J., held that:

fact issues regarding whether rent was in arrears precluded summary judgment whether landlord could apply payment received toward arrearage rather than current rent;

force majeure clause precluded rescission of lease for failure of consideration; and

force majeure clause precluded unjust enrichment claim.

Partial summary judgment for landlord.

Attorneys and Law Firms

****652 *383** Carb, Lucia, Cook & Kufeld, LLP, New York City (Stephen J. Fallis of counsel), for plaintiff.

Salans, New York City (John Cambria and Lisa K. Matz of counsel), for defendant.

Opinion

DEBRA A. JAMES, J.

This landlord-tenant action arises out of a leasehold at One World Trade Center (the "Building") which was terminated by the tragic events of September 11, 2001. ****653** The events that occurred on that infamous date are not directly implicated in this action. Plaintiff One World Trade Center was the net lessee of the Building and defendants Cantor Fitzgerald Securities, Cantor Fitzgerald, L.P., and Cantor Fitzgerald Incorporated (collectively, "Cantor Fitzgerald") were lessees in the Building.

Pursuant to a lease agreement dated October 12, 1978, defendants' predecessor-in-interest Cantor, Fitzgerald Securities Corp. leased space within the building (the "premises") from the Port Authority. Between 1978 and 2000 supplemental agreements to the lease were entered into between the Port Authority and defendants including Supplement No. 12 to the lease dated November 30, 2000. (The lease and its supplements are collectively referred to herein as the "Lease".)

Plaintiff One World Trade Center LLC leased the Building from the Port Authority of New York and New Jersey (the "Port Authority") pursuant to a Net Lease Agreement dated July 16, 2001 (the "net lease"). Plaintiff states that the net lease became effective July 24, 2001, and that as of that date the Lease was assigned to plaintiff by the Port Authority.

Plaintiff in this action seeks to recover from defendants rent and additional rent for the premises pursuant to the Lease for the period from August 1, 2001 through September 10, 2001. Plaintiff alleges in its complaint that defendants were in arrears on the payment of rent to the Port Authority at the time the net lease took effect and that plaintiff received a rent payment from defendants in August 2001 and applied that rent payment to the alleged arrears leaving a balance due that is sued for in this action. Defendants have answered and denied plaintiff's ***384** claims, raised various affirmative defenses and asserted counterclaims for rescission and unjust enrichment.

Plaintiff now moves for summary judgment granting the relief sought in its complaint and dismissing defendants' counterclaims. Plaintiff also moves to quash certain subpoenas issued by defendants. Defendants oppose plaintiff's motion.

Plaintiff's motion for summary judgment on the complaint must be denied. Plaintiff argues that it received a rent payment in August 2001 and that the payment had to be applied to rental arrears defendants allegedly owed to the Port Authority as of the date the net lease became effective. Defendants argue that the records that they currently have demonstrate that they paid more than the basic rental amount due under the Lease for the period from December

1, 2000, to September 10, 2001, and that the amount of additional rent due for that period is not readily discernable. Defendants also argue that because their records were destroyed and key personnel killed in the tragedy, discovery from third parties is required in order to determine the amount of rent that may due and owing, if any.

The court agrees with defendants that plaintiff has failed to carry its burden of demonstrating that defendants failed to pay the rent due on the premises. Plaintiff's claim for rent is based upon its assertion that defendants' were in arrears on their payment of rent to the Port Authority prior to the effectiveness of the net lease. Plaintiff however introduces insufficient evidence to establish that there was an arrearage at the time the net lease became effective. There is no affidavit or other evidence from the Port Authority establishing that plaintiff was in default at that time. Therefore, plaintiff has not established that its application of the August 2001 payment to the alleged arrearage was in fact proper. This issue of fact is contested ****654** by the parties and therefore summary judgment on the claims asserted in the complaint is properly denied.

Plaintiff also seeks dismissal of defendants' counterclaims and affirmative defenses for unjust enrichment and rescission. Defendants argue that because of the 9/11 tragedy, they are entitled to the remedies of rescission and unjust enrichment because the plaintiff will not be able to provide them with the future benefits which were the consideration for the defendants' ratification of Supplement No. 12 to the Lease dated November 30, 2000. According to the defendants, pursuant to Supplement No. 12 they agreed to pay an increased, "front-loaded" rent and agreed to restricted termination rights in exchange for ***385** future benefits including a fixed rental rate, restricted rights to terminate the lease, dedicated screening station in the lobby of the Building, and permission for defendants to install a tenant identification sign in the lobbies. Defendants argue that there are outstanding issues of fact as to these counterclaims which preclude their summary dismissal.

Plaintiff counters that defendants' counterclaims are barred by the express terms of the Lease. Section 39 of the Lease states:

> *Force Majeure* The Port Authority shall not be liable for any failure, delay or interruption in performing its obligations hereunder due to causes or conditions beyond the control of the Port Authority. Further, the Port Authority shall not be liable unless the failure, delay or interruption shall result from failure on the part of the Port Authority to use reasonable care to prevent or reasonable efforts to cure such failure, delay or interruption.

Section 36(d) of the Lease provides that:

> "Causes or conditions beyond the control of the Port Authority", shall mean and include acts of God ... war ... acts of third parties for which the Port Authority is not responsible ... or any other condition or circumstances, whether similar to or different from the foregoing (it being agreed that the foregoing enumeration shall not limit or be characteristic of such conditions or circumstances) which is beyond the control of the Port Authority or which could not be prevented or remedied by reasonable effort and at reasonable expense.

Plaintiff argues that defendants' counterclaims seeking recoupment of that portion of the increased rent allegedly paid in contemplation of future benefits under the Lease is barred by these clauses which expressly excuse the performance of the lessor under circumstances such as those presented by the events of September 11, 2001.

The court agrees with plaintiff that the *force majeure* clause bars defendants' counterclaims. Defendants' argument that their counterclaims are outside the operation of the Lease because they equitably seek to rescind the Lease on the contractual grounds of failure of consideration and unjust enrichment is unavailing.

Defendants' counterclaims essentially seek a rent-abatement for services that cannot be provided due to the destruction of ***386** the Building. The court agrees with plaintiff that there is no language in the Lease which can form the basis for a claim by defendants' that any allegedly increased "front-loaded" rent under the Lease was conditioned upon the provision of future services. The defendants are sophisticated commercial tenants and there is no reason to excuse them from the operation of the *force majeure* clause which they freely negotiated. Defendants bargained away their right to hold the lessor liable for non-performance in the ****655** face of the tragic, unanticipated events which destroyed the Building.

The sole case cited by defendants in support of their position that the *force majeure* clause is inapplicable, *Park West Management Corp. v. Mitchell,* 62 A.D.2d 291, 296, 404 N.Y.S.2d 115 [1st Dept. 1978], fails to support defendants' position as that case involved the interpretation of a residential tenant's rights under Real Property Law 235–b. The general rule is that "[o]rdinarily, only if the *force majeure* clause specifically includes the event that actually prevents a party's performance will that party be excused." *Kel Kim Corp. v. Central Markets, Inc.,* 70 N.Y.2d 900, 902–903, 524 N.Y.S.2d 384, 519 N.E.2d 295 (1987). In this case, the *force majeure* specifically shields the lessor from liability for any non-performance that

results from the acts of third parties, and therefore bars defendants' counterclaims for a refund of rent.

As to defendants' counterclaim for unjust enrichment, it similarly is barred because even assuming that the rental rate in effect prior to the destruction of the Building was "increased" in contemplation of future benefits under the Lease, there is no provision in the Lease for recoupment of such payments where the Lessor's future performance is rendered impossible due to the destruction of the Building without any fault of plaintiff. As stated long ago by the First Department, "[i]f by the terms of [the] lease rent is to be paid in advance, the tenant comes under an absolute engagement to pay it on the day fixed, and he is not relieved from that engagement by the fact that the property is destroyed ... and [tenant] is liable to pay the rent due in advance even though the destruction takes place on the very day it falls due." *Werner v. Padula,* 49 A.D. 135, 138, 63 N.Y.S. 68 (1st Dept. 1900).

With respect to plaintiff's motion to quash defendants' subpoena's in their entirety, the court shall deny plaintiff's motion as presented here and directs the defendants to comply ***387** with this court's separate Order of this same date resolving defendants' motion (Motion Seq. No. 2) seeking issuance of a third-party subpoena.

Accordingly, it is

ORDERED and ADJUDGED that plaintiff's motion for summary judgment dismissing defendants' counterclaims and the fifth affirmative defense seeking rescission and the sixth affirmative defense of unjust enrichment is GRANTED and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED and ADJUDGED that plaintiff's motion for summary judgment is otherwise DENIED; and it is further

ORDERED and ADJUDGED that plaintiff's motion to quash is DENIED and defendants are directed to comply with this court's separate Order of this same date resolving Motion Seq. No. 2; and it is further

ORDERED that the parties are hereby directed to attend a preliminary conference on October 22, 2004, at 11:00 A.M., at the Courthouse, IAS Part 59, Room 1254, 111 Centre Street, New York 10013.

This is the decision and order of the court.

All Citations

6 Misc.3d 382, 789 N.Y.S.2d 652, 2004 N.Y. Slip Op. 24444

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265 A.D. 749
Supreme Court, Appellate Division, First Department, New York.

ROBITZEK INVESTING CO., Inc.,
v.
COLONIAL BEACON OIL CO.

April 9, 1943.

Synopsis
Appeal from Supreme Court, Bronx County; Edward R. Koch, Justice.

Action by Robitzek Investing Co., Inc., against Colonial Beacon Oil Company to recover rent under a written lease. From an order of the Supreme Court of Bronx County granting plaintiff's motion for summary judgment and denying defendant's cross-motion for summary judgment, and from the judgment entered thereon, Sup., 37 N.Y.S.2d 772, defendant appeals.

Order and judgment affirmed.

Attorneys and Law Firms

****820** ***751** Satterlee & Warfield, of New York City (James F. Dwyer, of New York City, of counsel; Lloyd F. Thanhouser, of New York City, on the brief), for appellant.

Harry H. Chambers, of New York City (Harry B. Chambers, of New York City, on the brief), for respondent.

Before MARTIN, P. J., and UNTERMYER, DORE, COHN, and CALLAHAN, JJ.

Opinion

****821** COHN, Justice.

The action is to recover the sum of $300 representing one month's rent due on May 10, 1942, under a long term written lease between plaintiff and defendant covering real property located on Eastern Boulevard, Bronx County, New York City.

The demised premises consist of a gasoline filling station which was erected by plaintiff from plans and specifications approved by defendant. The filling station was completed in May, 1939. The rental agreed upon is a sum equal to 1 1/2 cents for each gallon of gasoline and other motor fuels sold at the station, with a minimum monthly rental of $300. In addition, lessee covenanted to pay water rents and taxes levied against the improvements, and taxes upon the land in excess of $125.

When the lease was executed, a loan agreement dated February 3, 1939, was entered into, whereby defendant loaned to plaintiff the sum of $15,000 to enable the latter to erect the improvements. Contemporaneously a bond and mortgage were made and delivered by plaintiff to defendant in the amount of $15,000, payable in 180 monthly installments of $116.67 each, with interest.

Defendant occupied the premises as a gasoline station and paid the rent reserved in the lease from May, 1939, until March 26, 1942. On that date defendant purported to cancel the lease by letter claiming restriction of the use of the premises by reason of an order of the War Production Board and further claiming that the use of the premises was illegal under the zoning resolution of the City of New York.

In its amended answer defendant admitted the making of the lease, the nonpayment of the amount demanded, but denied that any rent was due, and, in addition, set up five separate defenses allegedly justifying cancellation of the lease. From an order granting plaintiff's motion for summary judgment and directing that judgment be entered in favor of plaintiff in the sum of $300, being rent for the month of April, 1942, and denying defendant's motion for summary judgment and the judgment entered thereon, this appeal has been taken.

***752** The first and second defenses are based upon paragraph '7' of the lease, which reads: '7. It is understood and agreed that if for reason of any law, ordinance, injunction or regulation of properly constituted authority, Lessee is prevented from using all or any part of the property herein leased as a service station for the storage, handling, advertising or sale of gasoline or other petroleum products or for the conduct of any of the business usually conducted in connection with gasoline service stations, or if the use of the premises herein demised shall be in any manner restricted for any of the purposes above stated * * * the Lessee may, at its option, surrender and cancel this lease, remove its improvements and equipment from said property and be relieved from the payment of rent or any other obligation as of the date of such surrender.'

In the first defense it is alleged that 'Limitation Order L–70 of the United States War Production Board * * * prevents and restricts * * * the use of the premises demised

in said agreement of lease for ****822** the purposes therein stated and contemplated.' So far as material that order, promulgated March 14, 1942, reads as follows:

'(1) Service Station Hours of Distribution.

'No Service Station within the Curtailment Area shall deliver to any Persons any Motor Fuel during more than 12 hours of any calendar day or during more than 72 hours of any calendar week.'

In the second defense a similar contention is made with respect to Supplementary Order No. M–15–C of the United States Office of Production Management. That order became effective on December 27, 1941, and reads: 'No person shall sell, lease, trade, lend, deliver, ship or transfer new rubber tires, casings, or tubes, and no person shall accept any such sale, lease, trade, loan, delivery, shipment or transfer of any such new rubber tires, casings, or tubes.'

Defendant contends that by reason of the quoted federal regulations the use of the demised premises as a gasoline station was prevented and restricted and that it was therefore entitled to cancel the lease in accordance with its express terms.

We are unable to agree with this view. The clause of the lease relied upon by defendant contemplates a cancellation only (1) if the lessee is prevented from using the property for a gasoline service station and the business ordinarily connected therewith or (2) if the premises have been restricted against such use. The language employed shows that the clause has reference to a law or order regulating not ***753** the defendant's business but the use of the premises as such; it refers to a real property restriction. The governmental orders do not regulate the use of the premises but merely control transactions in gasoline, tires, casings and tubes without regard to any particular parcel of property. If it were the intention of the parties to do so, they could readily have provided for cancellation of the lease in the event of a regulation of defendant's business by employing language to that effect. Were we to accept defendant's interpretation of the agreement, any rule, order or regulation of public authority even of temporary duration which might affect defendant's business and restrict its profits would allow defendant to cancel the lease. That clearly was not the expressed intention of the parties. The federal regulations do not restrict the use of the land demised but they control the business of the defendant. A business enterprise of the type involved is subject to regulation by public agencies, but here that risk must be borne by defendant and not by plaintiff.

Where there is complete frustration of performance of a contract by act of the government, cancellation is permissible. Matter of Kramer & Uchitelle, Inc., 288 N.Y. 467, 472, 43 N.E.2d 493, 141 A.L.R. 1497. Here there is not complete frustration. Defendant could have continued to operate the gasoline station at the demised premises within the terms of the lease though the volume of its business might have suffered substantial diminution because of the federal regulatory measures. See Byrnes v. Balcom, 265 App.Div. 268, 271, 38 N.Y.S.2d 801; Colonial Operating Corp. v. Hannan Sales & Service, 265 App.Div. 411, 39 N.Y.S.2d 217. However, defendant does not claim that performance of the ****823** contract has been rendered impossible by governmental authority. It relies exclusively upon the cancellation clause in paragraph '7' of the lease. Upon the admitted facts defendant had no right to cancel under that paragraph of the agreement.

In its third defense defendant relies upon paragraph '7' and then proceeds to allege that the zoning resolution of the City of New York prevented, restricted and rendered unlawful the use of the premises for the purposes stated in the lease. Defendant's possession for a period of almost three years has never been questioned by any agency or department of the municipality. A certificate of occupancy covering the premises was issued May 25, 1939, by the Department of Housing and Buildings, Borough of Bronx. It specifically covers: 'Gasoline Service Sta. Auto Repair Shop, Storage and Parking of more than five (5) motor vehicles.'

***754** The New York City Charter, Section 646, subd. g, provides as follows: 'Every certificate of occupancy shall, unless and until set aside or vacated by the board of standards and appeals or a court of competent jurisdiction, be and remain binding and conclusive upon all agencies and officers of the city, and shall be binding and conclusive upon the department of labor of the state of New York, as to all matters therein set forth, and no order, direction or requirement at variance therewith shall be made or issued by any agency or officer of the city, nor by the department of labor of the state of New York, or any commission, board, officer or member thereof.'

The law is thus declared that a certificate of occupancy is binding and conclusive upon all agencies of the City until set aside by the Board of Standards and Appeals or by the courts. Drennan v. Smith Valley Realty Corporation, 211 App.Div. 796, 208 N.Y.S. 291; Matter of Edwards v. Murdock, 283 N.Y. 529, 29 N.E.2d 74; Central Park Plaza Corporation v. Monsky, 145 Misc. 688, 260 N.Y.S. 902.

So long as the certificate of occupancy is in full force and effect, it may not be collaterally attacked. Defendant has not been prevented from using the property for the purposes specified in the certificate nor is there any showing that the use of the demised premises has been restricted or rendered unlawful by the zoning resolution of

the City of New York. No attempt has ever been made to set aside the certificate of occupancy and for almost three years defendant has been in peaceful enjoyment of the premises.

As defendant fails to show that it has been or is being precluded from using the property for the purposes set forth in the lease or that any such purposes are in any way restricted, the third defense is without substance.

Defendant's fourth defense is that plaintiff by the terms of the lease represented that all necessary permits and licenses had been obtained and were valid and binding but that those representations were untrue and that defendant rescinded the agreement and duly tendered back possession of the premises to plaintiff. The proof submitted by defendant does not sustain this defense. The certificate of occupancy issued to plaintiff by the Department of Housing and Buildings, Borough of Bronx, dated May 25, 1939, certifies, as required by statute (New York ****824** City Charter, 1938, § 646, subd. d), that the premises conform 'to the requirements of the building code and all other laws and ordinances, and of the rules and regulations of the Board of Standards and Appeals, applicable to a building of its class ***755** and kind at the time the permit was issued' and that the 'provisions of section 646, subd. f of the New York Charter have been complied with'. Section 646, subd. f, of the New York City Charter provides that no certificate of occupancy shall be issued for any building where containers for inflammables are stored until the fire commissioner has tested and inspected certified his approval in writing on the installation of such containers. This approval is recorded on the certificate of occupancy. If any of the the permits or licenses required were illegal or invalid, such certificate would not issue.

There is no record of any violation against the premises nor is there any proof that any attempt has ever been made by any public official, board, agency, or by any individual to set aside before the Board of Standards and Appeals or in a court of law, the binding and conclusive effect of the certificate of occupancy. During the years between the time that defendant entered upon the premises pursuant to the terms of the lease and up to the time of the purported cancellation, its occupancy has been unchallenged. Up to the day that defendant decided to cancel there was not from any source the slightest suggestion of invalidity or illegality of any certificate, license or permit.

The only permits claimed to be missing are (1) a certificate of variance and (2) the certificate for the erection and maintenance of an electric sign. The former is unnecessary because plaintiff has the certificate of occupancy permitting the use of the premises for the purposes contemplated under the lease. As to the latter, no agreement was made by plaintiff to erect an electric sign.

Though the premises are now located in a restricted use district, they were in an unrestricted use district at the time original plans for a gasoline service station were filed. Before the effective date of the change rezoning the district into a business district, plaintiff had begun work under the plans as originally filed. The permit thus acquired gave it the right to use the premises as a gasoline station. City of Buffalo v. Chadeayne, 134 N.Y. 163, 31 N.E. 443.

Relying upon permits which defendant now challenges, plaintiff in 1939 expended large sums of money to build a structure which was designed to meet defendant's requirements. When plaintiff in good faith entered upon the construction of the building and gasoline station leased to defendant, and incurred liabilities on the basis of amended plans and specifications permitted and approved by the Department of Housing and Buildings, it acquired a vested right therein of which it could ***756** not thereafter be deprived. City of Buffalo v. Chadeayne, supra; City of New York v. Caulwal Construction Co., 235 App.Div. 682, 255 N.Y.S. 867, affirmed 261 N.Y. 578, 185 N.E. 746; People ex rel. Evens v. Kleinert, 201 App.Div. 751, 195 N.Y.S. 711.

Defendant's claim that any of the necessary certificates, licenses or permits are illegal and invalid finds no substantiation in the record.

****825** The fifth defense is merely a reiteration of the matters alleged in the third and fourth defenses, save that defendant relies upon the general purpose and intent of the lease. For reasons hereinbefore set forth this defense is likewise unsupported by proof.

As there is no triable issue of fact presented by the record the Special Term properly granted summary judgment in favor of plaintiff.

The order granting plaintiff's motion for summary judgment and denying defendant's cross-motion for summary judgment and the judgment entered thereon should be affirmed, with costs.

Judgment and order unanimously affirmed with costs.

Order filed.

All concur.

All Citations

265 A.D. 749, 40 N.Y.S.2d 819

Robitzek Investing Co. v. Colonial Beacon Oil Co., 265 A.D. 749 (1943)

40 N.Y.S.2d 819

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88 A.D.3d 1224
Supreme Court, Appellate Division, Third Department, New York.

ROUTE 6 OUTPARCELS, LLC,
Respondent,
v.
RUBY TUESDAY, INC., Appellant.

Oct. 27, 2011.

Synopsis
Background: Owner brought action against commercial tenant alleging breach of ground lease agreement. The Supreme Court, Albany County, Platkin, J., 910 N.Y.S.2d 408, 2010 WL 1945738, granted owner's motion for partial summary judgment, and tenant appealed.

The Supreme Court, Appellate Division, Spain, J., held that economic factors did not excuse tenant's nonperformance pursuant to agreement's force majeure clause.

Affirmed.

Attorneys and Law Firms

****436** Epstein, Becker & Green, P.C., New York City (Robert M. Travisano of counsel), for appellant.

****437** Sills, Cummis & Gross, P.C., New York City (Mark S. Olinsky of counsel) and Carter, Conboy, Case, Blackmore, Maloney & Laird, P.C., Albany (Michael J. Catalfimo of counsel), for respondent.

Before: PETERS, J.P., SPAIN, STEIN, McCARTHY and GARRY, JJ.

Opinion

SPAIN, J.

***1224** Appeal from an order of the Supreme Court (Platkin, J.), entered May 13, 2010 in Albany County, which granted plaintiff's motion for partial summary judgment.

Pursuant to a 2006 ground lease agreement, defendant agreed to construct and open a restaurant on plaintiff's real property, located in Pennsylvania, by March 2009, and to pay plaintiff an annual fixed rent in addition to a percentage of the restaurant's gross sales. Although defendant has consistently paid the fixed rent on the property, it did not construct the anticipated restaurant, prompting plaintiff to commence this breach of contract action. Plaintiff successfully moved for partial summary judgment on the issue of liability, and defendant now appeals.

We affirm. Defendant does not dispute that plaintiff has established a prima facie case for breach of contract under Pennsylvania law,[1] but argues that its performance was excused under the agreement's force majeure provision. "In order to use a force majeure clause as an excuse for non-performance, the event alleged as an excuse must have been beyond the party's control and not due to any fault or negligence by the non-performing party" (***1225** *Martin v. Pennsylvania, Dept. of Envtl. Resources,* 120 Pa.Cmwlth. 269, 548 A.2d 675, 678 [Pa.Cmwlth.1988]). "Furthermore, the non-performing party has the burden of proof as well as a duty to show what action was taken to perform the contract, regardless of the occurrence of the excuse" (*id.; accord Rohm & Haas Co. v. Crompton Corp.,* 2002 WL 1023435, *2, 2002 Phila Ct. Com. Pl. LEXIS 20, *6–7 [Pa.Com.Pl.2002]).

Here, the agreement's force majeure provision provides: "Except for any payments due [plaintiff] in accordance with this [l]ease, [plaintiff] and/or [defendant] shall be excused for the period of any delay and shall not be deemed in default with respect to the performance of any of the terms, covenants, and conditions of this [l]ease when prevented from so doing by cause or causes beyond the [plaintiff's] and/or [defendant's] control, which shall include, without limitation, all labor disputes, governmental regulations or controls, fire or other casualty, inability to obtain any material, services, acts of God, or any other cause, *whether similar or dissimilar* to the foregoing, not within the control of the [plaintiff] and/or [defendant]" (emphasis added). Defendant argues that the "global economic downturn that took hold in 2008" prevented its performance under the contract and, thus, its nonperformance was excused under the force majeure provision. Specifically, defendant relies on an affidavit of its vice-president and corporate controller, attesting that due to the economic crisis that began in early 2008, defendant experienced a drastic decline of its stock price, forcing defendant to reclassify over $500 million of its long term debt and to determine that complying with the lease provisions requiring construction of a new restaurant "would divert needed funds away from meeting debt obligations and leverage thresholds under its loan

covenants." As a result, defendant communicated to plaintiff in March 2008 that it would not construct ****438** the store anticipated by the parties' agreement.

We agree with Supreme Court that the economic factors that led defendant to make this decision cannot, as a matter of law, excuse its nonperformance. "[W]hen the parties have themselves defined the contours of force majeure in their agreement, those contours dictate the application, effect, and scope of force majeure" (*Rohm & Haas Co. v. Crompton Corp.,* 2002 WL 1023435, at *3, quoting *R & B Falcon Corp. v. American Exploration Co.,* 154 F.Supp.2d 969, 973 [S.D.Tex.2001]). Here, although the parties did, after identifying particular force majeure events, agree on a fairly broad clause by including the language "any other cause, whether similar or dissimilar to the foregoing," they still expressly limited the contemplated force majeure events to those beyond the control ***1226** of the nonperforming party. While defendant, of course, had no control over the world economy, the decisions it made with respect to how to cope with the financial downturn—notwithstanding that its options may have been limited—remained within defendant's power and control. Defendant made a calculated choice to allocate funds to the payment of its debts rather than to perform under the subject lease. Economic factors are an inherent part of all sophisticated business transactions and, as such, while not predictable, are never completely unforeseeable; indeed, "financial hardship is not grounds for avoiding performance under a contract" (*Rohm & Haas Co. v. Crompton Corp.,* 2002 WL 1023435, at *5, quoting *Macalloy Corp. v. Metallurg, Inc.,* 284 A.D.2d 227, 227, 728 N.Y.S.2d 14 [2001]; *see Millers Cove Energy Co., Inc. v. Moore,* 62 F.3d 155, 158 [6th Cir.1995] ["Courts and commentators generally refuse to excuse lack of compliance with contractual provisions due to economic hardship, unless such a ground is specifically outlined in the contract"]; *Morgantown Crossing, L.P. v. Manufacturers & Traders Trust Co.,* 2004 WL 2579613, *6 [E.D.Pa.2004]; *Stand Energy Corp. v. Cinergy Servs., Inc.,* 144 Ohio App.3d 410, 416, 760 N.E.2d 453, 457 [2001] ["worsening economic conditions ... do not qualify as a force majeure"]; *Hanover Petroleum Corp. v. Tenneco Inc.,* 521 So.2d 1234, 1239–1240 [La.App.3d.Cir.1988] ["adverse economic conditions ... which tend to render performance burdensome and unprofitable do not constitute force majeure"], *writ denied* 526 So.2d 800 [La.1988]).

Further, having decided not to construct the restaurant as early as March 2008, defendant has failed to demonstrate an attempt to perform, despite the alleged excuse, as required by Pennsylvania law (*see Martin v. Pennsylvania, Dept. of Envtl. Resources,* 548 A.2d at 678). Accordingly, we conclude that defendant's performance was not excused under the agreement's force majeure clause and plaintiff was properly granted partial summary judgment.

ORDERED that the order is affirmed, with costs.

PETERS, J.P., STEIN, McCARTHY and GARRY, JJ., concur.

All Citations

88 A.D.3d 1224, 931 N.Y.S.2d 436, 2011 N.Y. Slip Op. 07556

Footnotes

1 The parties agree that Pennsylvania law governs the substantive issues in this action.

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3 N.Y.2d 395
Court of Appeals of New York.

Leonard SILLMAN et al., Appellants,
v.
TWENTIETH CENTURY-FOX FILM CORPORATION, Respondent, et al., Defendants.

July 3, 1957.

Synopsis

Action by assignee seeking declaration of rights under partial assignment of rights under contract against obligor which had purchased contract from assignor. The Supreme Court, at Special Term, Felix C. Benvenga, J., New York County, entered order denying motion for summary judgment dismissing complaint and obligor appealed. The Supreme Court, Appellate Division, First Judicial Department, 2 A.D.2d 662, 152 N.Y.S.2d 6, reversed and assignee appealed. The Court of Appeals, Froessel, J., held that notwithstanding agreement between obligor and assignor prohibiting assignments by parties without consent and providing that distributor was not required to recognize an assignment by assignor, a triable issue was presented as to obligor's alleged waiver of anti-assignment clause.

Judgment appealed from reversed and order of Special Term reinstated.

Fuld, Desmond and Dye, JJ., dissented.

Attorneys and Law Firms

***499 **388 *396** Jay Leo Rothschild, Scarsdale, and Max Chopnick, New York City, for appellants.

***398** Whitman Knapp, David Simon and David D. Brown, III, New York City, for respondent.

Opinion

FROESSEL, Judge.

Defendant Berman Swarttz Productions, Inc., (hereinafter called Swarttz) entered into separate contracts, under date of June 30, 1953, with plaintiffs and various other persons interested in the Broadway musical revue 'New Faces of 1952', in order to produce a motion picture version of the state production. Plaintiffs' contracts may be summarized as follows:

Swarttz agreed to pay each plaintiff a certain percentage of the net profits of the picture. In exchange, The Intimate Revue Company (hereinafter called Revue), in the basic agreement, granted Swarttz the exclusive right to use the physical properties of the show; New Faces, ***500** Inc., (hereinafter called New Faces) granted Swarttz the exclusive right to use its trade names; Julian K. Sprague (and others) invested moneys in the picture by way of interest-bearing loans; and Leonard Sillman agreed to act as the associate producer.

In addition, in the Revue and Sprague contracts, Swarttz agreed to give the distributor ****389** of the picture a 'Notice of Irrevocable Authority' directing it to pay directly to Revue and Sprague their share of the profits. Similarly, in the New Faces and Sillman contracts, Swarttz agreed to deliver a 'Notice of Irrevocable Assignment and Authority' directing the distributor to pay directly to New Faces and Sillman their share of the profits and also agreed that their share would be so paid. All of the contracts permitted assignment.

It was originally contemplated that the picture was to be distributed by the United Artists Corporation in third dimension and color. Shortly thereafter, however, so as to obtain the ***399** benefits of the CinemaScope process, it was decided to distribute the picture through defendant Twentieth Century-Fox Film Corporation (hereinafter called Twentieth Century).

In order to effect these new arrangements, Swarttz, on September 8, 1953, entered into a contract with defendnat National Pictures Corporation (hereinafter called National), which had a CinemaScope license and a distribution agreement with Twentieth Century. Under this contract, Swarttz assigned to National all of Swarttz's rights under the various agreements with persons, including plaintiffs, having an interest in the production. In consideration, National agreed to pay Swarttz a certain percentage of the net profits of the picture less the percentages to be paid to the persons, firms and corporations, including plaintiffs, entitled thereto. National accepted such assignments and expressly assumed all of Swarttz's obligations thereunder. National also agreed to give Twentieth Century a 'Notice of Irrevocable Authority' directing the latter to pay to Chemical Bank and Trust Company for the accounts of Swarttz and of plaintiffs their percentages of the profits and that the bank was to pay these

sums directly to Swarttz and plaintiffs.

National's distribution agreement with Twentieth Century had been entered into on April 16, 1951, or more than two years prior to the making of any of the aforesaid agreements. Twentieth Century alleges that plaintiffs knew of this contract before Swarttz's contract with National, but plaintiffs deny that they had any knowledge of the contract until November, 1953. Under its terms, National is to furnish Twentieth Century with 7 to 10 pictures during the ensuing 7 years, each picture to cost a minimum of $400,000 and to be free from all incumbrances and from the claims of owners of any material used in the pictures.

***501** At least 10 days prior to the delivery of each picture, National is to deliver to Twentieth Century: 'Photostat copies of all contracts for the acquisition of literary or other material used in the Picture and with producers, directors, musicians, actors, actresses and any other persons who render services for or in connection with the production of the Picture.' Twentieth Century is given the right (but not the obligation) to examine such contracts and if, in the opinion of Twentieth Century's attorneys, they are not sufficient to permit full exercise of Twentieth Century's rights or the picture fails to conform to ***400** the agreement, National shall, upon written notice within 60 days of receipt of the contracts, be deemed in default. Twentieth Century may terminate the contract upon any default of National. Acceptance of the picture by Twentieth Century shall not be construed to release or relieve National of any of its representations, warranties, indemnities or covenants in the agreement, one of which was to 'discharge (1) all claims'.

After deduction of a distribution fee and expenses, the receipts of the picture are 'payable to or for the account of' National (emphasis supplied). Except for assignments by National to two named corporations, or for the purpose of securing loans by a prescribed procedure, article Twenty-Fourth of the agreement provides, among other things: '(a) * * * neither party hereto shall assign this agreement, in whole or in part, or any rights or monies payable hereunder, without the prior written consent of the other party, nor shall ****390** any right hereunder or any property or contract covered hereby devolve by operation of law or otherwise upon any receiver, trustee, liquidator, successor or other person through or as representative of either party.' It was further provided that Twentieth Century shall not be required to pay any sum payable to National to anyone except National or one designee only; that Twentieth Century shall not be required to recognize any assignments; and that if Twentieth Century shall receive notice of the existence of any assignment, it shall have the right to withhold payments until the assignment is cancelled or withdrawn.

Under the provisions of this agreement, plaintiffs' contracts with Swarttz and Swarttz's contract with National were submitted for inspection to Twentieth Century, which evinced no objection to any part of these contracts. The picture, although costing only $220,000 instead of the required $400,000, was delivered to and accepted and distributed by Twentieth Century under this agreement. Shortly after the first release of the picture, plaintiffs' attorney gave notice to Twentieth Century's attorney of the direct payment provisions in plaintiffs' contracts and was assured by him that Twentieth Century could and would 'hold up distribution of moneys to National' under its contract.

***502** Chemical Bank and Trust Company has refused to accept such funds as a distribution agent, and this contributed to the present ***401** controversy. Twentieth Century now holds a portion of the receipts deposited with defendant 'Chase National Bank' and threatens to distribute such receipts in disregard of plaintiffs' claims. Both National and Swarttz have refused to execute notices of irrevocable authority as required by their contracts.

In this action, plaintiffs seek a declaration of thier rights, the impression of a lien upon the receipts of the picture, a direction to pay to each of them a stated percentage of such receipts, an injunction prohibiting Twentieth Century from otherwise distributing them, an accounting and a money judgment for such sums as they claim are now due them. In addition, specific performance is sought of the agreements of National and Swarttz to execute and deliver the irrevocable notices. At Special Term, Twentieth Century's motion for summary judgment, or, in the alternative, for joinder of indispensable parties, was denied. The Appellate Division reversed on the law, and granted summary judgment without passing on the motion for joinder.

Both National and Swarttz are California corporations doing no business and having no assets in New York. They were served only in California and neither has appeared in this action, although the corporate defendant Swarttz has executed stipulations by Swarttz as president for extensions of time to answer. Other persons, whose contracts with Swarttz in regard to this picture entitle them to similar percentage payments as plaintiffs, have brought suit in California where their claims in some respects are said to conflict with those of plaintiffs.

In our opinion, Special Term was correct in denying defendants' alternative prayer for relief, viz., that assignees other than plaintiffs be brought into this action as indispensable parties. They are not such parties. Each of the plaintiffs in the case relies on a separate and distinct agreement. Even if we deemed them and other assignees as united in interest and conditionally necessary parties, they

are all without the jurisdiction of this State, and therefore are not required to be brought into this action, for it can effectively be disposed of without them (Civil Practice Act, s 194; Keene v. Chambers, 271 N.Y. 326, 3 N.E.2d 443; Howard v. Arthur Murray, Inc., 281 App.Div. 806, 118 N.Y.S.2d 677; Silberfeld v. Swiss Bank Corp., 266 App.Div. 756, 41 N.Y.S.2d 470; see China Sugar Refining Co. v. Anderson, Meyer & Co., 6 Misc.2d 184, 152 N.Y.S.2d 507). And so with the defendnats, National and Swarttz, plaintiffs' ***402** assignors (****391** Bergman v. Liverpool & London & Globe Ins. Co., 269 App.Div. 103, 54 N.Y.S.2d 204). *****503** Though also outside the jurisdiction of this State, they have nevertheless been named as parties defendnat in this action, have been served outside the State under the provisions of sections 232-235 of the Civil Practice Act, and are subject to an in rem judgment.

Since plaintiffs have no direct contractual relationship with Twentieth Century, they can prevail in their claim for direct payments only on the theory of an assumption of such an obligation by Twentieth Century or on the theory of an assignment from Swarttz and National. We see no merit whatever as to the first theory, for, whatever the law may be elsewhere (see Restatement, Contracts, s 164), it is well settled in this State that the assignee of rights under a bilateral contract does not become bound to perform the duties under that contract unless he expressly assumes to do so (Langel v. Betz, 250 N.Y. 159, 164, 164 N.E. 890, 892; Matter of Kaufman v. William Iselin & Co., 272 App.Div. 578, 581, 74 N.Y.S.2d 23, 25; Smith v. Morin Bros., 233 App.Div. 562, 564, 253 N.Y.S. 368, 370; Anderson v. New York & H. R. Co., 132 App.Div. 183, 187, 188, 116 N.Y.S. 954, 956, 957; New York Phonograph Co. v. Davega, 127 App.Div. 222, 234, 111 N.Y.S. 363, 371; 2 Williston on Contracts, s 418A), which is not this case.

As to the second ground pressed on us by plaintiffs, we conclude that Swarttz and National intended a present assignment to plaintiffs of a portion of the funds to become due to the former from Twentieth Century, and that such funds would ordinarily be assignable. Matter of Gruner, 295 N.Y. 510, 517, 518, 68 N.E.2d 514, 517, 518, 167 A.L.R. 628. All that was left for the future was the formality of a 'Notice' to Twentieth Century of the assignment. Such notice to the obligor is not required for an effective assignment, except to defeat a subsequent bona fide payment by the obligor (Williams v. Ingersoll, 89 N.Y. 508, 522; State Factors Corp. v. Sales Factors Corp., 257 App.Div. 101, 103, 12 N.Y.S.2d 12, 14).

The funds accruing to National under its contract with Twentieth Century, however, may be made nonassignable if that agreement in appropriate language so provides. We all agree with the Appellate Division that said contract does so provide and that Allhusen v. Caristo Const. Corp., 303 N.Y. 446, 103 N.E.2d 891, 37 A.L.R.2d 1245, is controlling here.

A prohibition against assignment, however, may be waived (Devlin v. Mayor of City of N. Y., 63 N.Y. 8, 14; Brewster v. City of Hornellsville, 35 App.Div. 161, 166, 54 N.Y.S. 904, 908; ***403** Hackett v. Campbell, 10 App.Div. 523, 526, 42 N.Y.S. 47, 49, affirmed 159 N.Y. 537, 53 N.E. 1125; see, also, Woollard v. Schaffer Stores Co., 272 N.Y. 304, 5 N.E.2d 829, 109 A.L.R. 1962; *****504** Gillette Bros. v. Aristocrat Restaurant, 239 N.Y. 87, 89, 90, 145 N.E. 748, 749; Murray v. Harway, 56 N.Y. 337, 342, 343; Ireland v. Nichols, 46 N.Y. 413, 416). The very wording of the clause that Twentieth Century 'shall not be required to' recognize assignments made without consent and 'shall have the right to withhold' payments indicates that the parties contemplated that Twentieth Century might recognize such assignments and thereby waive the anti-assignment clause. Waiver is 'the intentional relinquishment of a known right' (Werking v. Amity Estates, 2 N.Y.2d 43, 52, 155 N.Y.S.2d 633, 642). As we stated in Alsens Amer. Portland Cement Works v. Degnon Contr. Co., 222 N.Y. 34, 37, 118 N.E. 210: 'It is essentially a matter of intention. * * * Commonly, it is sought to be proved by various species of proofs and evidence, by declarations, by acts and by non-feasance, permitting differing inferences and which do not directly, unmistakably or unequivocally establish it. Then it is for the jury to determine from the facts as proved or found by them whether or not the intention existed.' ****392** See Devlin v. Mayor of City of N. Y., supra; Brewster v. City of Hornellsville, supra.

As to this issue of waiver, it appears from the papers that National's contract with Twentieth Century forbidding assignments was made in 1951, more than two years prior to the assignments in question; that Twentieth Century examined all the contracts here involved prior to accepting the picture from National in 1953, and consequently knew of the assignments to plaintiffs which it how alleges are a breach of its agreement with National; that, having examined these contracts, Twentieth Century was required by its agreement with National to notify National within 60 days if they were to be treated as a breach of the agreement; that Twentieth Century failed to so notify National; that Twentieth Century accepted the picture and exercised the rights created by the very contract which made the assignments to plaintiffs without notifying either plaintiffs or National of any intention to consider them void; that shortly after the picture was released, and after Chemical Bank refused to act as distributing agent, plaintiffs'

attorney spoke about the assignments to Twentieth Century's attorney, who not only evinced no objection at the time, but stated that Twentieth Century would withhold distribution of moneys to Natiaonal. ***404** While of course not decisive, these facts have an important bearing on the issue of waiver.

Rule 113 of the Rules of Civil Practice Provides that when an answer is served with a defense, sufficient as a matter of law, founded upon facts established prima facie by documentary evidence, 'the complaint may be dismissed on motion unless the plaintiff * * * shall show such facts as may be deemed by the judge hearing the motion, sufficient to raise an issue with respect to the verity and conclusiveness of such documentary evidence'. The Judge who heard this motion at Special Term ****505** concluded that the question of waiver raised a triable issue; so did two Justices of the Appellate Division; and so do we. To hold that there is a triable issue as to waiver does not, as our dissenting brethren claim, frustrate the plain purpose of the anti-assignment clause, except as the waiver of any contractual provision, clearly recognized by law, frustrates such provision; indeed, to hold as a matter of law that there was no waiver here would sharply depart from our established summary judgment procedure.

To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (Di Menna & Sons v. City of New York, 301 N.Y. 118, 92 N.E.2d 918). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (Braun v. Carey, 280 App.Div. 1019, 116 N.Y.S.2d 857), or where the issue is 'arguable' (Barrett v. Jacobs, 255 N.Y. 520, 522, 175 N.E. 275); 'issue-finding, rather than issue-determination, is the key to the procedure' (Esteve v. Abad, 271 App.Div. 725, 727, 68 N.Y.S.2d 322, 324). In Gravenhorst v. Zimmerman, 236 N.Y. 22, 38-39, 139 N.E. 766, 772, 27 A.L.R. 1465, Chief Judge Hiscock, writing for this court, observed that one person may argue that as matter of law the assignor abandoned and lost the benefit of his rescission, whereas another might think that was a question of fact, and concluded: 'It never could have been, or in justice ought to have been, the intention of those who framed our Practice Act and rules thereunder that the decision of such a serious question as this should be flung off on a motion for summary judgment. Whatever the final judgment may be the defendants were entitled to have the issue deliberately tried and their right to be heard in the usual manner of a trial protected.'

Inasmuch is it is our opinion, upon this record, that a triable issue is presented as to the alleged waiver of the anti-assignment ***405** clause, the judgment appealed from should be reversed and theorder of Special Term reinstated, with costs.

****393** FULD, Judge (dissenting).

Save for the issue of waiver, we we are all agreed that defendant Twentieth Century-Fox would be entitled to summary judgment dismissing the Complaint. On that question, too, I am persuaded, as was the Appellate Division, that no triable issue of fact is presented.

Plaintiffs are a few of a large number of artists and investors embroiled in a controversy with National Pictures Corporation and Berman Swarttz Productions over the distribution of profits from a motion picture released in 1954 and still being exhibited. The controversy is extensive ****506** and the disputants numerous. Some 17 other claimants, not parties to this action, have instituted suit in California and, according to the averment of the complaint in that California action, have assigned to the present plaintiffs different percentile shares of the profits than the latter now claim in the complaint before us. At any rate, in view of the inability of the parties to agree on their respective shares and in view of the consequent difficulty of distributing the profits as they are accumulated, at least one bank, the Chemical Bank and Trust Company, has refused to act as distributing agent. Plaintiffs now seek to foist this burden on Twentieth Century-Fox, the firm which distributed the film pursuant to a contract with Antional, on the theory that National assigned to the plaintiffs part of the payments due to it, in the proportions they claim.

I have no doubt, and, indeed, no one disputes, that it was to prevent entanglement in this very sort of controversy that Twentieth Century-Fox insisted, and explicitly provided in its contract with National, that it would not be 'required to recognize or accept any assignments'; that payments would be made only to National and to 'no other person'; that no right under the contract would 'devolve * * * upon any * * * other person through or as representative of either party'; and that 'neither party' would assign the agreement or any part of it 'or any rights or monies payable' under it 'without the prior written consent of the other'. Nevertheless, despite the admitted absence of such consent though the plaintiffs had ample opportunity to obtain it and, despite the fact that the plain and only purpose of the anti-assignment provisions would thereby be completely frustrated, plaintiffs urge ***406** that Twentieth Century-Fox must submit to the inconvenience, the expense and the uncertainty of a trial solely because it made no protest when it examined the contracts between plaintiffs and National or when it was told by plaintiffs' attorney of the assignments.

Allegations such as these, and they are the only ones made by plaintiffs, do not support the conclusion that a triable issue of fact is presented. That there was no 'protest' from the attorneys for Twentieth Century-Fox means nothing. Inquiry, to be meaningful, must go deeper: did that failure reasonably reflect an 'intentional relinquishment of a known right'? If it did not, then, there is no basis for either inference or finding of waiver. Werking v. Amity Estates, 2 N.Y.2d 43, 52, 155 N.Y.S.2d 633, 641; Alsens Amer. Portland Cement Works v. Degnon Contr. Co., 222 N.Y. 34, 37, 118 N.E. 210.

Courts are properly hesitant about frustrating contract provisions which prohibit assignment and, accordingly, the rule is settled that 'an estoppel or waiver must be established by the person claiming it by a preponderance of evidence, and neither an estoppel nor a waiver * * * ***507** can be inferred from mere silence or inaction.' Gibson Elec. Co. v. Liverpool & London & Globe Ins. Co., 159 N.Y. 418, 426-427, 54 N.E. 23, 26; see, also, Truglio v. Zurich Gen. Acc. & Liability Ins. Co., 247 N.Y. 423, 427, 160 N.E. 774. And, more to the point, the affirmative acts required to defeat a nonassignment clause by a finding of waiver have invariably been such as are unquestionably inconsistent with anything but recognition of the assignment as, for instance, making payment to the assignee **394 (see Hackett v. Campbell, 159 N.Y. 537, 53 N.E. 1125, affirming 10 App.Div. 523, 526, 42 N.Y.S. 47, 49; Devlin v. Mayor, etc., of City of New York, 63 N.Y. 8, 14) allowing the assignee to complete the job (see Brewster v. City of Hornellsville, 35 App.Div. 161, 166, 54 N.Y.S. 904, 907) or, in the case of a lease, receiving rents knowing that the assignee is in possession. See Woollard v. Schaffer Stores Co., 272 N.Y. 304, 312-313, 5 N.E.2d 829, 832, 109 A.L.R. 1262; Gillette Bros. v. Aristocrat Restaurant, 239 N.Y. 87, 89-90, 145 N.E. 748, 749.

Indeed, on facts far stronger than those asserted by plaintiffs, the courts have held, as a matter of law, that there was no waiver of the anti-assignment clause. See, e. g., Allhusen v. Caristo Constr. Corp., 5 Misc.2d 749-750, 166 N.Y.S.2d 109, 110, (per Botein, J.), affirmed 278 App.Div. 817, 104 N.Y.S.2d 565, affirmed 303 N.Y. 446, 103 N.E.2d 891; Concrete Form Co., etc. v. W. T. Grange Constr. Co., 320 Pa. 205, 181 A. 589; ***407** Joint School Dist. No. 2, etc. v. Marathon County Bank, 187 Wis. 416, 204 N.W. 471. In the Allhusen case, supra, 303 N.Y. 446, 103 N.E.2d 891, for instance, a contractor, the defendant, hired a subcontractor to do some painting work, thier contract providing that there was to be no assignment without the contractor's written consent. The subcontractor, nevertheless, made an asignment of amounts due to it as security for a loan, the assignee, a bank, being unaware of the provision against assignment. When the subcontractor later sought to secure a further loan, the bank discussed the assignment with the contractor's general manager. No protest was voiced and no word uttered about the invalidity of an assignment, and, on the strength of that conversation, the bank declared, it made additional loans secured by further assignments. The subcontractor thereafter became insolvent and the contractor, relying on the anti-assignment clause, refused to honor the assignments made to the bank. In the suit thereafter brought by the bank's successor, Special Term granted the contractor's motion for summary judgment dismissing the complaint. The court stressed the fact that there had been no written consent to the assignment and ruled, as a matter of law, that no waiver could be inferred from the circumstance that the contractor had failed to object to the assignment when he had been advised of it. The Appellate Division affirmed (***508** 278 App.Div. 817, 104 N.Y.S.2d 565) and so did we (303 N.Y. 446, 103 N.E.2d 891), although by the time the appeal reached us, the plaintiff, recognizing its weakness, had abandoned the argument of waiver.

The rightness of that result is reinforced and confirmed by cases decided in other jurisdictions. On facts even stronger than those in the Allhusen case, the highest courts of both Pennsylvania and Wisconsin have unanimously held, as a matter of law, that there was no waiver. (See Concrete Form Co. v. Grange Constr. Co., supra, 320 Pa. 205, 181 A. 589; Joint School Dist. v. Marathon County Bank, supra, 187 Wis. 416, 204 N.W. 471.) In the Pennsylvania case, which is particularly illuminating, an agreement between a contractor and a subcontractor provided that the latter would not 'assign any payments thereunder except by and in accordance with the consent of (the) contractor.' Without obtaining the requisite consent, the subcontractor executed an assignment of some of the moneys due it to a bank and the latter immediately notified the contractor by letter of the assignment, requesting an 'acknowledgment'. The contractor, ***408** acknowledging receipt of the letter 'concerning an assignment' confirmed the existence of the account, but said nothing about the anti-assignment clause. In reversing the trial court, which had held that the contractor's acknowledgment of the assignment constituted a waiver of the nonassignment provision, the Supreme Court decided that 'as a matter of law', there was no waiver (320 Pa. 208-209, 181 A. 590): 'This letter (acknowledging the assignment) did not constitute an unequivocal assent to the assignment. * * * There was no express consent; nor is there sufficient warrant for **395 any implication of the necessary assent. The original contract expressly forbade assignment. By that provision defendnat undoubtedly sought to provide against the introduction of one or more third parties * * *. Defendant wished to deal with its subcontractor and with it alone. Any waiver of that provision or consent to its violation would

have to be clear, distinct and unequivocal. Such is not the present case. The court below should have ruled as a matter of law that defendant did not consent to the assignment and could not, therefore, be held liable.' (Emphasis supplied.) Turning to the case before us, it is readily apparent that Twentieth Century-Fox also sought 'to provide against the introduction of * * * third parties,' that it wished, as it stated, to deal with National, and National alone, and that there is no 'clear, distinct and unequivocal' evidence of waiver. The Appellate Division was, therefore, eminently correct in holding that there was no basis for any claim of waiver. Let us dwell for a moment on the facts relied upon to spell out waiver. The papers which Twentieth Century-Fox examined, far from making any reference to assignment, actually directed attention to the very agreement ***509** between National and Twentieth Century-Fox which, in explicit terms, prohibited assignments.[1]

Moreover, that agreement, with all of its anti-assignment provisions, was actually attached to the contract which Berman Swarttz negotiated with National upon plaintiffs' instructions. And, in addition to that, the Swarttz-National agreement itself provided that it should not be construed as giving any right, legal or equitable, to third persons. In short, therefore, the papers examined, instead of informing Twentieth Century-Fox, as plaintiffs allege, that unless it protested it would be relinquishing **409** the anti-assignment provisions, really reaffirmed the vitality of those provisions. Surely, then, Twentieth Century-Fox's 'failure to protest' may not be regarded as evidence of an intention to waive. As earlier indicated, such an intent may only be predicated on action taken on the strength of known facts, and acts, to justify an inference of waiver, must be of an affirmative character, not mere silence or inaction. See, e. g., Gibson Elec. Co. v. Liverpool & London & Globe Ins. Co., supra, 159 N.Y. 418, 427, 54 N.E. 23, 26; Allhusen v. Caristo Constr. Corp., supra, 5 Misc.2d 749, affirmed 278 App.Div. 817, 104 N.Y.S.2d 565, affirmed 303 N.Y. 446, 103 N.E.2d 891; Emerson Radio & Phongraph Corp. v. Standard Appliances, 201 Misc. 821, 827, 112 N.Y.S.2d 615, 619.

Nor may any inference of waiver be said to flow from the fact that no objection was raised when, some time later, plaintiffs' attorney, in a conversation with counsel for Twentieth Century-Fox, advised him of the assignments. This is the same sort of inaction that has been held insufficient to establish waiver in precisely this type of case. See Allhusen v. Caristo Constr. Co., supra, 5 Misc.2d 749, affirmed 278 App.Div. 817, 104 N.Y.S.2d 565, affirmed 303 N.Y. 446, 103 N.E.2d 891; Concrete Form Co. v. Grange Constr. Co., supra, 320 Pa. 205, 181 A. 589; Joint School Dist. No. 2, etc. v. Marathon County Bank, supra, 187; Wis. 416, 204 N.W. 471. It is nowhere alleged that Twentieth Century-Fox or anyone on its behalf expressly waived the nonassignment provisions and, if plaintiffs wanted them waived, their attorney should have requested the requisite consent in writing. Having failed to obtain such consent, plaintiffs should not be permitted to involve Twentieth Century-Fox in a troublesome and expensive trial by simply alleging a waiver, without support (as I have demonstrated) of any fact sufficient in law to substantiate the allegation. To hold otherwise not only frustrates the plain purpose of the anti-assignment provisions but amounts to a **396** decided departure from our wise and established summary judgment procedure.

***510** I would affirm the Appellate Division determination granting summary judgment.

CONWAY, C. J., and VAN VOORHIS and BURKE, JJ., concur with FROESSEL, J.

FULD, J., dissents in an opinion in which DESMOND and DYE, JJ., concur.

Judgment of the Appellate Division reversed and the order of Special Term reinstated, with costs in this court and in the Appellate Division.

All Citations

3 N.Y.2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 498

Footnotes

1 Thus, plaintiffs had expressly authorized Berman Swarttz to arrange for the production of the film 'pursuant to' and 'under' the contract containing the non-assignment clauses.

Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 (1957)

144 N.E.2d 387, 165 N.Y.S.2d 498

19 N.Y.3d 46
Court of Appeals of New York.

Steven SIMKIN, Respondent,
v.
Laura BLANK, Appellant.

April 3, 2012.

Synopsis
Background: Ex-husband brought action against ex-wife, alleging causes of action for reformation of the parties' marital settlement agreement predicated on a mutual mistake, and unjust enrichment. The Supreme Court, New York County, Saralee Evans, J., granted ex-wife's motion to dismiss. Ex-husband appealed. The Supreme Court, Appellate Division, First Department, 80 A.D.3d 401, 915 N.Y.S.2d 47, reversed, but granted the ex-wife leave to appeal.

The Court of Appeals, Graffeo, J., held that ex-husband was not entitled to reformation of the marriage settlement agreement.

Reversed.

Attorneys and Law Firms

***223** Emery Celli Brinckerhoff & Abady LLP, New York City (Richard D. Emery and Adam R. Pulver of counsel), for appellant.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York City (Allan J. Arffa, Mark H. Alcott, William J. Taylor, Jr., and Susannah K. Howard of counsel), for respondent.

***49 OPINION OF THE COURT**

GRAFFEO, J.

****460** The primary issue before us is whether plaintiff has presented facts sufficient to support the reformation or setting aside of the parties' marital settlement agreement based on a claim of mutual mistake pertaining to an investment account. We conclude that plaintiff has failed to state a cause of action under CPLR 3211 and therefore dismiss the amended complaint.

Plaintiff Steven Simkin (husband) and defendant Laura Blank (wife) married in 1973 and have two children. Husband is a partner at a New York law firm and wife, also an attorney, is employed by a university. After almost 30 years of marriage, the parties separated in 2002 and stipulated in 2004 that the cut-off date for determining the value of marital assets would be September 1, 2004. The parties, represented by counsel, spent two years negotiating a detailed 22–page settlement agreement, executed in June 2006. In August 2006, the settlement agreement was incorporated, but not merged, into the parties' final judgment of divorce.

The settlement agreement set forth a comprehensive division of marital property. Husband agreed to pay wife $6,250,000 "[a]s and for an equitable distribution of property ... and in satisfaction of the Wife's support and marital property rights." In addition, wife retained title to a Manhattan apartment (subject to a $370,000 mortgage), an automobile, her retirement accounts and any "bank, brokerage and similar financial accounts in her name." Upon receipt of her distributive payment, wife agreed to convey her interest in the Scarsdale marital residence to husband. Husband received title to three automobiles ***50** and kept his retirement accounts, less $368,000 to equalize the value of the parties' retirement accounts. Husband further retained "bank, brokerage and similar financial accounts" that were in his name, two of which were specifically referenced—his capital account as a partner at the law firm and a Citibank account.

The agreement also contained a number of mutual releases between the parties. Each party waived any interest in the other's law license and released or discharged any debts or further claims against the other. Although the agreement acknowledged that the property division was "fair and reasonable," it did not state that the parties intended an equal distribution or other designated percentage division of the marital estate. The only provision that explicitly contemplated an equal division was the reference to equalizing the values of the parties' retirement accounts. The parties further acknowledged that the settlement constituted

> "an agreement between them with respect to any and all funds, assets or ****461** ***224** properties, both real and

> personal, including property in which either of them may have an equitable or beneficial interest wherever situated, now owned by the parties or either of them, or standing in their respective names or which may hereafter be acquired by either of them, and all other rights and obligations arising out of the marital relationship."

At the time the parties entered into the settlement, one of husband's unspecified brokerage accounts was maintained by Bernard L. Madoff Investment Securities (the Madoff account). According to husband, the parties believed the account was valued at $5.4 million as of September 1, 2004, the valuation date for marital assets. Husband withdrew funds from this account to pay a portion of his distributive payment owed wife in 2006, and continued to invest in the account subsequent to the divorce. In December 2008, Bernard Madoff's colossal Ponzi scheme was publicly exposed and Madoff later pleaded guilty to federal securities fraud and related offenses.

As a result of the disclosure of Madoff's fraud, in February 2009—about 2 ½ years after the divorce was finalized—husband commenced this action against wife alleging two causes of action: (1) reformation of the settlement agreement predicated on a mutual mistake and (2) unjust enrichment. The amended ***51** complaint asserts that the settlement agreement was intended to accomplish an "approximately equal division of [the couple's] marital assets," including a 50–50 division of the Madoff account. To that end, the amended complaint states that $2,700,000 of wife's $6,250,000 distributive payment represented her "share" of the Madoff account. Husband alleges that the parties' intention to equally divide the marital estate was frustrated because both parties operated under the "mistake" or misconception as to the existence of a legitimate investment account with Madoff which, in fact, was revealed to be part of a fraudulent Ponzi scheme. The amended complaint admits, however, that funds were previously " 'withdrawn' from the 'Account' " by husband and applied to his obligation to pay wife.

In his claim for reformation, husband requests that the court "determine the couple's true assets with respect to the Madoff [a]ccount" and alter the settlement terms to reflect an equal division of the actual value of the Madoff account. The second cause of action seeks restitution from wife "in an amount to be determined at trial" based on her unjust enrichment arising from husband's payment of what the parties mistakenly believed to be wife's share of the Madoff account. Wife moved to dismiss the amended complaint on several grounds, including a defense founded on documentary evidence (*see* CPLR 3211 [a] [1]) and for failure to state a cause of action (*see* CPLR 3211[a][7]).

Supreme Court granted wife's motion and dismissed the amended complaint. The Appellate Division, with two Justices dissenting, reversed and reinstated the action (80 A.D.3d 401, 915 N.Y.S.2d 47 [1st Dept.2011]). The Appellate Division granted wife leave to appeal on a certified question (2011 N.Y. Slip Op. 70450[U] [2011]), and we now reverse and reinstate Supreme Court's order of dismissal.

Wife argues that the Appellate Division erred in reinstating the amended complaint because the allegations, even if true, fail to appropriately establish the existence of a mutual mistake at the time the parties entered into their settlement agreement. Rather, she claims that, at most, the parties may have been mistaken as to the value of the Madoff account, but not its existence. Wife also contends that allowing husband's claims to go forward years ****462 ***225** after the division of property and issuance of a divorce decree would undermine policy concerns regarding finality in divorce cases. Husband responds that the amended complaint states a viable claim because the parties were both ***52** unaware and misled as to the legitimacy of the Madoff account, which, in husband's view, "did not in fact ever exist" due to the fraud occasioned on investors.

On a motion to dismiss under CPLR 3211, the pleading is to be given a liberal construction, the allegations contained within it are assumed to be true and the plaintiff is to be afforded every favorable inference (*see ABN AMRO Bank, N.V. v. MBIA Inc.,* 17 N.Y.3d 208, 227, 928 N.Y.S.2d 647, 952 N.E.2d 463 [2011]). At the same time, however, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration" (*Maas v. Cornell Univ.,* 94 N.Y.2d 87, 91, 699 N.Y.S.2d 716, 721 N.E.2d 966 [1999] [internal quotation marks omitted]). Moreover, a claim predicated on mutual mistake must be pleaded with the requisite particularity necessitated under CPLR 3016(b).

Marital settlement agreements are judicially favored and are not to be easily set aside (*see McCoy v. Feinman,* 99 N.Y.2d 295, 302, 755 N.Y.S.2d 693, 785 N.E.2d 714 [2002]; *Christian v. Christian,* 42 N.Y.2d 63, 71–72, 396 N.Y.S.2d 817, 365 N.E.2d 849 [1977]). Nevertheless, in the proper case, an agreement may be subject to rescission or reformation based on a mutual mistake by the parties (*see Matter of Gould v. Board of Educ. of Sewanhaka Cent. High School Dist.,* 81 N.Y.2d 446, 453, 599 N.Y.S.2d 787, 616 N.E.2d 142 [1993]; *Chimart Assoc. v. Paul,* 66 N.Y.2d 570, 573, 498 N.Y.S.2d 344, 489 N.E.2d 231 [1986]). Similarly, a release of claims may be avoided due to mutual

mistake (*see Centro Empresarial Cempresa S.A. v. América Móvil, S.A.B. de C.V.,* 17 N.Y.3d 269, 276, 929 N.Y.S.2d 3, 952 N.E.2d 995 [2011]). Based on these contract principles, the parties here agree that this appeal turns on whether husband's amended complaint states a claim for relief under a theory of mutual mistake.

We have explained that "[t]he mutual mistake must exist at the time the contract is entered into and must be substantial" (*Gould,* 81 N.Y.2d at 453, 599 N.Y.S.2d 787, 616 N.E.2d 142). Put differently, the mistake must be "so material that ... it goes to the foundation of the agreement" (*Da Silva v. Musso,* 53 N.Y.2d 543, 552, 444 N.Y.S.2d 50, 428 N.E.2d 382 [1981] [internal quotation marks and citations omitted]; *see also* 27 Lord, Williston on Contracts § 70:12 [4th ed.] ["The parties must have been mistaken as to a basic assumption of the contract ... Basic assumption means the mistake must vitally affect the basis upon which the parties contract"]). Court-ordered relief is therefore reserved only for "exceptional situations" (*Da Silva,* 53 N.Y.2d at 552, 444 N.Y.S.2d 50, 428 N.E.2d 382 [internal quotation marks omitted]). The premise underlying the doctrine of mutual mistake is that "the agreement as expressed, in some material respect, does not represent ***53** the meeting of the minds of the parties" (*Gould,* 81 N.Y.2d at 453, 599 N.Y.S.2d 787, 616 N.E.2d 142 [internal quotation marks and citations omitted]).

Although we have not addressed mutual mistake claims in the context of marital settlement agreements, the parties cite a number of Appellate Division cases that have analyzed this issue. Husband relies on *True v. True,* 63 A.D.3d 1145, 1146, 882 N.Y.S.2d 261 (2d Dept.2009), where the settlement agreement provided that the husband's stock awards from his employer would be "divided 50–50 in kind" and recited ****463 ***226** that 3,655 shares were available for division between the parties. After the wife redeemed her half of the shares, the husband learned that only 150 shares remained and brought an action to reform the agreement, arguing that the parties mistakenly specified the gross number of shares (3,655) rather than the net number that was actually available for distribution. The Second Department agreed and reformed the agreement to effectuate the parties' intent to divide the shares equally, holding that the husband had established "that the parties' use of 3,655 gross shares was a mutual mistake because it undermined their intent to divide the *net* shares available for division, 50–50 in kind" (*id.* at 1148, 882 N.Y.S.2d 261).

Other cases relied on by husband involve marital settlement agreements that were set aside or reformed because a mutual mistake rendered a portion of the agreement impossible to perform. In *Banker v. Banker,* 56 A.D.3d 1105, 870 N.Y.S.2d 481 (2008), the Third Department reformed a provision of a marital settlement that required the subdivision of a parcel of real property because the parties were unaware of a restrictive covenant against further subdivision. Similarly, in *Brender v. Brender,* 199 A.D.2d 665, 605 N.Y.S.2d 411 (1993), the Third Department set aside a settlement provision that allowed the wife to purchase health insurance through her husband's plan where both parties were mistaken in their belief that such coverage was available.

Wife in turn points to appellate cases denying a spouse's request to reopen a marital settlement agreement where the final value of an asset was not what the parties believed at the time of the divorce (*see Greenwald v. Greenwald,* 164 A.D.2d 706, 721, 565 N.Y.S.2d 494 [1st Dept.1991], *lv. denied* 78 N.Y.2d 855, 573 N.Y.S.2d 645, 578 N.E.2d 443 [1991] [stating that "posttrial changes in value may not be used to reallocate the distribution of marital assets"]). In *Kojovic v. Goldman,* 35 A.D.3d 65, 823 N.Y.S.2d 35 (2006), *lv. denied* 8 N.Y.3d 804, 831 N.Y.S.2d 106, 863 N.E.2d 111 (2007), for example, the First Department dismissed the wife's reformation and rescission claims where the husband unexpectedly sold his interest in a company for $18 million after the divorce. And in ***54** *Etzion v. Etzion*, 62 A.D.3d 646, 880 N.Y.S.2d 79 (2009), *lv. dismissed* 13 N.Y.3d 824, 890 N.Y.S.2d 437, 918 N.E.2d 950 (2009), the Second Department rejected the wife's mutual mistake claim where the market value of the husband's warehouse property substantially increased in value after the city adopted a rezoning plan subsequent to the parties' settlement.

Applying these legal principles, we are of the view that the amended complaint fails to adequately state a cause of action based on mutual mistake. As an initial matter, husband's claim that the alleged mutual mistake undermined the foundation of the settlement agreement, a precondition to relief under our precedents, is belied by the terms of the agreement itself. Unlike the settlement agreement in *True* that expressly incorporated a "50–50" division of a stated number of stock shares, the settlement agreement here, on its face, does not mention the Madoff account, much less evince an intent to divide the account in equal or other proportionate shares (*see Centro,* 17 N.Y.3d at 277, 929 N.Y.S.2d 3, 952 N.E.2d 995 [explaining that "courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include"] [internal quotation marks and citation omitted]). To the contrary, the agreement provides that the $6,250,000 payment to wife was "in satisfaction of ****464 ***227** [her] support and marital property rights," along with her release of various claims and inheritance rights. Despite the fact

that the agreement permitted husband to retain title to his "bank, brokerage and similar financial accounts" and enumerated two such accounts, his alleged $5.4 million Madoff investment account is neither identified nor valued. Given the extensive and carefully negotiated nature of the settlement agreement, we do not believe that this presents one of those "exceptional situations" (*Da Silva,* 53 N.Y.2d at 552, 444 N.Y.S.2d 50, 428 N.E.2d 382 [internal quotation marks omitted]) warranting reformation or rescission of a divorce settlement after all marital assets have been distributed.

Even putting the language of the agreement aside, the core allegation underpinning husband's mutual mistake claim—that the Madoff account was "nonexistent" when the parties executed their settlement agreement in June 2006—does not amount to a "material" mistake of fact as required by our case law. The premise of husband's argument is that the parties mistakenly believed that they had an investment account with Bernard Madoff when, in fact, no account ever existed. In ***55** husband's view, this case is no different from one in which parties are under a misimpression that they own a piece of real or personal property but later discover that they never obtained rightful ownership, such that a distribution would not have been possible at the time of the agreement. But that analogy is not apt here. Husband does not dispute that, until the Ponzi scheme began to unravel in late 2008—more than two years after the property division was completed—it would have been possible for him to redeem all or part of the investment. In fact, the amended complaint contains an admission that husband was able to withdraw funds (the amount is undisclosed) from the account in 2006 to partially pay his distributive payment to wife. Given that the mutual mistake must have existed at the time the agreement was executed in 2006 (*see Gould,* 81 N.Y.2d at 453, 599 N.Y.S.2d 787, 616 N.E.2d 142), the fact that husband could no longer withdraw funds years later is not determinative.[*]

This situation, however sympathetic, is more akin to a marital asset that unexpectedly loses value after dissolution of a marriage; the asset had value at the time of the settlement but the purported value did not remain consistent. Viewed from a different perspective, had the Madoff account or other asset retained by husband substantially increased in worth after the divorce, should wife be able to claim entitlement to a portion of the enhanced value? The answer is obviously no. Consequently, we find this case analogous to the Appellate Division precedents denying a spouse's attempt to reopen a settlement agreement based on post-divorce changes in asset valuation.

Finally, husband's unjust enrichment claim likewise fails to state a cause of action. It is well settled that, "[w]here the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded" (*IDT Corp. v. Morgan Stanley Dean* ****465 ***228** *Witter & Co.,* 12 N.Y.3d 132, 142, 879 N.Y.S.2d 355, 907 N.E.2d 268 [2009]).

Accordingly, the order of the Appellate Division should be reversed, with costs, the order of Supreme Court reinstated, and the certified question answered in the negative.

***56** Chief Judge LIPPMAN and Judges CIPARICK, READ, PIGOTT and JONES concur. Judge SMITH taking no part.

Order reversed, etc.

All Citations

19 N.Y.3d 46, 968 N.E.2d 459, 945 N.Y.S.2d 222, 2012 N.Y. Slip Op. 02413

Footnotes

[*] Husband notes in his brief that the Madoff account may, at a future point, have some value depending on how successful the trustee for the liquidation of Bernard L. Madoff Investment Securities is in recovering and distributing property to customers (*see In re Bernard L. Madoff Inv. Sec. LLC,* 654 F.3d 229 (2d Cir.2011)).

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161 A.D.2d 269
Supreme Court, Appellate Division, First Department, New York.

Oksana STASYSZYN, Plaintiff–Appellant,
v.
SUTTON EAST ASSOCIATES, et al., Defendants–Respondents.
SUTTON EAST ASSOCIATES, Third–Party Plaintiff–Respondent,
v.
NORDHEIMER BROTHERS COMPANIES, INC., Third–Party Defendant–Respondent.

May 8, 1990.

Synopsis

Tenant brought suit against her landlord and former landlords seeking to recover damages under a stipulation requiring that landlord restore her to her rooms at hotel within specified time. The Supreme Court, New York County, Davis, J., denied tenant's motion for summary judgment, and tenant appealed. The Supreme Court, Appellate Division, held that defense of legal impossibility did not excuse landlord's noncompliance with stipulation that it restore tenant, who temporarily vacated building during renovation, to her rooms at hotel within specified time where impossibility was result of revocation by government agency of permit to construct transient hotel after landlord determined that it would be economically disadvantageous for it to refurbish the premises in a manner mandated by the agency.

Reversed and remanded.

Attorneys and Law Firms

****298** J.F. Rose, for Oksana Stasyszyn.

G.M. Rosenberg, E. Greenberg, J. Zinns, for Sutton East Associates, et al.

G.M. Rosenberg, for Sutton East Associates.

E. Greenberg, for Nordheimer Bros. Companies, Inc.

Before KUPFERMAN, J.P., and ROSS, MILONAS, ASCH and ELLERIN, JJ.

Opinion

MEMORANDUM DECISION.

Order of the Supreme Court, New York County (William J. Davis, J.), entered on or about July 13, 1989, which, *inter alia,* denied plaintiff's motion for summary judgment, is unanimously reversed on the law to the extent appealed from, plaintiff's motion for summary judgment granted and the matter is remanded for an assessment of damages and a determination of the respective liability of the various defendants, with costs and disbursements.

Between 1970 and 1980, plaintiff was a hotel stabilized tenant at 330 East 56th Street in Manhattan. Defendants are three successive owners of the building. Defendant Sutton East Associates (SEA) purchased the premises in 1983 with the intention of renovating and converting the structure into a modern hotel facility. Thereafter, it undertook to vacate the building of its tenants and, in that connection, entered into a stipulation with plaintiff, dated August 23, 1984, pursuant to which she agreed to vacate temporarily her room during construction, withdraw various claims in exchange for which SEA would pay her the sum of $18,000 during each of the maximum of two years that she was not in possession of the premises and would restore her to designated rooms in the building not later than August 31, 1986. In addition, SEA ***270** stated that in the event it were to breach the terms of the agreement "by (1) failing to have [tenant's] rooms in a habitable condition and ready for occupancy by the dates set forth herein or (2) by failing to deposit the required sums in the escrow account of [SEA's] attorneys by the dates set forth herein or (3) by failing to deliver possession to [tenant] of the new rooms, by the dates set forth herein, then [SEA] agrees that the Sutton East Associates, a partnership, and the partners thereof shall be individually liable for any damages incurred by [tenant] as a result of said breach."

The interior of the hotel was subsequently demolished, but rehabilitation was never completed. Some eighteen months after executing the stipulation, and without having restored plaintiff to possession, SEA sold the building to defendant Sutton Hotel Associates (SHA). When SHA initially obtained ownership of the premises, it continued the interior demolition commenced by SEA. However, in January of 1987, SHA was served with a stop-work order by the Department of Buildings, and all rehabilitation work ceased. In July of 1988, SHA transferred the structure to defendant W.M. Associates, L.P. It is undisputed that the

building has never been renovated and remains uninhabitable. Plaintiff instituted ****299** the instant action for monetary damages and injunctive relief after it became evident that defendants were not going to render the hotel fit for occupancy so that she could resume residence therein. She then moved, in part, for summary judgment on the issue of liability in response to which defendants advanced a claim that compliance with the stipulation is a legal impossibility and that, moreover, the doctrine of laches is applicable based upon her failure to seek timely enforcement of her right, as of September 1, 1986, to recover possession of the premises in question. The current owner, W.M. Associates, also urges that it is not bound by any of the terms of the stipulation. There is no merit to any of defendants' claims, and plaintiff is entitled to summary judgment as to liability.

Contrary to the determination of the Supreme Court, there are no unresolved factual issues precluding summary judgment on the issue of liability. In that regard, the provisions of the stipulation are clear, and it is uncontested that defendants have failed to comply with their undertakings thereunder. Defendants assert that the revocation by the Department of Buildings of the permit to construct a transient hotel caused the stipulation to be impossible to perform. However, even if we were to accept as true SHA's conclusory allegations that it could not procure financing for the project in the form demanded ***271** by the Department of Buildings (that is, 49 percent hotel rooms, 51 percent apartments), the law is well-established that economic inability to perform contractual obligations, even to the extent of insolvency or bankruptcy, is simply not a valid basis for excusing compliance (*407 East 61st Garage, Inc. v. Savoy Fifth Avenue Corporation,* 23 N.Y.2d 275, 296 N.Y.S.2d 338, 244 N.E.2d 37; *A.W. Fiur Co., Inc. v. Ataka & Co., Ltd.,* 71 A.D.2d 370, 422 N.Y.S.2d 419; *Pettinelli Electric Co., Inc. v. Board of Education of the City of New York,* 56 A.D.2d 520, 391 N.Y.S.2d 118, *affd* 43 N.Y.2d 760, 401 N.Y.S.2d 1011, 372 N.E.2d 799). As the Court of Appeals observed in *407 East 61st Garage, Inc. v. Savoy Fifth Avenue Corporation, supra,* "[g]enerally, however, the 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" (23 N.Y.2d at 281, 296 N.Y.S.2d 338, 244 N.E.2d 37). The court specifically therein excluded financial difficulty or economic hardship as ever providing a ground to avoid compliance with a contract. In the present situation, SHA is not contending that it cannot obtain a permit from the Department of Buildings to renovate the building, but, rather, that it would be economically disadvantageous for it to refurbish the premises in the manner mandated by that agency. Yet, absent an express contingency clause in the agreement allowing a party to escape performance under certain specified circumstances, compliance is required even where the economic distress is attributable to the imposition of governmental rules and regulations or the inability to secure financing (see *Ogdensburg Urban Renewal Agency v. Moroney,* 42 A.D.2d 639, 345 N.Y.S.2d 169). Consequently, no viable question of fact has been raised with respect to any defense of legal impossibility.

There is, similarly, no substance to any of defendants' other arguments. Paragraph 17 of the stipulation states that "[t]his agreement is binding upon [SEA], all real parties in interest, all heirs, successors and assigns, and [SEA] warrants that should it relinquish or forfeit title to the hotel premises that it is obliged to give notice of this agreement to any subsequent, purchasers, mortgagors or other persons or entities with right, title or claim to an interest in the premises, and that it shall give immediate notice to [tenant's] attorney of any contract for sale of the premises." Moreover, SEA committed itself in paragraph 6 to "execute simultaneous with the execution of this agreement a duly acknowledged, rent stabilized standard form apartment lease between it and [tenant] for the new rooms at the hotel" and also to record this lease with the City Register. According to the Court of Appeals in *Orange and Rockland Utilities, Inc. v. Philwold Estates, Inc.,* 52 N.Y.2d 253, 437 N.Y.S.2d 291, 418 N.E.2d 1310, ****300** "[w]hether a covenant restricting real property is personal or runs with the land depends upon three factors: (1) whether ***272** the parties intended its burden to attach to the servient parcel and its benefit to run with the dominant estate, (2) whether the covenant touches and concerns the land, and (3) whether there is privity of estate" (at 262, 437 N.Y.S.2d 291, 418 N.E.2d 1310). Since the stipulation specifically declares that the instrument is to be binding on all subsequent purchasers, there can be no doubt that the first criterion is clearly met. Further, the burden imposed on the real property was to make the premises habitable and to restore plaintiff to possession so the covenant certainly concerns the property. Finally, there is a direct succession of conveyances from SEA to SHA to W.M. Associates such that there exists the necessary privity of estate. Indeed, in *Arroyo v. Marlow,* 122 A.D.2d 821, 505 N.Y.S.2d 892, which involves facts almost identical to those herein, the court found that there was privity between plaintiffs-tenants therein and defendant who had acquired the premises from the third-party defendants, and, thus, the covenant ran with the land. In any event, "the transferee of real property takes the premises subject to the conditions as to tenancy ... if the transferee has notice of the existence of the leasehold", and "possession of premises constitutes constructive notice to a purchaser of the rights of the possessor" (*52 Riverside Realty Company v. Ebenhart,* 119 A.D.2d 452, 453, 500 N.Y.S.2d 259; see also *Bank of New York, Albany v.*

Hirschfeld, 37 N.Y.2d 501, 374 N.Y.S.2d 100, 336 N.E.2d 710). Accordingly, neither SHA nor W.M. Associates may disclaim liability for a breach of the stipulation. As for defendants' claim of laches, it need only be noted that a party may, at its option, seek relief by either motion interposed in the underlying action or by a plenary action grounded upon the stipulation (*Teitelbaum Holdings, Ltd. v. Gold,* 48 N.Y.2d 51, 55, 421 N.Y.S.2d 556, 396 N.E.2d 1029). Since it is doubtful that plaintiff herein would have been able to obtain full redress for her damages pursuant to a proceeding to recover possession of the premises, her decision to commence the instant action rather than return to Civil Court is entirely reasonable. At any rate, the choice is hers, and she is not barred by *res judicata, collateral estoppel* or the statute of limitations from maintaining this action. Defendants, therefore, have failed to demonstrate any sort of laches.

Plaintiff's right to monetary damages and/or injunctive relief as a result of defendants' breach of the stipulation is evident, and the Supreme Court should have granted her motion for summary judgment on the issue of liability. This matter should, thus, be set down for an inquest at which her damages and, if appropriate, other remedies should be calculated, and defendants' respective responsibility should also be apportioned between them. Certainly, defendants' various liabilities ***273** do not impinge upon plaintiff's right to recovery and are merely questions to be determined as between them.

All Citations

161 A.D.2d 269, 555 N.Y.S.2d 297

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47 Misc.3d 1222(A)
Unreported Disposition
(The decision is referenced in the New York Supplement.)
Supreme Court, Orange County, New York.

Pat TORPEY and Steve Delcorso, Plaintiff-, Respondents,
v.
TJ REALTY OF ORANGE COUNTY INC., and Thomas Leisman, Defendants.

No. 2850/2013.
|
May 19, 2015.

Attorneys and Law Firms

Levinson, Reineke & Ornstein, P.C., Central Valley, for Defendants.

Ostrer & Associates, P.C., Chester, for Plaintiffs.

Opinion

JOHN P. COLANGELO, J.

***1** The following papers were read on the Defendants' motion for summary judgment and Plaintiffs' cross-motion to strike Defendants' answer or alternatively, for an order of preclusion or conditional preclusion subject to Defendants' compliance with court-ordered discovery:

Notice of Motion, Affidavit, Affirmation–Exhibits A–F 1–18

Notice of Cross–Motion, Affirmation, Affidavit, Exhibits A–H,

Memorandum of Law in Support of Cross–Motion, ... 19–46

Affidavit, Affirmation in Support of Motion for Summary Judgment 47–56

Plaintiffs' Reply Memorandum of Law 57–61

Inducement, Unjust Enrichment, Reformation, Rescission, and Violation of General Business Law § 349.

Factual and Procedural Background

The above-captioned action was commenced by plaintiffs/tenants Pat Torpey and Steve Delcorso ("Plaintiffs" or "Tenants") against Defendants TJ Realty of Orange County, Inc. ("TJ Realty") and its President, defendant Thomas Leisman ("Leishman", as used by Defendant) (collectively "Defendants" or the "Landlord") by summons and complaint filed on April 4, 2013. The complaint sets forth five causes of action: Fraudulent

The action arises from a lease entered into between Plaintiffs and Defendants in March 2012 (the "Lease") for a restaurant and bar located in Highland Mills, New York that had been operated by Defendants for several years as the Savory Grill Restaurant. (The "Premises") (See Lease, Exhibit D to Defts. Motion). The effective date of the Lease was April 1, 2012; the Lease is for a five year term, with two five-year renewal options as well as a purchase option. According to the terms of the Lease, Plaintiffs are obligated to pay an annual minimum rent of $60,000.00 (Lease ¶ 2),

and are permitted to make reasonable alterations of and additions to the Premises as long as such alterations or additions did not change the general character or reduce the fair market value of the Premises. Plaintiffs are required to obtain the written consent of the Defendants as well as meet other conditions if the estimated cost of such alterations or additions exceeds $10,000.00.(Lease ¶ 7). Plaintiffs' intended use of the Premises was expressly stated as follows: "Lessee covenants that the Demised Premises shall be used solely for **A RESTAURANT WITH ON PREMISE LIQUOR LICENSE** and for no other purpose, unless approved in writing by Lessor." (*Id.* ¶ 4; emphasis in original).

The fulcum of this action is Plaintiffs' claim that they were fraudulently induced to enter into the Lease by virtue of Defendants alleged knowing and deliberate concealment of certain claimed New York State Liquor Authority ("SLA") violations that had been issued against Defendants during Defendants' operation of the Premises (See Complaint, ¶¶ 34–38). The SLA mailed a written notice dated August 10, 2012 to Leishman concerning pending cancellation/revocation proceedings based upon violations that allegedly occurred on or before November 3, 2011. (See Exh. H. To Pls. Cross–Motion). Plaintiffs maintain that Leishman knew of such charges prior to the execution of the Lease. As a result of such SLA proceedings, a final order of cancellation of Defendants' liquor license for the Premises was eventually issued, effective March 13, 2013. (see Defts. Exhibit F). It is undisputed that the pendency of such revocation proceedings against Defendants was the reason behind the denial by the SLA licensing board of Plaintiffs' application for a Temporary Retail Liquor Permit on January 17, 2013. (See Deft. Exhibit E).

***2** While the instant action was pending, Defendants filed a notice of petition and petition dated May 17, 2013 in the Town of Woodbury Justice Court (the "May 2013 *Woodbury* Proceeding") seeking possession of the Premises, a judgment in the amount of $16,500.00 and a final judgment of eviction. Defendants agreed to withdraw the May 2013 *Woodbury* Proceeding and consolidate the claims therein with the instant, previously commenced Supreme Court action. Defendants then filed an answer to the summons and complaint herein, and interposed a counterclaim for unpaid rent, to which Plaintiffs filed a reply. (Plaintiffs' Exhibit A).

Thereafter, on February 27, 2014 and notwithstanding the previous discontinuance of the May 2013 *Woodbury* Proceeding, Defendants again served Plaintiffs with a notice of petition and petition in the Town of Woodbury Justice Court for non-payment of rent, termination of the lease and eviction of Plaintiffs from the premises. (The "2014 *Woodbury* Proceeding"; see Exhibit J to Plaintiffs' Exhibit A). Plaintiffs promptly moved in this Court by Order to Show Cause to remove the 2014 *Woodbury* Proceeding to this Court and to consolidate it with this action. The Court granted Plaintiffs' motion by Order dated May 12, 2014 (the "Order," annexed as Exh. B to Plaintiffs Cross–Motion). The Order further directed Plaintiffs to pay Defendants $7,500.00 on or before April 8, 2014 to be credited against any arrears alleged to be owed, and to thereafter make monthly payments of $3,000.00 to Defendants during the pendency of this action. Plaintiffs were also directed to provide proof of insurance for the Premises on or before May 1, 2014.

By the instant Motion, Defendants seek summary judgment dismissing the Complaint and an order directing a trial on Defendants' counterclaims. Plaintiffs opposed Defendants' motion and interposed a Cross–Motion pursuant to CPLR 3126 to strike Defendants' Answer, preclusion, or in the alternative, to compel Defendants to comply with Plaintiffs' discovery requests.

In opposing Defendants' motion, Plaintiffs rely in large part upon the affidavit of Plaintiff Steve Delcorso submitted in March 2014 in the context of the 2014 *Woodbury* Proceeding and support of Plaintiffs' Order to Show Cause to remove and consolidate (the "Delcorso Affid."), and the Affidavit of Plaintiff Pat Torpey, submitted in January 2015 in connection with Plaintiffs' instant Opposition and Cross–Motion. (the "Torpey Affid."). According to the Delcorso Affidavit, Plaintiffs received a letter from the SLA dated January 17, 2013 denying their application for a liquor license. (Delcorso Affid. ¶¶ 8–9). Plaintiffs claim that they then learned—for the first time—about the Defendants' alleged SLA violations and the possibility that Defendants' liquor license could be revoked which carried with it the potential inability of Plaintiffs to obtain their own license for at least two years. Plaintiffs fears were realized, but only in part; although Leishman pleaded "no contest" to the SLA charges on January 21, 2013, his liquor license for the Premises was cancelled and not revoked (see Exhibit F to Defts. motion); Plaintiffs were thereafter issued their own liquor license but not until June 10, 2013—over one year after the Lease was signed.

***3** Plaintiffs contend, in essence, that Defendants wrongfully failed to advise Plaintiffs before they signed the Lease of the pending charged SLA violations from November 2011. Plaintiffs also claim that Defendants concealed or misrepresented material facts relating to the condition of the Premises.

The Instant Complaint.
Plaintiffs first cause of action is for fraudulent inducement. Plaintiffs allege that Defendants, by their conduct and by omission, intentionally concealed from Plaintiffs the issuance of potential SLA violations and the pending revocation/cancellation proceeding against Defendants, thereby inducing Plaintiffs to enter into the Lease—a Lease, which by its terms, contemplated the operation of a "Restaurant With on Premises Liquor License" privileges. Plaintiffs also allege that Defendants' failure to disclose the true, tawdry condition of the Premises also wrongfully induced them to enter into the Lease and ultimately required them to make unanticipated and extensive improvements. By their second cause of action, Plaintiffs allege that Defendants have been unjustly enriched by Defendants' fraudulent conduct. The third and fourth causes of action seek relief in the form of reformation and rescission of the Lease in the event that Plaintiffs were to prove unable to obtain a liquor license for the Premises. Finally, for a fifth cause of action, Plaintiffs assert that Defendants engaged in deceptive acts or practices in violation of § 349 of the General Business Law. The relief demanded in the Complaint includes a money judgment for rent paid, lost profits, payment for costs of repairs and improvements, abatement of rent, reformation of the lease, recision of the lease and/or restoration of the *status quo* which existed prior to execution of the lease.

Defendants' Motion
By their motion, Defendants seek to dismiss the Complaint and demand a trial on their counterclaims for unpaid rent and eviction of Plaintiffs from the Premises. In support of their motion, Defendants submit the affidavit of Thomas Leishman, a named co-Defendant and President and 50% stockholder of TJ Realty. (Affid. of Thomas Leishman In Support of Defendants' Summary Motion to Dismiss the Complaint, sworn to on November 25, 2014 (the "Leishman Affid.").

In his Affidavit, Leishman denies that Plaintiffs were expressly told that no SLA violations were pending, and correctly points out that the Lease is silent as to whether any SLA violations were extant. Leishman disdainfully added that P]laintiffs' "failure to look into my violation history, *which I even told them about,* or to determine a reasonable time frame for obtaining the license was just another example of their incompetence." (See Leishman Affid. ¶ 10; emphasis added). Leishman contends that he was contacted by the SLA and issued the initial violation—his "first violation in approximately fifteen years in business"—"[j]ust prior to signing the Lease," and further states that he contested the violations and "immediately advised Plaintiffs of the circumstances" (*Id.* ¶ 6). It should be noted, however, that whether Leishman advised Plaintiff of the cited SLA violations before or after the Lease was signed remains unclear. Leishman goes on to maintain that as soon as he "became aware of the problem the alleged violations on the license caused," he pled "no contest" to the violations and accepted the lesser penalty of license cancellation. Plaintiffs "were then able to obtain a license a few months later." (Leishman Affid. ¶ 12). Leishman essentially concedes that had the license been revoked instead of cancelled, the consequences to Plaintiffs would likely have been more dire. (*Id.*).

***4** While Leishman claims that he told Plaintiffs of the charged violations, he further contends that even if he had remained silent or had lied, Plaintiffs cannot establish the essential element of reliance since "my liquor license violation history was readily available to the public". (*Id.* ¶ 14). Put simply, Leishman contends that Plaintiffs failed to do their homework. Defendants argue that Plaintiffs relied upon Defendants' silence or, at worst, misstatements at their own peril, since they could have and should have, at minimum, conducted a "basic internet search" or placed "a simple telephone call to the [SLA]," either of which would have revealed the Premises' violation history." (*Id.* ¶ 14).

Similarly, Leishman maintains that Plaintiffs were free to and did fully inspect the Premises prior to the execution of the Lease and therefore had no right to rely on any alleged misrepresentation regarding its condition (Leishman Reply Affid., sworn to Feb. 3, 2015, ¶¶ 10–11). With respect to the improvements to the Premises made by Plaintiffs, Defendants also maintain that since the cost of such improvements exceeded $10,000.00 and were not approved by Defendants, they were made in violation of the Lease and therefore no reimbursement to Plaintiffs is due. According to the Leishman Affidavit, "TJ Realty never received a request for consent to due [sic] any improvements on the property, as is required by the terms of the lease. All of the alleged improvements were done without my knowledge and consent." (Leishman Affid. ¶ 15).

In short, Defendants' contend that the terms of the Lease effectively eliminate all material issues of fact and mandate judgment in their favor as matter of law. Defendants claim that Plaintiffs should have exercised due diligence and researched the Premises' SLA violation history, particularly in light of the disclaimer in paragraph 5 of the Lease, *Condition of Demised Premises* which states that

"Lessor makes no representation or warranty, express or implied in fact or by law, as to the nature or condition of the Demised Premises, or its fitness or availability for any particular use, or the income from or expenses of operation of the Demised Premises." Similarly, Defendants maintain that despite the fact that the Lease clearly requires Plaintiffs to make all of the repairs on the Premises and Plaintiffs visited the property on at least four occasions, they never hired an engineer or other professionals to inspect the property and made no effort to ascertain what repairs were necessary at any time before the Lease was signed. (Leishman Reply Affid. ¶ 11).

In opposing Defendants' motion for summary judgment, Plaintiffs contend that Leishman never disclosed the SLA violations pending against him and the possible impact of such violations on the sole use of the Premises—a restaurant with an on-premise liquor license—as clearly stated in the Lease. Contrary to Leishman's assertion that he was contacted by the SLA shortly before signing the lease in March 2012, Plaintiffs refer to the SLA Notice of Pleading against him entitled "In the Matter of Proceedings to Cancel or Revoke" [Defendants' License] (Pls.Exh.H) which reflects that the Premises were cited by the SLA several months earlier for violations that occured on or before November 3, 2011. (Torpey Affid. ¶ 6–7). Thus, Plaintiffs contend that Leishman was notified that such violations were pending four months prior to Plaintiffs execution of the lease and during ongoing lease negotiations.

***5** According to the Torpey Affidavit and contrary to Leishman's assertion, while Leishman did explicitly tell Plaintiffs that he had a valid liquor license for the Premises and showed the license to Plaintiffs, he did not mention the pending violation proceeding at any time before the Lease was executed. (See Torpey Affid. ¶ 4). To the contrary, before the signing of the Lease, Plaintiffs claim that Leishman represented to them that the restaurant was "turn key", that everything was "perfect" and ready to go, and he hoped [Plaintiffs] could "live up to [his] reputation." (*Id.* ¶ 10). However, according to Torpey, the Premises were hardly in move-in condition. Aside from the liquor license issue, when Plaintiffs took possession, they learned that telephone and cable bills were delinquent which required Plaintiffs to change carriers in order to have any telephone and television service; the electric bill was delinquent, requiring Plaintiffs to tender a deposit on the amount of $25,000.00 to obtain electricity; there were delinquent bills with various suppliers; (*id.* ¶ 11); and, the septic tank was inoperable, requiring excavation of the sewer main to remove and replace the sewer line. (*Id.* ¶ 12). Plaintiffs annexed to their papers a "List of Improvements to Restaurant", which itemizes the work done which, they claim, further demonstrate that the restaurant could not have been opened and operated on a full time basis at the time the Lease was signed. (*Id.* ¶ 15).

Legal Analysis.

CPLR § 3212(b) states in pertinent part that a motion for summary judgment "shall be granted if, upon all of papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."

In *Andre v. Pomeroy,* 35 N.Y.2d 361, 364 (1974), the Court of Appeals held that:

"Summary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law ... [W]hen there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated."

The law is clear that "[t]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York University Medical Center,* 64 N.Y.2d 851, 853 (1985); *Ayotte v. Gervasio,* 81 N.Y.2d 1062, 1063 (1993); *S.J. Capelin Associates, Inc. v. Globe Manufacturing Corp.,* 34 N.Y.2d 338, 341 (1974). *Finkelstein v. Cornell University Medical College,* 269 A.D.2d 114, 117 (1st Dept.2000). Once the moving party has sustained his burden of making a *prima facie* showing of entitlement to summary judgment, the burden shifts to the opposing party to "produce evidentiary proof in admissible form" sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 (1980). Failure of the proponent of a motion for summary judgment to make a *prima facie* showing of entitlement requires denial of the motion, regardless of the sufficiency of the opposing papers. *Winegrad v. New York University Medical Center,* 64 N.Y.2d 851, 853 (1985).

***6** In this case, Defendants have made a *prima facie* showing of entitlement to summary judgment on the first and second causes of action set forth in the complaint. However, Plaintiffs have produced evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial on those causes

of action. The Affidavits of Torpey and Delcorso raise material issues of fact as to whether and to what extent Defendants misrepresented or concealed essential and material facts regarding SLA cancellation/proceedings that potentially placed in jeopardy Plaintiffs' ability to obtain a liquor license, as well as delinquency of bills and code violations which necessitated extensive expenditures, all of which were allegedly relied upon by Plaintiffs to their detriment. Where a complaint states a case of action for fraud, the parole evidence rule is not a bar to showing the fraud, either in the inducement or execution, despite a statement in the writing that no representations have been made. *O'Keefe v. Hicks,* 74 A.D.2d 919 (2d Dept.1980). By the same token, the affidavits of Plaintiffs raise material issues of fact as to whether Defendants have been unjustly enriched as a result of their misrepresentations or concealment of essential facts, and whether Plaintiffs are entitled to damages.

Accordingly, Defendants' motion for summary judgment is denied with respect to the causes of action for fraudulent inducement and unjust enrichment. However, Plaintiffs remaining causes of action—for rescission, reformation and violations of GBL § 349—cannot pass muster.As far as Plaintiffs' reformation and rescission claims are concerned, since Plaintiffs have now obtained a liquor license, the causes of action for reformation and rescission—which are predicated upon a potential failure to do so because of Defendants' conduct (Complaint, ¶¶ 45–54)—now appear to be moot. In addition, by remaining in the Premises, Plaintiff essentially affirmed the Lease and thereby undermined any potential rescission or reformation claim. Where, as here, a tenant claims that it was fraudulently induced to enter into a lease, the law is clear that such tenant then has a decision to make: the tenant may elect to affirm the lease, remain in the premises while adhering to its terms and seek damages caused by the alleged fraud; or the tenant may elect to vacate the premises and seek rescission of the lease and damages. As a leading treatise, Rasch's *Landlord and Tenant,* Vol. 1 (4th Ed.1998), pp. 115–116 states:

"A tenant who has been induced to enter into a lease by fraudulent misrepresentations has a choice of remedies. He may disaffirm or rescind the lease. Upon rescission, he ceases to be obligated to pay any rent accruing after the rescission. He also may recover such moneys as he may have paid under the lease, such as deposit monies, rents, and the like, as a consequence of the fraudulent acts of the landlord, as moneys had and received. *But a tenant cannot rescind the lease upon the ground of fraud, where he fails to promptly surrender possession of the property upon the discovery of the fraud, If he continues the use and occupancy of the premises received under the lease, he will be deemed to have elected to affirm the lease. His remedy thereafter, if, any, is to recover damages suffered as a result of the fraud.*" (Emphasis added). *See, e.g. Stayton Realty Corp. v. Rhodes,* 200 A.D.108 (1st Dept.); *aff'd,* 234 N.Y. 515 (1922); *Cochran v. Scherer,* 117 Misc. 765, 771 (Mun. Ct., NYC 1922). (The Court granted summary judgment to plaintiff landlord and dismissed tenant's defense of fraud since "defendant is still in possession of the premises. If he desired to claim fraud and for that reason repudiate or rescind the lease, he should have promptly on the discovery of the fraud surrendered possession of the property. This, however, the defendant failed to do but continued in physical possession of the premises long after the alleged fraud was discovered."); *McKeever v. Aronow,* 194 N.Y.S. 475 (Appel.Term, 1st Dept.1922) ("A party, while he may retain possession and obtain his damages for fraud, cannot rescind while retaining the fruits of the contract."); *Gould v. Cayuga County National Burke,* 86 N.Y. 75, 82 (1881).

***7** Put simply, Plaintiffs Tenants herein cannot have it both ways. In the instant case, as in *Cochran,* and as stated in *Rasch,* since Plaintiffs remain in possession, they have elected to affirm the lease and seek damages. Since they are enjoying the benefit of remaining in the Premises—deficient as they may allegedly be—and operating their restaurant, they must bear the burden of complying with the Lease while suing for compensatory damages. Accordingly, during the pendency of this action, Plaintiffs are required to abide by the Lease's terms, including their obligation to pay to Defendants the monthly rent due under the Lease—here, $5,000.00 per month. Payment in that amount is to be made by Plaintiffs to Defendants on a monthly basis beginning on June 15, 2015 and continuing thereafter until further order of the Court. Such payments are in lieu of the $3,000 per month payment which the Court directed Plaintiffs to pay in its March 2014 Order, and such Order is revised accordingly.

Finally, Plaintiffs' fifth cause of action based upon § 349 of the General Business Law is also meritless. General Law Business Law Section 349—essentially a consumer protection statute—is inapposite in situations, such as the instant case, which involve an isolated commercial transaction between two parties operating at arms length. As the Federal District Court held in denying a commercial defendant's attempt to invoke BGL § 349 in *Wells Fargo Bank Northwest, N.A. v. Taca International Airlines, S.A.,* 247 F.Supp.2d 352, 371 (S.D.NY 2002):

"Defendants final counterclaim maintains that Wells Fargo and C–S Aviation violated New York's consumer protection law, *NY Gen. Bus. Law § 349(a),* which prohibits "deceptive acts or practices in the conduct of any

business, trade or commerce or in the furnishing of any service in this state," and which does not require reasonable reliance.

* * * *

To establish a claim under *NY Gen. Bus. Law § 349(a),* a plaintiff must, *at a minimum plead and prove that the conduct at issue is consumer-oriented. Oswego Laborers' Local 214 v. Marine Midland Bank,* 85 N.Y.2d, 20, 25, 623 N.Y.S.2d 529, 647 N.E.2d 741 (1995) ... In other words, the typical violation contemplated by the statute involves an individual consumer who is misled by a seller of consumer goods, usually by way of false and misleading advertising. *The statute's concern with individual consumers is further evidenced by the remedies the statute provides, the derivation of the statute, and the case law, which demonstrates that successful plaintiffs are uniformerly those that bring claims involving recurring transactions where the amount in controversy is small and holds that business competitors have standing to rely on the statute only if they can prove that there has been harm to the public at large. Securitron Magnalock v. Schnablock,* 65 F.3d 256, 264 (2d Cir.1995).

Defendants' claims cannot meet this standard. The transaction described in the instant claims is between two business, for a limited number of specifically-negotiated transactions for substantial amounts of money." (Emphasis added). See also, *e.g., Oswego Laborers' Local 214 v. Marine Midland Bank,* 85 N.Y.2d 20, 25 (1995).

***8** As in *Wells Fargo,* the instant case involves an isolated business transaction, not repetitive consumer sales. Accordingly, GBL § 349 does not apply as a matter of law and Plaintiff fifth cause of action must be dismissed.

Plaintiffs' Cross–Motion

As far as Plaintiffs' cross-motion is concerned, this Court issued a disclosure order at the compliance conference held on January 12, 2015. (see Exhibit E). According to the Moving Affirmation submitted by the attorney for Plaintiffs, David L. Darwin, "discovery demands were served upon Defendants on July 17, 2014 in compliance with the discovery order, together with a cover letter containing [P]laintiffs' disclosure of statements, witnesses and photographs." (*Id.* ¶ 7). Defendants have neither requested an extension of time to respond to Plaintiffs demands nor objected to any of the demands. (*Id.* ¶ 10). Accordingly, Plaintiffs' cross-motion is granted to the extent that Defendants are ordered to respond to Plaintiff's disclosure requests within 45 days of the date of this decision. Should Defendants fail to do so, the Court will impose the appropriate relief under CPLR 3126 which may include striking Defendants' Answer or precluding Defendants from presenting evidence on any matter to which they fail to respond. For the same reasons, Defendants Motion for an immediate trial with respect to its counterclaims is denied without prejudice, and may be renewed by Defendants following completion of discovery.

Any issue not specifically addressed herein is denied. The parties are directed to appear on June 23, 2015 at 9:30 A.M. for a scheduling conference.

The foregoing constitutes the decision and order of this Court.

All Citations

47 Misc.3d 1222(A), 17 N.Y.S.3d 386 (Table), 2015 WL 2401237, 2015 N.Y. Slip Op. 50746(U)

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4 Misc.3d 1026(A)
Unreported Disposition
(The decision of the Court is referenced in a table in the New York Supplement.)
Supreme Court, New York County, New York.

TRINITY CENTRE, LLC, Plaintiff,
v.
WALL STREET COR RESPONDENTS, INC., Defendant.
Trinity Centre, LLC, Plaintiff,
v.
Markus Koch, Defendant.

No. 113287/02.
|
Aug. 9, 2004.

Attorneys and Law Firms

Pryor Cashman Sherman & Flynn Llp, Todd E. Soloway, Esq., Mark A. Tamoshunas, Esq., New York, attorneys for plaintiff.

Alfred W. Charles, Esq., New York, attorney for defendants.

ROLANDO T. ACOSTA, J.

Background[1]

***1** Wall Street Correspondents ("WSC") is a media company providing media coverage from the New York financial markets for German and Swiss television, radio and print media. Markus Koch is the president of WSC. WSC had its office at 55 Broadway, but was looking to expand its business. On August 4, 2000, WSC entered into a five year lease to commence on October 15, 2000, with the owners of 111 Broadway, for commercial space on the 17th floor; the new space was about twice the size of the space at 55 Broadway. Subsequent to the signing of the lease, Trinity Centre became the owners of 111 Broadway. On the same day WSC entered into the lease, Koch executed a guaranty of WSC's obligations under the lease through and including the vacate date. It was WSC's intention to sublet their space at 55 Broadway, but was unable to do so. Consequently, WSC was paying rent at both locations although its employees were working only out of 111 Broadway.

Pursuant to Article 9 of the lease, entitled Destruction, Fire and Other Casualty, WSC waived "the provisions of Section 227 of the Real Property Law[2] and agrees that the provisions of this article shall govern and control in lieu thereof." Under the provision of the lease, if WSC's space was damaged by fire or other casualty, WSC was not allowed to terminate the lease, but merely relieved of the obligation to pay rent until the space was restored. Trinity was required to "make repairs with all reasonable expedition, subject to delays due to adjustment of insurance claims, labor troubles and causes beyond [its] control." Article 9 of the lease also states that "Tenant's liability for rent shall resume five (5) days after written notice by the Owner that the premises are substantially ready for tenant's occupancy."

Notice is governed by Article 28 of the lease, which states that when Trinity is required to give WSC notice, it do so personally or by registered or certified mail, with return receipt requested (see insert 29 of the lease).

On September 11, 2001, approximately one year after WSC signed the lease, the World Trade Center was attacked and the United States Army and the New York City Police cordoned off the area where both locations were situated. As a result of the attack, there was no electrical, telephone or internet service. From September 21 to October 1, 2001, tenants were allowed in the restricted zone to remove whatever they wanted. On October 6, 2001, Trinity Centre, through its agents, sent WCS a letter (dated October 5) by certified mail that "our plan is to have the building back in full operation and available for you on October 10, 2002." The letter went on to say that "you may plan to resume your tenancy at that time" and that Trinity "was in the process of calculating any rent credit to which you may be entitled for the period through October 9, 2001." Although the letter appears to have been sent by certified mail, the record does not show that it was mailed with "return receipt requested," as required by insert number 29 of the lease.[3]

***2** According to Trinity, on October 10, 2001, the elevators, HVAC system, electrical power, and heat and hot water were all operational. The telephone and internet services, however, were still not fully operational, but those services were not provided by Trinity. Trinity, who had its offices at 111 Broadway, asserted that it had its telephone and internet service restored before October 10, 2001, and MCI was able to restore telephone service to

various tenants within 3–5 days after October 1, 2001.

WSC maintains that without telephone and internet service it would have gone out of business. In addition, WSC argued that "the door and ceiling in its office space were damaged, the air quality made it impossible to breath and the air was not being filtered on the 17th floor (an allegation which Trinity disputes), there was no mail service, and its telephone and internet providers informed it that because of the tremendous backlog, they could not say when they would restore service. On October 22, WSC vacated the 111 Broadway space and moved back to its space at 55 Broadway. In his affidavit in support of it cross-motion, Koch stated that WSC had been able to get telephone and internet service at that location by October 5. At his deposition, however, he admitted that there was no telephone or internet service at 55 Broadway for at least a week after WSC moved back. According to WSC, "the old space at 55 Broadway was grossly insufficient for our current needs, but we had to make due we had no choice. Our customers were threatening to leave us unless we got back into business, because they were paying for services which they were not getting."

On November 19, 2001, WSC gave Trinity notice that it had vacated the premises and set February 18, 2002 as the vacate date for Koch under the guarantee. Trinity, however, rejected the surrender of the lease on November 30, 2001, January 29, 2002, and again on April 10, 2002 noting that under the express terms of the lease there must be a surrender agreement in writing by Trinity. According to Trinity, WSC was experiencing a slowdown in business and used the 9/11 events to attempt to get out of its lease.

On or about January 17, 2002, Trinity served a Ten Day Notice to Tenant upon WSC seeking payment of rent arrears. This action was commenced against WSC on February 19, 2002, and against Koch on June 18, 2002. Trinity is seeking liquidated damages of $109,569.05 for fixed rent, additional rent and other charges as well as attorney's fees from WSC pursuant to the lease, and $48,525.10 from Koch as guarantor. In its answer, defendants assert the defenses of actual and constructive eviction, and that the lease was surrendered on November 19, 2001.

Plaintiff's Motion for Summary Judgment

It is well settled that the proponent of a motion for summary judgment must establish that "there is no defense to the cause of action or that the cause of action or defense has no merit," (C.P.L .R. § 3212[b]), sufficiently to warrant the court as a matter of law to direct judgment in his or her favor. *Bush v. St. Claire's Hospital,* 82 N.Y.2d 738, 739, 602 N.Y.S.2d 324, 621 N.E.2d 691 (1993); *Winegrad v. New York University Medical Center,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 (1985). This standard requires that the proponent of the motion "tender[ ] sufficient evidence to eliminate any material issues of fact from the case," *id.,* "by evidentiary proof in admissible form." *Zuckerman v. City of New York,* 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718 (1980). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions." C.P.L.R. § 3212(b).

***3** Where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so. *Vermette v. Kenworth Truck Company,* 68 N.Y.2d 714, 717, 506 N.Y.S.2d 313, 497 N.E.2d 680 (1986); *Zuckerman v. City of New York, supra,* 49 N.Y.2d at 560, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718. Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist. *Id.* at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718.

Here, Trinity made a *prima facie* showing of entitlement to summary judgment on the issue of liability. Specifically, it established, through admissible evidence, that WSC entered into a valid lease and has not paid rent and additional rent since September 1, 2001, and that Koch, as the guarantor, is liable for any rent and additional rent due from the September 1, 2001 through February 18, 2002, the vacate date.

Moreover, inasmuch as Trinity or its agents have never wrongfully physically prevented WSC from occupying the premises, there has been no actual eviction. *Barash v. Pennsylvania Terminal Real Estate Corp.,* 26 N.Y.2d 77, 308 N.Y.S.2d 649, 256 N.E.2d 707 (1970); *Sapp v. Propeller Co. LLC,* 5 A.D.3d 181, 772 N.Y.S.2d 515 (1st Dept.2004). In fact, shortly after the attack, tenants were allowed back into the premises to remove property and the building was reopened for occupancy on October 10, 2002. That the United States Army and the New York City Police Department restricted access to the area for several weeks does not amount to actual eviction. *See* 74 N.Y. Jur.2d., Landlord and Tenant, § 296 (1999)(acts of public authorities in the exercise of the police power, which decrease the value or utility to a tenant of the demised

premises ... do not amount to an eviction); *see also Dolman v. United States Trust Co.,* 2 N.Y.2d 110, 114, 157 N.Y.S.2d 537, 138 N.E.2d 784 (1956).

There was also no constructive eviction because WSC waived any casualty related constructive eviction claim. *Schwartz, Karlan & Gutstein v. 271 Venture,* 172 A.D.2d 226, 568 N.Y.S.2d 72 (1st Dept.1991); *see also* Real Property Law § 227; *RVC Associates v. Rockville Anesthesia Group,* 267 A.D.2d 370, 700 N.Y.S.2d 231 (2nd Dept.1999); *Milltown Park, Inc. v. American Felt and Filter Co.,* 180 A.D.2d 235, 584 N.Y.S.2d 927 (3rd Dept.1992); *Rodriguez v. Nachamie,* 57 A.D.2d 920, 395 N.Y.S.2d 51 (2nd Dept.1977). Pursuant to Article 9 of the lease, entitled Destruction, Fire and Other Casualty, WSC waived "the provisions of Section 227 of the Real Property Law and agrees that the provisions of this article shall govern and control in lie thereof." Under the provision of the lease, if WSC's space was damaged by fire or other casualty, WSC was not allowed to terminate the lease, but merely relieved of the obligation to pay rent until the space was restored. Trinity was required to "make repairs with all reasonable expedition, subject to delays due to adjustment of insurance claims, labor troubles and causes beyond [its] control." Thus, by the express terms of the lease, WSC waived any constructive eviction claim based on casualty and, instead is entitled pursuant to the lease to a rent abatement for the period that the space was unusable.[4]

***4** Last, Trinity never accepted surrender of the premises in writing as required by the lease. *See* Lease at paragraph 25 (Exhibit A). Nor has there been a surrender of the premises by operation of law because Trinity never demonstrated an intent through its actions to accept surrender of the space. *Reiseler v. 60 Gramercy Park North Corp.,* 88 A.D.2d 312, 453 N.Y.S.2d 186 (1st Dept.1982). Indeed, "merely quitting the premises does not constitute a valid surrender and does not relieve the tenant of its obligations under the lease." *Personnel Corp. of Am. v. Robert Fraser Holdings Ltd.,* No. 92 Civ. 3449, 1993 WL 88264 (S.D.N.Y. March 25, 1993), *amendment denied,* 1993 WL 147478 (S.D.N.Y. April 30, 1993).

Here, Trinity rejected WSC's attempt to surrender on November 30, 2001, January 29, 2002, and again on April 10, 2002. Indeed, WSC has conceded that Trinity has refused to accept surrender of the lease and, as such, the lease is still in effect.

Thus, Trinity having established *prima facie* entitlement to summary judgment, the burden shifted to WSC and Koch to establish a triable issue of fact, which defendants have failed to do with respect to their liability under the lease. In fact, defendants do not address Trinity's position that there was no actual eviction. As for constructive eviction, defendants appear to make several arguments.

First, they argue that they were not given proper notice under Articles 9 and 28 of the lease that the building was operable. Instead, Trinity notified WSC that the premises were ready on October 10, 2001, by e-mail dated October 17, 2001. Thus, according to WSC, the notice was defective because it was not served personally or by registered or certified mail[5] and, inasmuch as WSC had no internet service, it never received the e-mail.

In reply, however, Trinity attached a copy of a letter dated October 5, 2001, informing WSC that its plan was to have the building fully operational on October 10, 2001, and that WSC "may plan to resume your tenancy at that time." The letter appears to have been sent by certified mail on October 6, 2001, but there is no indication that it was done by "return receipt requested." *See* Exhibit C in Plaintiff's Reply. Trinity's failure to give proper notice under the lease does not invalidate the lease. It merely raises an issue of fact as to when defendants were obligated to resume paying under the lease.

Defendants also argue that Trinity did not explain how it arrived at the amounts that it is seeking from defendants. Even if true, calculations only go to damages not liability. The amount, nevertheless, is derived from the lease and the rent history, both of which are attached to Trinity's motion. Next, defendants claim that Trinity charged WSC for electrical charges even though WSC was not using the space. The lease, however, charged a flat rate for electrical usage that was not based on use. See Lease at Paragraph 38(a).

Defendants also claim that "[a]nother triable issue of fact is whether the Landlord truly completed the necessary repairs to reopen the building for occupancy. The air quality in the building was still horrible; the ceiling in the premises was still broken with electrical wires hanging out; there was no telephone, internet and IDSN service; there was no mail service; etc." WSC's proof of ceiling damage consisted of a photograph depicting a missing ceiling panel with a protruding electrical box. There was also some indication that their door was damaged and Koch stated by affidavit that "the poor air quality in our office made it impossible for us to breathe." Weak as this evidence may be, there are nonetheless issues of fact as to the extent of the damages to WSC's space, the air quality,[6] and to what extent, if any, are defendants entitled to an abatement in excess of the credit extended by Trinity. *See RVC Associates v. Rockville Anestesia Group, supra,* 267 A.D.2d at 371–72, 700 N.Y.S.2d 231.

Defendant's Cross–Motion for Summary Judgment

***5** Defendant cross-moves for summary judgment declaring the lease null and void by reason of impossibility of performance. Defendant's, however, never raised this defense in their answer. In fact, by this motion, defendants are seeking leave of the court for permission to amend the existing answer to include these claims. Defendants' request to amend their answer is denied for the following reasons. First of all, this claim could have easily been made earlier, even prior to extensive discovery. Moreover, defendants fail to offer an explanation for failing to raise this claim earlier.

Plaintiff, on the other hand would be prejudiced by allowing the amendment, especially given the weakness of defendants' impossibility of performance claim. Although the terrorist act caught the whole city by surprise, the lease between the parties in fact anticipated a potential casualty. By the express terms of the lease, WSC would receive a rent abatement for the period during which the space was unusable. WSC's claim that its need for telephone and internet service, air quality, and damage to the space made its occupancy under the lease impossible fails for several reasons. First, it obtained telephone and internet service at 55 Broadway about a week after it moved there on October 22, 2001. There is no indication in the record that restoration of service at 111 Broadway would have taken longer. Second, the air quality at 55 Broadway, just two blocks south of 111 Broadway could not have been much better. Last, the minor damages refer to by WSC would not have prevented it from operating its business.

The tragic events of 9/11 do not relieve defendants of their obligations under the lease. In their application for federal assistance, WSC stated that after September 11, as the operations at WSC "scaled down, the company has fewer employees and our lease for 55 Broadway is still running we decided to go back to this smaller space." A down turn in the economy partially resulting from the 9/11 tragedy, however, is not a valid reason for relieving a party from its responsibilities under a lease. Defendants' request to amend their answer is, therefore, denied.

This constitutes the decision, judgment and order of the Court.

All Citations

4 Misc.3d 1026(A), 798 N.Y.S.2d 348 (Table), 2004 WL 2127216, 2004 N.Y. Slip Op. 51060(U)

Footnotes

1 This decision was edited for publication

2 RPL § 227, When Tenant May Surrender Premises, states: Where any building, which is leased or occupied, is destroyed or so injured by the elements, or any other cause as to be untenable, and unfit for occupancy, *and no express agreement to the contrary has been made in writing,* the lessee or occupant may, if the destruction or injury occurred without his or her fault or neglect, quit and surrender possession of the leasehold premises, and of the land so leased or occupied; and he or she is not liable to pay to the lessor or owner, rent for the time subsequent to the surrender. Any paid rent in advance or which may have accrued by the terms of the lease or any other hiring shall be adjusted to the date of such surrender (emphasis added).

3 Although plaintiff attached a "return receipt requested" card to it's reply affidavit with WSC' name and address on it, the card did not have the certification number on it nor was it signed by WSC. Plaintiff did not provide an explanation for its failure to complete the card and only casually addressed the issue on reply. Furthermore, the print on the Certified Mail Receipt attached as an exhibit is not very clear.

4 Had WSC not waived RPL § 227, there may have been a triable issue of fact regarding constructive eviction notwithstanding *Barash v. Pennsylvania Terminal Real Estate Corp., supra,* 26 N.Y.2d at 83, 308 N.Y.S.2d 649, 256 N.E.2d 707. *See, e.g. Duane Fabs Properties Corp. v. Cronus Consulting LLC,* N.Y.L.J., 9/11/02, p. 18, col. 5; *Trinity Centre, LLC v. Laidlaw Capital Management Inc,* N.Y.L.J., 6/19/02, p. 18, col. 6; *but* see *WFKC Office Ltd. v. Law Office of Mark Landesman P.C.,* Index No. 100427/01 (Civ Ct N.Y. 2/15/02)(Rakower, J .). Inasmuch as this Court finds that WSC waived the claim, however, it need not reach this issue.

5 As this Court noted in *Bellstell 140 East 56th Street, LLC v. Layton,* N.Y.L.J., 2/17/99, p. 32, col. 5 (Civ.Ct., N.Y.Co.), "[i]t is well settled that a landlord and a tenant may, by the terms of their lease, agree to a more specific manner of service of notices, and that those terms are generally enforceable ...," *citing Chumley's Bar and Restaurant Corp. v. Bedford Court Associates,* 174 A.D.2d 398, 571 N.Y.S.2d 10 (1st Dept.1991); *Hendrickson v. Lexington Oil Co., Inc.,* 41 A.D.2d 672, 340 N.Y.S.2d 963 (2d Dept.1973); *B & A Realty Co. v. Castro,* N.Y.L.J., 5/9/95, p. 25, col. 1 (App.Term, 1st Dept.).

6 It should be noted that the air quality could not have been much better two blocks south at 55 Broadway, especially since Trinity had installed air filters in the building.

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508 F.2d 377
United States Court of Appeals, Second Circuit

UNITED STATES of America, Plaintiff, v. GENERAL DOUGLAS MacARTHUR SENIOR VILLAGE, INC., et al., Defendants-Appellees, D.C.R. Holding Corp., et al., Defendants-Appellants.

Nos. 23 to 25, Dockets 74-1065, 74-1066, and 74-1314.
|
Argued Sept. 9, 1974.
|
Decided Nov. 11, 1974.

Synopsis
United States brought action to foreclose mortgage. Purchasers of tax liens filed cross claims to secure refund of purchase price for liens from local taxing authorities. The United States District Court for the Eastern District of New York, Jack B. Weinstein, J., 366 F.Supp. 302, granted summary judgment for county and municipalities on the cross claims and purchasers appealed. The Court of Appeals, J. Joseph Smith, Circuit Judge, held that statute excepting claims of village, county or state from warranty of municipality selling tax lien that it can transfer title and possession implicitly includes the United States among the superior interest holders, and local taxing authorities' failure to convery anything of value to purchasers of tax liens by reason that the amount due on government's mortgage exceeded proceeds of foreclosure sale was not a breach of duty imposed by statute providing for refund to purchaser unable to obtain possession; and that purchasers' failure to establish warranty of priority precluded recovery on theory of contractual frustration and impossibility.

Affirmed.

Gurfein, Circuit Judge, filed dissenting opinion.

Attorneys and Law Firms

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William S. Norden, Deputy County Atty. (Joseph Jaspan, County Atty. of Nassau County, Natale C. Tedone, Sr. Deputy County Atty., Mineola, N.Y., of counsel), for defendant-appellee County of Nassau.

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***379** Michael P. Gurlides, Mineola, N.Y., on the brief for defendant-appellant Estate of David Rand.

John F. O'Shaughnessy, Town Atty. of the Town of Hempstead (Daniel P. McCarthy, Asst. Town Atty., of counsel), on the brief for defendant-appellee Town of Hempstead.

Before SMITH, TIMBERS and GURFEIN,* Circuit Judges.

Opinion

J. JOSEPH SMITH, Circuit Judge:

This appeal involves cross-claims raised in an action reported as United States v. General Douglas MacArthur Senior Village, inc., 337 F.Supp. 955 (E.D.N.Y.), rev'd, 470 F.2d 675 (2d Cir. 1972), cert. denied sub nom. County of Nassau et al. v. United States, 412 U.S. 922, 93 S.Ct. 2732, 37 L.Ed.2d 149 (1973). In the principal action, the United States, as the holder of a mortgage superior in interest to the tax liens purchased on the same property by the appellants, was permitted to foreclose upon that property of General Douglas MacArthur Senior Village, Inc.; there had been a breach of the mortgage agreement. The cross-claims presently under review constitute attempts by the defendant tax lienors, D.C.R. Holding Corporation and four individual parties, to secure a refund of their purchase price for the liens from Nassau County, the Village of Hempstead and Town of Hempstead. Since the amount due on the government's mortgage exceeded the proceeds of the foreclosure sale, the liens are now totally worthless. Judge Jack B. Weinstein of the Eastern District of New York dismissed the cross-claims on a motion for summary judgment. 366 F.Supp. 302 (1973). By reason of jurisdiction of the principal claim, jurisdiction over these ancillary claims obtains without independent jurisdictional basis. See, R. M. Smythe & Co. v. Chase National Bank of City of New York ,291 F.2d 721, 724 (2d

Cir. 1961); United States v. Championship Sports, Inc., 284 F.Supp. 501, 509 (S.D.N.Y.1968); United States v. Manufacturers Hanover Trust Co., 231 F.Supp. 160, 162 (S.D.N.Y.1964); 3 J. W. Moore, Federal Practice P13.36, at 13-925 (2d ed. 1974). After consideration of the New York law governing these state law claims, Erie R.R. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), we conclude that these cross-claims are without merit and affirm the judgment.

The appellants' several briefs basically expound three alternative grounds for reversal. One, predicated on the taxexempt character of the MacArthur property, fails by reason of collateral estoppel, for we held in resolving the principal claim that the property was in fact taxable. United States v. General Douglas MacArthur Senior Village, Inc., supra, 470 F.2d 675 at 680. The appellants' two other objections will require more detailed discussion; they are: under the New York Real Property Tax law (RPTL), McKinney's Consol.Laws, c. 50-a, a subdivision of the state selling a tax lien necessarily warrants the lien's priority; and under the common law of contractual obligation, the sale of worthless tax liens gives rise to an action for rescission.

I. WARRANTY OF PRIORITY

RPTL 1464(6) in corporates a warranty of lien validity into every sale of a tax lien by municipalities.[1] A tax lien may be valid, however, yet prove to be worthless because a superior lien on the property leaves no residue to which the inferior lien may attach. To protect against this latter possibility— one ***380** realized in the case under review— it would be necessary for a tax lien purchaser to require of the seller a warranty of priority. The risk of loss for sale of a lien rendered less valuable, or valueless, by a prior interest would then remain with the seller; the purchaser would be entitled to rescission.

Foreclosed by our prior decision in this case from impugning the lien's validity, supra, and not the beneficiaries of an express warranty of priority, the appellants thus seek to establish that a statutorily implied warranty of priority accompanied their transactions. Specifically, they rely on RPTL 1464(3), (5), for the proposition that a municipality selling a tax lien implicitly warrants that it can transfer title and possession, subject only to claims of the village, county or state. These provisions are set out in the margin.[2] The encumbrance at issue which rendered the tax liens valueless belonged to the federal government. As such, it was admittedly outside the express exceptions to the conveyance of a fee simple absolute required by these provisions.

Three considerations, however, counsel against the application in this instance of expressio unius, exclusio alterius, for which the appellants in effect contend. First, the certificate of sale received by each appellant made the lien purchased subject to superior tax liens of 'Sovereignties' and other municipalities. This express contractual reservation does not decide the issue against the appellants because their interest was superseded by a mortgage, rather than tax lien, held by a sovereignty. On the other hand, this recognition of sovereign claims does infer that an implied exception in RPTL 1464(3) for federal liens— clearly, liens of a 'sovereignty'— would comport with custom and usage and the basic business understanding.

Secondly, one cannot ignore the broader context within which the statute must operate: a federal system in which supremacy resides with the center. U.S. Const. art. VI. Since the state plainly lacks the power to subordinate a federal interest superior under federal law, New Brunswick v. United States, 276 U.S. 547, 48 S.Ct. 371, 72 L.Ed. 693 (1928); cf. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), the legislature undoubtedly assumed that an exception in subsection (3) for the United States was understood. The inference, then, that the United State is implicitly included among the superior interestholders listed in 1464(3) follows. We would hesitate to find it excluded on less than express terms. Cf. In re Gruner, 295 N.Y. 510, 524, 68 N.E.2d 514 (1946); Riverhead Estates Civic Ass'n v. Gobron, 134 N.Y.S.2d 13, 16, 206 Misc. 405 (Suffolk County Ct.1954).

Finally, in RPTL 1464(6), supra, fn. 1, the New York legislature specified various conditions (errors or irregularities in assessment, levy or collection proceedings) justifying a refund. Recognition of these circumstances of lien invalidity as a basis for rescission may seem no more than equity would require. In fact, however, this provision represents sents a notable advance from the governing law of caveat emptor. See the opinion below, 366 F.Supp. 302 at 305-306. ***381** If the New York legislature intended to make the even greater departure form the common law of creating a warranty of priority, we must assume that they would have done so with no less clarity.[3]

In sum, contrary to the appellants' assertion, RPTL 1464(3), (5), require a municipality to warrant that the real property conveyed in consideration of the purchase of the tax lien represents all within the state's power to convey. Since the appellees were powerless to overcome the federal government's mortgage, their failure to convey anything of value to the appellants was not a breach of the duty imposed by 1464. The statute offers no basis for rescission of the contested purchases.

II. CONTRACTUAL FRUSTRATION AND IMPOSSIBILITY

The common law of contract excuses a party from performing his contractual obligations because of 'impossibility of performance' or 'frustration of purpose.' See generally, 6 A. Corbin, Contracts 1322 (1962). In general impossibility may be equated with an inability to perform as promised due to intervening events, such as an act of state or destruction of the subject matter of the contract. The doctrine comes into play where (1) the contract does not expressly allocate the risk of the event's occurrence to either party, and (2) to discharge the contractual duties (and, hence, obligation to pay damages for breach) of the party rendered incapable of performing would comport with the customary risk allocation. Essentially, then, discharge by reason of impossibility— as well as the concomitant remedy (to the discharge) of rescission— enforces what can reasonably be inferred to be the intent of the parties at the time of contract.

Frustration of purpose, on the other hand, focuses on events which materially affect the consideration received by one party for his performance. Both parties can perform but, as a result of unforeseeable events, performance by party X would no longer give party Y what induced him to make the bargain in the first place. Thus frustrated, Y may rescind the contract. Discharge under this doctrine has been limited to instances where a virtually cataclysmic, wholly unforeseeable event renders the contract valueless to one party. See, Alfred Marks Realty Co. v. Hotel Hermitage Co., 170 App.Div. 484, 156 N.Y.S. 179 (2d Dept. 1915); Krell v. Henry (1903) 2 K.B. 740 (C.A.); 6 A. Corbin, Contracts, supra, at 1355.

Against the backdrop of this basic doctrinal distinction between impossibility and frustration, the lack of foundation for the appellants' invocation of common law becomes apparent. Their argument may be summarized as follows: the municipalities' inability to convey title and possession to the MacArthur property due to a foreclosure proceeding by a superior lienor was an event not contemplated by either the seller or purchaser of the tax lien; and this unforeseeable event left the municipalities without the means to perform their part of the contract, thereby discharging the purchasers' duty to perform (i.e., make payment) and providing the basis for rescission.

The corporate appellant places this argument under a frustration of purpose rubric, while the appellant Schwartz denominates it impossibility of performance. Their disagreement is illuminating in that the argument itself fails under either heading because it is such a confused mix of both.

A party invokes impossibility to excuse its own inability to perform. But obviously the appellants can perform because they already have. On the other hand, impossibility may apply to their situation insofar as impossibility may be felt to have discharged the municipalities ***382** from performing and thereby created a situation where the appellants would benefit from the rescission secured by the sellers. Cf. 6 A. Corbin, Contracts, supra, at 1353. This tack implies, though, that the municipalities' failure to deliver title and possession to the MacArthur property was evidence of non-performance and invitation to mutual rescission; and this thesis of course assumes the very point which the appellants need to prove— that the appellees' duty included delivery of title and possession.

Insofar as a frustration theory inheres in the appellants' argument, it too partakes of a certain circularity. Thus, to argue that the foreclosure by the superior lienor triggers the frustration doctrine is implicitly to characterize that event as cataclysmic. In fact, however, the risk of this event occurring is one which caveat emptor had long since placed with the purchaser. Broadly speaking, the thrust of the common law of tax lien sales, a law notably severe to purchasers, was to place any events depriving the transaction of value within the reasonable contemplation of the parties.

Whether the appellants' contractual defense is cast in terms of impossibility or frustration, it proves inadequate. Their argument essentially relies upon the existence of a warranty of priority. Accordingly, the appellants' failure to establish such a warranty, see I, supra, precludes their success on this ground.

The appellants may be correct, however, in maintaining that sound economics counsels recognition of a warranty of priority. Perhaps lack of this warranty does impose an unfair and unmanageable burden on the purchaser: To protect himself from loss, he must make a title search of any property before purchasing a tax lien on it. (Here a search would have disclosed the government mortgage.) And perhaps a municipality's failure to warrant priority may in the long run be less profitable for it than warranting priority, for the burden and expense of making these title searches— or the risk that attends a purchase made without a prior search— may keep would-be purchasers out of the tax lien market. Nevertheless, this court is not the forum to which these considerations are properly addressed. The New York state legislature has not seen fit to date to override by statute the common law rule that the seller of a tax lien does not warrant its priority. It has carved out other exceptions in the tax lien area to the common law of caveat emptor. It is not for this court to decide, however, that having gone thus far, the legislature must go still further. Similarly any waiver of federal mortgage priority in tax lien cases is for the Congress, not this court.

The appellees did not warrant the priority of the tax liens which they sold to the appellants, nor did the appellees' failure to convey title and possession to the MacArthur property free from the lien of the government mortgage discharge the appellants' duty to pay the purchase price for the liens under an impossibility of performance or frustration of purpose theory. The district court properly granted the appellees' motion for summary judgment.

Affirmed.

GURFEIN, Circuit Judge (dissenting):

This seems to me to be a case where an honest shopkeeper would have given the customer his money back. While public officials may not dispense such largesse, the intriguing question is whether courts may not compel them to do so in the interest of fairness.

I respectfully dissent from the opinion of my colleagues to the contrary. While I agree with a good deal of what Judge Smith has written about impossibility and frustration, I approach the case from the view that there has been a failure of consideration based on a mutual mistake of law which justifies rescission.

A local property tax lien arises from a failure to pay taxes. The failure is ***383** also a breach of a covenant in the mortgage. Everyone knows as a matter of law that such tax lien comes ahead of the mortgage, R.P.A. & P.L. 1354(2), McKinney's Consol.Laws, c. 81, subject to a right of redemption in the mortgagor. R.P.T.L. 1010. When the county or village sells a tax lien it says that this is a tax we ourselves could have collected ahead of the mortgage, subject only to a right of redemption, if we had not sold the lien to you. In this case, however, the county or village itself could not have collected the tax ahead of the mortgage. It was not selling a tax lien with characteristics legitimately and reasonably expected of a local property tax lien.

The reason the county or village was not selling a tax lien with these known characteristics is that the mortgage on the particular property, MacArthur Village, was held by the United States. On the earlier appeal, this Court held that the lien of the United States on MacArthur Village could not be defeated by tax liens of local governmental units. United States v. General Douglas MacArthur Senior Village, Inc., 470 F.2d 675 (2 Cir. 1972), cert. denied sub nom., County of Nassau et al. v. United States, 412 U.S. 922, 93 S.Ct. 2732, 37 L.Ed.2d 149 (1973).[1] The lien of the United States owned mortgage would not have been defeated by the local tax lien even if it had remained in the hands of the County of Nassau or The village, as the case may be.

This case does not involve priorities as such. There is a difference in kind between an ordinary type of federal tax lien such as one arising out of an income tax assessment or judgment and a federal mortgage lien. The former has no relation to the property but becomes a lien upon it to enforce a separate right of the federal government. The latter relates to the property itself. For that reason, in the earlier case involving MacArthur Village, this Court was not content to rely on the familiar rule applicable to priorities between ordinary federal tax liens and local property tax liens— the rule of United States v. New Britain, 347 U.S. 81, 74 S.Ct. 367, 98 L.Ed. 520 (1954), 'first in time is first in right.' Under that rule the appeal could have been decided by simply applying it to sanction the priority of the federal mortgage on MacArthur Village which was concededly 'first in time.' 470 F.2d at 677.[2] This Court went further, however, to hold that under S.R.A. Inc. v. Minnesota, 327 U.S. 558, 66 S.Ct. 749, 90 L.Ed. 851 (1946), and New Brunswick v. United States, 276 U.S. 547, 48 S.Ct. 371, 72 L.Ed. 693 (1928), 'local governments cannot take any action to collect unpaid taxes assessed against property which would have the effect of reducing or destroying the value of a federally held purchase-money mortgage lien.' 470 F.2d 679, 680.

Judge Kaufman (now Chief Judge) noted:

'In short, the land is not immune from local taxation, but the federal interest is, and the local governments cannot enforce their liens until the federal debt is satisfied.' Id.

The unenforceability is not what we normally describe in terms of relative priority. It is rather an infirmity imposed by implication from the federal constitution in the absence of Congressional consent. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).[3] The ***384** tax lien imposed upon property on which the federal government holds a mortgage is not a true tax lien but is, at best, a hybrid. In New Brunswick v. United States, supra, 276 U.S. at 556, 48 S.Ct. 371, 373, 72 L.Ed. 693, the Court concluded that where the United States had a lien equivalent to a mortgage, the City could impose taxes on the equitable owner provided that the rights of the United States 'are expressly excluded from such sales (tax sales) and they are made, by express terms, subject to all such prior rights, liens, and interests.' No statute of New York could constitutionally make the federal mortgage subject to the enforcement of the local tax lien.[4] The constitutional validity of the imposition of the local property tax is conditioned upon an implied agreement of the locality to exclude such tax liens from tax sales and also to state 'by

express terms' that such liens are subject to the prior rights of the United States.[5] The County of Nassau and the Village took advantage of this limited right to tax property subject to a federal mortgage lien but failed to live up to the second part of the constitutional dispensation— to exclude the tax lien arising from the tax lien sale.

If that is so, it seems to me that the county was not in a position to sell something that is commonly regarded as a proper tax lien. It owned no such lien on these premises, for while it could tax in a measure that included the federal mortgage interest, S.R.A. Inc. v. Minnesota, supra, it simply could not enforce the tax against the federal mortgage interest. Yet a buyer without notice would, I think, be justified in believing that a failure to announce that this was not an ordinary tax lien meant that it was precisely that.

This justified belief is strengthened by the circumstance that notice was given that the lien was subject to superior tax liens of such sovereignties but nothing was said of such mortgage liens. The majority acknowledges that 'this express contractual reservation does not decide the issue against the appellants because their interest was superseded by a mortgage, rather than tax lien, held by a sovereignty.' I venture to say that the logical extension of this is that since warning was given it should have been given correctly. The majority glean from this limited notice the inference that an implied exception in R.P.T.L. 1464(3) 'for (all) federal liens . . . would comport with custom and usage and the basic business understanding.'[6]

If this case is one of first impression, I do not see how we can find either 'custom and usage' or a 'basic business understanding' that there was one particular type of mortgage to which the tax lien would not be superior. So unclear was 'custom and usage' that the scholarly District Judge decided, on that very question, that the lien of United States was not superior to the local tax lien. ***385** United States v. General Douglas MacArthur Senior Village, Inc., 337 F.Supp. 955 (E.D.N.Y.1972), and for this appeal to come to us now, that decision had to be reversed by this Court. 470 F.2d 675 (2 Cir.) (MacArthur I).

A failure to deliver a tax lien enforcible by the seller itself is thus joined to a mutual mistake of law. Neither the seller nor the buyers knew that the tax lien did not possess the normal legal characteristics of a tax lien.[7] The seller was unjustly enriched when it was paid for a lien it could not itself enforce against the federal mortgage interest. See Rosenblum v. Manufacturers Trust Co., 270 N.Y. 79, 85, 200 N.E. 587 (1936).

While a benevolent casuistry may have been necessary in earlier days to convert a mistake of law into a mistake of fact in order to justify rescission, 3 Corbin, Contracts 620; 13 Williston, Contracts 1589, the New York Legislature has taken the forward step long urged by scholars. C.P.L.R. 3005 provides:

'When relief against mistake is sought in an action or by way of defense or counterclaim, relief shall not be denied merely because the mistake is one of law rather than of fact.'

When the mistake of law is a part of the fundamental basis of the transaction, rescission is permitted because there is present the further element of failure of consideration. Williston, supra, 1584.[8] For an application of the modern view, see Ryan v. Vickers, 158 Colo. 274, 406 P.2d 794 (1965), cert. denied, 383 U.S. 944, 86 S.Ct. 1201, 16 L.Ed.2d 208 (1966).[9]

Thus, if we apply New York law under Erie R.R. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), we find no decisional law on rescission involving a federal mortgage.[10] Nor, since we are not dealing with priorities, is any statute specifically in point.[11]

The suggestion of the majority that since the Legislature has listed specific equitable exceptions to the doctrine of caveat emptor, R.P.T.L. 1464(6), no others may be held to exist assumes an exclusivity in derogation of the general equitable powers of courts.[12] While I ***386** recognize that generally a court should not add to a statute, see Iselin v. United States, 270 U.S. 245, 250-251, 46 S.Ct. 248, 70 L.Ed. 566 (1926) (Brandeis, J.), it is not a valid generalization that the statute must be taken to defeat any judicial remedy which exists independent of the statute.

In short, I do not think the loose generalization, originally made when caveat emptor still reigned, that one buys a tax lien at his peril applies to this situation which involves an unusual interplay of federal and state power arising from our dual system of government.

Incidentally, a refund to the purchasers here, as Judge Weinstein perceptively recognized, would help the local units of government to sell their tax liens, because it would eliminate a trap for the unwary which the wary might seek to escape by abstaining entirely from attendance at tax sales.

I would reverse the summary judgment on behalf of the appellees and grant it on behalf of appellants.

All Citations

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Footnotes

* At the time of oral argument, Judge Gurfein was a United States District Judge for the Southern District of New York, sitting by designation.

1 New York Real Property Tax Law 1464: 6. In the event that any grantee under such conveyance is unable to obtain possession of the real property conveyed to him by reason of any error or irregularity in the assessment thereof, in the levying of a tax, or in any proceedings for the collection of any tax, the board of trustees shall refund to the purchaser the money so paid with interest, the same to be audited and paid as other village charges.

2 New York Real Property Tax Law 1464:
3. If the real property described in such notice is not redeemed within the time limited, the village treasurer shall, upon written application and the surrender of the certificate of sale together with proof of service by mail of the notice to redeem, or upon application by the board of trustees of the village with such proof of service, execute and deliver to the purchaser or village a conveyance of the real property so sold, the description of which shall include a specific statement of whose title or interest is thereby conveyed, as appears on the record, which conveyance shall vest in the grantee an absolute estate in fee, subject, however, to all claims the village, county or state may have thereon for taxes, liens or encumbrances.
. . . .int
5. The grantee or his assigns, or the village and its assigns, as the case may be, shall be entitled to have and possess the real property conveyed from and after the execution of such conveyance and may cause any occupants thereof to be removed in the same manner and by the same proceedings as in the case of a tenant holding over without permission of his landlord.

3 Appellant Schwartz appears to urge RPTL 1464(6) as an independent basis for refund. In this regard, we reiterate that this subsection literally addresses only problems of lien validity, not lien priority. Furthermore, for the historical reasons outlined immediately above, we reject any invitation to imply this additional basis for refund into 1464(6) as a matter of consistency with general equitable principles.

1 This Court specifically rejected the contention that in enacting the statute under which HUD made the loan to MacArthur Village, 12 U.S.C. 1701q, Congress waived the immunity mandated by New Brunswick v. United States, 276 U.S. 547, 48 S.Ct. 371, 72 L.Ed. 693 (1928), discussed infra. 470 F.2d at 680; see 12 U.S.C. 1733.

2 The Court held that the 1966 Tax Lien Act, 26 U.S.C. 6323(b)(6)(A), giving certain priorities to local property tax liens over federal tax liens did not apply in the case of federal mortgage liens.

3 Thus, New York could not provide by statute (C.P.A. 1087) that local property tax liens achieve priority over federal liens by being deemed ‘expenses of the sale’ in foreclosure by the mortgagee. United States v. Buffalo Savings Bank, 371 U.S. 228, 83 S.Ct. 314, 9 L.Ed.2d 283 (1963), reversing Buffalo Savings Bank v. Victory, 11 N.Y.2d 31 (1962). And see United States v. Equitable Life Assurance Society, 384 U.S. 323, 86 S.Ct. 1561, 16 L.Ed.2d 593 (1966).

4 The New York Legislature may have recognized this in a limited way when it provided that parcels listed in a notice of tax sale ‘mortgaged to the commissioners of the land office for loaning certain moneys of the United States’ shall be withdrawn from sale or bid in by the State Comptroller. R.P.T.L. 1004.

5 New Brunswick, supra, was apparently not cited to the District Court. There is no reference to it in its opinion.

6 R.P.T.L. 1464(3) reads:
‘If the real property described in such notice is not redeemed within the time limited, the village treasurer shall, upon written application and the surrender of the certificate of sale together with proof of service by mail of the notice to redeem, or upon application by the board of trustees of the village with such proof of service, execute and deliver to the purchaser or village a conveyance of the real property so sold, the description of which shall include a specific statement of whose title or interest is thereby conveyed, as appears on the record, which conveyance shall vest in the grantee an absolute estate in fee, subject, however, to all claims the village, county or state may have thereon for taxes, liens or encumbrances.’

7 R.P.T.L. 1006 provides that the certificate which the purchaser receives on a tax sale shall ‘contain a statement to the effect that if lands described thereon are not redeemed, the purchaser may complete the purchase and take a conveyance of the lands as provided in title one of article ten of this chapter, or, at his option, foreclose his lien pursuant to title two of article eleven thereof.’ Here, although there was no redemption, a deed was not forthcoming as promised.

8 The Real Property Tax Law itself provides that any conveyance to a tax certificate purchaser 'shall be subject to cancellation by reason of . . . (c) any defect in the proceedings affecting jurisdiction upon constitutional grounds . . ..' R.P.T.L. 1020(3).

9 In Ryan, the parties had contracted upon the assumption that a lien held by plaintiff's assignor on defendant's equipment was superior to all other liens, including one held by the Small Business Administration. A federal court subsequently held that the S.B.A. lien was superior. In the state court action, defendant raised mistake of law as a defense to an action on the contract and was granted rescission. The court characterized the situation as a 'mutual mistake as to the applicability of existing law to the factual situation here at hand.' 406 P.2d at 797.

10 Nor would the New York courts have complete freedom to declare 'New York law' in view of the explicit limitations imposed by New Brunswick v. United States, supra. Cf. Aquilino v. United States, 363 U.S. 509, 80 S.Ct. 1277, 4 L.Ed.2d 1365 (1960); id. at 516 (Harlan, J., dissenting); Clearfield Trust Co. v. United States, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943).

11 As Justice Frankfurter has written: 'The underlying assumptions of our dual form of government, and the consequent presumptions of a legislative draftsmanship which are expressive of our history and habits, cut across what might otherwise be the implied range of legislation.' Some Reflections on the Reading of Statutes, Cardozo Memorial Lectures, (Ass'n of the Bar of the City of New York) 215, 232.

12 Section 1464(6) reads:
'In the event that any grantee under such conveyance is unable to obtain possession of the real property conveyed to him by reason of any error or irregularity in the assessment thereof, in the levying of a tax, or in any proceedings for the collection of any tax, the board of trustees shall refund to the purchaser the money so paid with interest, the same to be audited and paid as other village charges.'

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68 A.D.3d 562
Supreme Court, Appellate Division, First Department, New York.

URBAN ARCHAEOLOGY LTD.,
Plaintiff–Appellant,
v.
207 E. 57TH STREET LLC, etc.,
Defendant–Respondent.

Dec. 17, 2009.

Synopsis

Background: Tenant brought action seeking declaration that it was excused from performing under lease agreement. The Supreme Court, New York County, O. Peter Sherwood, J., dismissed complaint, and tenant appealed.

The Supreme Court, Appellate Division, held that agreement's force majeure clause did not excuse tenant's failure to perform due to economic downturn's effect on it.

Affirmed.

Attorneys and Law Firms

***63** Alpert Butler & Weiss, P.C., New York (Clark E. Alpert of counsel), for appellant.

Epstein, Becker & Green, P.C., New York (Adrian Zuckerman of counsel), for respondent.

GONZALEZ, P.J., MAZZARELLI, NARDELLI, ACOSTA, ROMÁN, JJ.

Opinion

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered September 14, 2009, which granted defendant's motion to dismiss the complaint, unanimously affirmed, with costs.

The force majeure clause of the parties' lease agreement contemplates either party's inability to perform its obligations under the lease due to "any cause whatsoever" beyond the party's control— ***64** other than financial hardship. This clause conclusively establishes a defense to plaintiff's claim that it is excused from performing under the lease by reason of the effect that the downturn in the economy has had on it (*see Kel Kim Corp. v. Central Mkts.,* 70 N.Y.2d 900, 902–903, 524 N.Y.S.2d 384, 519 N.E.2d 295 [1987]).

We reject plaintiff's argument based on what it describes as the otherwise broad language of the clause.

Nor does the doctrine of impossibility avail plaintiff, since impossibility occasioned by financial hardship does not excuse performance of a contract (*see 407 E. 61st Garage v. Savoy Fifth Ave. Corp.,* 23 N.Y.2d 275, 281–282, 296 N.Y.S.2d 338, 244 N.E.2d 37 [1968]). Moreover, an economic downturn could have been foreseen or guarded against in the lease (*see Kel Kim Corp.,* 70 N.Y.2d at 902, 524 N.Y.S.2d 384, 519 N.E.2d 295).

All Citations

68 A.D.3d 562, 891 N.Y.S.2d 63, 2009 N.Y. Slip Op. 09379

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34 Misc.3d 1222(A)
Unreported Disposition
(The decision of the Court is referenced in a table in the New York Supplement.)
Supreme Court, New York County, New York.

URBAN ARCHAEOLOGY LTD., Plaintiff,
v.
207 EAST 57TH STREET LLC, Successor–In–Interest to 207 East 57th Street Associates, Defendants.

No. 600827/2009.
|
Sept. 10, 2009.

Attorneys and Law Firms

Barry J. Yellen, Esq. (Clark E. Alpert, of counsel), New York City, for plaintiff.

Epstein Becker & Green, P.C. (Ralph Berman, Steven M. Ziolkowski, of counsel), for defendant.

Opinion

O. PETER SHERWOOD, J.

***1** In this action, *inter alia,* for breach of a lease agreement, defendant 207 East 57th Street, LLC, Successor–In–Interest to 207 East 57th Street Associates ("defendant" or "landlord") moves pursuant to CPLR § 3211(a)(1) and (7) for an order dismissing the complaint for failure to state a cause of action and based upon the documentary evidence submitted. Plaintiff opposes the motion.

Background

The facts as alleged in the complaint are as follows: On July 15, 2008, plaintiff Urban Archaeology Ltd., as tenant ("plaintiff" or "tenant") entered into a written commercial lease agreement ("the Lease") with defendant's predecessor, 207 East 57th Street Associates, for lease of retail space on the ground floor of a building located at 207 East 57th Street in Manhattan ("the premises"). The Lease was for an initial ten-year term with a five-year renewal option (Berman Aff., Ex. "B", Lease ¶ 2[a] through [d]) at an initial base rent of $38,906.25 per month for the first three years with incremental increases in the base rent for the remaining term of the Lease (Lease ¶ 3[a]). Upon the execution of the Lease, the first month's rent was to be paid together with a security deposit, which could be met either in cash or by providing a letter of credit (Lease ¶ 35[a] and [b]). Plaintiff apparently deposited a letter of credit in the sum of $155,625.00 and paid the first month's rent of $38,906.25 (Berm Aff. Ex. "A", Compl. ¶ 27).

Before taking possession of the premises, plaintiff advised defendant that because of the economic downturn it was unable to perform according to the terms of the Lease and sought modifications to the lease including a lowering of the base rent (Compl.¶¶ 6, 10, 15). Instead, defendant served plaintiff with a Notice of Default, dated February 23, 2009, indicating that plaintiff was in default in the payment of the balance of rent owed for January 2009 in the sum of $24,303.08, plus the rent of $38,906.25 due for February 2009, and the additional rent due for those months for common charges in the sum of $1,226.90, for a total sum due of $64,436.23, and directing that it cure by March 4, 2009 (Berman Aff. Ex. "C"). Thereafter, on or about March 5, 2009, defendant served a Notice of Termination, terminating the Lease effective March 17, 2009. Defendant then drew down the letter of credit to cover the amount of plaintiff's arrears as provided for under the terms of the Lease (Berman Aff. ¶ 5; Lease ¶ 35[c]).

On March 18, 2009, plaintiff commenced the instant action by filing the summons and verified complaint seeking a judgment: (1) declaring that plaintiff is excused from performing under the terms of the Lease due to "Unavoidable Delay" as that term is defined in the Lease (Compl. ¶¶ 19 through 25); (2) returning to plaintiff the sum of $194,531.25, representing payment of the first month's rent of $38,906.25 together with the letter of credit plaintiff deposited in the sum of $155,625.00 (Compl. ¶¶ 27 through 29); and (3) reimbursement of attorney's fees, costs and disbursements in an amount in excess of $50,000.00 (Compl. ¶¶ 30 through 32).

CPLR § 3211 Motion and Parties' Arguments

***2** Defendant now moves for an order pursuant to CPLR § 3211(a)(1) and (7) dismissing the complaint based upon

documentary evidence and for failure to state a cause of action. In support of its motion, defendant submits the affirmation of its attorney, Ralph Berman, Esq ., of the law firm Epstein Becker & Green, PC, together with exhibits "A" through "C" consisting of the summons and verified complaint, the Lease, the Notice of Default and the Notice of Termination, and a supporting memorandum of law. Defendant contends that plaintiff's allegations of "Unavoidable Delay" all relate to financial hardship which is specifically excluded from the definition of Unavoidable Delay as defined in the Lease. On that basis, defendant argues that plaintiff is not excused by its adverse economic circumstances from performing its obligations under the Lease.

In opposition, plaintiff submits a sworn affidavit of its Chief Operating Officer, Gilbert Shapiro, who states that plaintiff has been in the business of designing, installing and manufacturing upscale decorative items and "artifacts" for use in clients' homes and businesses for over 30 years (Gilbert Aff. ¶ 3). The Lease at issue was the most expensive Lease plaintiff had ever undertaken and plaintiff claims that the broad "Unavoidable Delay" provision of the Lease was an essential part of its decision to enter into the Lease. Mr. Gilbert contends that the "Unavoidable Delay" provision discharged plaintiff from performing its obligations under the Lease in the event of a serious economic crisis outside its control that severely affected its industry and interfered with supply and demand of its product. In this regard, Mr. Gilbert avers that at the time defendant purchased the property subject to the Lease it was aware that plaintiff was in financial distress stemming from the worldwide economic crisis. He claims that he met with landlord's principal on March 2, 2009, shortly after defendant had purchased the premises, in an effort to re-negotiate the terms of the Lease, either by allowing plaintiff a "time-out" or temporarily reducing the amount of rent due. Defendant rejected plaintiff's requests and demanded performance. Plaintiff claims to have expended over $600,000.00 in preparing the Leased premises, posting the first month's rent, and posting the letter of credit. In the interim, the economic crisis hit with catastrophic results for plaintiff's clients and rendering the opening of an upscale store catering to a luxury market and at an extremely high rent not economically viable. Mr. Green anticipates that it may take years for the subject store to operate in any meaningful way or to be profitable. Mr. Green contends that the broad language of what he characterizes as the "*force majeure* " clause of the Lease excuses plaintiff's performance under the present unprecedented economic crisis, which was not foretold by the world's preeminent economic experts, and further that such circumstances must be contrasted with a situation under which non-performance is sought for financial difficulties of a party's own making. Here, plaintiff argues that the circumstances which are serving to frustrate performance under the terms of the Lease are due to an unforeseeable and extreme occurrence that was beyond its control and without any fault or negligence on its part. Plaintiff claims that all it needed was the time and rent abatement to ride out the economic tsunami and, instead, defendant decided to "go for broke" by keeping the first month's rent and spending down the letter of credit.

***3** Plaintiff also submits an expert affirmation of Paul Wachtel, a Professor of Economics at the Stern School of New York University, attesting to the unprecedented nature and severity of the current economic downturn which has been likened to an "economic tsunami". Professor Wachtel states that the present economic downturn was "unforeseeable as to its occurrence or as to the extent and length of this deep crisis" and no high-profile economist had predicted its occurrence. He further states that learned economists and financial experts agree that the purchase of discretionary upscale decorative items of the kind sold by plaintiff are among the first things to go in an economic crisis of the present severity.

In reply, defendant argues that economic inability to perform contractual obligations is not a valid basis for excusing compliance with the terms of the contract. Defendant contends that the "Unavoidable Delay" clause of the Lease is unambiguous and specifically excludes financial hardship as a basis for discharging plaintiff's obligations under the Lease. Nor may principles of impossibility or commercial impracticability be invoked to excuse performance in cases of financial hardship. Alternatively, defendant argues that even if plaintiff's economic hardship were held to constitute an Unavoidable Delay, defendant would not be obliged to return the first month's rent as such provision cannot be applied retroactively to void an obligation that had already been fulfilled.

Legal Analysis

It is well settled that, as a general rule, on a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v. State,* 86 N.Y.2d 307, 317 [1995]; *219 Broadway Corp. v. Alexander's, Inc.,* 46 N.Y.2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the

allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v. Goldman, Sachs & Co.,* 5 N.Y.3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support therefor (*see, Guggenheimer v. Ginzburg,* 43 N.Y.2d 268, 275 [1977]). Similarly, a dismissal motion pursuant to CPLR § 3211(a)(1), "may be granted where documentary evidence submitted conclusively establishes a defense to the asserted action as a matter of law' " (*Goldman v. Metropolitan Life Ins. Co.,* 5 N.Y.3d 561, 571 [2005], quoting *Held v. Kaufman,* 91 N.Y.2d 425, 430–431 [1998]).

Defendant's motion to dismiss turns upon construction of the "Unavoidable Delay" provision of the lease and whether it encompasses the circumstances of plaintiff's inability to perform under the Lease due to the circumstances of the present recession. The key provisions of the Lease at issue are paragraphs 1 and 38. Paragraph 1 of the Lease defines "Unavoidable Delay" as follows:

> ***4** *Unavoidable Delay* means a delay resulting from strikes or labor troubles or accident, or from any cause whatsoever beyond Landlord or Tenant's reasonable control (other than Landlord or Tenant's financial hardship), including, but not limited to, acts of foreign and/or domestic terrorism, laws, governmental preemption in connection with national emergency or by reason of any requirements of any governmental authority, or by reason of the conditions of supply and demand which have been or are affected by war or other emergency.
>
> Paragraph 38 of the Lease, titled *Inability to Perform* provides as follows: The obligation of each party hereunder to perform all of the covenants and agreements hereunder on the part of such party to be performed shall be excused by the period of Unavoidable Delay, as it relates to the particular obligation affected by such Unavoidable Delay and such party's inability to perform shall not relieve the other party of its obligations to perform under this Lease.

The law in New York is well settled that "once a party to a contract has made a promise, that party must perform or respond in damages for its failure, even when unforseen circumstances make performance burdensome" (*Kel Kim Corp. v. Central Markets, Inc.,* 70 N.Y.2d 900, 902 [1987]). The impossibility of performing the contract may be raised as an affirmative defense in a breach of contract action, but financial difficulty or economic hardship of the promisor, even to the extent of insolvency or bankruptcy, does not establish impossibility sufficient to excuse performance of a contractual obligation (*see, 407 E. 61st Garage v. Savoy Fifth Ave. Corp.,* 23 N.Y.2d 275, 281 [1968]; *Stasyszyn v. Sutton East Assocs. .,* 161 A.D.2d 269, 271, 555 N.Y.S.2d 297 [1st Dept 1990]). The defense is applied narrowly "due in part to judicial recognition that the purpose of contract law is to allocate the risks that might affect performance and that performance should be excused only in extreme circumstances (*see, Kel Kim Corp. v. Central Markets, Inc., supra*), such as when destruction of the subject matter of the contract by an act of God, *vis major* or by law makes performance objectively impossible (*407 E. 61st Garage v. Savoy Fifth Ave. Corp., supra*). Thus, parties to a contract have not been permitted to avoid contractual obligations on the ground of impossibility where a commodity swap agreement was rendered extremely disadvantageous due to an increase in the price of cobalt (*General Elec. Co. v. Metals Resources Group Ltd.,* 293 A.D.2d 417, 741 N.Y.S.2d 218 [1st Dept 2002]); financial condition of a contracting party changed due to the fraud of Bernie Madoff (*Sassower v. Blumenfeld,* 24 Misc.3d 843, 878 N.Y.S.2d 602, 2009 N.Y. Slip Op. 29198 [Sup.Ct.2009]); contracting party unable to secure financing in a form required (*Stasyszyn v. Sutton East Assocs., supra*); party unable to secure the level of insurance required due to a liability insurance crisis (*Kel Kim Corp. v. Central Markets, Inc., supra*), and a party was unable to generate sufficient cash flow due to the catastrophic economic collapse of the Asian market (*Bank of New York v. Tri Polyta Finance B.V.,* 2003 WL 1960587 [S .D.NY 2003]).

***5** The contract here was entered into by sophisticated commercial parties who could have anticipated the possibility that future events might result in financial disadvantage on the part of either party, even if the precise cause or extent of such financial disadvantage was not foreseen at the time the contract was executed (*see, General Elec. Corp. v. Metals Resource Group Ltd., supra*). Thus, under the circumstances extant at bar the impossibility of performance doctrine does not relieve plaintiff of its obligations under the Lease.

Plaintiff urges this court to adopt the reasoning of the United States District Court for the Southern District of Indiana in the case of *Hoosier Energy Rural Elec. Cooperative v. John Hancock Life Ins. Co.,* 588 F.Supp.2d 919 (S.D.Ind.2008). The Court held that the defendant had shown a likelihood of success on the merits on its defense of temporary commercial impracticability where the nature and scope of the present unprecedented credit crisis rendered performance under the contract at issue therein prohibitively expensive. The Court distinguished the facts of that case from those of the *Kel Kim* or *Bank of New York*

cases by stating that the defendant before it did not seek to excuse its performance in its entirety for an unlimited period of time, but rather sought a reasonable extension during a time of severe economic crisis. This Court finds the reasoning of the *Hoosier* decision to be unpersuasive. If that argument prevailed, "every debtor in a country suffering economic distress could avoid its debts" (*Bank of New York v. Tri Polyta Finance B.V., supra*).

Nor may the plaintiff prevail on the doctrine of *force majeure.* A *force majeure* provision will also be narrowly construed and is not intended to buffer a party against the normal risks of a contract. Generally, "only if the *force majeure* clause specifically includes the event that actually prevents a party's performance will that party be excused" (*Kel Kim Corp. v. Central Markets, Inc., supra*). In this case, the *force majeure* clause does not specifically include plaintiff's inability to meet its obligations due to a severe economic crisis. In fact, following the catchall language "from any cause whatsoever beyond Landlord or Tenant's reasonable control" contained in this provision is the exclusion "other than Landlord or Tenant's financial hardship". It would, therefore, appear that the parties to the Lease considered the possibility of a change in the financial circumstances of either party, even if not specifically anticipating the nature or extent of such economic downturn, and determined that this provision would not shield the parties from liability for any non-performance of their respective obligations on such basis.

Conclusion

Based upon the foregoing discussion, it is

ORDERED, that defendants' motion pursuant to CPLR § 3211(a)(1) and (7) to dismiss the complaint is granted and the complaint is dismissed, without costs and disbursements; and it is further

***6 ORDERED,** that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

All Citations

34 Misc.3d 1222(A), 951 N.Y.S.2d 84 (Table), 2009 WL 8572326, 2009 N.Y. Slip Op. 52825(U)

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1 N.Y.3d 470
Court of Appeals of New York.

VERMONT TEDDY BEAR CO., INC.,
Respondent,
v.
538 MADISON REALTY COMPANY,
Appellant.

March 25, 2004.

Synopsis

Background: Commercial tenant brought action seeking declaration that its termination of lease was proper. The Supreme Court, New York County, Herman Cahn, J., entered summary judgment in favor of tenant, and landlord appealed. The Supreme Court, Appellate Division, 308 A.D.2d 33, 761 N.Y.S.2d 620, affirmed and landlord appealed.

The Court of Appeals, Graffeo, J., held that lease was not terminated by landlord's failure to furnish written notice that the premises had been restored and were ready for occupancy after tenant's store was damaged in collapse of adjacent building's wall.

Reversed.

Attorneys and Law Firms

*****765 *471 **877** Jay Goldberg, PC, New York City (Jay Goldberg of counsel), and Greenberg Traurig, LLP (Israel Rubin and James W. Perkins of counsel), for appellant.

Reed Smith LLP, New York City (Andrew B. Messite of counsel), for respondent.

***472 OPINION OF THE COURT**

GRAFFEO, J.

After substantial damage occurred to its retail store, the tenant in this case terminated its lease on the ground that the building owner had failed to provide timely written notice that the premises had been restored and were ready for occupancy. *****766** The courts below agreed with the tenant that the lease required the owner to give such notice. Because our longstanding contract interpretation principles prohibit us from adding a missing term to an unambiguous lease, we reverse the order of the Appellate Division and deny the tenant's motion for summary judgment.

Beginning in October 1996, plaintiff Vermont Teddy Bear Co., Inc. (VTB) leased first-floor retail space at 538 Madison Avenue in Manhattan from defendant 538 Madison Realty Company. The parties executed a Real Estate Board of New York standard form store lease and annexed a rider to the document. The lease term was for 10 years, with escalating rental payments beginning at $300,000 per year. On December 7, 1997, during the second year of the lease term, a wall of 540 Madison Avenue—a building adjacent to the leased premises—collapsed. The disaster caused considerable damage to 538 Madison Avenue and temporarily shut down the area.[1] In light of the extensive damage, the New York City Department of Buildings issued a "Vacate Order" that remained in effect for several months and required the discontinuance of occupancy at 538 Madison Avenue.

***473** The effect of damage or destruction to the rental premises on the parties' lease agreement is addressed in article 9 of the contract, which states that

> "[i]f the demised premises are totally damaged or rendered wholly unusable by fire or other casualty, then the rent and other items of additional rent ... shall be proportionately paid up to the time of the casualty and thenceforth shall cease until the date when the premises shall have been repaired and ****878** restored by Owner, ... subject to Owner's right to elect not to restore the same ...."

This provision further establishes that "[t]enant's liability for rent shall resume five (5) days after written notice from Owner that the premises are substantially ready for Tenant's occupancy."[2]

The rider that was incorporated in the lease contained a provision relating to casualty loss. Specifically, paragraph 3 of the rider gave VTB a limited tenancy termination option in the event of a fire or casualty. If VTB wished to invoke this termination right, the rider required it to

> "provide Landlord within thirty (30) days of the fire or casualty, a written notice of Tenant's election to terminate the Lease if the Premises are not restored

> within one (1) year after Owner's receipt of such Tenant's notice. In the event the Premises are not restored within such one (1) year period the Lease shall be deemed terminated as of the end of the 12 mos. period and both Landlord and Tenant shall be released from all obligations which may arise after the Termination Date."

After the wall collapsed, VTB exercised its option under paragraph 3 of the rider and notified 538 Madison by letter dated December 16, 1997 that it intended to terminate the lease if the premises were not restored within one year.[3] In response, ***767** 538 Madison demanded assurances that VTB intended to ***474** continue its tenancy pursuant to the terms of the lease. Despite this demand, VTB removed its remaining possessions from the store in July 1998 and surrendered its keys.

One year having elapsed since the casualty, VTB declared the lease terminated in December 21, 1998 correspondence to the owner stating: "[a]s of today's date we have not received any notice from Landlord advising Tenant that restoration of the Premises has been completed or advising Tenant to reoccupy the Premises or to recommence the payment of rent under the Lease." In addition, VTB demanded return of its $150,000 security deposit and the portion of its prepaid December 1997 rent for the balance of that month after the casualty. 538 Madison promptly rejected termination of the lease, asserting that VTB was aware that the premises had been substantially restored by July 1998 and the lease remained in effect.

In May 1999, VTB initiated this action seeking a declaration that its termination of the lease was effective and a judgment for the return of its security deposit and prepaid rent. 538 Madison answered, raising several counterclaims, and subsequently moved to dismiss the complaint. Supreme Court denied the motion, concluding that issues of fact existed with respect to whether and when the premises were restored. Following discovery, VTB moved for summary judgment. In its opposition to the motion, 538 Madison contended that the lease did not obligate it to provide written notice of restoration to avoid termination. Supreme Court granted the motion, dismissing 538 Madison's affirmative defenses and counterclaims ***879** and directing entry of judgment in VTB's favor in the amount of $170,161.29 plus interest.

A divided Appellate Division affirmed. The majority acknowledged that paragraph 3 of the rider "contains no explicit requirement of written notice of the completed restoration" (308 A.D.2d 33, 36, 761 N.Y.S.2d 620 [1st Dept.2003]), but nevertheless concluded that article 9's written notice provision pertaining to resumption of rental payment obligated 538 Madison to issue notice of restoration to prevent termination. Two Justices dissented and voted to deny the motion for summary judgment, reasoning that "the majority's holding sanctions the judicial rewriting of the parties' lease by imposing a written notice requirement on the landlord that does not exist under the plain terms of that ***475** document" (*id.* at 42, 761 N.Y.S.2d 620). The dissent asserted that a question of fact regarding the restoration of the premises further precluded a grant of summary judgment in VTB's favor. 538 Madison now appeals as of right (*see* CPLR 5601[a]).

When interpreting contracts, we have repeatedly applied the "familiar and eminently sensible proposition of law [ ] that, when parties set down their agreement in a clear, complete document, their writing should ... be enforced according to its terms" (*W.W.W. Assoc. v. Giancontieri,* 77 N.Y.2d 157, 162, 565 N.Y.S.2d 440, 566 N.E.2d 639 [1990]; *see Reiss v. Financial Performance Corp.,* 97 N.Y.2d 195, 198, 738 N.Y.S.2d 658, 764 N.E.2d 958 [2001]). We have also emphasized this rule's special import "in the context of real property transactions, where commercial certainty is a paramount concern, and where ... the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length" (*Matter of Wallace v. 600 Partners Co.,* 86 N.Y.2d 543, 548, 634 N.Y.S.2d 669, 658 N.E.2d 715 [1995] [internal quotation marks and citations omitted]). In such ***768** circumstances, "courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include" (*Rowe v. Great Atl. & Pac. Tea Co.,* 46 N.Y.2d 62, 72, 412 N.Y.S.2d 827, 385 N.E.2d 566 [1978]). Hence, "courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Reiss,* 97 N.Y.2d at 199, 738 N.Y.S.2d 658, 764 N.E.2d 958 [internal quotation marks and citation omitted]).

In this case, neither party claims that the lease is ambiguous or incomplete. Instead, 538 Madison argues that article 9 and rider paragraph 3 do not require it to send VTB written notice of restoration to prevent termination of the lease; it merely must repair and restore the premises for reoccupancy within the contractual time period. 538 Madison urges that strict construction of the parties' unambiguous agreement demonstrates that the written notice requirement applies only to reinitiating VTB's liability for rent. Similarly relying on the plain meaning of the lease, VTB asserts that, when article 9's written notice provision is read together with the termination right in paragraph 3 of the rider, the only reasonable interpretation is that notice of restoration is required. Thus, VTB submits that its termination was effective because 538 Madison failed within one year of VTB's invocation of its

termination option to provide written notice that the premises had been restored.

In the absence of any ambiguity, we look solely to the language used by the parties to discern the contract's meaning. According ***476** to rider paragraph 3, a tenant's casualty-based termination will occur only ****880** in one circumstance—when, after receiving notice of the tenant's intent to terminate the tenancy, the owner fails to restore the premises within the prescribed one-year time frame. There is neither an explicit requirement that the owner give the tenant notice that the rental premises have been restored, nor any provision allowing the tenant to terminate the lease based on the lack of such notice.

Reading the lease's casualty-related provisions together does not alter our determination. Article 9's written notice component deals exclusively with the tenant's liability for rent, and there is no indication in rider paragraph 3 that the parties intended that written notice requirement to affect the owner's ability to prevent termination of the lease merely by restoring the premises in a timely fashion. Indeed, article 9 expressly provides that, in the event of a casualty, the lease "shall continue in full force and effect except as hereinafter set forth."

Assuming that the premises had been timely restored, it would presumably have been in 538 Madison's financial interest to provide written notice of the completed restoration as soon as possible in order to trigger VTB's obligation to pay rent. The logic of this proposition, however, does not justify judicial insertion of a contract term. The parties could have negotiated and included an explicit notice requirement regarding completion of restoration within the time period set forth in paragraph 3 of the rider (*see Rowe,* 46 N.Y.2d at 72, 412 N.Y.S.2d 827, 385 N.E.2d 566). They did not do so. We therefore conclude that the lease was not terminated by virtue of 538 Madison's failure to furnish written notice of restoration and VTB's motion for summary judgment on this theory should have been denied.

Nor is VTB entitled to summary judgment on its alternative argument that the restoration was incomplete. Pursuant to the contract, VTB could have properly terminated the lease if 538 Madison did, in fact, fail to restore the premises within one year. On this record, however, we cannot *****769** determine whether the lease terminated or continued in effect at the expiration of that period because a threshold issue of fact remains as to whether the restoration was substantially complete within one year of VTB's notice to 538 Madison.

Accordingly, the order of the Appellate Division should be reversed, with costs, and VTB's motion for summary judgment should be denied.

***477** Chief Judge KAYE and Judges G.B. SMITH, CIPARICK, ROSENBLATT, READ and R.S. SMITH concur.

Order reversed, etc.

All Citations

1 N.Y.3d 470, 807 N.E.2d 876, 775 N.Y.S.2d 765, 2004 N.Y. Slip Op. 02257

Footnotes

1 In *532 Madison Ave. Gourmet Foods v. Finlandia Ctr.,* 96 N.Y.2d 280, 727 N.Y.S.2d 49, 750 N.E.2d 1097 [2001], we addressed negligence claims against the owners of 540 Madison Avenue in connection with this incident.

2 By agreeing to the standard form provision regarding a casualty loss, VTB waived the option set forth in Real Property Law § 227 that permits a lessee of a destroyed property to "quit and surrender possession of the leasehold premises, and of the land so leased or occupied; and he or she is not liable to pay to the lessor or owner, rent for the time subsequent to the surrender."

3 The letter also indicated that VTB had previously advised 538 Madison of its intention to vacate the premises after the 1997 holiday season for business reasons unrelated to the casualty. VTB therefore requested the owner's assistance in obtaining a successor tenant.

77 N.Y.2d 157
Court of Appeals of New York.

W.W.W. ASSOCIATES, INC., Respondent, v. Frank GIANCONTIERI et al., Appellants.

Dec. 27, 1990.

Synopsis
Purchaser brought action against vendors for specific performance of contract for sale of real property. The Supreme Court, Suffolk County, Baisley, J., granted vendors' motion for summary judgment, and appeal was taken. The Supreme Court, Appellate Division, 152 A.D.2d 333, 548 N.Y.S.2d 580, reversed and remitted. Permission to appeal was granted. The Court of Appeals, Kaye, J., held that reciprocal cancellation provision was unambiguous and thus, extrinsic evidence to effect that clause was inserted for sole benefit of purchaser was inadmissible.

Reversed.

Attorneys and Law Firms

***441 *158 **640** John G. Poli, III, Huntington, for appellants.

Matthew Dollinger, Carle Place, and Michael J. Spithogiannis, Flushing, for respondent.

***159 OPINION OF THE COURT**

KAYE, Judge.

In this action for specific performance of a contract to sell real property, the issue is whether an unambiguous reciprocal cancellation provision should be read in light of extrinsic evidence, as a contingency clause for the sole benefit of plaintiff purchaser, subject to its unilateral waiver. Applying ***160** the principle that clear, complete writings should generally be enforced according to their terms, we reject plaintiff's reading of the contract and dismiss its complaint.

Defendants, owners of a two-acre parcel in Suffolk County, on October 16, 1986 contracted for the sale of the property to plaintiff, a real estate investor and developer. The purchase price was fixed at $750,000—$25,000 payable on contract execution, $225,000 to be paid in cash on closing (to take place "on or about December 1, 1986"), and the $500,000 balance secured by a purchase-money mortgage payable two years later.

The parties signed a printed form Contract of Sale, supplemented by several of their own paragraphs. Two provisions of the contract have particular relevance to the present dispute—a reciprocal cancellation provision (para. 31) and a merger clause (para. 19). Paragraph 31, one of the provisions the parties added to the contract form, reads: "The parties acknowledge that Sellers have been served with process instituting an action concerned with the real property which is the subject of this agreement. In the event the closing of title is delayed by reason of such litigation it is agreed that closing of title will in a like manner be adjourned until after the conclusion of such litigation provided, *in the event such litigation is not concluded, by or before 6–1–87 either party shall have the right to cancel this contract whereupon the down payment shall be returned and there shall be no further rights hereunder.*" (Emphasis supplied.) Paragraph 19 is the form merger provision, reading: "All prior understandings and agreements between *seller* and *purchaser* are merged in this contract [and it] completely expresses ***442 **641** their full agreement. It has been entered into after full investigation, neither party relying upon any statements made by anyone else that are not set forth in this contract."

The Contract of Sale, in other paragraphs the parties added to the printed form, provided that the purchaser alone had the unconditional right to cancel the contract within 10 days of signing (para. 32), and that the purchaser alone had the option to cancel if, at closing, the seller was unable to deliver building permits for 50 senior citizen housing units (para. 29).

The contract in fact did not close on December 1, 1986, as originally contemplated. As June 1, 1987 neared, with the litigation still unresolved, plaintiff on May 13 wrote defendants that it was prepared to close and would appear for ***161** closing on May 28; plaintiff also instituted the present action for specific performance. On June 2, 1987, defendants canceled the contract and returned the down payment, which plaintiff refused. Defendants thereafter sought summary judgment dismissing the specific

performance action, on the ground that the contract gave them the absolute right to cancel.

Plaintiff's claim to specific performance rests upon its recitation of how paragraph 31 originated. Those facts are set forth in the affidavit of plaintiff's vice-president, submitted in opposition to defendants' summary judgment motion.

As plaintiff explains, during contract negotiations it learned that, as a result of unrelated litigation against defendants, a lis pendens had been filed against the property. Although assured by defendants that the suit was meritless, plaintiff anticipated difficulty obtaining a construction loan (including title insurance for the loan) needed to implement its plans to build senior citizen housing units. According to the affidavit, it was therefore agreed that paragraph 31 would be added for plaintiff's sole benefit, as contract vendee. As it developed, plaintiff's fears proved groundless—the lis pendens did not impede its ability to secure construction financing. However, around March 1987, plaintiff claims it learned from the broker on the transaction that one of the defendants had told him they were doing nothing to defend the litigation, awaiting June 2, 1987 to cancel the contract and suggesting the broker might get a higher price.

Defendants made no response to these factual assertions. Rather, its summary judgment motion rested entirely on the language of the Contract of Sale, which it argued was, under the law, determinative of its right to cancel.

The trial court granted defendants' motion and dismissed the complaint, holding that the agreement unambiguously conferred the right to cancel on defendants as well as plaintiff. The Appellate Division, however, reversed and, after searching the record and adopting the facts alleged by plaintiff in its affidavit, granted summary judgment to plaintiff directing specific performance of the contract. We now reverse and dismiss the complaint.

Critical to the success of plaintiff's position is consideration of the extrinsic evidence that paragraph 31 was added to the contract solely for its benefit. The Appellate Division made clear that this evidence was at the heart of its decision: "review of the record reveals that under the circumstances of ***162** this case the language of clause 31 was intended to protect the plaintiff from having to purchase the property burdened by a notice of pendency filed as a result of the underlying action which could prevent the plaintiff from obtaining clear title and would impair its ability to obtain subsequent construction financing." (152 A.D.2d 333, 336, 548 N.Y.S.2d 580.) In that a party for whose sole benefit a condition is included in a contract may waive the condition prior to expiration of the time period set forth in the contract and accept the subject property "as is" (*see, e.g., Satterly v. Plaisted,* 52 A.D.2d 1074, 384 N.Y.S.2d 334, *affd.* 42 N.Y.2d 933, 397 N.Y.S.2d 1008, 366 N.E.2d 1362; *Catholic Foreign Mission Socy. v. Oussani,* 215 N.Y.1, 8, 109 N.E. 80; *Born v. Schrenkeisen,* 110 N.Y. 55, 59, 17 N.E. 339), plaintiff's undisputed factual assertions—if material— *****443 **642** would defeat defendants' summary judgment motion.

We conclude, however, that the extrinsic evidence tendered by plaintiff is not material. In its reliance on extrinsic evidence to bring itself within the "party benefited" cases, plaintiff ignores a vital first step in the analysis: before looking to evidence of what was in the parties' minds, a court must give due weight to what was in their contract.

A familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing (*see, e.g., Mercury Bay Boating Club v. San Diego Yacht Club,* 76 N.Y.2d 256, 269–270, 557 N.Y.S.2d 851, 557 N.E.2d 87; *Judnick Realty Corp. v. 32 W. 32nd St. Corp.,* 61 N.Y.2d 819, 822, 473 N.Y.S.2d 954, 462 N.E.2d 131; *Long Is. R.R. Co. v. Northville Indus. Corp.,* 41 N.Y.2d 455, 393 N.Y.S.2d 925, 362 N.E.2d 558; *Oxford Commercial Corp. v. Landau,* 12 N.Y.2d 362, 365, 239 N.Y.S.2d 865, 190 N.E.2d 230). That rule imparts "stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses * * * infirmity of memory * * * [and] the fear that the jury will improperly evaluate the extrinsic evidence." (Fisch, New York Evidence § 42, at 22 [2d ed].) Such considerations are all the more compelling in the context of real property transactions, where commercial certainty is a paramount concern.

Whether or not a writing is ambiguous is a question of law to be resolved by the courts (*Van Wagner Adv. Corp. v. S & M Enters.,* 67 N.Y.2d 186, 191, 501 N.Y.S.2d 628, 492 N.E.2d 756). In the present case, the contract, read as a whole to determine its purpose and intent (*see, e.g., Rentways, Inc. v. O'Neill Milk & Cream Co.,* 308 N.Y. 342, 347, 126 N.E.2d 271), ***163** plainly manifests the intention that defendants, as well as plaintiff, should have the right to cancel after June 1, 1987 if the litigation had not concluded by that date; and it further plainly manifests the intention that all prior understandings be merged into the contract, which expresses the parties' full agreement (*see,* 3 Corbin, Contracts § 578, at 402–403). Moreover, the face

of the contract reveals a "logical reason" (152 A.D.2d, at 341, 548 N.Y.S.2d 580) for the explicit provision that the cancellation right contained in paragraph 31 should run to the seller as well as the purchaser. A seller taking back a purchase-money mortgage for two thirds of the purchase price might well wish to reserve its option to sell the property for cash on an "as is" basis if third-party litigation affecting the property remained unresolved past a certain date.

Thus, we conclude there is no ambiguity as to the cancellation clause in issue, read in the context of the entire agreement, and that it confers a reciprocal right on both parties to the contract.

The question next raised is whether extrinsic evidence should be considered in order to *create* an ambiguity in the agreement. That question must be answered in the negative. It is well settled that "extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face." (*Intercontinental Planning v. Daystrom, Inc.,* 24 N.Y.2d 372, 379, 300 N.Y.S.2d 817, 248 N.E.2d 576; *see also, Chimart Assocs. v. Paul,* 66 N.Y.2d 570, 573, 498 N.Y.S.2d 344, 489 N.E.2d 231.)

Plaintiff's rejoinder—that defendants indeed had the specified absolute right to cancel the contract, but it was subject to plaintiff's absolute prior right of waiver—suffers from a logical inconsistency that is evidence in a mere statement of the argument. But there is an even greater problem. Here, sophisticated businessmen reduced their negotiations to a clear, complete writing. In the paragraphs immediately surrounding paragraph 31, they expressly bestowed certain options on the purchaser alone, but in paragraph 31 they chose otherwise, explicitly allowing both ***444 **643 buyer and seller to cancel in the event the litigation was unresolved by June 1, 1987. By ignoring the plain language of the contract, plaintiff effectively rewrites the bargain that was struck. An analysis that begins with consideration of extrinsic evidence of what the parties meant, instead of looking first to what they said and reaching extrinsic evidence only when required to do so because of some identified ambiguity, unnecessarily denigrates the contract and unsettles the law.

***164** Finally, plaintiff's conclusory assertion of bad faith is supported only by its vice-president's statement that one of the defendants told the broker on the transaction, who then told him, that defendants were doing nothing to defend the action, waiting for June 2 to cancel, and suggesting that the broker might resell the property at a higher price. Where the moving party "has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure so to do." (*Zuckerman v. City of New York,* 49 N.Y.2d 557, 560, 427 N.Y.S.2d 595, 404 N.E.2d 718.) Even viewing the burden of a summary judgment opponent more generously than that of the summary judgment proponent, plaintiff fails to raise a triable issue of fact (*see, Friends of Animals v. Associated Fur Mfrs.,* 46 N.Y.2d 1065, 1068, 416 N.Y.S.2d 790, 390 N.E.2d 298).

Accordingly, the Appellate Division order should be reversed, with costs, defendants' motion for summary judgment granted, and the complaint dismissed.

WACHTLER, C.J., and SIMONS, ALEXANDER, TITONE, HANCOCK and BELLACOSA, JJ., concur.

Order reversed, etc.

All Citations

77 N.Y.2d 157, 566 N.E.2d 639, 565 N.Y.S.2d 440

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182 A.D.2d 22
Supreme Court, Appellate Division, First Department, New York.

WILLIAM P. PAHL EQUIPMENT CORP. and 232 W. 58th Street Associates, Plaintiffs–Respondents,
v.
Henry KASSIS and 232 West Associates, Defendants–Appellants,
Joseph M. Sperazi, Grace Sperazi and The United States of America, Defendants.

Aug. 13, 1992.

Synopsis

Seller of business assets brought action to foreclose mortgage on building in which business was located, and to reform written instruments. The IAS Court, Shorter, J., granted motion to dismiss complaint, denied reargument, and dismissed second amended complaint. On seller's motion for leave to renew and reargue, the Supreme Court, New York County, Cahn, J., granted reargument and leave to replead, and reinstated causes of action. Purchaser/buyer appealed. The Supreme Court, Appellate Division, Sullivan, J., held that: (1) seller was not entitled to renewal or reargument of motion to dismiss; (2) seller did not state cause of action for reformation of memorandum of agreement of sale or purchase money note and mortgage; (3) liquidated damages provision in memorandum of agreement for sale precluded action for money damages; (4) pleadings failed to allege act or omission by purchasers constituting default under contract of sale, purchase money mortgage or note, and thus there was no right of foreclosure; and (5) seller's conduct in litigation warranted sanctions.

Reversed.

Attorneys and Law Firms

**9 *24 Philip M. Halpern, New York City, of counsel (Mark C. Durkin, with him on the brief, Collier, Cohen, Shields & Bock, attorneys) for defendants-appellants.

David L. Deitz, New York City, of counsel (Leonard Holland, with him on the brief, Wohl Loewe Stettner Fabricant & Deitz, attorneys) for plaintiffs-respondents.

Before *25 SULLIVAN, J.P., and CARRO, WALLACH and SMITH, JJ.

Opinion

SULLIVAN, Justice.

This action arises out of two commercial transactions entered into in September 1989, in the first of which 232 W. 58th Street Associates (Associates), a New York partnership, agreed, by written contract of sale dated September 12, 1989, to sell to Henry Kassis, a defendant herein, the premises located at 232 West 58th Street, in New York City, for $950,000, $200,000 of which was to be paid in cash, with the $750,000 balance, payable over time, secured by a purchase money mortgage. It is undisputed that Kassis and his designee, 232 West Associates, also a defendant herein, made all the payments due under the contract of sale as well as all payments called for under the terms of the mortgage and note.

Although Kassis apparently was interested only in the purchase of the building, he **10 also entered into a second transaction involving the sale by William P. Pahl Equipment Corp. (Pahl) to him, pursuant to a written September 12, 1989 memorandum of agreement, of certain assets—the name and customer list—of a retail and wholesale cosmetics business located at the subject premises for $350,000, $100,000 of which was paid on account. The entire transaction was structured as two separate sales, so that Associates could avoid certain adverse tax consequences. Title to the premises was conveyed on November 21, 1989, and Kassis took possession on or about December 19, 1989. After Kassis refused to make the final $250,000 payment due on the sale of Pahl's cosmetics business, Pahl and Associates, plaintiffs herein, thereafter commenced this action, seeking, in a first cause of action, to foreclose the purchase money mortgage based upon defendants' default in "concluding the sale of the business, and paying their final installment of the purchase price thereof." A second cause of action sought $250,000 by virtue of defendants' having "defaulted under the purchase money note, mortgage and memorandum of agreement." The third cause of action sought, on the grounds of mutual mistake, fraud or unilateral mistake, reformation of all the written instruments executed in connection with both transactions so as to make the default under the terms of the memorandum of agreement a corresponding default under the contract of sale and purchase money note and mortgage.

Defendants moved to dismiss the complaint pursuant to ***26** CPLR 3211(a)(5) and (7) on the grounds that, absent a default under the mortgage note, no right of foreclosure existed and no default was alleged; that the contract of sale and memorandum of agreement were two separate, wholly independent and integrated documents, and a breach of one was not a breach of the other and that plaintiffs failed to state legally cognizable causes of action for either damages or reformation. The motion was granted, the IAS court (Kenneth L. Shorter, J.) finding that the two transactions were separate and independent, that the seller's remedy for the buyer's default in the purchase of the business was limited, in accordance with the terms of the memorandum of agreement, to the amount of monies actually paid and that a cause of action in fraud sufficient to warrant reformation had not been pleaded. Leave to replead within 30 days was granted. Reargument was ultimately denied.

Plaintiffs served an amended complaint which set forth the same three causes of action, albeit in a different order, and realleged, verbatim, thirty of the forty paragraphs of the original complaint. It added a few allegations to the fraud and reformation cause of action, as well as the prayer for relief. After withdrawing their notice of appeal from the dismissal of their first and second causes of action only, plaintiffs served a second amended complaint asserting identical causes of action, separating the original complaint's third cause of action seeking reformation into three separate causes of action.

Defendants moved to dismiss the second amended complaint in its entirety, asserting, *inter alia,* legal insufficiency and the law of the case doctrine. The IAS court, on its last day before retirement, granted the motion and dismissed the complaint in its entirety. The appeal from that determination was dismissed for lack of prosecution pursuant to a February 4, 1992 order of this court.

In the interim, plaintiffs moved pursuant to CPLR 2221 for leave to renew and reargue the motion to dismiss the second amended complaint on the grounds of newly discovered evidence and the court's overlooking of applicable law and misapprehending the facts. Defendants opposed the motion and cross-moved for the imposition of financial sanctions pursuant to 22 NYCRR § 130, *et seq.* By virtue of the original IAS court's retirement, these motions were heard by a new court (Herman Cahn, J.), which, by order of October 9, 1991, granted reargument as to all but the previously dismissed fraud and deceit causes of action, upon reargument, the court ***27** reinstated three of the five causes of action of the second amended complaint granted plaintiffs leave to replead another ****11** and denied the cross-motion for sanctions. Defendants appeal. We reverse.

A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing "that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." (*Schneider v. Solowey,* 141 A.D.2d 813, 529 N.Y.S.2d 1017.) Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage, Inc. v. Home Insurance Co.,* 99 A.D.2d 971, 472 N.Y.S.2d 661) or to present arguments different from those originally asserted (*Foley v. Roche,* 68 A.D.2d 558, 418 N.Y.S.2d 588.) A motion to renew under CPLR 2221, on the other hand, is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention. (*Beiny v. Wynward,* 132 A.D.2d 190, 522 N.Y.S.2d 511, *appeal dismissed,* 71 N.Y.2d 994, 529 N.Y.S.2d 277, 524 N.E.2d 879.) Judged by these standards, it is clear that plaintiffs failed to meet their burden of proof in demonstrating new or additional facts warranting renewal or that the original IAS court overlooked or misapprehended the facts or law so as to warrant reargument.

The renewal aspect of the motion under review was based on a claim of newly discovered evidence, namely, a series of documents obtained by plaintiffs in response to their discovery requests in a separate lawsuit, and primarily consisting of the personal notes of the real estate broker supposedly encompassing the substance of conversations between the principals of Pahl and Associates and Kassis during the negotiations of the sale of the subject premises and cosmetics business. The contents of these documents, however, constitute neither new nor additional facts not known to plaintiffs at the time of the motion to dismiss the second amended complaint since they represented conversations and negotiations in which their principals had taken part and had to be aware of since September 1989. Similarly, these so-called new facts were, as even the court hearing the reargument/renewal motion conceded, the same facts plaintiffs had asserted in their opposition to the motions to dismiss the second amended complaint and even the original complaint. Thus, renewal was properly denied.

The reargument phase of plaintiffs' motion is equally ***28** devoid of merit. Aside from asserting a facile and completely unsupported misapplication of the law argument, they claimed, in passing, that the court overlooked the authorities they cited relating to its

interpretation of the memorandum of agreement's liquidated damage clause. The clause should be read, plaintiffs argued, "in light of the contract for the sale of the [p]remises" and interpreted to apply only to events prior to November 21, 1989, the date of the closing of title thereto. This same argument as to the validity and effectiveness of the liquidated damage clause was made in opposition to the motion to dismiss the original complaint, on the reargument thereof and, finally, in opposition to the motion to dismiss the second amended complaint. Having heard the same argument repeated three times, the court, understandably, did not feel obliged to articulate the claim any further or expound on the reasons why the authorities advanced did not overcome the second amended complaint's defects. Nor was the court required to do so. Plaintiffs, as the renewal/reargument court recognized, failed to meet their burden of proof in providing the court with a basis upon which to grant the motion and to reinstate the previously dismissed causes of action. Once the court found that plaintiffs had failed to set forth any grounds upon which to grant renewal or reargument, it should have concluded its analysis and denied the motion. (*See, Duque v. Ortiz,* 154 A.D.2d 333, 334, 545 N.Y.S.2d 810; *see, also, Klein v. Mount Sinai Hosp.,* 121 A.D.2d 164, 502 N.Y.S.2d 1018.)

In any event, on the merits, each of the four reinstated causes of action is legally ****12** insufficient in that it either fails to state a cause of action or is barred by documentary evidence and payment. The third cause of action seeks, *inter alia,* reformation of the contract of sale and memorandum of agreement so as to make a default under the latter a corresponding default under the former and, to that extent, was found to be validly pleaded by the renewal/reargument court. In that regard, plaintiffs alleged that neither agreement "fully sets forth that Kassis' obligation to pay for the business was absolute after Kassis acquired the [p]remises", that the liquidated damage clause in the memorandum of agreement did "not clearly set forth that it is applicable only prior to the conveyance of the [p]remises and not afterwards" and that the documents did "not clearly set forth that a default under the [m]emorandum of [a]greement is a default under all the other documents". They further alleged that "[t]he errors in committing the agreement of the parties to writing resulted from ***29** the mutual mistake of the parties, the mistake of plaintiffs and the fraud of [defendants] or scrivener's error." The fifth cause of action, as to which leave to replead was granted seeks reformation of the purchase money mortgage and note so that a breach of the memorandum of agreement would be a corresponding breach of the mortgage and note, thereby providing a basis for foreclosure.

In order to obtain reformation of a written instrument it must be shown that "the parties came to an understanding, but in reducing it to writing, through mutual mistake, or through mistake on one side and fraud on the other, omitted some provision agreed upon, or inserted one not agreed upon." (*Curtis v. Albee,* 167 N.Y. 360, 364, 60 N.E. 660; *Chimart Assocs. v. Paul,* 66 N.Y.2d 570, 573, 498 N.Y.S.2d 344, 489 N.E.2d 231; *Slutzky v. Gallati,* 97 A.D.2d 561, 468 N.Y.S.2d 87, *lv. denied* 61 N.Y.2d 602, 472 N.Y.S.2d 1025, 460 N.E.2d 231.) Reformation is not a mechanism to interject into the writings terms or provisions not agreed upon or suggested by one party but rejected by the other. (*Schmidt v. Magnetic Head Corp.,* 97 A.D.2d 151, 159, 468 N.Y.S.2d 649.) Nor may it be used to relieve a party from "a hard or oppressive bargain." (*Backer Mgt. Corp. v. Acme Quilting Co.,* 46 N.Y.2d 211, 219, 413 N.Y.S.2d 135, 385 N.E.2d 1062.) The burden upon a party seeking reformation is a heavy one since it is presumed that a deliberately prepared and executed written instrument accurately reflects the true intention of the parties: "[T]he proponent of reformation must show in no uncertain terms not only that mistake or fraud exists, but exactly what was really agreed upon between the parties." (*South Fork Broadcasting Corp. v. Fenton,* 141 A.D.2d 312, 314, 528 N.Y.S.2d 837, *appeal dismissed,* 73 N.Y.2d 809, 537 N.Y.S.2d 494, 534 N.E.2d 332.)

Of the grounds asserted in support of reformation, two of them, i.e., "mistake of plaintiffs" and "fraud", may be disposed of summarily since even the renewal/reargument court denied the motion to reargue the dismissal of the first cause of action of the second amended complaint sounding in fraud and deceit, thereby affirming the motion court's dismissal of the same. In any event, as already noted, reformation cannot be sustained on the ground of unilateral mistake alone. What is required is a showing of unilateral mistake induced by the other party's fraudulent representations. (*Kadish Pharmacy v. Blue Cross and Blue Shield of Greater NY,* 114 A.D.2d 439, 494 N.Y.S.2d 354, *appeal dismissed,* 68 N.Y.2d 641, 505 N.Y.S.2d 72, 496 N.E.2d 231.) There is no allegation here that the parties had reached an agreement, which, unbeknownst to plaintiffs but known to defendants, who had misled them, was not expressed in the subsequent writings. (*See, e.g., Chimart Assocs. v. Paul, supra,* 66 N.Y.2d at 573, 498 N.Y.S.2d 344, 489 N.E.2d 231; *Barash v. Pennsylvania Term Real* ***30** *Estate Corp.,* 26 N.Y.2d 77, 308 N.Y.S.2d 649, 256 N.E.2d 707.) As for the claim of mutual mistake and scrivener's error, the second amended complaint fails to allege the existence of a single mistake, much less a mutual one, or to identify what was agreed upon that is not contained in the challenged writings.

****13** The only allegations in support of the two

reformation causes of action consist of totally irrelevant claims as to what the written agreements do or do not say. For instance, plaintiffs allege that "[t]he note and purchase money mortgage do not fully set forth that a breach of the [m]emorandum of agreement constitutes a breach of mortgage" and that "[n]either the [c]ontract nor the [m]emorandum of [a]greement fully sets forth that Kassis' obligation to pay for the business was absolute after Kassis acquired the premises." What is not alleged, as is required for reformation, is that the parties agreed and intended the contracts to reflect that which plaintiffs allege they do not.

In any event, the clear wording of the two agreements militates strongly against the claims now asserted. Plaintiffs cannot point to a single provision that contains even a hint that the parties intended the closing of title on the subject premises to be contingent on the consummation of the sale of the cosmetics business or that the failure to close on the sale of the cosmetics business constituted an event of default under the purchase money note and mortgage. In fact, as the documents disclose, the parties had mutually agreed to the contrary. Most significantly, the memorandum of agreement for the sale of the business contained a cross-default provision which made a default by any party under the contract of sale for the subject premises a corresponding default thereunder as well. That the contract of sale did not contain a similar provision seems to us persuasive that the parties, sophisticated businessmen represented by counsel throughout the negotiation, drafting and execution of the agreements, never intended that one be included. (*Burnside Bargain Store, Inc. v. Carmel,* 156 A.D.2d 248, 249, 548 N.Y.S.2d 510; *see, also, Chimart Assocs. v. Paul, supra,* 66 N.Y.2d 570, 498 N.Y.S.2d 344, 489 N.E.2d 231.)

Similarly, each agreement contains a liquidated damage clause setting forth the seller's agreed upon remedy in the event the purchaser breached the agreement. Neither clause makes reference to the other and, contrary to plaintiffs' unsupported claims, nothing in the language of the liquidated damage clause of the memorandum of agreement indicates that it was intended to be applicable only prior to November ***31** 21, 1989, the date of the closing of title of the subject premises. To the contrary, the clause expressly applies to the purchaser's default in "the performance of any of the terms of this contract," which imposed numerous obligations upon Kassis that had to be performed on or before the date of the closing on the sale of the cosmetics business, set in the memorandum of agreement for January 9, 1990, almost two months after the closing of title on the subject property.

It should also be noted that the contract of sale for the subject premises contains the standard provision that, except as otherwise provided, none "of the agreements, representations, warranties and provisions [therein] on the part of the [s]eller to be performed ... shall survive closing of title and delivery of the deed". Nowhere in the contract did the parties provide for an exception with respect to any of the obligations under the memorandum of agreement. Moreover, none of the written instruments reveals an intention by the parties to include a cross-default provision in the contract of sale for the subject premises, purchase money mortgage or note.

In light of the liquidated damage provision of the memorandum of agreement, which specifically forecloses any right the sellers might have to sue the purchaser for breach of that agreement, plaintiffs do not have a cause of action for money damages for breach of the memorandum of agreement as asserted in their second cause of action of the second amended complaint. Paragraph 2(a) of the agreement provides, "Should the [p]urchaser default in the performance of any of the terms of this contract, then the money paid on account of this contract shall be, in view of the fact that the property has been kept off the market and the difficulty of ascertaining damages, retained by the [s]eller as liquidated damages, and this contract shall thereupon become null and void, and neither party shall have further rights against ****14** the other." It is not disputed that defendants paid $100,000, which plaintiffs have retained, on account of the $350,000 purchase price. The liquidated damage clause specifically provides that upon default and retention by the seller of the monies paid on account the contract "shall thereupon become null and void" and that "neither party shall have further rights against the other." Clearly, there was no basis for reinstatement of this cause of action.

The fourth cause of action of the second amended complaint, which seeks foreclosure of the purchase money mortgage given in connection with the sale of the subject ***32** premises, is equally defective. A cause of action in foreclosure will not lie unless the mortgagor is in default under the terms of the mortgage. (RPAPL §§ 1301 *et seq.; see,* Marks, Maloney & Paperno, *Mortgages & Mort. Foreclosure, N.Y.* [1975 Rev.Ed.] § 160.) The pleading in question fails to allege a single act or omission by defendants constituting a default under the contract of sale, purchase money mortgage or note. All that is asserted is defendants' default "in concluding the purchase of the business, and paying their final installment of the purchase price thereof", which, as noted, is not a corresponding default under the purchase money mortgage or note. Thus, nothing is asserted which would afford a right of foreclosure.

Defendants also appeal from the denial of their cross-

motion for sanctions. 22 NYCRR § 130–1.1(a) permits a court, in the exercise of discretion, to award costs in reimbursement of actual expenses reasonably incurred, as well as attorneys' fees, resulting from frivolous conduct, that is, conduct "completely without merit in law or fact and [which] cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" (*id.* § 130–1.1[c]). In our view, plaintiffs' continued pursuit of this baseless litigation—on the basis of previously rejected claims—by seeking reargument/renewal of the dismissal of its third complaint in the action constitutes a clear case of frivolous conduct. After the dismissal of their original complaint, plaintiffs moved to reargue and then filed two more complaints reasserting the identical causes of action that had previously been dismissed. They filed two notices of appeal from the dismissals of the original and second amended complaints, the first of which they withdrew and the second of which they failed to perfect. Even after the dismissal of their second amended complaint and the filing of a second notice of appeal, they moved to reargue, presenting no new facts and relying upon the same previously rejected arguments. Moreover, they attempted to buttress their arguments by accusing the motion court of not having read the case law they cited and of having merely relied on portions of the headnotes of the cases it cited. Such *ad hominem* attack without the assertion of a proper basis for reargument/renewal justifies the imposition of a sanction. (*See, e.g., Jones v. Camar Realty Corp.,* 167 A.D.2d 285, 561 N.Y.S.2d 916, *appeal dismissed,* 77 N.Y.2d 939, 569 N.Y.S.2d 612, 572 N.E.2d 53, *cert. denied sub nom. Hanft v. Camar Realty Corp.,* 502 U.S. 940, 112 S.Ct. 376, 116 L.Ed.2d 328.) In light of the extensive prior proceedings in the action, plaintiffs' pursuit of ***33** this motion appears to be nothing more than a desperate attempt to salvage a baseless lawsuit.

The amount sought in sanctions, $3,341.30, representing the costs and expenses incurred in opposing plaintiffs' second motion to renew/reargue and in preparing the cross-motion is supported by an appropriate evidentiary showing, which was not challenged, and appears fair and reasonable.

Accordingly, the order of the Supreme Court, New York County (Herman Cahn, J.), entered on or about October 9, 1991, which, *inter alia,* granted plaintiffs' motion to renew and reargue and which, upon reargument, reinstated the second, third and fourth causes of action and granted leave to replead the fifth cause of action to seek reformation of the underlying mortgage and note, should be reversed, on the law, with costs and disbursements, the motion denied and the cross-motion for the ****15** imposition of financial sanctions in the sum of $3,341.30 granted.

Order of the Supreme Court, New York County (Herman Cahn, J.), entered on or about October 9, 1991, is reversed, on the law, with costs and disbursements, the motion denied and the cross-motion for the imposition of financial sanctions in the sum of $3,341.30 granted.

All concur.

All Citations

182 A.D.2d 22, 588 N.Y.S.2d 8

End of Document

2020 WL 7315470 (N.Y.Sup.), 2020 N.Y. Slip Op. 34063(U) (Trial Order)
Supreme Court of New York.
New York County

**1 35 EAST 75TH STREET CORPORATION, Plaintiff,
v.
CHRISTIAN LOUBOUTIN L.L.C., Defendant.

No. 154883/2020.
December 9, 2020.

Decision + Order on Motion

Present: Hon. Arlene P. Bluth, Justice.

MOTION DATE 12/08/2020

MOTION SEQ. NO. 001

***1** The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for SUMMARY JUDGMENT.

The motion by plaintiff for summary judgment on its three causes of action seeking rent, additional rent and legal fees is granted.

Background

In this commercial landlord tenant case, plaintiff claims that defendant (the tenant in a building owned by plaintiff) has not paid rent since March 3, 2020. It argues that the total due is comprised of the monthly payments of rent and real estate tax escalation charges for 2020/21.

In opposition, defendant admits it has not paid the rent since March. Instead, it argues that the Court cannot grant summary judgment under the impossibility and frustration of purpose doctrines. Defendant argues that the ongoing pandemic implicates these doctrines and absolves defendant of its obligations under the lease.

It contends that when it signed the lease in 2013 no one could have predicted that there would be an infectious disease that would shut down the vast majority of businesses. Defendant points out that its entire business was built on a highly visible and well trafficked retail location **2 on the Upper East Side. In other words, the lack of customer traffic has decimated the store's revenues.

Defendant complains that plaintiff refused to negotiate a mutually acceptable resolution and instead brought this action. It questions why plaintiff has made this motion instead of proceeding to discovery about defendant's counterclaims and affirmative defenses. Defendant brings counterclaims for frustration of purpose to terminate the lease, frustration of purpose for a rent abatement, impossibility of performance to rescind the lease and impossibility of performance for a rent abatement. It also asserts six affirmative defenses including failure to state a cause of action, impossibility of performance, frustration of purpose, failure of consideration, illegality and failure to mitigate.

In reply, plaintiff maintains that the sole dispute in this case is whether the effects of the ongoing pandemic are a sufficient defense to paying rent due under a lease. It argues that the equitable defenses raised by plaintiff are inapplicable and have historically had narrow application. Plaintiff points out that the parties included a force majeure clause for unforeseen events in the lease but this provision did not relieve defendant of its obligation to pay rent. Plaintiff also argues that there have been many reasons why retail stores have succeeded or failed over the years and that is simply a risk defendant took when it entered into a lease that extended from 2013 through 2029.

It insists that application of defendant's logic would call into question the enforceability of all contracts when economic circumstances change. Plaintiff speculates that if a tenant could get out of a lease when the market is difficult, then presumably a landlord could terminate a lease when the market is competitive and charge a higher rent.

****3 Discussion**

***2** 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]).

There is no doubt that the ongoing pandemic has decimated retail stores across New York City. It has made it nearly impossible for some businesses to pay the rent and the Court empathizes with the difficulties facing these establishments. But this Court is tasked with assessing whether any of the doctrines defendant has identified raise an issue of fact that might ****4** compel the Court to deny the instant motion. As discussed below, the Court finds that defendant has not raised a valid issue of fact and the Court grants the motion.

Frustration of Purpose

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*.).

Contrary to defendant's argument, this doctrine has no applicability here. This is not a case where the retail space defendant leased no longer exists, nor is it even prohibited from selling its products. Instead, defendant's business model of attracting street traffic is no longer profitable because there are dramatically fewer people walking around due to the pandemic. But market changes happen all the time. Sometimes businesses become more desirable (such as the stores near the newly-completed Second Avenue subway stops) and other times less so (such as the value of taxi medallions with the rise of ride-share apps).

But unforeseen economic forces, even the horrendous effects of a deadly virus, do not automatically permit the Court to simply rip up a contract signed between two sophisticated parties.

Of course, defendant would not have entered into the lease if it knew there would be a pandemic that negatively affected the retail market. But that is not sufficient to invoke the frustration of purpose doctrine (*PPF Safeguard, LLC v BCR Safeguard Holding, LLC*, 85 AD3d 506, 924 NYS2d 391 [1st Dept 2011] [finding that Hurricane Katrina was not a sufficient basis to implicate the frustration of purpose doctrine to excuse payment in New Orleans-based self-storage contract]).

****5 Impossibility**

***3** "Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract" (*Kel Kim Corp. v Cent. Markets, Inc.*, 70 NY2d 900, 902, 524 NYS2d 384 [1987]).

Similarly, the impossibility doctrine does not compel the Court to deny the instant motion. The subject matter of the contract--the physical location of the retail store--is still intact. And defendant is permitted to sell its products. The issue is that it cannot sell enough to pay the rent. That does not implicate the impossibility doctrine. As the First Department found in connection with a case about the failure to pay under a commodity swap contract, "Defendant's performance may have been rendered financially disadvantageous by circumstances unforeseen by the parties at the time of the contract's making. However, financial disadvantage to either of the contracting parties was not only foreseeable but was contemplated by the contract, even if the precise causes of such disadvantage were not specified. In any event, it is not a basis for reliance upon the impossibility of performance doctrine" (*Gen. Elec. Co. v Metals Resources Group Ltd.*, 293 AD2d 417, 418, 741 NYS2d 218 [1st Dept 2002]).

And, here, the parties actually included a force majeure clause in the lease that specifically provided that it would *not* excuse defendant from having to pay rent (NYSCEF Doc. No. 11, ¶ 26[c]). Instead, it purported to extend the period of performance for whatever the delay may have been (*id*.). It did not contemplate that defendant could simply walk away with nearly a decade left on the lease and not pay any more rent.

****6 Summary**

The Court grants the motion and dismisses defendant's affirmative defenses and counterclaims. To the extent that defendant claims there was a lack of consideration (its fourth affirmative defense) that argument is without merit. The contract was for a retail space, which defendant occupied and ran its business out of starting in 2013. This is not a situation where some outside force (like a zoning change) prevented defendant from operating its store. And, as plaintiff pointed out, defendant failed to respond to plaintiff's arguments with respect to the first, fifth and sixth affirmative defenses.

These are difficult times for landlords and tenants (both commercial and residential) in New York City. And while the Court recognizes the financial hardships that defendant has faced, it must also observe that plaintiff's faces challenges too. Even though defendant is not paying the rent, plaintiff still has its own obligations (such as paying property taxes) that must be fulfilled. Permitting the doctrines of impossibility or frustration of purpose to rescind an otherwise valid lease would simply allocate the loss to plaintiff. It is not this Court's role to ignore a contract and decide *sua sponte* who should take the financial loss.

Under these circumstances, where defendant signed a lease in 2013 and ran a retail store for many years before the pandemic, the Court finds that plaintiff has met its burden as a matter of law.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary is granted and the affirmative defenses and counterclaims asserted by defendant are severed and dismissed, and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of $1,680,454.73 plus interest from November 30, 2020; and it is further

***4 **7** ORDERED that the issue of reasonable attorneys' fees is severed and a virtual hearing will be scheduled by the Clerk of this part.

12/9/2020

DATE

<<signature>>

ARLENE P. BLUTH, J.S.C.

2020 WL 5745631 (N.Y.Sup.), 2020 N.Y. Slip Op. 33144(U) (Trial Order)
Supreme Court of New York.
Kings County

**1 BKNY1, INC., d/b/a 132 Lounge, Plaintiff,
v.
132 CAPULET HOLDINGS, LLC, Defendant.

No. 508647/16.
September 23, 2020.

Decision and Order

Present: Hon. Lawrence Knipel, Justice.

At an IAS Term, Comm Part 4 of the Supreme Court of the State, of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23rd day of September, 2020.

Mot. Seq. No. 16

*1 The following e-filed papers read herein:	NYSCEF #:
Notice of Motion, Affidavits (Affirmations), and Exhibits Annexed	547-557
Opposing Affidavits (Affirmations) and Exhibits Annexed ___	558-562
Reply Affidavits (Affirmations) _____	566-567

In this action for a *Yellowstone* injunction and other relief, defendant 132 Capulet Holdings, LLC (defendant), moves for: (1) leave, pursuant to CPLR 2221 (d), to reargue its prior motion for, among other things, partial summary judgment on its affirmative defenses and counterclaims, and, upon reargument, granting that branch of its prior motion; and/or (2) an order vacating the *Yellowstone* injunction entered in favor of plaintiff BKNY1, Inc., d/b/a 132 Lounge (plaintiff), on the grounds that the latter has failed to pay rent for the months of April and May 2020; and/or (3) "[a]lternatively setting this matter down for trial on a date certain"; and/or (4) reimbursement of costs, expenses, and attorneys' fees incurred by defendant in making this motion. Plaintiff opposes the motion.

**2 *(1)*

The initial branch of defendant's motion which is for leave to reargue its prior motion for partial summary judgment on its affirmative defenses and counterclaims is *denied*. The record reflects that the legal and factual issues underlying defendant's affirmative defenses and counterclaims are scheduled to be tried in or about November 2020 by a Civil Court Judge presiding over the holdover proceeding commenced by defendant against plaintiff in the Housing Part of the Kings County Civil Court (*see 132 Capulet Holdings, LLC v BKNY1, Inc., d/b/a 132 Lounge*, index No. LT-79902-19-KI) (the holdover proceeding). [1] There is a "strong preference for resolving landlord-tenant disputes in Civil Court due to its unique ability to resolve such issues" (*44-46 W. 65th Apt. Corp. v Stvan*, 3 AD3d 440, 441 [1st Dept 2004]). The interests of judicial economy, fairness, and consistency are better served by deferring to the Civil Court's upcoming hearing and determination in the: holdover proceeding.

(2)

The *Yellowstone* injunction has been predicated on plaintiff's representation made on the record of the hearing that it has paid, and will continue paying, rent.[2] It is undisputed that plaintiff has failed to pay rent for the months of April and May 2020.[3] The mandatory ****3** closure of plaintiff's restaurant business during those months by Executive Order No. 202.3 as cited by plaintiff, did not relieve it of its contractual obligation to pay rent. Plaintiff has failed to cite - and the Court's own review has not uncovered - any provision of the lease excusing it from timely and fully paying its rent during (and notwithstanding) the state-mandated closure of its business.

2** The common-law doctrine of frustration of purpose is inapplicable under the circumstances. "[T]o 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" (*Warner v Kaplan*, 71 AD3d 1, 6 [1st Dept 2009] [internal quotation marks omitted], *lv denied* 14 NY3d 706 [2010]). "The doctrine applies when a change in circumstances makes one party's performance virtually worthless to the other, frustrating [its] purpose in making the contract" (*PPF Safeguard, **LLC** v BCR Safeguard **Holding**, **LLC, 85 AD3d 506, 508 [1st Dept 2011] [internal citations omitted]). Examples include a situation where the tenant was unable to use the premises as a restaurant until a public sewer was completed approximately three years after the lease had been executed (*see Center for Specialty Care v CSC Acquisition I, **LLC***, 185 AD3d 34, 42 [1st Dept 2020] [citation omitted]). On the other hand, "impossibility occasioned by financial hardship does not excuse performance of a contract" (*Urban Archaeology Ltd. v 207 E. 57th St. **LLC***, 68 AD3d 562, 562 [1st Dept 2009]). Inasmuch as the initial term of the lease, as amended by the March 2012 rider, is for approximately nine years (Nov. 2012 to Sept. 2021), a temporary closure of plaintiff's business for two months (April and May 2020) in the penultimate year of its initial term could not have frustrated its overall purpose.

****4** Nor is the doctrine of impossibility of performance available to plaintiff in this case. "Generally, once a party to a contract has made a promise, that party must perform or respond in damages for its failure, even when unforeseen circumstances make performance burdensome" (*Kel Kim Corp. v Central Markets, Inc.*, 70 NY2d 900, 902 [1987]). "[A]bsent an express contingency clause in the agreement allowing a party to escape performance under certain specified circumstances, compliance is required" (*Stasyszyn v Sutton E. Assoc.*, 161 AD2d 269, 271 [1st Dept 1990]). Nothing in the lease at issue permits termination or suspension of plaintiff's obligation to pay rent in the event of the issuance of a governmental order restricting the use of the leased premises (*see Casteel USA v V.C. Vitanza Sons, Inc.*, 170 AD2d 568, 569 (2d Dept 1991]). To the contrary, the lease specifically provides that plaintiff's obligation to pay rent "shall in no wise be affected, impaired or excused because Owner is unable to fulfill any of its obligations under this lease . . .by reason of . . . government preemption or restrictions" (Lease [NYSCEF #24], ¶ 26), which is the case here.[4] Accordingly, the branch of defendant's motion for an order vacating the *Yellowstone* injunction on account of plaintiff's failure to pay rent for the months of April and May 2020 is granted to the extent set forth in the decretal paragraphs below.

The alternative branches of defendant's motion are either academic or without merit.

****5** ***Conclusion***

Accordingly, it is

ORDERED that defendant's motion is *granted to the extent* that (1) plaintiff is directed to pay to defendant the April and May 2020 base rent ($10,927 per month as set forth in the Rent Rider) within 30 days after electronic service of this decision and order with notice of entry on its counsel by defendant's counsel; and (2) if plaintiff fails to pay such rent on time and in full, defendant may, if it be so advised, renew its request for the vacature of the *Yellowstone* injunction upon further order of the Court; and the remainder of its motion is denied; and it is further

ORDERED that defendant's counsel is directed to electronically serve a copy of this decision and order with notice of entry on plaintiff's counsel and to electronically file ah affidavit of service thereof with the Kings County Clerk.

***3** This constitutes the decision and order of the Court.

ENTER,

<<signature>>

J. S. C.

Footnotes

1 *See* Affidavit of Nasser Ghorchian (plaintiff's president), dated July 26, 2020 (NYSCEF #559) (Plaintiff's Affidavit), ¶¶ 1-3; Amended Petition with attachments filed in the holdover proceeding (NYSCEF #562).

2 *See* Order, dated Aug. 5, 2016 (NYSCEF #41), incorporating Transcript of Hearing, **held** on Aug. 5, 2016 (NYSCEF #42), at page 89, lines 19-21 (statement of plaintiff's counsel: "Rent is being paid and we'll continue to pay rent as we always have to the owners of the building.").

3 *See* Plaintiff's Affidavit, ¶ 16.

4 Nptably, neither plaintiff's president nor plaintiff's counsel has demonstrated, via any competent evidence, such as plaintiff's financial documentation or an affidavit by its accountant with supporting evidence, that plaintiff was (and still is) unable to pay the April and May 2020 rent (*accord 538 Morgan Ave. Props.* ***LLC*** *v 538 Morgan Realty* ***LLC***, 2020 NY Slip Op 32780[U],*10 [Sup Ct, Kings County 2020]).

2020 WL 6526996 (N.Y.Sup.), 2020 N.Y. Slip Op. 33707(U) (Trial Order)
Supreme Court of New York.
New York County

1 **DR. SMOOD NEW YORK LLC f/k/a **Dr. Smood** Orchard LLC, Plaintiff,
v.
ORCHARD HOUSTON, LLC, Defendant.

No. 652812/2020.
November 2, 2020.

Decision + Order on Motion

Present: Hon. Laurence L. Love, Justice.

MOTION DATE 10/20/2020

MOTION SEQ. NO. 002

***1** The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64 were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

Upon the foregoing documents, the motion is decided as follows:

On or about February 22, 2017, Plaintiff, **Dr**. **Smood** New York, LLC ("**Dr**. **Smood**") and Defendant, Orchard Houston, LLC ("Orchard") entered into a ten (10) year Lease agreement for the premises described as a portion of the ground floor and basement space of the building located at 181-185 East Houston a/k/a 195-201 Orchard Street, New York, New York (the "Premises"). Plaintiff last paid the monthly rent in March, 2020 and has failed to pay the monthly rent since that time arguing that it has no obligation to pay rent during the COVID-19 pandemic, citing the lease and a series of New York State executive orders. In June 2020, **Dr**. **Smood** and Orchard engaged in settlement discussions to potentially revise the rental obligations under the Lease, given the effect of the pandemic on possible performance thereof. On July 1, 2020, Orchard served **Dr**. **Smood** with a notice to cure, declaring **Dr**. **Smood** in default of the Lease for failure to pay rent for the months of April 2020, May 2020, and June 2020. The Notice stated that, if **Dr**. **Smood** failed to cure the default at the end of the expiration period (July 10, 2020), Orchard would, inter **2 alia, draw upon Plaintiff's security deposit under the Lease. In response, **Dr**. **Smood** filed its first order to show cause for a Yellowstone injunction and related relief, though the parties later stipulated to withdraw the first notice to cure and the first order to show cause in an effort to settle the matter outside of court. Thereafter, Orchard served the **Dr**. **Smood** with a second Notice to Cure, declaring **Dr**. **Smood** in default of the Lease for failure to pay rent for the months of April 2020-September 2020, resulting in **Dr**. **Smood's** filing of a second Order to Show Cause, seeking injunctive relief. Orchard cross-moves for an Order requiring plaintiff to pay use and occupancy at the rate specified in the lease during the pendency of this action and directing Tenant to post an undertaking in the amount of $250,000.00 to secure the rent arrearages in the aggregate amount of $198,764.31 for April, May, June, July 2020, August and September 2020.

In its reply papers, plaintiff withdrew its demand for a *Yellowstone* injunction and now seeks only a Preliminary Injunction and Temporary Restraining Order.

A preliminary injunction is appropriate when the party seeking injunctive relief establishes: (1) likelihood of ultimate success on the merits; (2) irreparable injury if the injunction is not granted; and (3) a balancing of the equities in its favor. *See* *Four Times Square Assocs., L.L.C. v. Cigna Investments, Inc.*, 306 A.D.2d 4, 5 (1st Dep't 2003) (citing *Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981)); CPLR §§ 6301, 6311. The elements to be satisfied must be demonstrated by clear and convincing evidence. *Liotta v. Mattone*, 71 A.D.3d 741 (2nd Dep't, 2010). However, the moving party is only required to make a *prima facie* showing of its entitlement to a preliminary injunction, not prove the entirety of its case on the merits. The decision to grant a motion for a preliminary injunction "is committed to the sound discretion of the trial court." *N.Y. Cnty. Lawyers' Ass'n v. State*, 192 Misc. 2d 424, 428-29 (Sup. Ct. N.Y. Cnty. 2002); *see also Terrell v. Terrell*, 279 A.D.2d 301, 304 (1st Dep't 2001).

***2** ****3** Plaintiff argues that "(i) Plaintiff will likely succeed on the merits because the government regulations issued in response to the pandemic frustrated the purpose of Plaintiff's Lease; (ii) Plaintiff will suffer an irreparable injury absent an injunction, as Defendant will, inter alia, unjustly draw upon Plaintiff's security deposit on the Premises; and (iii) the equities balance in Plaintiff's favor, as Plaintiff should not be penalized for being legally precluded from operating its business as contemplated under the Lease while the Landlord continued to reap an unjust and un-bargained for reward."

In support of its motion, plaintiff submits the affidavit of Francesco Perillo, an employee of plaintiff, a copy of the relevant lease, copies of the relevant NYS Executive Orders. The affidavit specifically highlights Article 11, Section 11.3 of the Lease, which states that "if the Premises are damaged by fire or other casualty, or if the Building is damaged such that Tenant is deprived of reasonable access to the Premises...Fixed Rent, Tenant's Tax Payment and Tenant's Operating Payment shall be reduced in the proportion by which the area of the part of the Premises which is not usable (or accessible) and is not used by Tenant bears to the total area of the Premises." Plaintiff claims that "The casualty triggering Section 11.3 of the Lease began on or about March 16, 2020, when, pursuant to the Executive Orders previously discussed herein, Plaintiff was legally forced to close its business due to the property and physical damage caused by the COVID-19 virus and the dangerous propensity such virus poses to the public." Plaintiff further argues that the premises "were rendered wholly inaccessible and unusable by the Executive Orders and the novel coronavirus from March 16, 2020 to July 6, 2020, and partially inaccessible and unusable from July 6, 2020 onward" and that as such, plaintiff is entitled to a total rent abatement. Plaintiff further argues that the purpose of the contract has been frustrated and same is a defense to nonperformance under a lease when the frustrated purpose is "so completely the basis of the contract that, as both ****4** parties understood, without it, the transaction would have made little sense" *Jack Kelly Partners LLC v. Zegelstein*, 140 A.D.3d 79 (1st Dept 2016); see also, *Crown IT Servs., Inc. v. Koval-Olsen*, 11 A.D.3d 263 (1st Dept 2004); Restatement [Second] of Contracts §§ 265 and 269. It is undisputed that the purpose of the lease was for plaintiff to operate "a full service café specializing in fresh and raw quick-service products with menu items to include breakfast, lunch, and dinner, coffee and tea beverages, cold-pressed juices, shakes and smoothies, and other related products."

In opposition, defendant submits the affidavit of Amir Chaluts, a member of Orchard, together with supporting documentation. At the outset, the Court notes that plaintiff failed to timely serve the instant Order to Show Cause, however both motions will be decided on the merits. Similarly, plaintiff's allegations that the pandemic constitutes a "casualty" are entirely without merit as there has been no physical harm to the demised premises and the lease does not provide for a rent abatement in such a case as plaintiff was required to obtain insurance to guarantee payment under said circumstances. Plaintiff's argument that the lease has been frustrated is similarly without merit as "for a party to avail itself of the frustration of purpose defense, there must be complete destruction of the basis of the underlying contract; partial frustration such as a diminution in business, where a tenant could continue to use the premises for an intended purpose, is insufficient to establish the defense as a matter of law." See *Robitzek Inv. Co. v. Colonial Beacon Oil Co.*, 265 AD 749, 753 (1st Dept 1943). Here, defendant has made a clear showing that the plaintiff has been operating out of the demised premises since at least July, 2020, yet has continued to assert that it has no obligation to pay rent. Specifically, the premises remain open for both counter service and pickup of orders submitted online. Plaintiff has only been prevented by the relevant executive orders from operating indoor dining services. As such, plaintiff has failed to establish a likelihood of success on the merits and as such is not entitled to a preliminary injunction.

***3 **5** As the Court is denying plaintiff's motion seeking an injunction, plaintiff is not required to post a bond pursuant to CPLR 6312(b). Plaintiff's obligation to pay rent and taxes pursuant to the lease continues unabated. As such, it is hereby

ORDERED that plaintiff's motion seeking a preliminary injunction and defendant's cross-motion seeking an Order requiring plaintiff to pay monthly use and occupancy and post a bond are hereby denied in their entirety.

11/2/2020

DATE

<<signature>>

LAURENCE L. LOVE, J.S.C.

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