

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER M. TISCH PART 18

Justice

-----X

MEPA REALTY LLC,

Plaintiff,

- v -

W 14 MARKET LLC, JIN AN, YUNSUB AN

Defendants.

-----X

INDEX NO. 159890/2020

MOTION DATE 08/11/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, plaintiff-landlord moves for summary judgment on its complaint against defendants W 14 Market LLC (tenant), and Jin Sup An and Yun Sub An as guarantors to the commercial lease.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). "Once this showing has been made, . . . the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]).

To sustain a cause of action for breach of contract, plaintiff must prove the existence of a contract, plaintiff's performance, defendant's breach, and damages (see Harris v Seward Park Hous. Corp., 79 AD3d 425, 426 [1st Dept 2010]; see A/R Retail LLC v Hugo Boss Retail, Inc.,

2021 NY Slip Op 21139 [Sup Ct, NY County 2021]; Markov v Katt, 176 AD3d 401, 402 [1st Dept 2019]). It is undisputed that the tenant failed to pay rent in full since June 2019 in violation of the lease provisions. Defendants did not oppose existence of the lease and the guaranties; the tenant's failure to pay rent, nor those branches of the motion for liquidated damages and attorneys' fees.

The Court finds that plaintiff met its prima facie burden entitling it to judgment on the first cause of action in part for fixed rent, late fees, and taxes. However, that branch of the motion seeking reimbursement of ECB and FDNY violations, and other various charges and/or repairs, is denied as plaintiff failed to produce any evidence of such violations or proof that such expenses were incurred. As to that portion of the first cause of action only, the motion is denied (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] ["Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers"]). The Court finds defendants' waiver argument as unavailing, given paragraphs 25 and 65 of the lease. Additionally, defendants failed to sufficiently raise the defenses of frustration of purpose or impossibility. The affidavit of one of the guarantors, Jin Sup An, only states that the tenant "took possession of the Premises for the purpose of operating a marketplace of vendors to sell food, drink, and delicacies"; that "without the foot traffic from people working, living, and shopping in the area, the Tenant could not prosper"; and that operating a retail store at \$75,000.00 per month is pointless even where "the Premises was feasibly able to open in a marginal capacity or when customers are too fearful of profound illness and potential death due to COVID-19 to venture out to shop at a retail establishment" (NYSCEF Doc No. 26 at ¶¶ 6, 9, 31, 32). Not only does the Court acknowledge that the default here occurred pre-COVID-19, but the affidavit is, in any event, insufficient to demonstrate an issue of fact as to impossibility or

frustration of purpose (see 558 Seventh Ave. Corp. v Times Sq. Photo Inc., 194 AD3d 561, 561-62 [1st Dept 2021], appeal dismissed, 37 NY3d 1040 [2021] [“although the pandemic has been disruptive for many businesses, the purpose of the lease in this case was not frustrated, and defendants' performance was not rendered impossible, by its reduced revenues”]; 45-47-49 Eighth Ave. LLC v Conti, 72 Misc 3d 1210[A], 2021 NY Slip Op 50691 [U], at *3 [Sup Ct, NY County 2021] [Lebovits, J.]).

Accordingly, it is hereby ORDERED that the motion is denied in part to the extent of plaintiff's entitlement to additional charges including ECB and FDNY violations, water and sewer charges, unit repair, AC and elevator maintenance, gas charges, and Tenant's alleged failure to leave the premises in proper condition; and it is further

ORDERED that the remainder of the motion is granted; and it is further


ORDERED that the Clerk is directed to enter judgment in favor of the plaintiff against defendants W 14 Market LLC, Jin Sup An, and Yun Sub An on the first and second causes of action in the amount of \$1,474,013.51 and \$154,500.00 as and for the third cause of action, for a total sum of \$1,628,513.51, with costs and disbursements as calculated by the Clerk; and it is further

ORDERED that that fourth cause of action that seeks the recovery of attorney's fees is severed and the issue of the amount of reasonable attorney's fees that plaintiff may recover against the defendant defendants W 14 Market LLC, Jin Sup An, and Yun Sub An is referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,¹ upon the Special Referee Clerk in the General Clerk’s Office (Room 119), who is directed to place this matter on the calendar of the Special Referee’s Part for the earliest convenient date; and it is further

ORDERED that such service upon the Special Referee Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.

<u>2/28/2022</u> DATE	 ALEXANDER M. TISCH, J.S.C.			
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN			

¹ Available on the Court’s website at www.nycourts.gov/supctmanh under the “References” link on the navigation bar.