SUPREME COURT-STATE OF NEW YORK
DECISION AFTER TRIAL
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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90 CHICKEN CORP.,

Plaintiff,

-against-

90 JERICHO REALTY CORP. and R&R OF GC, INC.,

Defendants.

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TRIAL/IAS PART: 4

NASSAU COUNTY

Index No: 605513-23

The Court held a bench trial in November 2023 on Plaintiff 90 Chicken Corp.'s ("Plaintiff" or "90 Chicken Corp.) claim that Defendant 90 Jericho Realty Corp. ("Defendant" or "90 Jericho") breached a lease agreement and subsequent possession agreement between the parties. Post-trial briefs were submitted in February 2024 and April 2024, and were supplemented by oral argument on the record on April 22, 2024. As set forth in further detail below, the Court determines that Plaintiff has established that Defendant breached the parties' agreements, and awards nominal damages of $1.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant owns commercial property located at 90 Jericho Turnpike, Jericho New York (the "Premises"). Plaintiff is a corporation headed by Lalmir Sultanzada. Sultanzada and his family members operate various fast-food franchises throughout the New York metropolitan area. Sultanzada learned that R&R of GC, Inc. ("R&R"), which had operated a Wendy's fast-food franchise at the location, wished to terminate its lease with Defendant, which is controlled by the same individuals that control R&R.[1] Sultanzada hoped to open a Popeye's franchise at the Premises, and formed the Plaintiff entity to enter into the lease at issue.

[1] Plaintiff also asserted claims against R&R of GC, Inc., but discontinued those claims prior to trial.

Plaintiff and Defendant entered into a lease on June 27, 2022. They later agreed that Defendant would deliver the premises to Plaintiff on March 1, 2023. The lease term was ten years, with two automatic renewal periods of five years apiece. During the interim between the lease signing and the proposed delivery date, however, Wendy's International, Inc. exercised its own contractual rights pursuant to its franchise agreement with R&R to assume the obligations of R&R in that entity's lease for the Premises. Defendant then advised Plaintiff that it would not be able to deliver the Premises until Defendant's lease with R&R/Wendy's terminated in 2030. This lawsuit followed. Plaintiff seeks lost profits over the twenty years that its lease, with its renewals, would run. It claims those lost profits are over $7 million over that period, or $2.776 million at present value.

The Court concludes that Plaintiff has established that Defendant breached the terms of the lease and subsequent possession agreement between the parties, as Defendant did not deliver the premises to Plaintiff on March 1, 2023 as the parties had agreed. Nevertheless, as discussed in more detail below, the Plaintiff did not establish its claim for damages based on lost profits. Inasmuch as Plaintiff did not provide any other evidence of damages at trial, the Court awards nominal damages to Plaintiff in the amount of $1.

At the outset, the lease is silent as to whether lost profits are an appropriate, much less agreed-upon, measure of damages. And, there was no testimony at trial that the parties agreed that lost profits, even if appropriately quantified, should be a measure of damages. This is not surprising. Indeed, as the First Department held, "[a] tenant not yet in possession may not recover profits which allegedly would have been earned if not for a breach by the landlord preventing the tenant from taking possession." *Maruki, Inc. v. Lefrak Fifth Ave. Corp.*, 161 A.D.2d 264, 267 (1st Dept. 1990). Thus, lost profits, regardless of how quantified, appear to be foreclosed by the lack of any agreement by the parties that such profits are a measure of damages. This is fatal to Plaintiff's claim, as a party seeking lost profits must show that lost profits were "fairly within the contemplation of the parties to the contract at the time it was made." *Great Earth Int'l Franchising Corp. v. Milks Dev.*, 311 F. Supp. 2d 419 (S.D.N.Y. 2004).

Even if the parties did contemplate an award of lost profits as damages, the testimony and evidence adduced by Plaintiff regarding the amount of lost profits did not carry its burden for the Court to quantify such damages. Lost profits must be proven with reasonably certainty.

See, e.g., Kenford Co. v. County of Erie, 67 N.Y.2d 257, 261 (1986). This is particularly difficult when the business is new, as "there does not exist a reasonable basis of experience upon which to estimate lost profits with the requisite degree of reasonable certainty." *Id.* As a result, lost profits for new businesses are typically not recoverable. Rather, lost profits may only be awarded when a business is "established and in operation for a definition period of time . . . calculations based on other similar businesses are too speculative and will not satisfy the reasonable means of calculating damages and lost profits." *Mehta v. New York City Dep't of Consumer Affairs*, 162 A.D.2d 236, 237 (1st Dept. 1990).

This is even the case when the plaintiff has experience in the field at issue. *See Bersin Properties, LLC v. Nomura Credit & Capital, Inc.*, 74 Misc. 3d 1209(A), 2022 WL 433654 (Sup. Ct. N.Y. Cty. Feb. 7, 2022), *aff'd*, 213 A.D.3d 431 (1st Dept. 2023). There, the defendant agreed to provide up to $135 million in financing for the development of a mall to a real estate developer who had successfully worked for many years in that field. *See id.* at *1. *See also Bersin Properties*, N.Y. Cty. Index No. 452630/2014, NYSCEF Docket Entries 54 and 333. The plaintiff filed suit after defendant rejected plaintiff's request for a $54 million draw on that agreement and sought $600 million in lost profits. *See Bersin Properties*, 2022 WL 433654, at *12, citing NYSCEF Docket Entry 136 at 50-51. The *Bersin Properties* court granted summary judgment to defendant, noting that New York "applies a near per se rule rejecting plaintiff's attempts to collect purported lost profits from a business venture with no prior track record to support claims of future success." *See Bersin Properties*, 2022 WL 433654, at *12.

The same logic that guided the *Bersin Properties* court applies here. Plaintiff's claim for lost damages centered on the testimony of Sultanzada's son, Dawood Noor, who is the CFO of Sultanzada's various companies, and Mark Sosnowski, who has significant experience and expertise in business valuation. Noor attempted to compare the sales for various other Popeye's restaurants that his family operated. But these locations are quite different from the Premises, including demographics, population density, and traffic. Moreover, the Premises has operated as a Wendy's franchise, which specializes in hamburgers. By contrast, Popeye's specialty is chicken. Finally, Noor acknowledged that some of the fast-food restaurants in his family's portfolio actually lost money. In short, there was no competent evidence before the Court that Popeye's would succeed at the Premises, much less to accurately compute any damages from a successful operation.

Plaintiff's claim that Sultanzada and Noor's significant experience in the fast-food business cures the infirmities in their claim for future profits is foreclosed by the analysis in *Bersin Properties*, and indeed in the full line of cases to which it cites. In short, it is of no moment that Plaintiff may have experience in the industry at issue. Rather, central to the analysis is that lost future profits cannot be determined with reasonable certainty when the business itself has not existed at the location in question. That is the case here, just as it was in *Bersin Properties*. And, quite notably, Plaintiff has not cited to any authority, much less controlling authority, to support its claim that lost future profits are appropriate for a business that has not existed in a given location.

Inasmuch as Plaintiff has only claimed damages based on lost future profits, which the Court cannot award under the applicable case law, the only damages that are appropriate are nominal damages. Such damages are a "trifling sum" when "there is no substantial loss or injury to be compensated, but still the law recognizes a technical invasion of [plaintiff's] rights or a breach of the defendant's duty." *McWeeney v. Lambe*, 138 A.D.3d 796 (2d Dept. 2016), quoting *Berney v. Adriance*, 157 A.D. 628, 631-32 (1st Dept. 1913). The *McWeeney* court modified a trial court's award of nominal damages in the amount of $7,000, and awarded $1 instead. Guided by *McWeeney*, this Court awards that same amount.

All other matters not decided are denied.

This constitutes the Decision and Order of the Court after Trial.

Settle judgment on ten (10) days notice.

DATED: Mineola, NY
May 1, 2024

ENTER

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
May 03 2024
NASSAU COUNTY
COUNTY CLERK'S OFFICE