

**640 Broadway Owners Subsidiary II LLC v Cafe
Angelique, Inc.**

2022 NY Slip Op 30201(U)

January 20, 2022

Supreme Court, New York County

Docket Number: Index No. 153000/2021

Judge: David Benjamin Cohen

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. DAVID B. COHEN PART 58

Justice

-----X

INDEX NO. 153000/2021

640 BROADWAY OWNERS SUBSIDIARY II LLC,

MOTION SEQ. NO. 001

Plaintiff,

- v -

**DECISION + ORDER ON
MOTION**

CAFE ANGELIQUE, INC.,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

were read on this motion to/for SUMMARY JUDGMENT.

In this action arising from the breach of a lease, plaintiff 640 Broadway Owners Subsidiary II LLC (“Landlord”) moves for an order, pursuant to CPLR 3212, granting summary judgment against defendant Café Angelique, Inc., (“Tenant”) and holding Tenant liable under its lease; awarding Landlord a money judgment against defendant in the sum of \$342,116.65 plus interest, and for rent accruing through judgment, or in the alternative, directing an inquest for damages; and awarding plaintiff its legal fees and expenses incurred herein and either accepting affidavits as to the amount of such fees or directing an inquest to determine the amount of such legal fees and expenses. Tenant opposes the motion. After consideration of the parties’ contentions, as well as the relevant statutes and case law, the motion is decided as follows.

I. Factual and Procedural Background

Landlord, the owner of a building located at 640 Broadway, New York, New York (the “Building”), commenced this action on March 24, 2021, alleging that Tenant, which occupied a store in the Building (“the premises”), breached its lease by failing to pay rent. Tenant, in its

answer, set forth affirmative defenses including frustration of purpose, impossibility of performance, and forbearance due to the COVID-19 pandemic.

II. The Lease

On November 1, 2001, Tenant entered into a Lease with Landlord's predecessor in interest (the "Original Lease"). The Original Lease was amended by the First Amendment of Lease dated as of November 1, 2001 (the "First Amendment"), and further amended by the Second Amendment of Lease dated as of October 31, 2016 (the "Second Amendment"). The Original Lease, First Amendment and Second Amendment are collectively referred to as the "Lease" (Exhibit D).

Pursuant to Paragraph 4 of the Second Amendment, the term of the Original Lease was extended for ten years. The extended term commenced on November 1, 2016 and was to expire on October 31, 2026.

Paragraph 6 of the Second Amendment provided that the base rent for the Premises for the period of November 1, 2019 through October 31, 2020 was to be \$19,313.95 per month. It further provided that the base rent for the Premises for the period of November 1, 2020 through October 31, 2021 was to be \$19,893.37 per month.

Paragraph 28 of the Original Lease provided that Tenant was responsible for the payment of water and sewer charges as additional rent.

Paragraph 56 of the Original Lease provided that if Tenant failed to pay any sum required to be paid to Landlord, aside from any sum specifically designated in the Lease as base rent or additional rent, such amount was also to be deemed additional rent.

The Original Lease provided at Paragraph 19 that Plaintiff was entitled to any legal fees and disbursements incurred in bringing a legal action to enforce Tenant's obligations under the Lease.

III. The Parties' Contentions

Landlord argues that Tenant breached its Lease by failing to pay rent and additional rent from January 3, 2017 onward and by vacating the Premises without its permission on January 18, 2021. According to Landlord, the sum of the rent and additional rent that is owed by Tenant totals \$342,116.65, plus interest. In support of its motion, Landlord submits, inter alia, an affidavit by Christopher Conlon ("Conlon"), Landlords' vice president. Conlon identifies Exhibit E (Doc 14) as an open invoices statement of Tenant for the period of January 3, 2017 through July 31, 2021. The statement, which Conlon said was maintained by Landlord and prepared in the regular course of business, reflects all of the written invoices which Tenant failed to pay from January 3, 2017 through July 31, 2021, totaling \$342,116.65, plus interest. Conlon also states that, on January 18, 2021, Tenant vacated the premises prior to the expiration of the Lease without the permission of the Landlord.

In opposition, Tenant submits an affidavit by Isaac Ben-Avraham ("Ben-Avraham"), Tenant's president. Ben-Avraham represents that "[t]he rent as evidenced by [Landlord's] affidavits and exhibits show[ed] the rent was almost \$20,000.00 per month [and that] all rent charges [were] paid through February 28, 2020. What appear[ed] open [were] one insufficient fee charge for \$40.00 dated January 3, 2017, one insufficient fee charge for \$40.00 posted October 26, 2018, a credit for \$3 posted 07/15/2019[,] [and a] water bill of \$5,529.75 posted January 29, 2020" (Doc 17).

Avraham further states that “[Landlord] verbally agreed with [him] on a rent abatement reducing rent to \$5,000.00 per month and ... [a]s [Landlord’s] Exhibit E shows, [Tenant] [even] paid five (5) months of [rent at the abated rent of] \$3,000.00 per month” (id.).

Avraham notes “that [Landlord’s] documents show[ed] it purchased the building but does not show any evidence that there was an assignment and assumption of the Lease along with the rights and obligations related thereto [and this] lack of assignment and assumption should leave this Lease unenforceable at the stated rent however [Landlord] should be entitled to use and occupancy which would be fair market value which would be zero since the value of this Lease during the Pandemic was zero” (id.)

In further support of its motion, Landlord argues that (1) it is the owner of the subject premises, as evidenced by the deed (Exhibit C, Doc 12), and all of the prior landlord’s rights under the Lease transferred to Landlord when it took title to the premises, and Tenant’s claim that Landlord needs to submit an assignment of the lease is invalid; and (2) the doctrines of impossibility and frustration of purpose are inapplicable to this proceeding and these affirmative defenses must therefore be dismissed.

IV. Legal Conclusions

“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 NY Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). “This burden is a heavy one,” requiring that the “facts . . . be viewed in the light most favorable to the non-moving party” (*Jacobsen v NY City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014] [internal quotation marks and citation omitted]). Once met, the burden

shifts to the opposing party, who must establish the existence of a triable issue of fact to defeat the summary judgment motion (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Here, Landlord has met its prima facie entitlement to summary judgment by demonstrating that Tenant breached the Lease by failing to pay rent and additional rent, totaling \$342,116.65, plus interest, from January 3, 2017 through July 31, 2021 (see the Lease [Doc 13], the affidavit of Conlon [Doc 9], and the open invoices statement [Doc 14]). In opposition, Tenant has failed to raise a triable issue of fact. The prior landlord's interest in the Lease was conveyed to Landlord, which is entitled to enforce all terms of the Lease (see 74 N.Y. Jur. 2d Landlord and Tenant § 135). Avraham's statement that "[Landlord] verbally agreed ... on a rent abatement reducing rent to \$5,000.00 per month" is insufficient to raise a triable issue of fact since the Lease had a "no oral modifications" clause (see Ex D) and therefore was governed by the Statute of Frauds (see General Obligations Law § 15-301 [1]). Without a written agreement signed by Landlord, Tenant is required to prove an exception to the Statute of Frauds such as waiver, estoppel, or partial performance (*310 S. Broadway Corp. v Barrier Gas Serv.*, 224 AD2d 409, 410 [2d Dept 1996]).

Contrary to Avraham's argument that the open invoice statement (Ex E, Doc 14) shows that Tenant paid rent at the abated rent \$3,000.00 per month on August 1, 2020, October 1, 2020, November 1, 2020, December 1, 2020, and January 1, 2021, what the open invoice statement shows is that Tenant paid a credit of \$3,000.00 toward the rent of more than 19,000 dollars on those dates.

Further, recent cases decided by the Appellate Division, First Department have rejected defenses based on the doctrines of frustration of purpose, impossibility of performance, and forbearance due to the COVID-19 pandemic in similar cases (see, e.g., *558 Seventh Ave Corp. v.*

Times Square Photo, Inc., 194 A.D.3d 561 [1st Dept. 2021]; *Gap, Inc. v. 170 Broadway Retail Owner, LLC*, 195 A.D.3d 575 [1st Dept. 2021]).

Accordingly, it is hereby:

ORDERED that the motion by Plaintiff 640 Broadway Owners Subsidiary II LLC for summary judgment is granted to the extent 640 Broadway Owners Subsidiary II LLC is awarded a judgment against defendant Café Angelique, Inc. for unpaid rent and additional rent from January 3, 2017 until July 31, 2021 in the amount of \$342,116.65, plus interest from March 1, 2020,¹ as well as costs and disbursements to be calculated by the Clerk; and Plaintiff is also awarded attorneys' fees; and it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to determine the amount of the attorneys' fees owed by Defendant to Plaintiff; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/suptctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine the attorneys' fees; and it is further

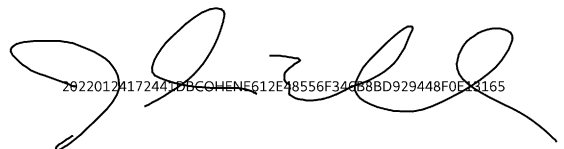
ORDERED that counsel shall immediately consult one another and counsel for plaintiff/petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as

¹ The open invoices statement shows that Tenant stopped paying rent in March 3, 2020.

practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the plaintiff shall serve a proposed accounting within 24 days from the date of this order and the defendant shall serve objections to the proposed accounting in a pre-hearing memorandum within 20 days from service of plaintiff's papers and the foregoing papers shall be filed with the Special Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above.

1/20/2022
DATE



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DAVID B. COHEN, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
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<input type="checkbox"/>	SUBMIT ORDER
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CHECK IF APPROPRIATE:

<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN
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<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
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