| **DOLP 825 Props. II LLC v Mint No. 5, Inc.** |
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| 2026 NY Slip Op 31096(U) |
| March 19, 2026 |
| Supreme Court, New York County |
| Docket Number: Index No. 650539/2024 |
| Judge: Kathleen Waterman-Marshall |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. KATHLEEN WATERMAN-MARSHALL** **PART** **31**

***Justice***

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DOLP 825 PROPERTIES II LLC,

Plaintiff,

- v -

MINT NO. 5, INC. F/K/A PROJECT Z, INC. D/B/A DISHES, MOSHE MALLUL

Defendant.

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**INDEX NO.** 650539/2024

**MOTION DATE** 05/01/2024

**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, 42, 52, 54, 72, 73, 74

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

Upon the foregoing documents and following on-the-record oral argument on July 29, 2025, the motion by plaintiff DOLP 825 Properties II LLC ("DOLP") for partial summary judgment on its third and fourth causes of action for breach of a commercial guaranty and attorney's fees against Moshe Mallul ("Mr. Mallul"), is granted.

## Background

This action arises out of a commercial lease for a restaurant. DOLP owns a 40-floor commercial building at 825-827 Third Avenue in Manhattan. Defendant Mint No. 5 Inc. f/k/a Project Z, Inc. d/b/a Dishes ("Mint") leased a portion of the building from DOLP to operate a luncheon or delicatessen-type business under the name "Dishes," and Mr. Mallul executed a personal guaranty (the "Guaranty") of the commercial lease. DOLP alleges that Mint did not pay rent from November 2019 through April 2023, and seeks to recover this unpaid rent from Mr. Mallul pursuant to the Guaranty.[1]

On this motion for partial summary judgment DOLP does not seek to recover that portion of the unpaid rent from March 7, 2020 through June 30, 2021, as the parties dispute whether NYC Administrative Code § 22-1005 precludes recovery against Mr. Mallul as personal guarantor for a commercial lease during certain COVID-era shutdowns and restrictions.

After DOLP and Mint entered into the commercial lease, DOLP began to empty the building of commercial tenants in order to perform a building-wide renovation/construction project. There is no genuine dispute that, as part of DOLP's construction project, the room

[1] It is undisputed that DOLP sent, and Mint received, regular monthly invoices throughout all periods covered by this motion (stipulation to correct oral argument record, NYSCEF Doc. No. 73). Likewise, it is undisputed that DOLP first sent a default notice to Mint in October of 2022 (*id.*).

housing the internet and phone services for the building was removed and Mint's phone and internet services were disrupted; first, for a brief period in January 2020, and then permanently in February 2020. Shortly after these telephone and internet interruptions, the parties were impacted by COVID-era shutdowns and restrictions in March 2020. Mint eventually vacated the premises in July of 2023.

DOLP brought this action against Mint and Mr. Mallul for unpaid rent, additional rent, and attorney's fees. It contends that it should be awarded partial summary judgment on its claims for unpaid rent and attorney's fees against Mr. Mallul pursuant to the Lease and Guaranty agreements. At bottom, it alleges that it has established that the Lease requires payment of rent irrespective of government shutdowns, restrictions, or any impact of its construction project, pursuant to the express terms of the lease and as a matter of law.

Mr. Mallul opposes partial summary judgment and contends that the COVID-era shutdowns and restrictions frustrated the purpose of the commercial lease and made performance impossible. He also alleges that construction activities, both standing alone and taken in conjunction with the COVID-era shutdowns and restrictions, also frustrated the purpose of the lease and made performance impossible. Mr. Mallul further alleges that DOLP breached the lease and the covenant of good faith and fair dealing by engaging in construction activities that emptied a substantial portion of the building's commercial tenants – an important customer base for Mint – and impacted Mint's telephone and internet services. For these reasons, Mr. Mallul contends summary judgment is not warranted.

**Discussion**

The standard by which the Court analyzes the instant motion is well established. On a motion for summary judgment, the burden rests with the moving party to make a prima facie showing they are entitled to judgment as a matter of law and demonstrate the absence of any material issues of fact (*Friends of Thayer Lake, LLC v Brown*, 27 NY3d 1039 [2016]). Once met, the burden shifts to the opposing party to submit admissible evidence to create a question of fact requiring trial (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]). However, a "feigned issue of fact" will not defeat summary judgment (*Red Zone LLC v Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048 [2016]). A failure to make a prima facie showing requires the Court to deny the motion, regardless of the sufficiency of opposing papers (*Alverez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also JMD Holding Corp. v Congress Financial Corp*., 4 NY3d 373 [2005]).

DOLP seeks partial summary judgment for unpaid rent for the period of November 1, 2019 through April 30, 2023 – excluding the period March 7, 2020 through June 30, 2021 as the parties dispute whether Administrative Code § 22-1005 precludes recovery against Mr. Mallul as personal guarantor for a commercial lease during this period. DOLP has demonstrated its prima facie entitlement to summary judgment via the lease, guaranty agreement, and affidavit of its management company's collections manager and ledger stating the rental arears (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Int.," N.Y. v Navarro*, 25 NY3d 485, 492 [2015] [movant must establish "the existence of the guaranty, the underlying debt and the guarantor's failure to perform under the guaranty"] quoting *Davimos v Halle*, 35 AD3d 270 [1st Dept 2006]; *75 Commercial, LLC v Sung An*, 209 AD3d 574 [1st Dept 2022]). Accordingly, Mr.

Mallul must demonstrate an issue of fact or viable affirmative defense exists sufficient to preclude summary judgment.[2]

*First Affirmative Defense – Lack of Personal Jurisdiction*

Mr. Mullal's first affirmative defense, that the Court lacks personal jurisdiction over him, is without merit. It is irrefutable that Mr. Mallul submitted to personal jurisdiction of this Court, as paragraph 19 of the Guaranty provides:

> Guarantor [Mr. Mallul] does hereby agree to submit to the personal jurisdiction of the Supreme Court of the State of New York, County of New York …

Additionally, Mr. Mallul was served with a copy of the complaint in compliance with CPLR § 308(2). Accordingly, the first affirmative defense must be stricken (*see Golf Glen Plaza Niles v Amcoid USA, LLC*, 160 AD3d 1375 [4th Dept 2018]; *Reem Const. v Altschul & Altschul*, 117 AD3d 583 [1st Dept 2014]).

*Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Affirmative Defenses*

The second, fifth, sixth, seventh, eighth, ninth, and tenth affirmative defenses (personal jurisdiction, failure to state a cause of action, failure to mitigate damages, improper calculation, documentary evidence, failure to satisfy conditions precedent, unclean hands/laches/waiver/ estoppel, and accord and satisfaction, respectively) are boilerplate, pled without any additional facts, and were not raised in opposition to the partial summary judgment motion. They are, to the extent pled by Mr. Mallul, therefore, dismissed as conclusory (*Kronish Lieb Weiner & Hellman LLP v Tahari, Ltd*., 35 AD3d 317, 319 [1st Dept 2006]; *Oates v Marino*, 106 AD2d 289 [1st Dept 1984] [Party opposing summary judgment motion must lay bare its proof to establish triable issue of fact]).

*Third Affirmative Defense*

The third affirmative defense that some or all of Mr. Mallul's obligations under the Guaranty are barred by New York City Administrative Code § 22-1005 does not serve to defeat partial summary judgment here, as DOLP is not seeking to recover under the Guaranty for the period to which Administrative Code § 22-1005 applies (March 2020 through June 2021).

*Fourth Affirmative Defense*

Mr. Mallul's affirmative defense of impossibility and frustration of purpose must fail as a matter of law. As to Mr. Mullal's claim that COVID-era orders requiring certain businesses to close constitutes an impossibility of performance or frustration of purpose of the lease, the Appellate Division, First Department has determined that forced closure under COVID-era executive orders does not completely deprive commercial tenants of the benefit of their commercial lease bargain sufficient to rescind a lease under the theories of frustration of purpose or impossibility (*Gap, Inc. v 170 Broadway Retail Owner, LLC*, 195 AD3d 575 [1st Dept 2021];

[2] It appears that the only affirmative defenses pled on behalf of Mr. Mallul are the first (lack of personal jurisdiction), the third (barred in part by Administrative Code § 22-1005), and fourth (frustration and impossibility). However, in an abundance of caution, as the answer was filed jointly on behalf of all defendants, the Court addresses each of the affirmative defenses as though raised on behalf of Mr. Mallul.

*Gap, Inc. v 44-45 Broadway Leasing Co. LLC*, 206 AD3d 503 [1st Dept 2022]; *Bremen House, Inc v LoBosco*, 214 AD3d 557 [1st Dept 2023]). Mr. Mullal's argument that the COVID-era orders together with additional conduct by the landlord can amount to impossibility or frustration is without support; he cites no authority which has so found, and this Court finds the argument, under these circumstances, unpersuasive.

Additionally, this affirmative defense must fail under the express terms of the lease. Paragraph 15.2 of the lease provides that the tenant's obligations are not excused or reduced if the premises cannot be used for the intended business purpose due to a national emergency or governmental rule/order/regulation. Accordingly, the fourth affirmative defense alleging impossibility or frustration of purpose stemming from COVID-era shutdown orders, as raised by Mr. Mullal, is stricken.

Mr. Mullal's claim that DOLP's construction activities, chiefly the removal of the communications closet interrupting Mint's internet and phone services, amounts of a frustration of purposes, is, as a matter of law, without merit. So too is the related claim that the purpose of Mint's lease was frustrated by DOLP emptying the building of other commercial tenants to perform the renovation. "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" (*Center for Specialty Care, Inc. v CSC Acquisition, I, LLC*, 185 AD3d 34 [1st Dept 2020] [Mazzarelli, J.] quoting *Warner v Kaplan*, 71 AD3d 1, 6 [1st Dept 2009]). "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" (*Kel Kim Corp. v Central Mkts.*, 70 NY2d 900, 902 [1987]). "[W]here performance is possible, albeit unprofitable, the legal excuse of impossibility is not available" (*Warner*, 71 AD3d at 2; *407 E 61st Garage v Savoy Fifth Ave. Corp.*, 23 NY2d 275, 282 [1968]). Likewise, the doctrine of 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 AD3d at 2 quoting *Matter of Rebell v Trask*, 220 AD2d 594, 598 [1998] citing *407 E. 61st Garage*, 23 NY2d at 282]).

There is no doubt that the interruption of Mint's phone and internet services reduced its ability to accept orders during a time in which business was heavily moving into the virtual and socially distant spaces due to COVID. However, Mint could have remained open for business, as unprofitable it may have been, without the ability to accept online and telephone orders and using a different point of sale (POS) system.[3] There is nothing in the record, other than financial considerations, that indicates Mint was required to close or that it could not accept walk-in business as a result of construction in the building. Indeed, Mr. Mallul's submissions on this motion affirm that Mint relies on, in part, walk-in business (NYSCEF Doc. No. 25 at ¶ 3 and NYSCEF Doc. No. 41, at 9 "Background"). In this regard, Mr. Mullal's reliance on matters where the business could not open or operate in any capacity is misplaced (*see e.g. Jack Kelly Partners LLC v Zegelstein*, 140 AD3d 79 [Tom, J.P.] [issues of fact precluded summary judgment on commercial lease for office use where building's certificate of occupancy

[3] Why Mint did not seek to use wireless telephone and internet services during this time is a question that is left unanswered on this motion.

prohibited office use]; *Mr. Ham, Inc. v Perlbinder Holdings, LLC*, 116 AD3d 577 [1st Dept 2014] [removal of kitchen frustrated purpose of tenant's commercial lease to operate a restaurant]).[4] Similarly, there is nothing in the record to indicate that Mint was limited to serving the employees and guests of the other commercial tenants in the building. Put simply, Mint could have continued to operate the first-class Dishes style restaurant required by the lease in the absence of telephone and internet service by serving walk-in customers and customers not affiliated with the other commercial tenants in the building. Thus, it cannot rely on the doctrine of impossibility or frustration of purpose.

The doctrine of impossibility or frustration of purpose is separately unavailable because the lease contemplated building renovation by DOLP. Although the extent of the building renovation may not have been expected at the time the parties entered into the lease, the parties clearly contemplated that DOLP may renovate the building, as paragraph 12.2 of the lease obligated Mint to continue to pay rent notwithstanding DOLP's renovation work. Paragraph 12.2 provides, in part:

> There shall be no allowance to Tenant for diminution of rental value and no liability on the part of Landlord by reason of inconvenience, annoyance or injury to business arising from Landlord or others making repairs, alterations, additions or improvements in or to any portion of the Building or the Demised Premises or in and to the fixtures, appurtenances or equipment thereof. It is specifically agreed that Tenant shall not be entitled to any setoff or reduction or rent by reason of any failure of Landlord to comply with the covenants of this Article or any other Article of this Lease. Tenant agrees that Tenant's sole remedy at law in such instance will be by way of an action for damages for breach of contract.

Thus, frustration of purpose is separately unavailable as the event allegedly preventing performance was foreseeable and contracted for by the parties (*Warner*, 71 AD3d at 2 quoting *Matter of Rebell v Trask*, 220 AD2d 594, 598 [1998] citing *407 E. 61st Garage*, 23 NY2d at 282).

Mr. Mullal's connected claim that DOLP breached the lease or the covenant of good faith and fair dealing by renovating the building in a manner which impacted telephone and internet services fairs no better. As an initial matter, these claims are not raised as an affirmative defense on his behalf. In any event, Mr. Mullal does not cite any provision of the lease he claims DOLP violated, and paragraph 15.1 of the lease expressly provides that there are no representations, promises, or rights other than those set forth in the lease. Additionally, paragraph 12.2 of the lease provides that there shall be no reduction of rent or liability on the part of DOLP for construction in the building including fixtures and equipment. Assuming, *arguendo*, that Mint

[4] Accord with *Benderson Dev. Co. v Commenco Corp*., finding a restaurant's lease frustrated where premises was required by local ordinance to have, but lacked, a public sewer (44 AD2d 889 [4th Dept 1974]).

had asserted a valid claim for breach of the lease or covenant of good faith and fair dealing arising out of DOLP's construction activities, it was nevertheless obligated to pay rent under paragraph 12.2 of the lease and Mr. Mullal was nevertheless obligated to pay rent under the Guaranty (*Universal Communications Network, Inc., 29 W. 28th Owner, LLC*, 85 AD3d 668, 669 [1st Dept 2011] ["[T]he obligation to pay rent pursuant to a commercial lease is an independent covenant, and thus cannot be relieved by allegations of a landlord's breach, absent an express provision to the contrary"]).

It is undisputed that neither Mint nor Mr. Mullal paid rent. Contrary to Mr. Mullal's position, additional discovery on the issue of the telephone and internet services would not change the outcome, as the parties' agreement expressly controls and Mint remained obligated to pay rent regardless of the impact of construction on its telephone and internet services. Accordingly, these claims do not provide a basis to avoid summary judgment for rental arears under the Guaranty and the fourth affirmative defense is stricken as to Mr. Mullal.

*Claimed Issues of Fact*

Nor do Mr. Mallul's submissions create an issue of fact to defeat partial summary judgment. Mr. Mallul's affidavit contends that he communicated with a DOLP representative in November 2019, August 2020, and June 2021, and that DOLP's representative discouraged Mint and Mr. Mullal from surrendering the premises, leading Defendants to believe that a deal could be worked out. However, conspicuously absent from Mr. Mullal's assertion is the identity of the DOLP representative or the communications themselves. Instead, the emails annexed to Mr. Mallul's affidavit discuss overhead protection on the sidewalk blocking Mint's signage, exhaust from a neighboring restaurant, and the internet and phone disruptions. Notably, the emails do not discuss surrender of the premises or contain any statements that a deal could be worked out between DOLP and Mint. Mr. Mallul's affidavit is consequently conclusory, self-serving, and does not create an issue of fact regarding surrender of the premises or payment of rent pursuant to the lease or Guaranty (*Red Zone LLC*, 27 NY3d 1048; *DeCintio v Lawrence Hosp.*, 55 AD3d 407 [1st Dept 2008]).

*Attorney's Fees*

The Guaranty provides for DOLP's attorney's fees incurred in seeking to recover, inter alia, unpaid rent (Guaranty at ¶¶ 4A and 7). Where attorney fees are authorized, either by statute or agreement, the fee sought must be reasonable; where the fee is unreasonable, inflated, or needlessly incurred, the Court may dismiss the claim for attorney's fees (*American Motorists Ins. Co. v Napco Sec. Sys.*, 244 AD2d 197 [1st Dept 1997]). In determining the reasonableness of attorney's fees, the Court considers the attorney's affidavit and submissions to elicit the "difficulty of the issues and the skill required to resolve them; the lawyers' experience, ability and reputation; the time and labor required; the amount involved and benefit resulting to the client from the services; the customary fee charged for similar services; the contingency or certainty of compensation; the results obtained and the responsibility involved" (*Bankers Fed. Sav. Bank v Off W. Broadway Devs.*, 224 AD2d 376 [1st Dept 1996]). Therefore, the amount of attorneys' fees due DOLP is severed and shall proceed to an inquest on paper submissions.

*Interest*

Given that the failure to pay rent occurred each month in two separate time periods (November 2019 through March 2020 and July 2021 through April 2023), with the majority of the unpaid rent occurring beginning to accrue in July 2021, the Court sets May 1, 2021 as the intermediate date from which to calculate interest (CPLR § 5001[b]).

*Amend Answer*

Mr. Mullal's request to amend his Answer in the event that DOLP's motion is granted comprises a single sentence in the memorandum of law in opposition. The request is denied as it fails to comply with CPLR 2215's requirement that the relief be brought by cross-motion. In the absence of a proper cross-motion, the Court, in its discretion, declines to consider the improper request (*Fried v Jacob Holding, Inc.*, 110 AD3d 56, 64-65 [2d Dept 2013] ["a party in compliance with CPLR 2215 is entitled to have its cross motion considered; a party not in compliance with the statute must hope that the court opts, in the exercise of its discretion, to entertain the request"]). In any event, Mr. Mullal does not set forth the proposed amendments (CPLR 3025 [b] ["Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading"]).

Accordingly, it is

**ORDERED** that plaintiff DOLP 825 Properties II LLC shall have judgment and does recover as against defendant Moshe Mullal the principal amount of $699,269.44 together with pre-judgment interest at the statutory rate from May 1, 2021, as well as costs and disbursements as taxed and calculated by the Clerk of the Court, and the Clerk of the Court shall enter judgment in accordance therewith; and it is further

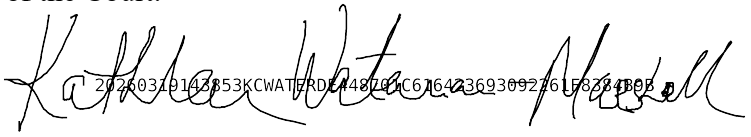
**ORDERED** that the amount of attorney's fees due DOLP from Mr. Mullal is severed and shall proceed to **Inquest on paper submissions on May 11, 2026**, or as soon thereafter as the parties may be heard; and it is further

**ORDERED** that papers in support of the amount of attorney's fees shall be filed via NYSCEF no later than April 10, 2026; and it is further

**ORDERED** that papers in opposition of the amount of attorney's fees shall be filed via NYSCEF no later than May 8, 2026; and it is further

**ORDERED** that a **Preliminary Conference shall be held on May 13, 2026 at 10:00am in courtroom 335 at 60 Centre Street New York, NY 10007**. Counsel are reminded of the Part Rules, including those regarding the submission of a joint proposed conference order in lieu of an in-person appearance; and it is further

**ORDERED** that judgment shall be submitted to the Clerk of the Court, and not to Chambers or the Part, unless directed otherwise by the Clerk of the Court.




**3/19/2026**
**DATE**

**KATHLEEN WATERMAN-MARSHALL, J.S.C.**

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|---|---|---|---|---|---|---|---|
| **CHECK ONE:** | | **CASE DISPOSED** | | | [X] | **NON-FINAL DISPOSITION** | |
| | | **GRANTED** | [ ] | **DENIED** | [X] | **GRANTED IN PART** | [ ] **OTHER** |
| **APPLICATION:** | | **SETTLE ORDER** | | | | **SUBMIT ORDER** | |
| **CHECK IF APPROPRIATE:** | | **INCLUDES TRANSFER/REASSIGN** | | | | **FIDUCIARY APPOINTMENT** | [ ] **REFERENCE** |