SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DEBRA A. JAMES** **PART** **IAS MOTION 59EFM**

Justice

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THE GAP, INC.,

Plaintiff,

- v -

170 BROADWAY RETAIL OWNER, LLC,

Defendant.

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INDEX NO. 652732/2020

MOTION DATE 10/08/2020

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 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, 43, 44, 45, 46, 47, 48, 49, 50, 51, 53, 54, 55, 56, 57, 58, 59

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 74, 75, 76, 77, 78, 79

were read on this motion to/for DISMISS.

ORDER

Upon the foregoing documents, it is hereby

ORDERED that the motion to dismiss the complaint (Motion Sequence Number 002) is granted only to the extent that "count two" declaratory judgment to the extent that it is based upon "failure of consideration"; "count five" reformation of Lease"; "count six" "money had and received"; and "count seven" "unjust enrichment" are dismissed, and the motion is otherwise denied; and it is further

ORDERED that the plaintiff's motion for a Yellowstone injunction (Mot. Seq. No. 001) is GRANTED, retroactive to July 15, 2020, and the cure period is hereby tolled pending a determination of whether the plaintiff is in default under the Lease dated February 5, 2014 pursuant to such Notice of Default; and it is further

ORDERED that defendant is, effective July 15, 2020, preliminarily enjoined from terminating plaintiff's leases pending the outcome of this action and a declaration determining the rights, remedies and liabilities of the parties; and it is further

ORDERED that the Yellowstone injunction granted above is hereby conditioned upon plaintiff filing with the Clerk of the County an undertaking in the form of a bond in the total amount of $5,500,000.00, comprised of the sum of $2,500,000.00 to secure payment of future use and occupancy, pendent lite, for the period November 1, 2020 until a final determination of this action plus $3,000,000.00 to secure the payment of rent arrears allegedly owed by plaintiff to defendant for the monthly fixed rent due under the Lease dated February 5, 2020, from April 1, 2020 to date; and it is further

ORDERED that counsel are directed to file with IAS Part 59 (59nyef@nycourts.gov) and NYSCEF a proposed preliminary discovery conference order or proposed competing preliminary

discovery conference order(s) on or before November 30, 2020, which shall include a proposed date for the submission of a proposed discovery compliance conference order.

DECISION

Defendant's Cross Motion to Dismiss

On a motion to dismiss brought under CPLR 3211, the court must "accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Leon v Martinez, 84 NY2d 83, 87-88 [1994] [citations omitted]). Ambiguous allegations must be resolved in the plaintiff's favor (see JF Capital Advisors, LLC v Lightstone Group, LLC, 25 NY3d 759, 764 [2015]). A motion to dismiss will be denied "if from [the] four corners [of the complaint] factual allegations are discerned which taken together manifest any cause of action cognizable at law" (Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]). However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts" (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003]). "[F]actual allegations . . . that consist of bare legal conclusions, or that are inherently incredible . . . are not entitled to such consideration" (Mamoon v Dot Net Inc., 135 AD3d

656, 658 [1st Dept 2016] [internal quotation marks and citation omitted]). Moreover, "[w]hen documentary evidence is submitted by a defendant 'the standard morphs from whether the plaintiff stated a cause of action to whether it has one'" (Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc., 115 AD3d 128, 135 [1st Dept 2014] [internal citation omitted]).

1. "Court One" Breach of Contract

In "count one" of the complaint, plaintiff retail store tenant seeks damages in the form of a refund from defendant landlord of a prorated amount of rent for March 2020, for breach of the Lease dated February 5, 2014 (Lease). The complaint and plaintiff's papers in opposition to this motion, considered collectively, allege that defendant breached paragraph Article 2, paragraph C. of the Lease when landlord did not provide an "abatement or reduction in Fixed Rent due to loss or use of all or a portion of the Demised Premises due to Casualty"[1] attributable to the period after March 19, 2020, when, due to the governmental shut-down of non-essential businesses, plaintiff could not lawfully use the premises in the manner set forth in the Lease. Contrary to defendant's argument, plaintiff, thereby, identifies the portion of the lease that defendant purportedly violated. Benderson Development Co., Inc. v Commenco Corp., (44 AD2d 889 [4th Dept.

[1]Lease Article 39 captioned "Definitions" contains no definition of the word "Casualty".

1974]) supports plaintiff's position, as paragraph C of Article 2 of the Lease at bar, under which defendant promises plaintiff a refund to the extent that a Casualty renders the Demised Premises not useable is akin to the provision under which the landlord warranted the use of the subject premises as a restaurant in that case. As plaintiff does allege a portion of the lease that defendant breached, the "count one" breach of contract claim is sufficiently pled and shall not be dismissed.

2. "Count Two" and "Count Three" Declaratory Judgment and Injunctive Relief

CPLR 3001 provides, in part, that the "court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." A declaratory judgment action requires an actual controversy (see Long Is. Light. Co. v Allianz Underwriters Ins. Co., 35 AD3d 253 [1st Dept 2006], appeal dismissed, 8 NY3d 956 [2007]). On a motion seeking to dismiss a declaratory judgment claim, "the only question is whether a proper case is presented for invoking the jurisdiction of the court to make a declaratory judgment, and not whether the plaintiff is entitled to a declaration favorable to him" (Law Research Serv. v Honeywell, Inc., 31 AD2d 900, 900 [1st Dept 1969] [collecting cases]).

Relief on a declaratory judgment claim is limited to a declaration of the parties' legal rights based on the facts presented (see Thome v Alexander & Louisa Calder Found., 70 AD3d 88, 100 [1st Dept 2009], lv denied 15 NY3d 703 [2010]).

Here, the allegations asserted in "counts" two and three plead the existence of a justiciable controversy. In such counts, plaintiff asserts that it is excused from performing under the Lease, i.e. remitting rent, as the result of the destruction of the means of performance of the contract of the contract, i.e., its use of the premises as a retail store under the Lease. It alleges in some factual detail, that such performance has been made objectively impossible, by an unanticipated event that could not have been foreseen or guarded against in the Lease, a credible description of the current worldwide pandemic, shutting down New York City "brick and mortar" retail stores. Plaintiff's action for a declaration that it is excused due to the impossibility of performance as a result of "the destruction of the means of performance by an act of God, vis major, or by law", states a viable claim (see 407 East 81st Garage, Inc. v Savoy Fifth Ave. Corp., 23 NY2d 275, 281 [1968]). Nor is this a case where the court can determine as matter of law that defendant is entitled to a declaration in

its favor.[2] However, to the extent that plaintiff seeks a declaration that there is a failure of consideration, such cause of action is duplicative of its cause of action and defendant's counterclaim for breach of contract. Compare Strobe v Netherland Co., 245 AD 573, 575 (4th Dept. 1935). To that extent, the declaratory judgment cause of action fails, and must be dismissed. Finally, the remedy of "injunctive relief" enjoining the defendant from terminating the Lease is available should a declaratory judgment be granted in favor of plaintiff. Therefore, except to the extent that a failure of consideration is alleged, "counts" two and three of the complaint shall not be dismissed.

3. "Count Four" Rescission/Cancellation of Lease

Rescission on the grounds of impossibility or frustration of purpose is a viable cause of action, which, as for the reasons stated above, plaintiff has sufficiently pled. See Jack Kelly Partners LLC v Zegelstein, 140 AD3d 79 (1st Dept. 2016).

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[2] The implication of the presence of a "business interruption insurance" provision and the absence of a force majeure clause in the Lease for the declaration of the parties rights thereunder would be the subject of inquiry on a motion for summary judgment (see Kel Kim Corp. v Central Markets, Inc., 70 NY2d 900 [1987]), 407 E. 61st Garage v Savoy Fifth Ave. Corp., 23 NY2d 275 (1968) and Decision and Order dated September 23, 2020 in BKNY1, Inc. d/b/a 132 Lounge v 132 Capulet Holdings, LLC, Kings County Supreme Court, Index No. 508647/2016, (Knipel, J.), but not the motion at bar that challenges the pleadings.

4. "Count Five" Reformation of Lease

Plaintiff alleges neither mutual mistake nor fraud. Thus, its claim for reformation is insufficiently pled and must be dismissed. New York First Avenue CVS, Inc. v Wellington Tower Associates, L.P, 299 AD2d 205 (1st Dept. 2002).

5. "Count Six" and "Count Seven" Money Had and Received and Unjust Enrichment

"Since a valid contract exists governing the subject matter in dispute, the cause of action for unjust enrichment is untenable" (G&G Investments, Inc. v Revlon Consumer Products Corp., 283 AD2d 253 [1st Dept. 2001]). Likewise, a "quasi-contract claim for money had and received is barred by the existence of a written contract" (see Atria Builders, LLC v Morgan 32 Holdings, LLC, 84 AD3d 508 [1st Dept. 2011]).

Yellowstone Injunction

As discussed above, this declaratory judgment action seeks an adjudication of the rights of plaintiff-tenant and defendant landlord under a certain commercial lease. Plaintiff now seeks a Yellowstone injunction pursuant to First National Stores v Yellowstone Shopping Center, 21 NY2d 630 (1968).

Plaintiff has demonstrated that it (1) holds a commercial lease; (2) received from the landlord a notice [of default with a cure period]; (3) requested injunctive relief before the termination of the lease; and (4) is prepared and maintains the

ability to cure the alleged default by any means short of vacating the premises. See Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Avenue Associates, 93 NY2d 508, 514 (1999).

This court agrees with plaintiff that although the ten-day cure period under the Default Notice has expired, the Lease remains extant as defendant never terminated the Lease. See Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Associates, 93 NY2d 508, 514 (1999) (the party seeking a Yellowstone injunction must demonstrate that "it requested injunctive relief prior to the termination of the lease"). The decision of the Appellate Division, First Department, in KB Gallery LLC v 875 W. 181 Owners Corp., 76 AD3d 909 (1st Dept. 2010), is consistent to the extent that it held:

> "The motion court properly found that plaintiff did not timely seek Yellowstone relief, since plaintiff did not make its application until after the applicable cure period had expired and the notice of termination had been served." (Citations omitted; underscoring supplied.)

The court agrees with plaintiff that the statement of the First Department in KB Gallery LLC, "We reject plaintiff's contention that a Yellowstone injunction brought after the expiration of the applicable cure period will be deemed timely as long as it is made before the lease in question actually terminated" is dicta, and at odds with that portion of the opinion of the Court of Appeals in Graubard, supra, at 514, that states that the

issuance of a Yellowstone injunction turns on whether "[the tenant] requested injunctive relief prior to the termination of the lease", as opposed to whether such relief was sought prior to the termination of the cure period.

With respect to the undertaking, plaintiff has convinced this court that the posting of a bond rather than the direct payment of outstanding rent arrears and future use and occupancy to defendant is appropriate under the circumstances, as the alleged default involves a monetary conditional limitation in the Lease. See Graubard, supra, at p. 515 ("The escrow account was simply a condition of the Yellowstone injunction, much like a bond, to ensure that [the landlord] was paid when the day of reckoning finally arrived in this protracted litigation."). See also Lexington Ave. & 42nd St. Corp. v Lexchamp Operating, 205 AD2d 421, 423-424 (1st Dept. 1994).

10/30/2020
DATE

DEBRA A. JAMES, J.S.C.

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