SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LAURENCE L. LOVE** **PART** **IAS MOTION 63M**

Justice

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DR. SMOOD NEW YORK LLC F/K/A DR. SMOOD ORCHARD LLC

Plaintiff,

- v -

ORCHARD HOUSTON, LLC,

Defendant.

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INDEX NO. 652812/2020

MOTION DATE 10/20/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64

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

Upon the foregoing documents, the motion is decided as follows:

On or about February 22, 2017, Plaintiff, Dr. Smood New York, LLC ("Dr. Smood") and Defendant, Orchard Houston, LLC ("Orchard") entered into a ten (10) year Lease agreement for the premises described as a portion of the ground floor and basement space of the building located at 181-185 East Houston a/k/a 195-201 Orchard Street, New York, New York (the "Premises"). Plaintiff last paid the monthly rent in March, 2020 and has failed to pay the monthly rent since that time arguing that it has no obligation to pay rent during the COVID-19 pandemic, citing the lease and a series of New York State executive orders. In June 2020, Dr. Smood and Orchard engaged in settlement discussions to potentially revise the rental obligations under the Lease, given the effect of the pandemic on possible performance thereof. On July 1, 2020, Orchard served Dr. Smood with a notice to cure, declaring Dr. Smood in default of the Lease for failure to pay rent for the months of April 2020, May 2020, and June 2020. The Notice stated that, if Dr. Smood failed to cure the default at the end of the expiration period (July 10, 2020), Orchard would, inter

alia, draw upon Plaintiff's security deposit under the Lease. In response, Dr. Smood filed its first order to show cause for a Yellowstone injunction and related relief, though the parties later stipulated to withdraw the first notice to cure and the first order to show cause in an effort to settle the matter outside of court. Thereafter, Orchard served the Dr. Smood with a second Notice to Cure, declaring Dr. Smood in default of the Lease for failure to pay rent for the months of April 2020-September 2020, resulting in Dr. Smood's filing of a second Order to Show Cause, seeking injunctive relief. Orchard cross-moves for an Order requiring plaintiff to pay use and occupancy at the rate specified in the lease during the pendency of this action and directing Tenant to post an undertaking in the amount of $250,000.00 to secure the rent arrearages in the aggregate amount of $198,764.31 for April, May, June, July 2020, August and September 2020.

In its reply papers, plaintiff withdrew its demand for a *Yellowstone* injunction and now seeks only a Preliminary Injunction and Temporary Restraining Order.

A preliminary injunction is appropriate when the party seeking injunctive relief establishes: (1) likelihood of ultimate success on the merits; (2) irreparable injury if the injunction is not granted; and (3) a balancing of the equities in its favor. *See Four Times Square Assocs., L.L.C. v. Cigna Investments, Inc.*, 306 A.D.2d 4, 5 (1st Dep't 2003) (citing *Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981)); CPLR §§ 6301, 6311. The elements to be satisfied must be demonstrated by clear and convincing evidence. *Liotta v. Mattone*, 71 A.D.3d 741 (2nd Dep't, 2010). However, the moving party is only required to make a *prima facie* showing of its entitlement to a preliminary injunction, not prove the entirety of its case on the merits. The decision to grant a motion for a preliminary injunction "is committed to the sound discretion of the trial court." *N.Y. Cnty. Lawyers' Ass'n v. State*, 192 Misc. 2d 424, 428-29 (Sup. Ct. N.Y. Cnty. 2002); *see also Terrell v. Terrell*, 279 A.D.2d 301, 304 (1st Dep't 2001).

Plaintiff argues that "(i) Plaintiff will likely succeed on the merits because the government regulations issued in response to the pandemic frustrated the purpose of Plaintiff's Lease; (ii) Plaintiff will suffer an irreparable injury absent an injunction, as Defendant will, inter alia, unjustly draw upon Plaintiff's security deposit on the Premises; and (iii) the equities balance in Plaintiff's favor, as Plaintiff should not be penalized for being legally precluded from operating its business as contemplated under the Lease while the Landlord continued to reap an unjust and un-bargained for reward."

In support of its motion, plaintiff submits the affidavit of Francesco Perillo, an employee of plaintiff, a copy of the relevant lease, copies of the relevant NYS Executive Orders. The affidavit specifically highlights Article 11, Section 11.3 of the Lease, which states that "if the Premises are damaged by fire or other casualty, or if the Building is damaged such that Tenant is deprived of reasonable access to the Premises…Fixed Rent, Tenant's Tax Payment and Tenant's Operating Payment shall be reduced in the proportion by which the area of the part of the Premises which is not usable (or accessible) and is not used by Tenant bears to the total area of the Premises." Plaintiff claims that "The casualty triggering Section 11.3 of the Lease began on or about March 16, 2020, when, pursuant to the Executive Orders previously discussed herein, Plaintiff was legally forced to close its business due to the property and physical damage caused by the COVID-19 virus and the dangerous propensity such virus poses to the public." Plaintiff further argues that the premises "were rendered wholly inaccessible and unusable by the Executive Orders and the novel coronavirus from March 16, 2020 to July 6, 2020, and partially inaccessible and unusable from July 6, 2020 onward" and that as such, plaintiff is entitled to a total rent abatement. Plaintiff further argues that the purpose of the contract has been frustrated and same is a defense to nonperformance under a lease when the frustrated purpose is "so completely the basis of the contract that, as both

parties understood, without it, the transaction would have made little sense" *Jack Kelly Partners LLC v. Zegelstein*, 140 A.D.3d 79 (1st Dept 2016); see also, *Crown IT Servs., Inc. v. Koval-Olsen*, 11 A.D.3d 263 (1st Dept 2004); Restatement [Second] of Contracts §§265 and 269. It is undisputed that the purpose of the lease was for plaintiff to operate "a full service café specializing in fresh and raw quick-service products with menu items to include breakfast, lunch, and dinner, coffee and tea beverages, cold-pressed juices, shakes and smoothies, and other related products."

In opposition, defendant submits the affidavit of Amir Chaluts, a member of Orchard, together with supporting documentation. At the outset, the Court notes that plaintiff failed to timely serve the instant Order to Show Cause, however both motions will be decided on the merits. Similarly, plaintiff's allegations that the pandemic constitutes a "casualty" are entirely without merit as there has been no physical harm to the demised premises and the lease does not provide for a rent abatement in such a case as plaintiff was required to obtain insurance to guarantee payment under said circumstances. Plaintiff's argument that the lease has been frustrated is similarly without merit as "for a party to avail itself of the frustration of purpose defense, there must be complete destruction of the basis of the underlying contract; partial frustration such as a diminution in business, where a tenant could continue to use the premises for an intended purpose, is insufficient to establish the defense as a matter of law." See *Robitzek Inv. Co. v. Colonial Beacon Oil Co.*, 265 AD 749, 753 (1st Dept 1943). Here, defendant has made a clear showing that the plaintiff has been operating out of the demised premises since at least July, 2020, yet has continued to assert that it has no obligation to pay rent. Specifically, the premises remain open for both counter service and pickup of orders submitted online. Plaintiff has only been prevented by the relevant executive orders from operating indoor dining services. As such, plaintiff has failed to establish a likelihood of success on the merits and as such is not entitled to a preliminary injunction.

As the Court is denying plaintiff's motion seeking an injunction, plaintiff is not required to post a bond pursuant to CPLR 6312(b). Plaintiff's obligation to pay rent and taxes pursuant to the lease continues unabated. As such, it is hereby

ORDERED that plaintiff's motion seeking a preliminary injunction and defendant's cross-motion seeking an Order requiring plaintiff to pay monthly use and occupancy and post a bond are hereby denied in their entirety.

11/2/2020
DATE

LAURENCE L. LOVE, J.S.C.

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