

**International Plaza Assoc. L.P. v Amorepacific US, Inc.**

2020 NY Slip Op 34521(U)

December 14, 2020

Supreme Court, New York County

Docket Number: Index No. 155158/2020

Judge: Carol Ruth Feinman

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART IAS MOTION 28EFM

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INTERNATIONAL PLAZA ASSOCIATES L.P.	INDEX NO.	<u>155158/2020</u>
Plaintiff,	MOTION DATE	<u>12/01/2020</u>
- v -	MOTION SEQ. NO.	<u>001</u>
AMOREPACIFIC US, INC., D/B/A INNISFREE,		
Defendant.		

**DECISION + ORDER ON MOTION**

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HON. CAROL RUTH FEINMAN:

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, 23, 24, 25  
were read on this motion to/for SUMMARY JUDGMENT(BEFORE JOIND)

Upon the foregoing documents, it is decided as follows:

Plaintiff, landlord, moved for summary judgment against defendant, commercial tenant, on the grounds that that, as a matter of law, this Court should grant plaintiff a judgment of at least \$314,000.00 in rent arrears. These arrears were incurred from the period from March 2020 through the present time and defendant claims that they are due to the covid19 pandemic and the Governor’s Executive Orders relating to the opening of retail stores which sell and demonstrate cosmetics and personal products. The motion is denied by this Court.

This motion was brought by plaintiff almost immediately after its commencement of the case. Plaintiff claims that it is not seeking to evict defendant, so that he would not be bound by Governor Cuomo’s moratorium on evictions until at least January 1, 2021. Instead plaintiff is seeking to recover the rent owed by defendant as a commercial debt. Defendant does not deny that it has not paid the full rent amounts owed for the period of arrears although it has paid partial rent and plaintiff has accepted these payments. Defendant argues that there are factual issues necessary to seek out through discovery especially due to what, if anything, is the role played by the covid 19 pandemic and its resultant governmental shutdown and then restrictions of retail sale of the goods sold by defendant. Contrary to plaintiff’s claims covid19 could not have been foreseen and a clause in the lease could not have been designed by defendant. Plaintiff also does not state that it would have agreed to such a clause and it is unlikely that it would have. Also, contrary to plaintiff’s claim in its memorandum of law, the defendant’s loss and at times a lack of income due to covid 19 is not just part of the up and downs during a commercial tenant’s lease period.

It is well accepted that summary judgment is a “drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue” (*Rotuba Extruders, Inc. vs. Ceppos*, 46 NY2d 223 [1978]). Defendant raises several defenses to justify a denial of summary judgment but the primary one is “Frustration of Purpose.” Namely that the shutdown of the defendant’s shop from March, 2020 to June, 2020 and the continuing restrictions made it almost impossible for defendant to fulfill its function for which it signed a lease with plaintiff. Defendant is a manufacturer and purveyor of cosmetics and other beauty supplies and part of its business includes allowing customers to test the product. That is limited with the important requirement that people who walk into the store must wear a face mask and that they keep a six foot distance from each other. With the present second wave of covid 19 it cannot be foreseen when the situation will return to “normal.” A good part of this defense requires defendant to present facts on how it has attempted to conduct its business and its alleged failure to do so for a reason never imagined let alone foreseen by either defendant or plaintiff. These changes in circumstances cannot be shown by legal memoranda or oral arguments alone. They require discovery. (*See, PPF Sageguard, LLC v. BCR Safeguard Holding LLC*, 924 NY2d 391 [1<sup>st</sup> Dept. 2011]).


One of the questions to answer is that of foreseeability. As Defendant states this must be determined by findings of fact, especially in this crisis that has never occurred in most of our lifetimes. Findings of summary judgment based on previously occurred events cannot be applied to the present case. There is a need to begin the fact finding discovery process in order to enable defendant to make its case. This is not saying that a finding of summary judgment can never be found. It is just premature at this point.

Based on the record of this case, as well as oral arguments made by the attorneys, Plaintiff’s motion is denied without prejudice. The case is restored to the Preliminary Conference Part in IAS Part 28.

The Clerk of this Court is directed to deny Plaintiff’s motion for summary judgment without prejudice and to retain the case for preliminary conference in IAS Part 28.

This is the order and decision of this Court.

DATED: December 14 2020  
New York, NY

  
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Carol Ruth Feinman, AJSC

**HON. CAROL RUTH FEINMAN**  
J.S.C.