At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 15th day of March, 2021.

PRESENT: HON. LOREN BAILY-SCHIFFMAN
JUSTICE

267 DEVELOPMENT, LLC, Plaintiff, - against - BROOKLYN BABIES AND TODDLERS, LLC, and MARY ANN O'NEIL, Defendants.	Index No.: 510160/2020 Motion Seq. # 1 & 2 DECISION & ORDER

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

	PAPERS NUMBERED
Notice of Motion, Affidavits, Affirmation and Exhibits	1
Notice of Cross-Motion, Affidavit, Affirmation and Exhibits	2
Affirmation in Opposition to Cross-Motion	3
Defendant's Reply Affirmation, Affidavit and Exhibits	4
Defendant's Memo of Law	5

Upon the foregoing papers, Plaintiff, 267 DEVELOPMENT LLC, moves this Court for an Order pursuant to CPLR § 3212 (a), CPLR § 3211 (a) (7) and/or CPLR § 3211(a) (1) granting summary judgment in its favor and dismissing the affirmative defenses and counterclaim contained in Defendants' answer. Defendants cross-move for summary judgment pursuant to CPLR § 3212 dismissing Plaintiff's 4th and 5th causes of action and for summary judgment in its favor on their counterclaim for commercial tenant harassment.

BACKGROUND

Plaintiff owns the property that is leased to Defendants and commercial tenant, Brooklyn Babies and Toddlers, LLC ("BB") with Defendant, Mary Ann O'Neil acting as guarantor. Governor Cuomo signed Executive Orders § 202.3, § 202.6 and § 202.7 closing certain businesses throughout New York State in response to the Covid-19 pandemic. BB was one of

the businesses forced to close pursuant to these Executive Orders. Additionally, Governor Cuomo initiated a moratorium on residential and commercial evictions and foreclosures in 2020 that has been extended through May 21, 2021.

Plaintiff commenced the instant action against BB, as Tenant, and Mary Ann O'Neil, as guarantor, seeking payment in the amount of $93,554.94 in total as rent arrears and attorneys' fees pursuant to their 10-year lease agreement. In opposition to Plaintiff's motion for summary judgment, Defendants rely in part upon New York City Administrative Code § 22-1005 ("§ 22-1005"), also referred to as Local Law 55. Pursuant to § 22-1005, commercial Landlords cannot seek monies for lease arrears from a non-tenant who personally guarantees a lease agreement on behalf of a business that meets the criteria as set forth in the provision. Specifically, this law refers to businesses that were forced to close as a result of the Executive Orders signed by Governor Cuomo.

However, this newly enacted provision protects only the guarantors of commercial leases and not the Tenant itself. While Governor Cuomo has signed executive orders that establish a moratorium on residential as well as commercial evictions and foreclosures, there is no law preventing a Landlord from seeking arrears from a commercial Tenant. On September 23, 2020 the New York City Council amended § 22-1005 and extended the prohibition against enforcement of guarantor provisions in commercial leases, through March 31, 2021. Additionally, the amendment clarifies its intent by stating that it applies to all personal guarantor agreements, regardless of whether those agreements were contained in the original lease or not.

Defendants contend that Plaintiff's motion must be denied because the lease has been suspended as a result of force majeure, frustration of purpose and/or impossibility of performance. In the case at bar, a force majeure clause was not included in the lease agreement and therefore cannot be asserted as a defense to a breach of contract claim. ***Gen. Elec. Co. v. Metals Res. Grp. Ltd., 293 A.D.2d 417, 418 (1st Dept 2002)***. Defendants also argue alternatively that since their business was closed by the Governor's Order, performance under the contract was made objectively impossible.

New York law recognizes the common law doctrine of impossibility as an avenue to excuse performance when there have been extraordinary intervening events. It is not enough to show that an event has rendered performance prohibitively expensive or impractical. Rather, the party invoking the doctrine must prove that the subject matter of the contract or the means of performance have been "destroyed," such that performance is "objectively impossible." ***Kel Kim Corp.v Central Markets, 70 N.Y.2d 900, 902 (1987)***. The Court of Appeals explained therein, "the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract." ***Id. at 902***. 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. ***Kolodin v Valenti, 115 AD3d 197, 200 (1st Dept 2014).***

The doctrine of impossibility was applied after the September 11th terrorist attacks in ***Bush v. Protravel International, Inc., 192M.2d 743, 747-748 (Civ. Ct., Richmond County 2002).*** Telephone communications had been disrupted throughout New York City after 9/11. As a result, the Plaintiff in the aforementioned case was precluded from timely canceling travel

reservations. The Civil Court found that performance of the travel contract was rendered impossible for a period of time immediately following the 9/11 attack where New York City was in virtual lockdown. ***Id. at 747.***

In a recent article entitled, ***"New York Contract Law Remedies in the Face of Disruption Caused by COVID-19", Ropes & Gray Newsletter 200:100, 2020 by Gregg Weiner, Adam Harris, Christian Reigstad, Dielai Yang and Andrew Todres,*** the issues before this Court were discussed and the authors concluded:

> In the context of the coronavirus outbreak, impossibility may provide grounds for excusing performance if, for example, government responsive measures such as shutdowns, travel bans, or quarantines entirely preclude a party from performing its contractual obligations. However, even then, the party invoking the doctrine must show that the measures were unforeseeable and the risk associated with them could not have been built into the contract. The sheer magnitude of COVID-19's impact has left businesses large and small scrambling in search of relief from contractual obligations. Affected parties to contracts governed by New York law may be able to use the doctrines of force majeure, impossibility, or frustration of purpose to exit contracts or protect themselves from liability for non-performance.

In the case at bar this Court finds that the shutdown of BB's business has precluded it from performing its contractual obligations. The government shutdown was unforeseeable and could not have been built into the contract. Under the circumstances presented, this Court finds that performance under the subject lease was made impossible.

Defendants cross-move for summary judgment on their counterclaim for "commercial tenant harassment." New York City Administrative Code § 22-902(a) was also amended to define commercial tenant harassment. The amendment sets forth that a landlord may be held

liable for "commercial tenant harassment" for attempting to enforce a personal liability guarantee that they know or reasonably should know is not enforceable pursuant to § 22-1005. ***§ 22-902(a) (11) (14).*** Defendants claim that Plaintiff's inclusion of the 4th and 5th causes of action in their complaint against Ms. O'Neil constitutes commercial tenant harassment under the law. After review of the submissions in the instant motion, this Court agrees and finds that Defendants are entitled to summary judgment on their counterclaim for commercial tenant harassment.

Accordingly, it is

ORDERED, that Plaintiff's motion for summary judgment is denied in its entirety, (mot. Seq. #1);

And it is further

ORDERED, that Defendants' cross-motion is granted in its entirety, (mot. seq. #2);

Plaintiff's causes of action against BB are barred by doctrine of impossibility while the "shut down" order is in effect; and

Plaintiff's 4th and 5th causes of action against the guarantor are therefore stricken and Defendant O'Neil is entitled to judgment for commercial tenant harassment.

The parties' remaining contentions are without merit.

This is the Decision and Order of the Court.

ENTER

LOREN BAILY-SCHIFFMAN
JSC