SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

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THE RUXTON TOWER LIMITED PARTNERSHIP

Plaintiff,

- v -

CENTRAL PARK TAEKWONDO, LLC,

Defendant.

INDEX NO. 656715/2020

MOTION DATE 05/20/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

----------X

HON. NANCY BANNON:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 28, 29, 30, 40, 41, 42

were read on this motion to/for DISMISS DEFENSE

I. INTRODUCTION

In this action wherein the plaintiff landlord seeks, *inter alia*, to recover damages for breach of a commercial lease agreement by the defendant, a former tenant, the plaintiff moves pursuant to CPLR 3211(a)(1), CPLR 3211 (a)(7), and CPLR 3211(b) to dismiss the defendant's counterclaims and to strike the ninth, tenth, and eleventh affirmative defenses. The defendant opposes the motion. For the following reasons, the motion is granted.

II. BACKGROUND

The parties entered into a 10-year commercial lease agreement with respect to retail space on the ground floor of the premises located at 50 West 72nd Street in Manhattan in 2010. The parties entered into a lease addendum agreement in 2013 and a lease extension agreement (together with the lease addendum agreement and the lease, the lease agreements) in February

2020, shortly before the outbreak of the COVID-19 pandemic resulted in nationwide shutdowns and restrictions on in-person activities. The lease extension agreement extended the lease until December 31, 2025.

Prior to the pandemic, the defendant operated a Taekwondo school at the subject premises. Executive orders requiring the closure of gyms and fitness facilities beginning on March 16, 2020, necessitated the closure of the Taekwondo school. Nonetheless, the defendant continued to pay monthly rent through August 2020. As of August 31, 2020, the defendant vacated the premises and surrendered possession to the plaintiff.

On December 3, 2020, the plaintiff initiated this action seeking, *inter alia*, to recover rent owed since August 2020. The plaintiff has not stated whether the premises have been re-let.

In its answer, the defendant asserts counterclaims sounding in breach of contract (first counterclaim), money had and received (fourth counterclaim), and unjust enrichment (fifth counterclaim), seeking money damages. The defendant also seeks declaratory and equitable relief on the grounds that the lease agreements terminated, or the defendant's obligations thereunder were abated, as of March 2020 or January 2021 (second and third counterclaims), that its performance is excused under the doctrine of frustration of purpose (sixth and seventh counterclaims), and that its performance is excused under the doctrine of impossibility (eighth and ninth counterclaims). Relatedly, the defendant seeks reformation of the lease agreements on the basis that, but for the parties' assumption that the defendant would have the right to operate a martial arts school for the full term of the lease, they would not have entered into the lease agreements (tenth and eleventh counterclaims). Finally, the defendant seeks to recover attorneys' fees pursuant to the lease agreements (twelfth counterclaim). The defendant also asserts various affirmative defenses, including excuse from performance (ninth affirmative

defense), frustration of purpose (tenth affirmative defense), and impossibility of performance (eleventh affirmative defense).

III. LEGAL STANDARD

Dismissal under CPLR 3211(a)(1) is warranted only when the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431, 433 (1st Dept. 2014); Fontanetta v John Doe 1, 73 AD3d 78 (2nd Dept. 2010). A particular paper will qualify as "documentary evidence" only if it satisfies the following criteria: (1) it is "unambiguous"; (2) it is of "undisputed authenticity"; and (3) its contents are "essentially undeniable." See VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC, 171 AD3d 189 (1st Dept. 2019) quoting Fontanetta v John Doe 1, supra.

On a motion to dismiss for failing to state a cause of action under CPLR 3211(a)(7), the pleading is to be afforded a liberal construction and the court should accept as true the facts alleged in the complaint, accord the pleading the benefit of every reasonable inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994).

Pursuant to CPLR 3211(b), a "party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." The burden is on the plaintiff to demonstrate that the defenses are without merit as a matter of law. See Granite State Ins. Co. v Transatlantic Reinsurance Co., 132 AD3d 479 (1st Dept. 2015); 534 East 11th Street Housing Dev. Fund v Hendrick, 90 AD3d 541 (1st Dept. 2011). In reviewing such a motion, "the allegations set forth in the answer must be viewed in the light most favorable to the

defendant." Granite State Ins. Co. v Transatlantic Reinsurance Co., supra at 481; see 182 Fifth Avenue LLC v Design Development Concepts, Inc., 300 AD2d 198 (1st Dept. 2002).

IV. DISCUSSION

A. First, Fourth, and Fifth Counterclaims

The defendant's first (breach of contract), fourth (money had and received), and fifth (unjust enrichment) counterclaims are each based upon the defendant's allegation that the plaintiff improperly accepted and retained rent payments from March 2020 through August 2020, in spite of the issuance of statewide executive orders beginning on March 16, 2020, which required all gyms, fitness centers, or classes to cease operation until further notice. The prohibition on indoor fitness classes in Manhattan was not eased until March 2021. The gravamen of the defendant's argument is that, since its obligations under the lease agreements were waived, excused, and/or rendered impossible after March 2020, the plaintiff breached the lease agreements by continuing to demand and accept performance thereunder. This argument is without merit.

The defendant fails to identify a single lease provision the plaintiff allegedly breached, which is fatal to the first counterclaim sounding in breach of contract. See Gap, Inc. v 170 Broadway Retail Owner, LLC, 195 AD3d 575 (1st Dept. 2021). Indeed, the lease here, as is common in commercial leases, requires payment of rent and additional rent for the entire term, with few exceptions, not present here. Moreover, as discussed below, the defendant is not entitled to a rent abatement under Paragraph 9 of the lease, which does not contemplate loss of use of the premises due to a pandemic or attendant government lockdown. Finally, to the extent the defendant seeks equitable relief, its claims are premised entirely on its defenses sounding in

frustration of purpose and impossibility. The defendant's equitable claims must be dismissed because, for the reasons discussed below, those defenses fail. Accordingly, the first, fourth, and fifth counterclaims are dismissed.

B. Second and Third Counterclaims and Ninth Affirmative Defense

The defendant's second and third counterclaims seek a declaration that the defendant is entitled to an abatement of its rent payment obligations under the lease agreements because the COVID-19 pandemic and its resulting lockdowns constituted a "casualty" within the meaning of Paragraph 9 of the lease that rendered the entire premises unusable. The ninth affirmative defense seeks abatement on the same grounds.

Paragraph 9 of the lease provides, in relevant part,

> (a) If the demised premises or any part thereof shall be damaged by fire or other casualty, Tenant shall give immediate notice thereof to Owner and this lease shall continue in full force and effect except as hereinafter set forth. (b) If the demised premises are partially damaged or rendered partially unusable or inaccessible by fire or other casualty, the damages thereto shall be repaired by and at the expense of Owner and the rent and other items of additional rent, until such repair shall be substantially completed, shall be apportioned from the day following the casualty according to the part of the demised premises which is usable. (c) If the demised premises are totally damaged or rendered wholly unusable or inaccessible by fire or other casualty, then the rent and other items of additional rent as hereinafter expressly provided shall be proportionately paid up to the time of the casualty and thenceforth shall cease until the date when the demised premises shall have been repaired and restored by Owner (or sooner occupied in part by Tenant then rent shall be apportioned as provided in subsection (b) above), subject to Owner's right to elect not to restore the same as hereinafter provided…

A review of Paragraph 9, which refers multiple times to a "fire or other casualty" and resulting "damage" to the premises requiring "repair" by the plaintiff, makes clear that "casualty" refers to "singular incidents causing physical damage to the premises and does not contemplate loss of use due to a pandemic or resulting government lockdown." Gap, Inc. v 170

Broadway Retail Owner, LLC, supra at 577 (citing cases); see also Gap Inc. v Ponte Gadea New York LLC, 2021 WL 861121, *6 (S.D.N.Y. March 8, 2021). The court therefore concludes that the COVID-19 pandemic and its effects did not constitute a casualty under Paragraph 9 of the lease. The plaintiff is entitled to dismissal of the second and third counterclaims insofar as they are premised on the right to a casualty-based rent abatement. The plaintiff is also entitled to an order striking of the ninth affirmative defense, which seeks abatement on the same grounds.

C. Sixth and Seventh Counterclaims and Tenth Affirmative Defense

The defendant's sixth and seventh counterclaims seek a declaration that the lease agreements were terminated on the grounds of frustration of purpose. The tenth affirmative defense seeks a declaration that the defendant's performance under the subject lease agreements was excused on the same grounds. In sum and substance, the defendant argues that the COVID-19 pandemic was an unforeseeable event that so completely frustrated the purpose of the lease agreements that the parties should be discharged from their obligations thereunder.

The frustration of purpose doctrine "offers a defense against enforcement of a contract when the reasons for performing the contract cease to exist due to an unforeseeable event which destroys the reasons for performing the contract." Structure Tone, Inc. v Universal Services Group, Ltd., 87 AD3d 909, 912 (1st Dept. 2011). "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, 42 (1st Dept. 2020) (quoting Warner v Kaplan, 71 AD3d 1, 6 [1st Dept. 2009]) (quotation marks omitted). "Examples of a lease's purposes being declared frustrated have included situations where the tenant was unable

to use the premises as a restaurant until a public sewer was completed, which took nearly three years after the lease was executed ... and where a tenant who entered into a lease of premises for office space could not occupy the premises because the certificate of occupancy allowed only residential use and the landlord refused to correct it." Id. at 42-43.

Importantly, frustration of purpose is not available "where the event which prevented performance was foreseeable and provision could have been made for its occurrence." Id. at 43 (quoting Warner v Kaplan, supra at 6) (quotation marks omitted). Moreover, economic hardship and reduced revenues alone, even if occasioned by an arguably unforeseeable circumstance such as a pandemic, do not warrant application of the frustration of purpose doctrine. See Gap, Inc. v 170 Broadway Retail Owner, LLC, supra; 558 Seventh Ave. Corp. v Times Square Photo Inc., 194 AD3d 561 (1st Dept. 2021).

The rider to the parties' lease agreement provides that the subject premises shall be used "only and strictly as and for a first-class Tae Kwon Do School." Nonetheless, the defendant may use the premises "for any permitted use that does not violate the terms of any other lease within the building that [the plaintiff] is a party to and does not directly compete with the business of any other tenant within the building" upon the written consent of the plaintiff.

The plaintiff avers that the provisions of the lease agreement conclusively establish that the pandemic and attendant government lockdown orders were foreseeable. In support of this argument, the plaintiff points to Paragraph 79 of the rider to the lease, which contains a *force majeure* clause as follows:

> In the event that Tenant or Landlord shall be delayed in, or prevented from performance of any act required hereunder by reason of strikes, lockouts, material shortages, failure of power, riots, insurrection, war or other reasons of like nature, then the time for performance of such acts, other than the payment of Rent or additional Rent by Tenant, shall be postponed for the period of such but any delay shall not extend the Term.

Since this clause identifies neither pandemics nor government orders, the only basis for its application to the defendant's proffered excuse for nonperformance is the catchall phrase, "or other reasons of like nature." "The principle of interpretation applicable to such clauses is that the general words are not to be given expansive meaning; they are confined to things of the same kind or nature as the particular matters mentioned." Kel Kim Corp. v Central Markets, Inc., 70 NY2d 900, 903 (1987). The events listed in the *force majeure* clause here are different in kind and nature from the defendant's total inability to hold indoor fitness classes due to the pandemic and resulting government shutdown orders. This is factually distinct from other recent cases in the Supreme Court, New York County, wherein the relevant *force majeure* clause either explicitly referenced government law, restriction, regulation, or other state action, or were otherwise drafted more broadly than the clause herein. See, e.g., Valentino U.S.A., Inc. v 693 Fifth Owner LLC, 70 Misc 3d 1218(A) (Sup Ct, NY County 2021) (clause referencing "restrictive governmental laws or regulations"); Ichiban Foods, Inc. v Walsam 325 Lex LLC, 2021 WL 2889950 (Sup Ct, NY County July 2, 2021) (clause referencing, *inter alia*, "governmental restrictions, governmental regulations, governmental controls" and "governmental action"); Hugo Boss Retail, Inc. v A/R Retail, LLC, 71 Misc 3d 1222(A) (Sup Ct, NY County 2021) (clause referencing "order or regulations of or by any government authority"). In this case, Paragraph 79 does not conclusively establish that the parties foresaw and allocated the risk that a pandemic or government restrictions would prevent the defendant's business from functioning. See 1877 Webster Ave. Inc. v Tremont Center, LLC, 72 Misc 3d 284 (Sup Ct, Bronx County 2021).

The plaintiff next invokes Paragraph 26 of the lease as definitive proof that the pandemic and government restrictions were foreseeable. Paragraph 26 provides as follows:

> Except as may otherwise be expressly provided herein, [t]his Lease and the obligation of Tenant to pay Rent and additional rent hereunder and perform all of the other covenants and agreements hereunder on part of Tenant to be performed shall in no way be affected, impaired or excused because Owner is unable to fulfill any of its obligations under this Lease, or to supply, or is delayed in supplying, any service expressly or impliedly to be supplied, or is unable to make, or is delayed in making, any repair, additions, alterations or decorations, or is unable to supply, or is delayed in supplying, any equipment, fixtures or materials, if Owner is prevented or delayed from doing so by reason of any strike or labor troubles, government preemption or restrictions, or by reason of any rule, order or regulations of any department or subdivision thereof of any government agency, or by reason of the conditions of which have been or are affected, either directly or indirectly, by war or other emergency, or when, in the judgment of Owner, reasonably exercised, temporary interruption of such services is necessary by reason of accident, mechanical breakdown, or to make repairs, alterations or improvements.

The plaintiff contends that the hell-or-high-water provision in Paragraph 26 renders the subject government shutdown orders a foreseeable circumstance for which risk was allocated to the defendant. The defendant counters that Paragraph 26 only contemplates failures of the plaintiff to act as required by the lease and does not cover the unavailability of the subject premises for indoor fitness classes due solely to extrinsic occurrences such as pandemics and executive orders.

Other trial courts in this jurisdiction, when faced with similar clauses, have agreed with the plaintiff that they are dispositive of the question of foreseeability. See, e.g., Victoria's Secret Stores, LLC v Herald Square Owner LLC, 70 Misc 3d 1206(A) (Sup Ct, NY County 2021); CAB Bedford LLC v Equinox Bedford Ave, Inc., 2020 WL 7629593 (Sup Ct, NY County Dec. 22, 2020); BKNY1, Inc. v 132 Capulet Holdings, LLC, 2020 WL 5745631 (Sup Ct, NY County Sept. 23, 2020). The court finds the reasoning adopted by these courts to be persuasive. The

intended effect of Paragraph 26 is clear: the defendant is not absolved of its obligation to pay rent if the plaintiff is unable to fulfill any obligations under the lease, including making the premises available to the defendant for its intended use, where such inability is the result of, *inter alia*, "government preemption or restrictions," or "any rule, order or regulations of any department or subdivision thereof of any government agency." In other words, the parties did not contract to excuse the defendant's rent payments if it were forced to shut down due to government orders, as is the case here. Since Paragraph 26 expressly allocated the foregoing risk to the defendant, the frustration of purpose defense is unavailable.

Additionally, the defendant has not pleaded that the COVID-19 pandemic "so completely" frustrated the purpose of the lease that, had it been foreseen, the "transaction would have made little sense." Center for Specialty Care, Inc. v CSC Acquisition I, LLC, supra at 42. The defendant avers in its counterclaims that, as a result of the pandemic and subsequent executive orders prohibiting indoor fitness classes, it has been "prohibited from operating a School at the Premises, which is the contemplated permitted use under the terms of the Lease…" The defendant asserts that as of September 2020, it "is no longer operational." Further, the defendant claims that "[w]hen any indoor sporting activities are permitted to resume, the government has announced that any reopening will be at marginal capacity for the foreseeable future. It will thus be years before defendant's business even remotely recovers to pre-COVID-19 Pandemic levels."

The defendant does not explain, however, how the prohibition on indoor classes preventing it from operating a Taekwondo school in *any* capacity, even if such operations were less profitable. For example, the defendant was free to offer online fitness classes or, when restrictions on gyms eased, private training sessions, as opposed to group classes. Indeed, the

plaintiff has alleged, and the defendant does not deny, that the defendant offered virtual classes during the period it was precluded from conducting indoor group classes. Similarly, while the defendant suggests that continuing restrictions on capacity will prove detrimental to it now that fitness classes have been allowed to resume, the diminishing profitability of the defendant's business model, even if a consequence of circumstances beyond its control, does not amount to complete frustration of the purpose of the lease. See Gap, Inc. v 170 Broadway Retail Owner, LLC, supra; 558 Seventh Ave. Corp. v Times Square Photo Inc., supra.

Further, while government prohibitions on indoor fitness classes in Manhattan continued until March 2021, the defendant vacated the premises as of August 31, 2020, after the restrictions had been in place for approximately five months only. A five-month closure out of a fifteen-year lease did not frustrate the overall purpose of the lease. See 558 Seventh Ave. Corp. v Times Square Photo, Inc., supra (temporary shuttering of electronics and repair store due to executive orders did not frustrate purpose of lease); CAB Bedford LLC v Equinox Bedford Ave, Inc., supra at *2 ("A gym being forced to shut down for a few months does not invalidate obligations in a fifteen-year lease."); Greater New York Auto. Dealers Ass'n, Inc. v City Spec, LLC, 70 Misc 3d 1209(A) (N.Y. Civ. Ct. 2020) ("[E]ven if Respondent were forced by the Executive Order to close in-person operations at the Premises, a four-month closure out of a five-year lease did not frustrate the overall purpose of the Lease.").

There can be no dispute that the effects of the COVID-19 pandemic on many businesses have been severe. Boutique fitness studios or martial arts schools such as the defendant, which rely on an in-person fitness class model, have particularly suffered as a consequence of government restrictions designed to prevent the spread of the virus and the shifting preferences of these businesses' clientele to avoid group settings where the risk of transmission is elevated.

However, the Appellate Division, First Department has been clear that a business's becoming less profitable due to the COVID-19 pandemic and attendant government restrictions is not sufficient reason to rescind a lease or excuse performance thereunder on the ground of frustration of purpose. See Gap, Inc. v 170 Broadway Retail Owner, LLC, supra; 558 Seventh Ave. Corp. v Times Square Photo, Inc., supra.

This is not a case where the premises rented by the defendant ceased to exist, or where the defendant was denied entry thereto, or even where the defendant was prohibited from providing its services by means other than in-person instruction. Rather, the crux of the defendant's complaint is that its business model of group martial arts instruction is no longer profitable due to its preclusion for a period of months from holding in-person classes and subsequent limitations on the capacity of its classes. While the court is sympathetic to the defendant's struggles, which have been occasioned by no fault of the defendant, the frustration of purpose doctrine is inapplicable here. Accordingly, the sixth and seventh counterclaims and the tenth affirmative defense are dismissed.

D. Eighth and Ninth Counterclaims and Eleventh Affirmative Defense

The eighth and ninth counterclaims seek rescission of the lease agreements on the grounds that the COVID-19 pandemic and resulting governmental restrictions rendered the parties' performance of the lease agreements impossible.

Impossibility is a defense to a breach of contract action "only when … performance [is rendered] objectively impossible … by an unanticipated event that could not have been foreseen or guarded against in contract." Kel Kim Corp. v Central Markets, Inc., supra at 902; see 407 East 61st Garage, Inc. v Savoy Fifth Ave. Corp., 23 NY2d 275, 281 (1968) ("[T]he excuse of

impossibility of performance is limited to the destruction of the means of performance by an act of God, vis major, or by law."). Put differently, impossibility may excuse performance of a contract if such performance is rendered impossible by intervening governmental activities, but only if those activities are unforeseeable. RW Holdings, LLC v Mayer, 131 AD3d 1228 (2nd Dept. 2015) (quoting Pleasant Hill Dev., Inc. v Foxwood Enters., LLC, 65 AD3d 1203 [2nd Dept. 2009]).

The impossibility defense to contract performance should be applied narrowly, "due in part to judicial recognition that the purpose of contract law is to allocate risks that might affect performance and that performance should be excused only in extreme circumstances." Kel Kim Corp. v Central Markets, Inc., supra at 902. "[W]here impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused." 407 East 61st Garage, Inc. v Savoy Fifth Ave. Corp., supra at 281-82; see Valenti v Going Grain, Inc., 159 AD3d 645 (1st Dept. 2018) (failure to pay rent as agreed and ensuing eviction proceeding did not excuse performance under contract of sale); Urban Archaeology Ltd. v 2017 E. 57th Street LLC, 68 AD3d 562 (1st Dept. 2009) (economic downturn did not excuse tenant's performance under lease).

Here, the defendant's impossibility defense fails because the text of the lease, as discussed above, demonstrates that the conditions the defendant claims rendered its performance impossible were foreseeable. Moreover, the defendant does not, and cannot, claim that the means of its performance under the lease were destroyed by the pandemic and attendant shutdown orders. The defendant admits that it continued to pay rent for approximately five months after it was prohibited from conducting in-person classes and makes no allegation that it was or is prevented from making further payments. Under the relevant decisional authority,

alleging that revenues have decreased to the point that the defendant is "no longer operational" does not equate to impossibility or impracticability. Thus, the doctrine is unavailable to the defendants here. As such, the eighth and ninth counterclaims and the eleventh affirmative defense are dismissed.

E. Tenth and Eleventh Counterclaims

The defendant's tenth and eleventh counterclaims seek reformation of the lease agreements on the basis that the parties made a mutual mistake in drafting the lease agreements when they failed to foresee and address the possibility of a pandemic. The defendant avers that the parties would never have entered into the lease agreements had they known that the defendant would be unable to operate a Taekwondo school at the premises every month for the full term of its tenancy. Further, the defendant states in conclusory terms that "[i]t was the parties' intent that defendant would not pay rent or other consideration for the Premises if such use were rendered impossible or impracticable."

"In the proper circumstances, mutual mistake or fraud may furnish the basis for reforming a written agreement." Chimart Assocs. v Paul, 66 NY2d 570, 573 (1986). Where mutual mistake is alleged, the party seeking reformation must demonstrate that "the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement." Id. "The mutual mistake must exist at the time the contract is entered into and must be substantial." Weissman v Bondy & Schloss, 230 AD2d 465, 468 (1st Dept. 1997). "Reformation is not granted for the purpose of alleviating a hard or oppressive bargain, but rather to restate the intended terms of an agreement when the writing that memorializes that agreement

is at variance with the intent of both parties." George Backer Mgmt. Corp. v Acme Quilting Co., 46 NY2d 211, 219 (1978).

The defendant's allegations that, had it anticipated the COVID-19 pandemic and resulting shutdown of indoor fitness classes, it would not have entered the lease or would have agreed to different terms are insufficient to support a claim for reformation on the basis of mutual mistake. The defendant's assertions are belied by the terms of the lease agreements themselves, which include the unconditional obligation to pay rent in Paragraph 26, described above. Relatedly, the defendant pleads no facts supporting an inference that the alleged mistake existed at the time of contract. To the extent that the parties did not anticipate the pandemic at the time they entered the lease agreements, they made a mistaken assumption about the future, not about anything that "exist[ed] at the time the contract is entered into". As such, the defendant's argument does not suffice to state a claim for reformation of a contract based on mutual mistake. Therefore, the tenth and eleventh counterclaims are dismissed.

F. Twelfth Counterclaim

The defendant's twelfth counterclaim seeks to recover attorneys' fees and expenses pursuant to the lease agreements. "Under the general rule in New York, attorneys' fees are deemed incidental to litigation and may not be recovered unless supported by statute, court rule or written agreement of the parties." Flemming v Barnwell Nursing Home & Health Facilities, Inc., 15 NY3d 375, 379, (2010) (citing Hooper Assocs., Ltd. v AGS Computers, Inc., 74 NY2d 487, 491 [1989]). The defendant has not identified a specific provision authorizing recovery of such fees. Moreover, portions of the original lease agreement submitted in support of this motion are illegible, such that the defendant has nor demonstrated to the court that any such

provision exists. In any event, since the defendant premises its attorney's fees claim on alleged breaches of the lease by the plaintiff, and the court has rejected those claims as without merit, the twelfth counterclaim must likewise be rejected and dismissed.

V. CONCLUSION

Accordingly, it is

ORDERED that the plaintiff's motion pursuant to CPLR 3211(a)(1), CPLR 3211 (a)(7), and CPLR 3211(b) to dismiss the defendant's counterclaims and to strike the ninth, tenth, and eleventh affirmative defenses is granted in its entirety; and it is further

ORDERED that the parties shall comply with the preliminary conference order dated August 12, 2021, and shall appear for a compliance conference on December 16, 2021, at 10:00 a.m., via Microsoft Teams, as previously scheduled; and it is further

ORDERED that the parties are reminded that any subsequent motion practice, including summary judgment motion practice, does not stay discovery unless otherwise directed by the court.

This constitutes the Decision and Order of the court.

DATED: September 3, 2021

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON