SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR ENGORON** **PART** **37**

Justice

----------X

ESRT 1400 BROADWAY, L.P.,

Plaintiff,

- v -

JONAS TRADING CORP.,

Defendant.

----------X

INDEX NO. 157417/2020

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 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

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents and for the reasons stated hereinbelow, plaintiff's motion for summary judgement is granted as indicated below.

Background

On August 9, 2012, plaintiff's predecessor-in-interest, 1400 Broadway Associates, LLC, as landlord, and defendant, Jonas Trading Corp. ("Tenant"), as tenant, entered into a commercial lease agreement covering a retail space located on the ground floor and in the basement of 1400 Broadway, New York, New York ("the Premises"). NYSCEF Doc. No. 16. That lease was subsequently amended by an October 18, 2017, Recapture Letter and a February 26, 2018, First Lease Modification Agreement (collectively with the original lease, "the Lease") between Tenant and plaintiff, ESRT 1400 Broadway LP ("Landlord"). NYSCEF Doc. Nos. 17 and 18.

Article 10(A) of the Lease, titled "Repairs; Destruction," provides, inter alia, that:

> "The exterior walls of the Building, the windows and the portions of all window sills outside same and areas above any hung ceiling are not part of the demised premises and landlord hereby reserves all rights to such parts of the Building."

Article 21(A) of the Lease, titled "Landlord's Liability," reads in relevant part:

> "If, by reason of … (f) conditions affected by, or actions (including without limitation any evacuation or closure of the Building) taken by Landlord or others reasonably intended to assure health, security or safety of the Building or any persons in response to, war, any act of terrorism or violence (even if not directed at the Building or any occupant thereof), or any other national state, municipal emergency (whether or not officially proclaimed by any governmental authority) …, this lease and Tenant's obligations to pay rent hereinunder shall in no wise be

affected, impaired or excused."

Article 25(A) of the Lease, titled "No Waiver, Constructive Eviction, Survival of Obligations, Etc.," provides, inter alia, that:

> "No act or omission of Landlord or its agents shall constitute an actual or constructive partial or total eviction or give rise to a right of Tenant to terminate this lease or receive an abatement of any portion of its rent, or to be relieved of any other obligation hereunder or to be compensated for any loss or injury suffered by it, except as otherwise explicitly set forth herein."

In a letter dated May 12, 2020, Landlord informed Tenant that it had defaulted on its rent obligations. NYSCEF Doc. No. 20.

In a letter dated June 22, 2020, Landlord informed Tenant that a) it was still in default of its rental obligations; b) that Landlord had applied its Security Deposit; and c) that Landlord was demanding that Tenant replenish the Security Deposit as required by the Lease. NYSCEF Doc. No. 21.

On September 14, 2020, Landlord initiated the instant lawsuit asserting three causes of action: (1) breach of contract; (2) continuing damages; and (3) attorney's fees. NYSCEF Doc. No. 22.

On November 16, 2020, Tenant answered with general denials, 27 affirmative defenses, and one counterclaim, partial constructive eviction. NYSEF Doc. No. 23. On February 10, 2021, Landlord replied with twelve affirmative defenses to Tenant's counterclaim. NYSCEF Doc. No. 24.

On June 28, 2021, Landlord moved, pursuant to CPLR 3212, for summary judgement granting its causes of action and dismissing Tenant's affirmative defenses and counterclaim. NYSCEF Doc. No. 9.

On December 1, 2021, at 2:15 pm, Landlord and Tenant appeared before this Court in a virtual oral argument, during which both parties acknowledged, inter alia, that Landlord was no longer seeking Late Fees as part of its claim for Additional Rent as part of its breach of contract or continuing damages causes of action.

Discussion

To prevail in a summary judgement action, the moving party must tender sufficient evidence to demonstrate the absence of any material issue of fact, and entitlement to judgement in its favor as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Ayotte v Gervasio, 81 NY2d 1062 (1993); CPLR 3212(b). Once the movant's initial burden has been met, the burden then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980); see generally American Sav. Bank v Imperato, 159 AD2d 444 (1st Dep't 1990) ("The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgement").

The elements of a cause of action for breach of contract are "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." Harris v Seward Park Hous. Corp., 79 AD3d 425, 426 (1st Dep't 2010).

Here, plaintiff has made a prima facie showing of breach of contract and continuing damages by providing, inter alia: a copy of the pleadings; the Lease; an affidavit of Maxx Melendez, an Accounts Receivable Collections Associate for Landlord's managing agent, ESRT Management, LLC, reflecting personal knowledge of Landlord's business record keeping procedures for its rent ledgers (NYSCEF Doc. No. 12); and the rent ledger for the Premises (NYSCEF Doc. No. 19). CPLR 3212(b).

It is undisputed that Tenant entered into a lease for, and took possession of, the Premises; and it is also undisputed that Tenant remains in possession of the Premises and has not fulfilled its rent obligations under the Lease. As such, it is upon Tenant to submit proof sufficient to create material issues of fact requiring trial.

In its Sixth, Seventh, Eighth, Ninth, and Tenth affirmative defenses, Tenant argues its obligations under the Lease were fully and/or partially excused by frustration of purpose, failure of consideration, impossibility, illegality, and/or commercial impracticability due to the global COVID-19 pandemic and its attendant government-ordered lockdowns. These affirmative defenses fail, however, in light of the clear language of the Lease as interpreted under controlling precedent from the Appellate Division, First Department. See generally Gap, Inc. v 170 Broadway Retail Owner, LLC, 195 AD3d 575, 577 (1st Dep't 2021) (COVID-19 pandemic does not entitle commercial tenant to recission based on frustration of purpose and impossibility); 558 Seventh Ave. Corp., v Times Sq. Photo Inc., 194 AD3d 561, 562 (1st Dep't 2021) ("the purpose of the lease in this case was not frustrated [by COVID-19], and defendants' performance was not rendered impossible, by its reduced revenues.").

In its Fourth, 17th, and 18th affirmative defenses Tenant argues that, due to the actions of Landlord, Tenant was either constructively evicted, partially constructively evicted, or materially deprived of the beneficial use and enjoyment of the Premises. These affirmative defenses also fail, however, as they each require a landlord's wrongful act, and here Landlord's alleged wrongful acts of, inter alia, limiting building access and allegedly providing insufficient security have been contracted out by the language of the Lease. See generally Barash v Pennsylvania Term. Real Est. Corp., 26 NY2d 77, 78 (1970) ("To be an eviction, constructive or actual, there must be a wrongful act by the landlord which deprives the tenant of the beneficial enjoyment or actual possession of the demised premises."). Furthermore, Tenant has not given up possession of the Premises.

In its counterclaim, Tenant alleges that plaintiff's construction and demolition work on the second floor of the subject building has caused Tenant to be partially constructively evicted from the Premises and so not liable for rents due. This counterclaim fails because of the clear language of Article 25 of the lease.

As to Tenant's other affirmative defenses, Tenant has failed to support them with facts; this Court finds them unavailing for that and other reasons.

Finally, however, in his affidavit Tenant's president, Zion Ovadia, annexed a video of a plate glass window outside the Premises being shattered during a night of civil unrest that occurred in New York City and elsewhere on May 31, 2020, and alleges Tenant is entitled to reimbursement by Landlord for the cost of the replacement windows. NYSCEF Doc. Nos. 32 and 35. At the aforesaid oral argument parties agreed that Landlord would credit Tenant $8000 for Tenant's window protection and repair expenses.

Conclusion

Thus, pursuant to CPLR 3212, the summary judgment motion of plaintiff, ESRT 1400 Broadway LP, is hereby granted as to liability and $293,579.42 in damages through June 2021 (calculated as follows: $326,632.21 in Rent and Additional Rent as per the undisputed June 2021 Rent Ledger, minus $53,387.13 in Late Fees from March 2020 also as per the Ledger, minus $8000 for window protection and repair expenses, plus $28,334.34 in Security Deposit replenishment as per the Lease); the affirmative defenses and counterclaim of defendant, Jonas Trading Corp., are dismissed; and the Clerk is hereby directed to enter judgment accordingly.

It is further ordered that plaintiff's request for attorney's fees is hereby severed, and plaintiff may obtain an inquest into said fees and into continuing damages from July 2021 forward by presenting the Clerk with a Note of Issue with Notice of Inquest, a copy of this Decision and Order, and any necessary fees. Plaintiff must file such Note of Issue within 60 days from the date of this Decision and Order, and plaintiff's failure to do so timely shall result in automatic disposal of this action. Plaintiff is further directed, within 45 days of filing the Note of Issue, to contact chambers to schedule the inquest date.

12/7/2021
DATE

ARTHUR ENGORON, J.S.C.

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