| **New WTC Retail Owner LLC v FAL Coffee WTC, LLC** |
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| 2022 NY Slip Op 30238(U) |
| January 18, 2022 |
| Supreme Court, New York County |
| Docket Number: Index No. 654200/2020 |
| Judge: Nancy M. Bannon |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

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NEW WTC RETAIL OWNER LLC,

Plaintiff,

- v -

FAL COFFEE WTC, LLC,

Defendant.

**INDEX NO.** 654200/2020

**MOTION DATE** 07/01/2021

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

----------X

HON. NANCY BANNON:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 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 were read on this motion to/for JUDGMENT - SUMMARY.

## I. INTRODUCTION

In this action wherein the plaintiff seeks to recover damages for breach of a commercial lease agreement, the plaintiff moves pursuant to CPLR 3212 for summary judgment (1) on the first cause of action of the complaint in the sum of $155,605.93 for unpaid rent and additional rent due through October 8, 2019, and (2) on the second cause of action to accelerate the lease and require the defendant to pay rent and additional rent through August 31, 2026, in the sum of $1,386,499.23. The plaintiff further seeks to strike the defendant's twenty-nine affirmative defenses. The defendant opposes the motion. The plaintiff's motion is granted in part.

## II. BACKGROUND

On December 30, 2013, the plaintiff, as landlord, and the defendant, as tenant, entered into a written lease agreement (the lease) for retail space (the premises) at the Westfield World Trade Center Mall in lower Manhattan. The lease provided for a ten-year term commencing on

the "Grand Opening Date," which took place on August 16, 2016. The lease term was set to expire on August 31, 2026. The defendant agreed to use and occupy the subject premises solely for the operation of a café selling coffee, baked goods, and associated merchandise.

Pursuant to the lease, the defendant agreed to pay (1) minimum monthly base rent in the amounts set forth in the lease (rental), (2) additional rent consisting of the defendant's *pro rata* share of taxes, insurance, and other building expenses (additional rental), and (3) a percentage of any annual gross sales over $2.5 million (percentage rental, and together with rental and additional rental, rent or Rental). Further, pursuant to Section 5.03(c) of the lease, the defendant "irrevocably waive[d] any claim based upon or related to" any claimed representation by the plaintiff as to the condition and suitability of the premises, the occupancy of any other entity of the premises, and the traffic or sales to be expected at the premises. Pursuant to Section 27.02 of the lease, the defendant similarly acknowledged that it did not enter into the lease in reliance on any representations or warranties regarding the profitability of the premises.

On June 26, 2018, the parties entered into a lease amendment agreement (the amendment) providing that the defendant's rent obligations would be reduced by approximately $9,500.00 per month for the period from September 1, 2017, through August 31, 2018 (the abatement period). The amendment contained a mutual release whereby the parties discharged one another from all claims arising out of the lease as of June 26, 2018. The defendant paid reduced rent for the duration of the abatement period. Beginning September 1, 2018, the defendant continued to pay reduced rent. On January 25, 2019, the plaintiff sent the defendant a rent demand (the first rent demand) stating that the defendant owed the plaintiff arrears in the sum of $111,700.93from September 2018 through January 2019 and that the defendant was

required to pay that amount by February 8, 2019. An itemized statement illustrating the defendant's debt was attached to the demand.

The defendant nonetheless continued to pay rent at the reduced rate set forth in the amendment through August 2019. While the first rent demand stated that the plaintiff would commence nonpayment summary proceedings if the plaintiff's debt were not paid by the date provided, it did not commence any such proceedings or send any further demand to the defendant through August 2019.

The defendant did not make any rent payment for the month of September 2019. By letter dated September 16, 2019, the defendant advised the plaintiff that it could no longer fulfill its rent obligations and would immediately surrender the premises to the plaintiff. The letter averred, *inter alia*, that the defendant's financial prospects had been harmed by lower-than-anticipated foot traffic and the plaintiff's leasing space in the vicinity of the premises to competitors to the defendant's café business. By letter dated September 25, 2019, (the surrender letter) the defendant stated that it "hereby quits and surrenders the premises."

Also on September 25, 2019, the plaintiff sent a second rent demand (the second rent demand) to the defendant stating that the defendant owed the plaintiff arrears in the sum of $161,032.00 through September 1, 2019. The demand stated that the defendant was required to pay that sum by October 1, 2019, and attached an updated itemized statement illustrating the defendant's debt. The defendant did not pay the outstanding balance. On October 3, 2019, the plaintiff sent the defendant a termination notice (the termination notice) terminating the lease by no later than October 8, 2019 (the termination date).

The defendant vacated the premises as of the termination date. Subsequent correspondence between the parties indicates that the defendant returned the keys to the premises

shortly thereafter. However, the defendant left personal property, equipment, and trade fixtures at the premises when it vacated. The defendant avers that it had oral conversations with representatives of the plaintiff wherein the plaintiff indicated it would coordinate the removal of the defendant's property from the premises. In an email sent to the plaintiff's counsel on October 16, 2019, the defendant's counsel attached a list of its equipment and property. The defendant's counsel further asked in the email that the plaintiff's counsel advise when the defendant may remove its property and whom the defendant should contact to arrange removal. By letter dated October 22, 2019, the plaintiff responded to the request, stating that "[a]ll property left in the Premises when the Lease terminated is now the lawful chattel of [the plaintiff]" pursuant to the terms of the lease.

On March 18, 2020, the plaintiff entered into a lease with Mall Donuts, LLC (Dunkin Donuts), with respect to the premises. On December 4, 2020, that lease was amended (the Dunkin Donuts lease amendment) to provide that its commencement date would take place on the earlier to occur of "(i) the date [Dunkin Donuts] initially opens for business in the Premises or (ii) June 1, 2021." The plaintiff further agreed to reimburse Dunkin Donuts $250,000.00 for its construction in connection with preparing to operate at the premises. The plaintiff represents that for the period beginning on June 1, 2021, through the expiration of the defendant's lease, Dunkin Donuts is scheduled to pay $1,924,376.34 in rental and additional rental payments.

The plaintiff commenced this action seeking unpaid rent through the October 8, 2019, lease termination date in the sum of $161,032.00 (first cause of action) and accelerated rent in the sum of $3,163,747.00 (second cause of action), plus contractual attorneys' fees, by filing of the summons and complaint on September 2, 2020. The defendants answered on October 15, 2020. The instant motion ensued.

In its moving papers, the plaintiff amends its demand for damages under the first cause of action to $155,605.93, the number reflected in account statements the plaintiff submits. The plaintiff also amends its demand for accelerated rent to reflect the addition of the $250,000.00 Dunkin Donuts reimbursement and the subtraction of the expected rent from Dunkin Donuts through the remainder of the lease term, such that the total damages the plaintiff seeks under the second cause of action is $1,386,499.23. However, the plaintiff subsequently amends its demand under the second cause of action again its reply papers to reflect the withdrawal of its claim, on this motion only, for the $250,000.00 Dunkin Donuts reimbursement and $89,979.77 in accelerated additional rental, the application of the defendant's security deposit in the sum of $77,262.50, and a 4% discount of the amount due from the defendant as required pursuant to Section 19.03(f) of the lease, such that the total sum it seeks under the second cause of action is $918,538.14.

## III. LEGAL STANDARD

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). In opposition, the nonmoving party must demonstrate by admissible evidence the existence of a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). However, if the initial burden is not met by the movant, summary judgment must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, 64 NY2d 851; Giaquinto v Town

of Hempstead, 106 AD3d 1049 (2nd Dept. 2013); O'Halloran v City of New York, 78 AD3d 536 (1st Dept. 2010).

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. Motion for Summary Judgment

In support of its motion, the plaintiff submits, *inter alia*, the affidavit of Diana Grasso, the plaintiff's operating manager, the lease and amendment, the first and second rent demands, the termination notice, an account statement attributable to the defendant's tenancy and demonstrating rental arrears as of February 2021, a spreadsheet calculating the defendant's future rent under the lease, and the Dunkin Donuts lease amendment. In opposition to the motion, the defendant submits, *inter alia*, letter and email correspondence between the parties and documents related to closures and restrictions on the operation of the Westfield Mall due to the COVID-19 pandemic.

i. First Cause of Action

As to the first cause of action, the plaintiff's submissions demonstrate the existence of an agreement between the parties, the plaintiff's performance thereunder, the defendant's breach, and resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010); Flomenbaum v New York Univ., 71 AD3d 80 (1st Dept. 2009). Specifically, the plaintiff establishes that, in contravention of the terms of the lease and amendment the parties had agreed to, the defendant continued to pay reduced rent beyond the term permitted by the amendment, through August 31, 2019; the defendant failed to pay any rent for the month of September 2019; and the defendant failed to pay any rent through the termination date for the month of October 2019. The account statement and rent demands the plaintiff submits establish that the defendant continues to owe $106,148.99 with respect to rent due from September 1, 2018, through August 31, 2019, $39,331.83 with respect to rent due for the month of September 2019, and $10,150.13 with respect to partial rent due through the termination date.

The defendant avers that, notwithstanding the foregoing, the plaintiff cannot recover the $106,148.99 owed between September 2018 and August 2019 because the plaintiff's acceptance of reduced rent during that period constituted waiver of its contractual entitlement to rent at the agreed-upon rate. The defendant's argument is without merit.

It is well-settled that contractual rights may be waived if they are knowingly, voluntarily and intentionally abandoned. See Nassau Trust Co. v Montrose Concrete Prods. Corp., 56 NY2d 175 (1982). Such abandonment "may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage." General Motors Acceptance Corp. v Clifton–Fine Cent. School Dist., 85 NY2d 232, 236 (1995); see Hadden v Consolidated Edison

Co. of N.Y., 45 NY2d 466 (1978). Nonetheless, waiver "should not be lightly presumed" and must be based on "a clear manifestation of intent" to relinquish a contractual protection. Gilbert Frank Corp. v Federal Ins. Co., 70 NY2d 966, 968 (1988). Generally, the existence of intent to waive a contractual right is a question of fact. See Jefpaul Garage Corp. v Presbyterian Hosp. in City of N.Y., 61 NY2d 442 (1984).

"The inclusion of a merger clause in an instrument is no bar to waiver because 'a contractual provision against oral modification may itself be waived.'" Madison Ave. Leasehold, LLC v Madison Bentley Assoc. LLC, 630 AD3d 1, 6 (1st Dept. 2006) (quoting Rose v Spa Realty Assoc., 42 NY2d 338, 343 [1977]). However, a party invoking waiver in the presence of a merger or no-waiver clause is subject to a "heightened standard" to merit relief. Gans v Wilbee Corporation, 199 AD3d 564, 564 (1st Dept. 2021). To avoid contractual obligations in such circumstance, "some performance confirming the modification must be present, and it must be 'unequivocally referable to the oral modification.'" Paramount Leasehold, L.P. v 43rd Street Deli, Inc., 136 AD3d 563, 568 (1st Dept. 2016) (quoting Rose v Spa Realty Assoc., supra at 343). "[I]in the context of a lease dispute, there must be 'sufficient indicia that the reasonable expectations of both parties under the original lease were supplanted by subsequent actions.'" Paramount Leasehold, L.P. v 43rd Street Deli, Inc., supra at 568 (quoting Simon & Son Upholstery v 601 W. Assoc., 268 AD2d 359, 360 [1st Dept. 2000]).

Here, Section 27.01 of the lease contains a no-waiver clause providing that "[o]ne or more waivers of any covenant or condition by Landlord or Tenant shall not be construed as a waiver of a subsequent breach of the same covenant or condition" and "[n]o breach of a covenant or condition of this Lease shall be deemed to have been waived unless such waiver is in writing signed by the waiving party." Moreover, Section 27.15 of the lease provides that

> Payment by Tenant or receipt by Landlord of a lesser amount than the Rental or other charges herein stipulated shall be deemed to be on account of the earliest Rental or other charges due from Tenant to Landlord. No endorsements or statement on any check or any letter accompanying any check or payment as Rental or other charges shall be deemed an accord and satisfaction, and Landlord shall accept such check or payment without prejudice to Landlord's right to recover the balance of any and all Rental or other charges due from Tenant to Landlord or to pursue any other remedy provided in this Lease or by law.

In sum, the parties explicitly agreed in the lease both that all modifications were to be in writing and that the plaintiff could accept lesser rent payments without prejudice to its right to recover the balance of "any and all Rental or other charges" due from the defendant.

Considering a defendant tenant's waiver argument in the context of an analogous no-waiver provision, the Court of Appeals held that the payment of prorated rent in lieu of the annual rent provided for in the parties' lease "was just as demonstrative of breach of contract as of completion of the purported oral modification [of the payment terms]." Eujoy Realty Corp. v Van Wagner Communications, LLC, 981 NYS2d 326, 335 (2013). Accordingly, it could not be said that such partial payment was unequivocally referable to the oral modification. To be sure, the Court noted, General Obligations Law § 15-301, which codifies the enforceability of no-waiver clauses, "becomes meaningless if a tenant's nonpayment of the rent required by a lease is sufficient to prove an oral modification of payment terms, or estop the landlord from recovering the shortfall." Id. at 335.

The same reasoning compels the court to reject the defendant's waiver defense here. The defendant's partial payments were not unequivocally referable to the plaintiff's alleged waiver and the plaintiff's acceptance of the same was consistent with the provisions of the lease. The partial payments and acceptance, supported only by the defendant's uncorroborated representation that full payment was waived, are not sufficient to create a triable issue of fact in the face of the lease. See Paramount Leasehold, L.P. v 43rd Street Deli, Inc., supra at 569 (no

issue of fact as to breach of lease obligation to pay percentage rent where only evidence of waiver was defendant's failure to pay percentage rent over the years); 457 Madison Ave. Corp. v Lederer De Paris, Inc., 51 AD3d 579, 579 (1st Dept. 2008) (in light of no-waiver clause, no waiver where landlord did not demand increased rent payments it was entitled to under lease for first five months of the year).

Accordingly, the plaintiff is entitled to judgment in the sum of $155,605.93 on its first cause of action.

ii. Second Cause of Action

In the second cause of action, the plaintiff seeks accelerated rent as liquidated damages for the defendant's default under the lease. In relevant part, Section 19.01 of the lease defines as an event of default the failure of the defendant to pay when due any installment of rent, where such failure continues for a period of five days after notice is given by the plaintiff. Section 19.03 provides for remedies and damages available to the plaintiff in the event of the defendant's default.

Section 19.03(a) permits the plaintiff, at its option, to terminate the lease upon three days' notice. Upon such termination, the defendant "shall remain liable for all damages as hereinafter set forth." In this regard, Section 19.03(c) mandates, *inter alia*, that notwithstanding termination of the lease,

> Tenant shall pay and be liable for (on the days originally fixed herein for the payment thereof) the installments of Rental as if this Lease had not been terminated and as if Landlord had not entered and whether the Premises are relet or remain vacant, in whole or in part but in the event the Premises is relet by Landlord, Tenant shall be entitled to a credit in the net sum of rents received by Landlord in reletting after deduction of all expenses incurred in reletting the Premises, and in collecting such rents.

Alternatively, Section 19.03(f) permits the plaintiff, at its option, to elect to immediately accelerate all payments due under the lease, subject to certain offsets and discounts, and to recover all other amounts necessary to compensate the plaintiff for the defendant's failure to perform under the lease, as and for liquidated damages "in lieu of payments to be made … under Section 19.03(c)."

The plaintiff's submissions establish that the defendant defaulted within the meaning of the lease when it failed to pay the outstanding balance set forth in the second rent demand by October 1, 2019, or any time thereafter. Moreover, the plaintiff properly terminated the lease as of October 8, 2019, pursuant to Section 19.03(a), by sending the defendant the termination notice. The termination notice advised the defendant that the plaintiff reserved its right, pursuant to Section 19.03(f), to seek accelerated rent in lieu of continuing monthly rental payments under Section 19.03(c). The plaintiff thus demonstrates, *prima facie*, its entitlement to judgment on the issue of liability under the second cause of action.

Contrary to the defendant's contentions, there is no factual issue as to whether the early termination of the lease upon the defendant's default relieves it of the obligation to pay the damages contemplated by the lease. While the defendant offered to surrender prior to the plaintiff's service of the termination notice, the parties' correspondence does not contain anything to indicate that the parties "manifestly intended" the defendant's departure "to constitute a surrender and acceptance of the premises" or to "terminate[] the plaintiff['s] rights to recover damages under the lease." Ring v Printmaking Workshop, Inc., 70 AD3d 480, 480 (1st Dept. 2010). Rather, a review of the record makes clear that the plaintiff "consistently reserved [its] rights to collect the remaining rent from the tenant." Jimenez v Henderson, 144 AD3d 469, 470 (1st Dept. 2016). Moreover, Section 19.03(b)(i) of the lease expressly states that if the lease

is terminated due to the defendant's default, "in no event shall re-entry be deemed an acceptance of surrender of the Lease … or otherwise limit the damages to which [the plaintiff] is entitled under the provisions of this Lease."

The defendant likewise fails to demonstrate the existence of a triable issue as to the enforceability of Section 19.03(f). The "well established" rule in New York is that "[a] contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation." Truck Rent–A–Ctr., Inc. v. Puritan Farms 2nd, Inc., 41 NY2d 420, 425 (1977); see 172 Van Duzer Realty Corp. v Globe Alumni Student Assistance Assn., Inc., 24 NY3d 528, 536 (2014). "If, however, the amount fixed is plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced." Truck Rent–A–Ctr., Inc. v. Puritan Farms 2nd, Inc., supra at 425. Whether a rent acceleration clause "represents an enforceable liquidation of damages or an unenforceable penalty is a question of law, giving due consideration to the nature of the contract and the circumstances." JMD Holding Corp. v. Cong. Fin. Corp., 4 NY3d 373, 379 (2005). "The burden is on the party seeking to avoid liquidated damages . . . to show that the stated liquidated damages are, in fact, a penalty." Id.

Here, the defendant does not meet its burden. Contrary to the defendant's conclusory assertions, "the liquidated damages provision in the parties' lease did not constitute a penalty, but rather, allowed the landlord to recoup its actual damages and the benefit of the bargain." New 24 West 40th Street LLC v XE Capital Management, LLC, 104 AD3d 513, 514 (1st Dept. 2013). To be sure, the plaintiff has applied the terms of the parties' accelerated rent provision favorably "so as to reduce defendant's liability exposure under the lease by seeking payment of [rent] payable

through the end of the lease at a 4% discounted rate," plus credits to defendant for rent payments anticipated under the Dunkin Donuts lease and the security deposit the defendant posted. Id. In sum, the plaintiff's demand for accelerated rent does not seek recoupment of damages "disproportionate to any loss which could possibly accrue to the landlord." Fifty States Mgt. Corp. v Pioneer Auto Parks, 46 NY2d 573, 578 (1979).

Additionally, the acceleration clause in the parties' lease does not provide for the plaintiff's recovery of actual *and* liquidated damages, which remedies are mutually exclusive. See, e.g., Federal Realty Ltd. Partnership v Choices Women's Medical Center, Inc., 289 AD2d 439, 441 (2nd Dept. 2001); J.R. Stevenson Corp. v Westchester County, 113 AD2d 918, 921 (2nd Dept. 1985). Rather, the lease allows the plaintiff to recover rent, offset by any rent collected by a replacement tenant, either monthly for the duration of the terminated lease or in one lump sum. Such a clause is properly enforceable. See 172 Van Duzer Realty Corp. v Globe Alumni Student Assistance Assn., Inc., supra at 535 (upholding clause requiring rent to be paid immediately, rather than in monthly installments, following termination of lease).

The defendant also fails to raise any triable issue as to whether the COVID-19 pandemic and attendant executive orders should reduce the amount recoverable under the accelerated damages provision. Section 17.01 provides, in relevant part, that "[i]n the event the Premises shall be partially or totally destroyed by fire or other casualty … so as to become partially or totally untenantable, then the damage to the Premises shall be repaired" by the plaintiff, whereupon rent payable by the defendant shall be abated "in proportion to the Floor Area of the Premises rendered untenantable for Tenant's business…" A review of Section 17.01, which refers to a "fire or other casualty" resulting in the premises becoming "untenantable" and 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, 195 AD3d 575, 577 (1st Dept. 2021) (citing cases); see also Gap Inc. v Ponte Gadea New York LLC, 2021 WL 861121, *6 (S.D.N.Y. March 8, 2021). The COVID-19 pandemic and its effects did not constitute a casualty under Section 17.01 of the lease, such that the accelerated rent due to the plaintiff could be abated.

Further, to the extent the defendant seeks abatement on the grounds that the COVID-19 pandemic and resulting governmental restrictions rendered the parties' performance of the lease impossible, such defense is unavailable. 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 demonstrates that the conditions the defendant claims rendered its performance impossible were foreseeable. Specifically, Section 27.04 of the lease includes within the definition of force majeure "restrictive governmental laws or controls" and provides that such event "shall not excuse" the defendant's obligations to pay rent. Moreover, the defendant does not, and cannot, claim that the means of its performance under the lease would have been destroyed by the pandemic and attendant shutdown orders.

For the foregoing reasons, the plaintiff is entitled to judgment on the issue of liability on the second cause of action. The plaintiff has also presented proof of damages in the sum of $918,538.14 on the second cause of action. However, this sum excludes the plaintiff's demands for $250,000.00 in construction costs it is required to pay Dunkin Donuts and $89,979.77 in accelerated additional rental, for which the plaintiff has not submitted adequate proof. While the plaintiff has indicated, on reply, that it wishes to waive such demands for purposes of this motion, it also states, somewhat equivocally, that it seeks an inquest as to the recoverability of these sums. Inasmuch as the plaintiff has not abandoned its claim for damages under the second cause of action in the full amount claimed in its reply papers, the issue of damages shall be decided at a hearing upon the completion of discovery related to that issue.

iii. Setoff

The defendant avers that it is entitled to setoff of the sums owed under the first and second causes of action insofar as the plaintiff did not permit the defendant to return to the premises after the termination of the lease to collect equipment it had installed. The defendant's assertion is belied by the terms of the lease. Section 6.02 provides, in relevant part,

> If Tenant shall fail to remove any of Tenant's Property at the expiration or termination of this Lease, Landlord may, at Landlord's option, retain either any or all of the property, and title thereto shall thereupon vest in Landlord without compensation to Tenant; or remove all or any portion of the Tenant's Property from the Premises and dispose of Tenant's Property in any manner, without compensation to Tenant.

"Tenant's Property" is defined in Section 6.02 as "trade fixtures, equipment and other personal property installed by Tenant." Provisions such as these in a commercial lease, providing that all property permitted or required to be removed at the end of the lease term that remains in the premises after a tenant's removal is deemed abandoned, are enforceable. See Dollar Choice Deals, Inc. v Ross & Ross, LLC, 2022 N.Y. Slip Op. 00043 (1st Dept. Jan. 6, 2022); Tewksbury Management Group, LLC v Rogers Investments NV LP, 110 AD3d 546, 547 (1st Dept. 2013).

Moreover, there is no merit to the defendant's suggestion that it was not given sufficient time to remove its property from the premises. The plaintiff's second rent demand and termination notice each provided timely notice in strict compliance with the terms of the lease. Correspondence between the parties submitted by the defendant further demonstrates that as of October 16, 2019, the defendant retained the keys to the premises and that the defendant repeatedly stated that it expected the plaintiff to begin attempts to re-let the premises immediately upon receipt of the defendant's September 25, 2019, letter. Finally, the defendant's suggestion that the plaintiff was somehow obligated to facilitate the removal of its property is unsupported by the record or any applicable law.

Accordingly, the defendant is not entitled to any setoff of the sums it owes under the lease on the bases alleged.

B. Motion to Dismiss Affirmative Defenses

The defendant has interposed 29 affirmative defenses in this action. The plaintiff moves to dismiss each of them and addresses the bases for their dismissal in its moving papers. The only affirmative defenses the defendant addresses in its opposition papers are detailed in the court's discussion above and are subject to dismissal on the grounds provided. The remaining defenses, the dismissal of which the defendant has not opposed, are dismissed for the reasons stated in the plaintiff's moving papers.

## V. CONCLUSION

Accordingly, upon the foregoing papers it is

ORDERED that the branch of the plaintiff's motion seeking summary judgment on the complaint pursuant to CPLR 3212 is granted to the extent that (1) the plaintiff is awarded judgment on the first cause of action in the sum of $155,605.93 and (2) the plaintiff is awarded judgment on the issue of liability on the second cause of action, with damages to be determined at a hearing upon the filing of the Note of Issue, and that branch of the motion is otherwise denied; and it is further

ORDERED that the branch of the plaintiff's motion seeking to dismiss the defendants' affirmative defenses is granted in its entirety; and it is further

ORDERED that the Clerk shall enter judgment in favor of the plaintiff and against the defendants, jointly and severally, in the sum of $155,605.93, with statutory interest from October 8, 2019; and it is further

ORDERED that the parties shall complete discovery on the issue of damages due under the second cause of action and file the Note of Issue by March 18, 2022.

This constitutes the Decision and Order of the court.

DATED: January 18, 2022

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