

<b>Eldad Prime LLC v Gary Ostrow, D.O., P.C.</b>
2022 NY Slip Op 30711(U)
March 28, 2022
Supreme Court, New York County
Docket Number: Index No. 150526/2021
Judge: Suzanne Adams
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. SUZANNE ADAMS PART 39TR**

*Justice*

-----X

ELDAD PRIME LLC

Plaintiff,

- v -

GARY OSTROW, D.O., P.C.,

Defendant.

-----X

INDEX NO. 150526/2021

MOTION DATE 09/01/2021

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ordered that plaintiff's motion for dismissal and for summary judgment is granted, and defendant's cross-motion to stay this action and deny the motion pursuant to CPLR 3212(f) is denied. In this action to recover for breach of a lease agreement, plaintiff is the owner and landlord of the building at 115 East 57<sup>th</sup> Street in Manhattan, where defendant is the commercial tenant who leased the 16<sup>th</sup> floor of the building (the "Premises"). Plaintiff now moves (i) pursuant to CPLR 3211(b) to dismiss defendant's First through Eleventh Affirmative Defenses, and First through Fourth Counterclaims; (ii) pursuant to CPLR 3025(c) to deem the Verified Complaint as amended to conform to the evidence submitted on the instant motion so as to amend the amounts sought in the First, Second, and Fifth Causes of Action; (iii) pursuant to CPLR 3212 for summary judgment on said First, Second, and Fifth Causes of Action; and (iv) in the event that summary judgment is denied, to direct defendant's payment of rent pursuant to Real Property Actions and Proceedings Law § 220. Defendant opposes the

motion and cross-moves to stay this matter pursuant to the Administrative Order of this court's Chief Administrative Judge (AO/261/21), and to deny plaintiff's motion pursuant to CPLR 3212(f) on the grounds there has been no discovery. Plaintiff opposes the cross-motion. The court notes that Administrative Order 261/21, which stayed certain pending residential and commercial eviction and foreclosure proceedings, expired on January 15, 2022, and has not been extended, and thus is inapplicable to the instant matter.

It is well established that “[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*see*, CPLR 3026).” *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). The standard of review on a CPLR 3211(b) motion to dismiss an affirmative defense is “whether there is any legal or factual basis for the assertion of the defense.” *Matter of Ideal Mut. Ins. Co.*, 140 A.D.2d 62, 67 (1<sup>st</sup> Dep’t 1988). With respect to motions for summary judgment, it is equally well established that “the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986) (citing *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985)). The party opposing a motion for summary judgment is entitled to all reasonable inferences most favorable to it, and summary judgment will only be granted if there are no genuine, triable issues of fact. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520, 521-22 (1<sup>st</sup> Dep’t 1989).

Viewing the evidence in a light most favorable to the non-moving party, dismissal of the First through Eleventh Affirmative Defenses and First through Fourth Counterclaims is warranted, as they lack factual and/or legal support, and plaintiff has made a *prima facie* showing of entitlement to judgment as a matter of law on its First, Second, and Fifth Causes of Action. For example, defendant's Fourth Affirmative Defense asserts that plaintiff's claims are “barred in

whole or in part based upon the doctrine of impossibility of performance and/or the doctrine of commercial impracticability.” (Exhibit F to the moving papers) The doctrine of impossibility or impracticability generally applies where performance is prevented by “the destruction of the means of performance by an act of God, *vis major*, or by law [citations omitted].” *407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 281 (1968). “. . . [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 [citations omitted].” *407 E. 61st Garage, Inc.*, 23 N.Y.2d at 281. Further, “the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract [citations omitted].” *Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d 900, 902 (1987). The frustration of purpose doctrine applies where the frustrated purpose was “so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense.” *Crown IT Servs., Inc. v. Koval-Olsen*, 11 A.D.3d 263, 265 (1<sup>st</sup> Dep’t 2004). *See also, PPF Safeguard, LLC v. BCR Safeguard Holding, LLC*, 85 A.D.3d 506, 508 (1<sup>st</sup> Dept 2011) (frustration of purpose applies “when a change in circumstances makes one party’s performance virtually worthless to the other, frustrating his purpose in making the contract”).

Neither doctrine is applicable here. Not only was defendant’s business, as a medical provider, not subject to closure under the operative executive orders, the lease specifically addresses the circumstances at issue and sets forth the parties’ respective obligations. (Exhibit B to the moving papers) Paragraph 26 of the lease provides in pertinent part:

This lease and the obligation of Tenant [defendant] to pay Rent and additional rent hereunder and perform all of the other covenants and agreements hereunder on the part of Tenant to be performed shall in nowise be affected, impaired or excused because Landlord [plaintiff] is unable to fulfill any of its obligations under this Lease expressly or impliedly to be performed by Landlord . . . if Landlord

is prevented or delayed from so doing by reason of strikes or labor troubles or by accident or by any cause whatsoever reasonably beyond Landlord's control, including but not limited to, laws, government preemption in connection with a National Emergency or by reason of any rule, order or regulation of any federal, state, county or municipal authority or any department or subdivision thereof or any government agency or by reason of the conditions of supply and demand which have been or are affected by war or other emergency. . . .

This lease provision contains a carve-out requiring the continued payment of rent in the instant situation, and as such defendant cannot use same to establish an issue of fact precluding summary judgment.

Another example is defendant's Fifth Affirmative Defense that the Covid-19 pandemic and resultant governmental declarations of emergency and other actions constituted a casualty so as to suspend rental and additional rental obligations. However, the casualty provision of the lease, contained in Article 10, clearly refers to physical damage of the Premises, which did not occur in this matter. As the First Department recently held in *Gap, Inc. v. 170 Broadway Retail Owner, LLC*, 195 A.D.3d 575, 577 (1<sup>st</sup> Dep't 2021), "That portion of the lease 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 (see *Gap Inc. v. Ponte Gadea New York LLC*, 524 F. Supp.3d 224 [S.D.N.Y. 2021]; *1140 Broadway LLC v. Bold Food, LLC*, 2020 N.Y. Slip Op. 34017(U) 2020 WL 7137817 [Sup. Ct., N.Y. County 2020]; *Dr. Smood New York LLC v. Orchard Houston, LLC*, 2020 N.Y. Slip Op. 33707(U), 2020 WL 6526996 [Sup. Ct., N.Y. County 2020]; *but see 188 Ave. A Take Out Food Corp. v. Lucky Jab Realty Corp.*, 2020 N.Y. Slip Op. 34311(U), 2020 WL 7629597 [Sup. Ct., N.Y. County 2020])." The interpretation of "casualty" as articulated in *188 Ave. A Take Out Food Corp.*, *infra*, is not consistent with reported case law nor the general understanding of the term in the context of a lease for real property, and thus does not obtain. *See*

*Gap Inc. v. Ponte Gadea New York LLC*, 524 F. Supp.3d at 233 (“New York courts, while not establishing a definitive general definition of “casualty,” have found the term applicable to singular events, such as fires, that cause physical damage in or to a property. *See, e.g., 45 Broadway Owner LLC v. NYSA-ILA Pension Tr. Fund*, 107 A.D.3d 629, 631, 970 N.Y.S.2d 1 (2013) (holding that casualty, as that term was used in a lease discussing damage caused by a ‘fire or other casualty,’ included a flood resulting from a rusted gauge on an HVAC system); *Blue Water Realty, LLC v. Salon Mgmt. of Great Neck, Corp.*, 189 A.D.3d 496, 497–98, 139 N.Y.S.3d 9 (2020) (holding that casualty, which the First Department had previously defined as an ‘accident’ or an ‘unfortunate occurrence,’ did not include repeated leaks and flooding which were a ‘common occurrence’ in the leased premises)).

Accordingly, it is hereby

ORDERED that plaintiff’s motion is granted and the cross-motion is denied; and it further

ORDERED that defendant’s First through Eleventh Affirmative Defenses and First through Fourth Counterclaims are dismissed, with prejudice; and it is further

ORDERED that the Verified Complaint is hereby deemed amended to conform to the evidence submitted on this motion, so as to amend the amounts sought in the First, Second, and Fifth Causes of Action; and it is further


ORDERED plaintiff’s motion for summary judgment on the First, Second, and Fifth Causes of Action is granted, and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$1,025,529.77, together with interest at the statutory rate from the date of this order through the date of entry of judgment, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an

appropriate bill of costs, and attorneys' fees as determined by a Special Referee as set forth hereinbelow; and it is further

ORDERED that the amount of attorneys' fees to be assessed as against defendant is referred for determination to a Special Referee, and that within 60 days from the date of this order plaintiff shall cause a copy of this order with notice of entry, including proof of service thereof, to be filed with the Special Referee clerk (Room 119M, 646-386-3028 or [spref@nycourts.gov](mailto:spref@nycourts.gov)) to arrange a date for a reference to determine pursuant to CPLR § 4317(b); and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendant in accordance with the aforesaid award of damages with interest, costs, and disbursements, and the report of the Special Referee, without any further application.

This constitutes the decision and order of the court.

<u>3/28/2022</u> DATE	 SUZANNE ADAMS, J.S.C.			
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE