SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

----------X

933 BROADWAY, LLC,

Plaintiff,

- v -

GODIVA CHOCOLATIER, INC.,

Defendant.

----------X

INDEX NO. 652446/2021

MOTION DATE 05/24/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25

were read on this motion for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.

Upon the foregoing documents, it is hereby ordered that plaintiff's motion for summary judgment pursuant to CPLR 3212 is granted in accordance with the following memorandum.

Background

In this action for breach of a commercial lease, plaintiff 933 Broadway, LLC ("plaintiff") asserts three causes of action for breach of contract: for annual fixed rent (first cause of action), for additional rent (second cause of action), and for costs and reasonable attorney's fees (third cause of action) against defendant Godiva Chocolatier, Inc. ("defendant"). Plaintiff now seeks summary judgment on its complaint.

Pursuant to a lease dated May 23, 2019, plaintiff leased to defendant a portion of the ground floor and lower level of the building located at 933 Broadway, New York, New York (the "premises") (NYSCEF Doc. No. 6, § 1.1). Defendant was to use the premises as "a café for the sale by Tenant at retail and for off premises and on premises consumption of first quality

chocolates, and retail sale for off premises and on premises consumption of food and non-alcoholic beverages" (*id.*, § 5.1).

The commencement of the lease term and defendant's obligation to pay rent were subject to completion of certain work by defendant in the premises, but the term was to last from the rent commencement date to "the last day of February immediately succeeding the sixth (6th) anniversary of the Rent Commencement Date (as hereinafter defined) occurs" (*id.*, § 1.2). Defendant began paying rent on July 1, 2019 (NYSCEF Doc. No. 8). The monthly fixed rent during the time relevant to this action is $40,000 (NYSCEF Doc. No. 6, § 2.1(A). In addition, defendant agreed to pay additional rent of a proportionate share of real estate tax increases (*id.*, § 3.1). If defendant failed to pay either the fixed rent or additional rent when due, defendant agreed to pay a late fee of four cents per dollar of overdue rent, as well as interest of "four (4) percentage points above the rate then most recently announced by Citibank, N.A., New York, New York, or its successor, a its corporate base lending rate" annually from the date due to the date paid (*id.*, § 26.1).

On March 17, 2020, defendant voluntarily closed the café located at the premises in response to the COVID-19 pandemic (NYSCEF Doc. No. 18, ¶ 8). Shortly thereafter, pursuant to the Governor's Executive Order on March 20, 2020 (9 NYCRR 8.202.8), all non-essential businesses were required to close and on-premises dining was banned, which would have closed the café had defendant not done so itself (NYSCEF Doc. No. 18, ¶ 9). On July 20, 2020, the café reopened under the then present restrictions on gatherings and indoor dining, requiring masks, limited capacity, and pickup and delivery orders (NYSCEF Doc. No. 18, ¶ 11). Defendant continued to operate the café in this manner until it voluntarily shut down on November 6, 2020, as the COVID-19 restrictions then in effect "prevented orderly operations" (*id.*, ¶ 12).

At around the time the café reopened, the parties negotiated a First Amendment of Lease (*id.*, ¶ 13). The amended lease provides that plaintiff would defer defendant's fixed rent for April through June 2020, in the amount of $120,000 (NYSCEF Doc. No. 7, § 2). Fixed rent payments would resume on July 1, 2020, and the deferred fixed rent would be paid back in ten installments beginning January 1, 2021 (*id.*). Defendant asserts that it paid the rent from July 1, 2020 through November 19, 2020, but that plaintiff never deposited the checks (NYSCEF Doc. No. 18, ¶ 14). Instead, roughly contemporaneous to the instant motion, plaintiff returned the checks to defendant with no explanation other than they had become "stale" (*id.*; NYSCEF Doc. No. 5, ¶ 12).

At the time it commenced this action, plaintiff asserted that defendant owed outstanding fixed rent and additional rent of $200,000.00, for the period from July 1, 2020 through April 30, 2021 (NYSCEF Doc. No. 1, ¶ 15). Further, that defendant owed additional rent of $19,889.56 (*id.*, ¶ 20). In support of its motion, plaintiff offers its rent ledger, and the affidavit of its managing agent to state that the total outstanding amount is now $511,159.86, including the returned checks, for totals of $490,000 in fixed rent, $13,973.30 in additional rent, and $7,186.56 in late fees (NYSCEF Doc. No. 5, ¶¶ 10-20; NYSCEF Doc. No. 8). Plaintiff subsequently abandoned the claim for late fees.

Plaintiff commenced this action by filing a summons and complaint on April 12, 2021 (NYSCEF Doc. No. 1). Defendant appeared and answered the complaint (NYSCEF Doc. No. 3). Plaintiff now makes the instant motion for summary judgment.

Standard of Review

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof

to warrant judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The opposing party must proffer its own evidence to show disputed material facts requiring a trial (*id.*). However, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assoc. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]).

Discussion

A breach of contract requires allegations of "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v. Seward Park Housing Corp.*, 79 AD3d 425 [1st Dept 2010]). Here, plaintiff has established a prima facie case for breach of contract by submission of the lease and amended lease, plaintiff's rent ledger for defendant, and the affidavit of its managing agent, which together establish that the parties had a contract, that plaintiff performed thereunder, that defendant has breached the contract by not paying fixed rent and additional rent, and that plaintiff has been damaged thereby. In opposition, defendant raises four defenses: frustration of purpose, impossibility of performance, force majeure/acts of god, and duty to mitigate. Preliminarily, notwithstanding the pending legislation to require that commercial landlords mitigate their damages upon a tenant vacating the premises prior to the end of a lease term,[1] defendant acknowledges that no such duty currently exists (*see*, NYSCEF Doc. No. 16 at 9-10).

"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.

[1] S.B. S1129, 2021-2022 Leg. Sess. (N.Y. 2021); Assemb. B. A6906, 2021-2022 Leg. Sess. (N.Y. 2021). *See*, NY State Assembly Bill A6906, https://www.nysenate.gov/legislation/bills/2021/a6906; NY State Senate Bill S1129, https://www.nysenate.gov/legislation/bills/2021/s1129

Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract" (*Kel Kim Corp. v Central Mkts.*, 70 NY2d 900, 902 [1987]). "[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 E. 61st Garage, Inc. v Savoy Fifth Ave. Corp.*, 23 NY2d 275, 281 [1968]; *see also 558 Seventh Avenue Corp. v Times Square Phot Inc.*, 194 A.D.3d 561, 561-62 [1st Dept 2021] [holding that reduced revenues due to the COVID-19 pandemic did not render performance impossible]). "[A]bsent an express contingency clause in the agreement allowing a party to escape performance under certain specified circumstances, compliance is required even where the economic distress is attributable to the imposition of governmental rules and regulations or the inability to secure financing" (*Stasyszyn v Sutton E. Assoc.*, 161 AD2d 269, 271 [1st Dept 1990]).

Similarly, frustration of purpose applies only where the tenant was "completely deprived of the benefit of its bargain" (*Gap, Inc. v 170 Broadway Retail Owner, LLC*, 195 AD3d 575, 577 [1st Dept 2021]; *see also, City Natl. Bank v Baby Blue Distributions, Inc.*, 199 AD3d 559 [1st Dept 2021]). In other words, 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" (*PPF Safeguard, LLC v BCR Safeguard Holding, LLC*, 85 AD3d 506, 508 [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" (*Ctr. for Specialty Care, Inc. v CSC Acquisition I, LLC*, 185 AD3d 34, 42 [1st Dept 2020] [internal quotation marks and citations omitted]).

"[T]his doctrine is a narrow one which does not apply "unless the frustration is substantial" (*Crown IT Services, Inc. v Koval-Olsen*, 11 AD3d 263, 265 [1st Dept 2004]).

Finally, where a lease includes a force majeure or Acts of God clause, it "is to be narrowly construed and only if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused" (*Reade v Stoneybrook Realty, LLC*, 63 AD3d 433, 434 [1st Dept 2009], *quoting Kel Kim Corp.*, 70 NY2d at 902-903). "Such force majeure clauses excuse non-performance only where the reasonable expectations of the parties have been frustrated due to circumstances beyond the control of the parties" (*Macalloy Corp. v Metallurg, Inc.*, 284 AD2d 227, 227 [1st Dept 2001]).

Here, these defenses do not apply. The lease provides that either party may have additional time to perform its obligations under the lease in the event of "strikes, labor troubles, inability to procure labor or materials, failure of power, restrictive governmental laws or regulations, riots, insurrection, war, Acts of God, fire or other casualty, condemnation or other reason of a similar or dissimilar nature beyond the reasonable control of the party delayed" (NYSCEF Doc. No. 6 § 21.11). However, the lease goes on to provide that such events will not "operate to excuse Tenant from the prompt payment of Rent or any other payments or charges required by the terms of this Lease . . . . Delays or failures to perform resulting from lack of funds shall not be deemed delays beyond the reasonable control of a party" (*id.*). Thus, the parties expressly foresaw that this situation might occur and guarded against it (*Kel Kim Corp.*, 70 NY2d at 902). None of defendant's defenses thus excuse its failure to pay rent.

Moreover, defendant's inability to use the premises for the exact purpose it operated it for before the onset of the COVID-19 pandemic constitutes neither frustration of purpose nor impossibility of performance. As the Appellate Division, First Department, has now held more

than once, a loss of revenues occasioned by the pandemic, or by executive orders issued to guard against its spread, do not fulfill either doctrine (*e.g. City Natl. Bank v Baby Blue Distributions, Inc.*, 199 AD3d 559 [1st Dept 2021] ["However, the pandemic did not destroy the subject matter of the contract, i.e., defendants' loan from plaintiff. Defendants still possessed or made use of the loaned funds. Nor did the pandemic destroy the means of performance"] [internal quotation marks and citations omitted]; *558 Seventh Ave. Corp.*, 194 AD3d at 562 ["Thus, although the pandemic has been disruptive for many businesses, the purpose of the lease in this case was not frustrated, and defendants' performance was not rendered impossible, by its reduced revenues"]).

Defendant herein was restricted to limited indoor capacity and pickup and delivery orders but continued to operate until it voluntarily ceased operations at the premises. Defendant's inability to operate the full breadth of its services and any concomitant loss of revenue, neither frustrated the purpose of the lease with plaintiff, nor made defendant's performance thereunder impossible.

Defendant offers no further defenses as to liability, having abandoned reliance on its remaining affirmative defenses by failing to oppose plaintiff's motion to dismiss them. Defendant does argue that summary judgment is inappropriate with respect to the amount of plaintiff's damages, however, stating that plaintiff offered no explanation as to why it failed to deposit the $240,000 worth of rent checks that defendant paid in a timely manner. However, defendant does not argue that the money was withdrawn from its accounts, nor does it dispute that it owed the money at the time it wrote the checks. While plaintiff's failure to deposit the checks may be puzzling, on this record it does not create an issue of fact requiring a trial or damages inquest.

Plaintiff also seeks, pursuant to CPLR 3025(c), to amend its pleadings to conform to the proof as set forth in its moving papers as to the amount of its damages. "The court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances" (CPLR 3025[c]). Defendant does not oppose this branch of plaintiff's motion, and accordingly the relief sought is granted.

Finally, plaintiff is entitled to recover its costs and reasonable attorneys' fees pursuant to the terms of the lease (NYSCEF Doc. No. 6, § 21.7). The amount of said fees will be severed and set down for an inquest to be heard and determined before a Judicial Hearing Officer ("JHO") or Special Referee as provided further below.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted, and the Clerk of the Court is directed to enter judgment in favor of plaintiff 933 Broadway LLC and against defendant Godiva Chocolatier, Inc., in the sum of $503,973.30, with interest at the statutory rate from July 1, 2020, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff's motion to conform its pleadings to the evidence adduced on this motion pursuant to CPLR 3025(c) is granted, and the Court deems the pleadings to be so amended; and it is further

ORDERED that plaintiff is entitled to its reasonable attorneys' fees incurred in this action in an amount to be heard and determined by a Judicial Hearing Officer ("JHO") or Special Referee at inquest; and, therefore, it is

ORDERED that the issue of such fees is severed and a JHO or Special Referee shall be designated to conduct an inquest and determine the amount of Plaintiff's said fees, which is hereby submitted to the JHO/Special Referee for such purpose; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above.

This constitutes the Decision and Order of the court.

ENTER:

4/7/2022
DATE

LOUIS L. NOCK, J.S.C.

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