# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

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

***Justice***

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LIN-DAN GARAGE CORP.,

Plaintiff,

- v -

BENEFICIAL 21 PARKING LLC and ICON PARKING HOLDINGS, LLC,

Defendants.

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**INDEX NO.** 654234/2020

**MOTION DATE** 01/14/2021

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, and 35

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, it is hereby ordered that plaintiff's motion for partial summary judgment is granted based upon the following memorandum decision.

## Background

In this action for breach of a commercial lease and accompanying payment and performance guaranty, plaintiff Lin-Dan Garage Corp. ("plaintiff") seeks partial summary judgment on its first, sixth, seventh, and eighth causes of action for breach of contract and attorneys fees, which to the extent relevant here seek damages for unpaid rent and defendant Icon Parking Holdings, LLC's ("Guarantor") failure to pay under the payment and performance guaranty, as well as plaintiff's attorneys' fees for prosecuting this action. In opposing the motion, Guarantor and defendant Beneficial 21 Parking LLC ("Tenant") also argue that plaintiff's second cause of action for account stated, fourth cause of action for ejectment, and fifth cause of action for declaratory judgment, should be dismissed as either duplicative of the breach of contract

claims or, in the case of the ejectment claim, moot, as Tenant has surrendered the premises to plaintiff and vacated the space as of November 13, 2020.

Plaintiff commenced a companion action against Guarantor in this court, captioned *Lin-Dan Garage Corp. v Icon Parking Holdings, LLC*, Index No. 653012/2020, in which plaintiff sought summary judgment in lieu of complaint against Guarantor for failure to pay under a separate Good Guy Guaranty, pursuant to which Guarantor agreed to unconditionally guaranty the payment of rent under the lease. By decision and order dated January 14, 2022, the Court granted plaintiff's motion and awarded it summary judgment in the amount of $200,000, representing the rent due under the lease and guaranteed by Guarantor for April through July 2020 (*id.*, NYSCEF Doc. No. 29). The Court assumes familiarity with the underlying facts of this action and the parties' contractual relationships as set forth in its decision in the companion action, with additional relevant facts set forth below.

In conjunction with the First Amendment of Lease dated January 1, 2019 (NYSCEF Doc. No. 16) between plaintiff and Tenant and the Good Guy Guaranty provided by Guarantor dated March 4, 2019 (NYSCEF Doc. No. 18), Guarantor also signed an unconditional Guaranty of payment and performance of all of Tenant's obligations under the lease, up to the amount of $249,839.13 (NYSCEF Doc. No. 19). That amount increased by 2% yearly on August 1st for every year the lease was in effect (*id.*, ¶ 1). Guarantor's obligations thereunder included plaintiff's costs and reasonable attorney's fees arising from any action to enforce the guaranty (*id.*). The guaranty was provided as an inducement for plaintiff to amend the lease, and as a further inducement guarantor agreed that plaintiff could bring an independent action to enforce the guaranty without "first pursing or exhausting any remedy or claims against Tenant" (*id.*, ¶ 3).

Subsequent to the unpaid rent that is the subject of the companion action, plaintiff asserts, by the affidavit of its President Linda E. Rosenzweig, that tenant also failed to pay rent for the months of August and through October 2020 (NYSEF Doc. No. 13, ¶ 12). Plaintiff sent tenant a notice of default for its failure to pay the August 2020 rent on August 7, 2020 (*id.*, ¶ 18; NYSCEF Doc. No. 25). On August 10, 2020, pursuant to the First Amendment of Lease (NYSCEF Doc. No. 16, ¶ 6), plaintiff exercised its right to terminate the lease on sixty days' notice, and informed tenant that it was terminating the lease effective October 31, 2020 and that tenant was required to vacate the premises as of that date (NYSCEF Doc. No. 13, ¶¶ 19-20; NYSCEF Doc. No. 26). Tenant remained in the premises and did not vacate until November 13, 2020 (NYSCEF Doc. No. 13). The lease provides for holdover rent at the rate of three times the monthly rent for any holdover month (NYSCEF Doc. No. 15, § 24.02[b]). In total, therefore, plaintiff seeks to recover $500,000 from tenant and up to the amount available under the Guaranty from the guarantor, representing $350,000 in unpaid rent and $150,000 in holdover rent for the month of November 2020.

**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, the First Amendment of Lease, the notices of default and termination, and the affidavit of its President, which together establish that the parties had a contract, that plaintiff performed thereunder, that defendants have breached the contract by not paying rent, and that plaintiff has been damaged thereby. [1] In opposition, defendant raises three defenses: impermissible double recovery, documentary evidence, and frustration of purpose. As an initial matter, plaintiff effectively concedes that such recovery would be impermissible and requests summary judgment under the Guaranty as to liability only, with the amount of damages to be determined after the remaining balance of this action is heard (NYSCEF Doc. No. 35). Such calculation would include, as plaintiff suggests, the amount of the judgment in the companion action, to prevent any double recovery.

Defendants argue that documentary evidence provides them with a defense to plaintiff's claims, yet the only document they refer to is the provision of the lease regarding holdover rent, regarding which they aver that there issues of fact regarding whether they may pro-rate any holdover rent owed, and whether plaintiff may recover holdover rent if they are not sued by a potential incoming tenant for not being able to deliver possession of the premises. Neither argument is availing.

[1] Defendants raise objections to the personal knowledge and foundation of Rosenzweig's affidavit herein, as guarantor also did in the companion action. The Court refers to that portion of its decision in the prior action dismissing those objections (*Lin-Dan Garage Corp. v Icon Parking Holdings, LLC*, Index No. 653012/2020, NYSCEF Doc. No. 29 at 3 n 1).

It is settled law that a court may interpret the unambiguous terms of a contract (*Maysek & Moran, Inc. v S.G. Warburg & Co.*, 284 AD2d 203, 204 [1st Dept 2001]). When doing so, a court should not read the contract in a way that renders any provision or clause meaningless (*Warner v Kaplan*, 71 AD3d 1, 5 [1st Dept 2009]). Where the contract language offers no reasonable basis for a difference of opinion, the court should not find it ambiguous (*Breed v Ins. Co. of N.A.*, 46 NY2d 351, 355 [1978]). Provisions in a contract are not ambiguous merely because the parties interpret them differently (*Mount Vernon Fire Ins. Co. v Creative Housing Ltd.*, 88 NY2d 347, 352 [1996]). Moreover, "when parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms" (*Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004] [internal quotation marks and citations omitted]). "[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*id.*).

The holdover rent provision in the instant lease simply does not provide for pro rating any part of the holdover rent for any given holdover month, and the Court may not add such term itself (*id.*). Moreover, while the holdover provisions of the lease do provide that tenant must indemnify plaintiff "against liability resulting from delay by Tenant in so surrendering the Premises, including any claims made by any succeeding tenant or prospective tenant founded upon such delay," plaintiff's right to asses holdover rent against tenant is not excluded by such indemnification (NYSCEF Doc. No. 15, § 24.02). The lease provides that holdover rent is one of plaintiff's remedies "in addition to any other remedies available to [plaintiff] . . . which remedies [plaintiff] may exercise independently, in any sequence, or cumulatively at [plaintiff's] sole election" (*id.*). Defendants' construction of the provision would render this clause meaningless

(*Warner*, 71 AD3d at 5). Moreover, any evidence of contrary meaning that defendants suggest might be found through discovery would be parol evidence, which is inadmissible to vary the unambiguous terms of the lease (*Safariland, LLC v H.B.A. Agencies, Ltd.*, 198 AD3d 519, 520 [1st Dept 2021]).

Turning to frustration of purpose, 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]). 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]).

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 constitute frustration of purpose (*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]; *Gap, Inc.*, 195 AD3d at 577 ["Furthermore, plaintiff's assertion that

Executive Order (A. Cuomo) No. 202.8 (9 NYCRR 8.202.8) rendered it objectively impossible to perform its operations as a retail store as required by the lease is unavailing as defendant correctly points out that by the time plaintiff filed its complaint in July 2020, this was no longer the case"]; *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"]).

Here, Tenant was not completely deprived of the benefit of its bargain. As defendants themselves state in the affidavit of Paul Regan, Guarantor's Senior Vice President of Operations and Real Estate, Tenant was able to operate the parking garage an take in 80% of their revenue from April through October 2019 during the time relevant to the motion (NYSCEF Doc. No. 32, ¶ 17). At most, therefore, defendants have alleged a reduction in revenue, not a complete frustration of purpose, and therefore do not have a defense to plaintiff's claims in this regard (*558 Seventh Ave. Corp.*, 194 AD3d at 562). To the extent that defendants argue that they need discovery regarding the parties' position on force majeure, such a clause is not present in the lease or the First Amendment of Lease, and any evidence of the parties' intent in this respect would not be admissible to vary the unambiguous terms of the agreements (*Safariland, LLC*, 198 AD3d at 520).

Turning now to defendants' request for summary judgment dismissing the second, fourth, and fifth causes of action, plaintiff opposes this request with respect to its second cause of action for account stated, and having effectively conceded the point with respect to the fourth and fifth causes of action, those causes of action are dismissed. An account stated claim requires proof that the parties came together and agreed on how much the defendant owes the plaintiff, allowing plaintiff to maintain an action for that amount (*Herrick, Feinstein LLP v. Stamm*, 297 AD2d 477,

478 [1st Dept 2002]). However, where an account stated claim is simply another attempt to collect under an enforceable contract, it should be dismissed as duplicative (*Vanpoy Corp., S.R.L. v Soleil Chartered Bank*, -- AD3d --, 2022 NY Slip Op 02381 [1st Dept 2022]). Here, both the breach of contract and account stated claims seek recovery of unpaid rent under the lease and First Amendment of Lease (*compare* NYSCEF Doc. No. 2, ¶¶ 56-63 *with* NYSCEF Doc. No. 2, ¶¶ 65-71). Accordingly, the account stated claim shall be dismissed as duplicative.

Finally, plaintiff has established its entitlement to its reasonable attorney's fees under the lease and Guaranty (NYSCEF Doc. No. 13, § 19.03; NYSCEF Doc. No. 18, ¶ 1). The amount of such fees shall be determined following hearing on the balance of this action.

Accordingly, it is hereby,

ORDERED that the plaintiff's motion for summary judgment is granted to the extent of granting partial summary judgment in favor of plaintiff and against defendant Beneficial 21 Parking LLC on the first and sixth causes of action, and against defendant Icon Parking Holdings, LLC on the seventh and eighth causes of action as follows; and it is further

ORDERED that the Clerk shall enter judgment in favor of plaintiff and against defendant Beneficial 21 Parking LLC in the amount of $500,000.00, together with interest at the statutory rate from the date of April 1, 2020 as calculated by the Clerk; and it is further

ORDERED that, it appearing to the Court that defendants are entitled to summary judgment dismissing the second, fourth, and fifth causes of action pursuant to CPLR 3212(b), the Clerk is directed to enter judgment dismissing those causes of action against defendants; and it is further

ORDERED that the first, second, fourth, and fifth causes of action are severed, and the balance of the claims are continued; and it is further

ORDERED that the defendants are found liable to plaintiff on the sixth, seventh, and eighth causes of action and the issue of the amount of a judgment to be entered thereon shall be determined at the trial herein; and it is further

ORDERED that the action shall continue as to the third and sixth through eighth causes of action.

This constitutes the Decision and Order of the Court.

Louis L. Nock

**4/26/2022**
**DATE**

**LOUIS L. NOCK, J.S.C.**

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| **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** |