

| |
|--|
| Avamer 57 Fee LLC v Gorgeous Bride, Inc. |
| 2022 NY Slip Op 31453(U) |
| May 2, 2022 |
| Supreme Court, New York County |
| Docket Number: Index No. 655648/2021 |
| Judge: Sabrina Kraus |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. |
| This opinion is uncorrected and not selected for official publication. |

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

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

-----X

AVAMER 57 FEE LLC,

Plaintiff,

- v -

GORGEOUS BRIDE, INC., GABRIEL SHIMUNOV

Defendant.

-----X

INDEX NO. 655648/2021

MOTION DATE 04/08/2022

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, 33, 34, 35

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

BACKGROUND

Plaintiff commenced this action seeking a judgment for rent and additional rent against Gorgeous Bride, Inc. (Tenant) and Gabriel Shimunov (Guarantor) pursuant to the lease agreement and guaranty for a portion of the 11th floor at 57 West 57th Street, New York, New York. Defendants have counterclaimed for harassment.

On March 15, 2022, plaintiff moved for summary judgment and dismissal of defendants' defenses and counterclaims. On April 8, 2022, the motion was fully briefed and submitted to this court for determination. For the reasons stated below, the motion is granted in part and denied in part.

ALLEGED FACTS

Plaintiff is the owner and landlord of the building located at 57 West 57th Street, New York, New York. Tenant is the tenant of suite 1106 in the building, pursuant to a lease agreement, dated June 29, 2012. As material inducement for plaintiff to enter into the lease,

Guarantor executed a written “Good Guy” Guaranty, whereby Guarantor guaranteed the full and prompt payment of all rent and additional rent. As of April 2020, Tenant ceased making rent and additional rent payments. Tenant remains in possession of the Subject Premises.

Under paragraph “2” of the Lease, the Tenant was permitted to use the Premises as an “upscale hair and make-up studio and for no other purpose”. As a high-end salon, the Tenant provided various services such as hair cutting, coloring and styling as well as make-up consultations. Tenant alleges that it was closed by administrative order for a number of months during the pandemic and that since then it is only opened for business when there is an appointment.

Plaintiff commenced a prior action against the parties which sued the guarantor for the period the business was closed pursuant to administrative order. Plaintiff subsequently discontinued that action without prejudice.

DISCUSSION

Plaintiff’s Motion For Summary Judgment Is Defective

Pursuant to 22 NYCRR §202.8-g:

Upon any motion for summary judgment, other than a motion made pursuant to CPLR 3213, there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried. See, 22 NYCRR §202.8-g(a).

Plaintiff’s failure to submit such a statement is a procedural defect that warrants the denial of Plaintiff’s summary judgment. *Amos Fin. LLC v. Crapanzano*, 73 Misc3d 448 (Sup. Ct. Rockland Co. 2021); *Central Mgt. Cor. v. Petco Animal Supplies Stores, Inc.*, 2021 NY Slip Op 32125(U) (Sup. Ct. NY Co. 2021).

Uniform Rule 202.8-g is not precatory or discretionary in its application: it is a mandate on all summary judgment movants in this state. Consistent with Judiciary Law § 213 (2) (b), the Chief Administrative Judge—on the advice and consent of the Administrative Board of the Courts,

comprising the Chief Judge and the four Presiding Justices of the Appellate Divisions (*see* NY Const, art VI, § 30)—promulgated this rule of practice and procedure to vindicate substantial judicial economy interests for both bar and bench. These interests have been the focus of extensive discussion, and years of experience, concerning the Commercial Division predicate to Uniform Rule 202.8-g (a) (*see* Uniform Civil Rules for Sup Ct and County Ct [22 NYCRR] § 202.70, Rules of Commercial Div of Sup Ct, rule 19-a). Plaintiff's motion ignores Uniform Rule 202.8-g entirely, along with its constitutional, statutory and administrative predicates, and its underlying policy objectives. Thus, plaintiff's motion is procedurally defective on its face.

Amos Fin. LLC v. Crapanzano, 73 Misc. 3d 448, 451–52 (N.Y. Sup. Ct. 2021).

Based on the foregoing, plaintiff's motion for summary judgment and for dismissal of defendants' second counterclaim is denied.

Plaintiff's Motion to Dismiss Defenses

“The standard of review on a motion to dismiss an affirmative defense pursuant to CPLR § 3211(b) is akin to that used under CPLR § 3211(a)(7), i.e., whether there is any legal ... basis for the assertion of the defense.” *Matter of Ideal Mut. Ins. Co.*, 140 A.D.2d 62, 67 (1st Dep't 1988).

The First Affirmative Defense Is Dismissed

Impossibility of Performance

Generally, once a party to a contract has made a promise, that party must perform or respond in damages for its failure, even when unforeseen circumstances make performance burdensome.” *Kel Kim Corp. v. Central Mkts, Inc.*, 70 N.Y.2d 900, 902 (1987). The defense of impossibility of performance, a common-law exception to this general rule, is “applied narrowly... 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.” *Id.* “... (T)he impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract.” *Id.* Objective impossibility, which is required for this defense, is an extremely narrow category, and “impossibility occasioned by financial

hardship” is excluded from the doctrine entirely. *Urban Archaeology Ltd. v. 207 E. 57th St. LLC*, 68 A.D.3d 562, 562 (1st Dep’t 2009) (citing *407 E. 61st Garage v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 281-82 (1968)). “Moreover, an economic downturn,” even when occasioned by such unprecedented events and at the massive scale of the 2008 global financial crisis, as in *Urban Archaeology*, 68 A.D.3d at 562, “could have been foreseen or guarded against in the lease,” making the doctrine of impossibility inapplicable.

Defendants attempt to raise the same defenses and make the same claims as the defendants in *558 Seventh Ave. Corp. v. Times Square Photo Inc.*, 194 A.D.3d at 561 (1st Dep’t 2021), where the Appellate Division, First Department, reversed the denial of the landlord’s motion for summary judgment as to liability for unpaid rent, and rejected the defendants’ affirmative defenses of frustration of purpose and impossibility. The Court stated that “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.” *Id.*; *See, also, Lantino v. Clay LLC*, No. 1:18-cv-12247 (SDA), 2020 WL 2239957, at *3 (S.D.N.Y. May 8, 2020) (“*financial difficulties arising out of the COVID-19 pandemic and the PAUSE Executive Order that adversely affected [a party’s] ability to make the payments called for under” a contract do not excuse performance*); *See, also, Metpath, Inc. v. Birmingham Fire Ins. Co. of Pa.*, 86 A.D.2d 407, 408-10 (1st Dep’t 1982).

Further, in *BKNYI, Inc. v. 132 Capulet Holdings, LLC*, No. 508647/16, 2020 WL 5745631 (Sup. Ct. Kings Cnty. Sept. 23, 2020), the Court held that “closure of [tenant’s] restaurant business during those months [of April and May 2020] by Executive Order No. 202.3 . . . did not relieve it of its contractual obligation to pay rent.” 2020 WL 5745631, at *1. The Court pointed to the absence of any provision in the lease excusing tenant “from timely and fully

paying its rent during (and notwithstanding) the state-mandated closure of its business.” *Id.* The Court explained the inapplicability of the impossibility of performance doctrine as follows:

Nothing in the lease at issue permits termination or suspension of plaintiff’s obligation to pay rent in the event of the issuance of a governmental order restricting the use of the leased premises (see *Casteel USA v. V.C. Vitanza Sons, Inc.*, 170 A.D.2d 568, 569 (2d Dep’t 1991)). To the contrary, the lease specifically provides that plaintiff’s obligation to pay rent “shall in no wise be affected, impaired or excused because Owner is unable to fulfill any of its obligations under this lease . . . by reason of . . . government preemption or restrictions” . . . which is the case here. *Id.* at *2.

Like the tenants in *BKNYI, Inc. and 558 Seventh Ave.*, defendants were required to pay rent and additional rent to plaintiff and to satisfy all other obligations in accordance with the terms of the Lease and Guaranty.

Defendants' argument that the parties could not have possibly anticipated the "devastating effects of the novel coronavirus" is simply untrue. The Lease contains a force majeure clause which specifically provides that Tenant's right to pay rent is not affected, impaired or excused because the Landlord is unable to fulfill its obligations under the Lease due to, among other things, government preemption due to a National Emergency or by reason of any rule, order or regulation of any government agency.

As a negotiated agreement between sophisticated parties, Tenant could have requested an exemption from paying rent due to a pandemic, National Emergency or by reason of any rule, order or regulation of any government agency. Tenant points to no provision of the lease that suspends its obligation to pay rent. Instead, the lease specifically requires Tenant to pay rent each month without any set off or deduction whatsoever.

Defendants' reliance on *Doherty v Eckstein Brewing Co.*, 115 Misc. 183 (App. Term 1st Dep't 1921), *af'd*, 198 A.D.708 (1st Dep't 1921), is misplaced. The tenant in *Doherty* was a bar which was forced to close as a result of prohibition - which is vastly different than Tenant, who

alleges to be a hair salon - which Tenant alleges was prohibited from operating its business for at most four months as a result of relevant New York State Executive Order

Accordingly, the defense of impossibility of performance is inapplicable here and the defense asserted by defendants alleging any form of impossibility of performance is dismissed.

Frustration of Purpose

The common-law contractual defense of frustration of purpose “is a narrow one which does not apply ‘unless the frustration is substantial’. In order to invoke this defense, 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.” *Crown IT Servs., Inc. v. Koval-Olsen*, 11 A.D.3d 263, 265 (1st Dep’t 2004) (citing *Rockland Dev. Assocs. v. Richlou Auto Body, Inc.*, 173 A.D.2d 690, 690 (2d Dep’t 1991) and Restatement (Second) of Contracts Section 265 (1981)). In the context of a commercial lease, “it is not enough that the transaction has become less profitable for the affected party or even that he will sustain a loss.” *Rockland Dev.*, 173 A.D.2d at 691.

Instead, frustration of purpose generally requires that the leased premises be rendered entirely unsuitable for the intended commercial purposes for a significant period of time - often permanently. *See, e.g., Jack Kelly Partners LLC v. Zegelstein*, 140 A.D.3d 79, 85 (1st Dep’t 2016) (*frustration of purpose defense permitted where leased premises could not legally be used as office space during any part of the lease term due to a certificate of occupancy allowing only residential use*); *Elkar Realty Corp. v. Kamada*, 6 A.D.2d 155, 157 (1st Dep’t 1958) (*purpose of commercial lease frustrated when it became clear that it was impossible to adequately renovate floor of premises, such that contemplated business could not legally open at any time*). The Court in *558 Seventh Ave.*, rejected the defendants’ affirmative defense of frustration purpose because,

although defendants closed their business temporarily, they eventually reopened for service and were able to gain access to the premises during the period of nonpayment. Similarly, any disruption in use of the Premises by Tenant was temporary and the temporary inability to occupy the premises did not frustrate the overall purpose of the lease. *See, 558 Seventh Ave.*, 194 A.D.3d at 194; *See, also, BKNYI, Inc.* WL 574563, at *2 (*closure of tenant's business for two months could not have frustrated its overall purpose*).

Accordingly, the defense asserted by defendants alleging frustration of purpose is also dismissed. Based on the foregoing, the motion to dismiss defendants' first affirmative defense is granted.

Defendants' Affirmative Defense and Counterclaim based on Casualty

Defendants' argument that the casualty clause precludes their payment of rent is not supported by the case law of this department.

Article 9 of the Lease provides that "if the demised premises or any part thereof shall be damaged by fire or other casualty, Tenant shall give immediate notice thereof to Landlord..." in which case the rent may be apportioned appropriately depending on whether the casualty partially or totally damaged the Premises.

Tenant's argument, that the 'novel coronavirus' damaged the Premises, has been struck down by the Appellate Division, First Department, which opined on this issue and concluded that the 'novel coronavirus' does not constitute a casualty under a commercial lease that would entitle a tenant to a rent apportionment or a rent abatement. In *Gap, Inc. v 170 Broadway Retail Owner, LLC*, 195 A.D.3d 575 [1st Dep't 2021], the Court states:

[P]laintiff [tenant] is not entitled to a rent abatement under the lease "due to loss of use of all or a portion of the Demised Premises due to [a] Casualty." 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, also, A/R Retail LLC v Hugo Boss Retail, Inc., 72 Misc.3d 627 (Sup. Ct. N.Y. Cnty. 2021), *1140 Broadway LLC v Bold Food, LLC*, 2020 WL 7137817 (N.Y. Sup.), 2020 Slip Op 34017(U); and *Dr. Smood New York LLC v Orchard Houston, LLC*, 2020 WL 6526996 (N.Y. Sup.), 2020 Slip Op 33707(U) (Sup. Ct., N.Y. Cnty. 2020).

Based on the foregoing defendants' second affirmative defense and first counterclaim are dismissed.

Defendants' Third Affirmative Defense

As a third affirmative defense, defendants allege that New York City Administrative Code §22-1005 rendered the Guaranty unenforceable and therefore this action may not be maintained as against the Guarantor. Since plaintiff is only seeking amounts from the Guarantor that accrued after the expiration of Administrative Code §22-1005, this affirmative defense lacks merit and must be dismissed.

New York City Administrative Code §22-1005 states, in relevant part, that if there is “[a] provision in a commercial lease or other rental agreement involving real property located within the city that provides for one or more natural persons who are not the tenant under such agreement to become, upon the occurrence of a default or other event, wholly or partially personally liable for the payment of rent, utility expenses or taxes owed by the tenant under such agreement, shall not be enforceable against such natural persons if ...” certain conditions are met, including, but not limited to, a tenant being required to close to members of the public under executive order 202.7 issued on March 19, 2020. The statute goes on to state that such individual shall not be liable for such obligations incurred between March 7, 2020 and June 30, 2021.

Plaintiff is seeking rent and additional rent from the Guarantor for the period of time from July 1, 2021 – after the expiration of Admin. Code. §22-1005 – to the present. Accordingly, Defendants’ third affirmative defense is dismissed.

Defendants’ Fourth and Fifth Affirmative Defenses

Defendants’ fourth affirmative defense alleges that plaintiff has failed to state a cause of action upon which relief can be granted. This defense is not subject to dismissal as it may be raised at any time. “The assertion of that defense in an answer should not be subject to a motion to strike or provide a basis to test the sufficiency of the complaint.” *Riland v. Frederick S. Todman & Co.*, 56 A.D.2d 350, 353(1977). As such the motion to dismiss the fourth affirmative defense is denied.

Defendants’ fifth affirmative defense asserts laches, waiver and estoppel.

Equitable defenses, such as waiver, estoppel and/or laches, are unavailable in an action exclusively for damages. *Manshion Joho Ctr. Co., Ltd. v. Manshion Joho Ctr., Inc.*, 24 A.D.3d 189 (2005). Further, it is well settled that the defense of laches is not a viable defense to commercial nonpayment disputes. *See, Diversified Bldg. Co., LLC v. Nader Enters., LLC*, 2011 NY Slip Op 50161[U] [Sup. Ct. Nassau Cnty., 2011], citing *Landlord and Tenant Practice in New York*, Section 14:351 at 14-186 (West’s NY Practice Series, vol F, 2007) footnote No.1, citing: *Kalimian v. Collezioni Fifth Ave., Inc.*, N.Y.L.J., 11/13/98, p. 28, col. 3 [App. Term, 1st Dept.]; *U.B.O. Realty Corp. v. Fulton*, N.Y.L.J., 9/8/93, p. 21, col. 1 [App. Term, 1st Dept] (laches “finds application only in the context of residential non-payments”). Therefore, this action is not barred by the doctrines of laches, waiver or estoppel, and defendants’ fifth affirmative defense is dismissed.

CONCLUSION

WHEREFORE it is hereby:

ORDERED that plaintiff’s motion for summary judgment and dismissal of the counterclaim for harassment are denied; and it is further

ORDERED that defendants’ first, second, third, and fifth affirmative defenses as well as defendant’s first counterclaim are dismissed; and it is further

ORDERED that the parties shall appear for a virtual status conference on June 23, 2022 at 11am; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

202205021429025BKRAUSA7068DE4089747B99CFA2D731673FB87



SABRINA KRAUS, J.S.C.

5/2/2022
DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: