SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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1140 LLC,

Plaintiff,

- v -

ZEROCATER, INC.,

Defendant.

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INDEX NO. 653898/2020

MOTION DATE 10/30/2020

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, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 60, and 61

were read on this motion for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.

Upon the foregoing documents, plaintiff's motion for summary judgment is granted based on the following memorandum decision.

Background

This matter presents the court with the latest episode in a series of commercial landlord-tenant disputes arising out of the impact of the COVID-19 pandemic on tenants' ability to pay rent while their business operations were affected during the height of the pandemic. Presently before the court is plaintiff 1140 LLC's ("plaintiff") motion for summary judgment on its complaint for past due rent plus late fees and interest, future rent, and plaintiff's reasonable attorney's fees and costs.

The Lease

Plaintiff and defendant Zerocater, Inc. ("defendant"), entered into a lease dated February 8, 2019, for a portion of the fifth floor of the building located at 1140 Broadway, New York,

New York (the "premises"), for a term running through June 30, 2023 (NYSCEF Doc. No. 11 at 1). Under the lease, defendant agreed to pay monthly rent at an escalating rate of $22,597.33 in the first year of the term and $24,943.25 in the final year (*id.*, § 3[b]; Schedule A). In addition, defendant agreed to pay additional charges for water, electricity, a percentage of real estate taxes, and sprinkler supervisory services (*id.*, §§ 8[d]; 15, 16, 37[m]). Late payments of rent or additional charges bear a one-time 3.5% late charge and additional monthly interest of 1.5% (*id.*, § 33).

The lease contains several provisions regarding termination and defaults that are relevant to the instant action. If defendant failed to pay rent or additional charges for more than five days following notice of same, or if defendant failed to fulfill any other obligation under the lease for more than 30 days following notice of same, plaintiff could give five days' notice of intent to terminate the lease, and the lease would terminate accordingly (*id.*, § 22). In the event of the lease terminating in this manner, defendant would remain obligated to pay rent through the termination date of the lease (*id.*, § 26). In addition, in the event of a dispossession by summary proceeding commenced by plaintiff, defendant agreed to pay, as liquidated damages, any deficiency between the rent due for the remainder of the lease term and the rent collected for any reletting of the premises if plaintiff elected to relet (*id.*, § 23). Absent any early termination, defendant would remain liable for "any expected Rent through the Lease expiration" (*id.*, § 26).

The lease also provides, however, that under certain circumstances defendant may abate the payment of rent, and even terminate the lease. Specifically, "[i]f the premises or any part thereof shall be damaged by fire or other casualty, Tenant shall immediately give notice thereof to Landlord" and defendant's rent obligation will be abated in proportion to the portion of the premises that is untenantable as a result of the damage, which abatement shall continue until

plaintiff either elects to terminate the lease or repairs the damage as more specifically provided, and which shall be total if the premises are wholly unusable or defendant is denied access (*id.*, § 12[a]). Where plaintiff elects not to terminate the lease, it must provide defendant with a good faith estimate of the time to repair the damage, and if such period is greater than nine months defendant may elect to terminate the lease within 10 to 45 days following the giving of notice to plaintiff (*id.*, § 12[b]). If defendant elects not terminate and repairs are not complete within nine months, defendant may then terminate the lease on thirty days' notice to plaintiff (*id.*). Notwithstanding these provisions, defendant's right to a rent abatement is contingent on defendant collecting on its Business Interruption insurance proceeds for a year following the fire or other casualty and paying over those proceeds to plaintiff (*id.*).

Finally, the court notes that the lease contains a provision titled "Inability to Perform," which addresses plaintiff's inability to fulfill its obligations under the lease. Specifically, if plaintiff is unable to fulfill any of its obligations, or is delayed in supplying services or making repairs by reason of, among other things, *force majeure*, "government preemption or restrictions or by reason of any rule, order or regulation . . . or by reason of the conditions which have been affected, either directly or indirectly, by war or other emergency," defendant's obligation to pay rent would not be "affected, impaired or excused" (*id.*, § 30).

Tenant's Alleged Default

The following facts, except where otherwise indicated, are essentially undisputed. In March 2020, the COVID-19 pandemic was beginning to spread throughout the country. The governor's office issued various stay-at-home orders prohibiting, among other things, the operating of non-essential businesses, for a period of roughly two or three months (9 NYCRR §§ 8.202.6, 8.202.8). Beginning in April 2020, defendant stopped paying rent on the premises,

arguing that it was unable to use the office space due to the stay-at-home orders and the airborne nature of the virus (NYSCEF Doc. No. 10, ¶ 15; NYSCEF Doc. No. 19, ¶¶ 4-6). At this time, plaintiff also asserted that they were entitled under Section 12 of the lease to abate the payment of rent (NYSCEF Doc. No. 19, ¶ 7). Five months later, on August 18, 2020, defendant informed plaintiff that it was terminating the lease pursuant to Section 12 and vacated the premises shortly thereafter (NYSCEF Doc. No. 10, ¶ 16, NYSCEF Doc. No. 12, NYSCEF Doc. No. 19, ¶ 8).

Upon defendant vacating the premises, plaintiff drew down on a letter of credit defendant gave as a security deposit (NYSCEF Doc. No. 10, ¶ 17). Defendant advised plaintiff that plaintiff was in breach of the lease because it had previously submitted a substitute letter of credit on April 28, 2020, and plaintiff had drawn down on the original letter of credit (NYSCEF Doc. No. 19, ¶¶ 9-10). Plaintiff ultimately returned the substitute letter of credit (*id.*, ¶ 11), and the record does not reflect that plaintiff ever drew upon it after plaintiff drew upon the original letter of credit.[1]

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]).

[1] For this reason, defendant's argument regarding plaintiff's breach of the lease fails, as defendant submits no evidence that it was ever actually damaged, and, indeed, attests that the letter was returned to defendant.

Discussion

The initial onset of the COVID-19 pandemic spawned differing opinions as to whether and to what extent the pandemic itself, as well as the various orders issued to contain its spread, would affect the contractual obligations of commercial tenants. After much litigation, and differing opinions among justices of the trial courts, this court recognizes that the Appellate Division has settled the issue in a series of decisions handed down, beginning last year.

In *558 Seventh Avenue Corp. v Times Square Photo, Inc.* (194 AD3d 561 [1st Dept 2021]), the Appellate Division, First Department, held that an electronic sales and repair store that was restricted to curbside service and could still access the premises during the pandemic could not rely on defenses of impossibility of performance or frustration of purpose (*id.* 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"]). Since then, the Appellate Division, First Department, has repeatedly held the same in cases alleging similar facts (*e.g., Knickerbocker Retail LLC v Bruckner Forever Young Social Adult Day Care Inc.*, 204 AD3d 536, 537 [1st Dept 2022] [rejecting frustration of purpose defense, stating that "New York City Executive Order No. 100 of 2020 (N.Y.C EEO 100), which, under § 17, directed adult congregate care facilities such as the tenant's to suspend operations during the pandemic, was temporary"]; *Fives 160th, LLC v Zhao*, 204 AD3d 439, 440 [1st Dept 2022] ["Although the pandemic did make it more difficult and less profitable for defendants to run their business, they were never prevented from using the space or operating their restaurant"]; *Valentino U.S.A., Inc. v 693 Fifth Owner LLC*, 203 AD3d 480 [1st Dept 2022] ["Here, the pandemic, while continuing to be 'disruptive for many businesses,' did not render

plaintiff's performance impossible, even if its ability to provide a luxury experience was rendered more difficult, because the leased premises were not destroyed"]).

Applying these cases to the record on the plaintiff's motion, the court finds that plaintiff has met its *prima facie* burden on the motion. 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 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 charges, and that plaintiff has been damaged thereby. Defendant's defenses of frustration of purpose and failure of consideration fail for the reasons set forth in the above cases. The stay-at-home orders issued by the governor's office were temporary, and defendant's apparently unilateral decision not to operate in the building thereafter because of the potential presence of COVID-19 is insufficient to show that the purpose of the lease was frustrated. To the extent that defendant relies on the "Inability to Perform" provision, that provision specifically provides that in the event of government regulation or emergency conditions that interferes with plaintiff's ability to fulfill its obligations under the lease, defendant's obligation to pay rent will continue (NYSCEF Doc. No. 11, § 30). Thus, the parties expressly foresaw that this situation might occur and guarded against it (*Kel Kim Corp. v Central Mkts.*, 70 NY2d 900, 902 [1987]).

Defendant's attempt to abate its rent and then to terminate the lease is similarly unavailing. The record does not reflect that defendant ever gave plaintiff the required notice of a casualty which would have allowed for the nine-month period during which plaintiff could

remediate damage caused by the casualty, and did not give sufficient notice before attempting to terminate the lease (NYSCEF Doc. No. 11, § 12). Moreover, plaintiff asserts, and defendant does not dispute, that defendant has not collected on its business interruption insurance and paid the proceeds thereof to plaintiff, as required to obtain a rent abatement (*id.*). Even if defendant had fulfilled these conditions precedent to obtaining a rent abatement and terminating the lease, the First Department has held that similar "casualty" language in a lease does not cover a pandemic or stay-at-home orders issued therefor (*Gap, Inc. v 170 Broadway Retail Owner, LLC*, 195 AD3d 575, 577 [1st Dept 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"]).

Finally, defendant also relies on Real Property Law § 227 as a basis for terminating the lease. The statute provides, in relevant part, that:

> Where any building, which is leased or occupied, is destroyed or so injured by the elements, or any other cause as to be untenantable, and unfit for occupancy, and no express agreement to the contrary has been made in writing, the lessee or occupant may, if the destruction or injury occurred without his or her fault or neglect, quit and surrender possession of the leasehold premises, and of the land so leased or occupied; and he or she is not liable to pay to the lessor or owner, rent for the time subsequent to the surrender.

(Real Property Law § 227.) It is undisputed that the premises have not been destroyed or so injured by the elements as to be untenantable and unfit for occupancy. To the extent that defendant argues that the "any other cause" provision should cover an airborne pandemic, it cites no authority for this proposition. In interpreting the predecessor to Real Property Law § 227, the First Department held that "[t]he statute clearly contemplates a physical destruction of, or injury to, the building itself, or something within the building . . . . And while it is true that the original purpose has been somewhat extended by the words 'or any other cause,' nevertheless there still

must be, in order to bring a case within the statute, some physical destruction of the building or some defect in it by which it is rendered uninhabitable." (*Floyd-Jones v Schaan*, 129 AD 82, 83 [1st Dept 1908], *appeal dismissed* 203 NY 568 [1911].) The possibility of COVID-19 being present in the premises is simply not a "physical destruction" of the premises such that this statute would apply. Moreover, defendant does not provide any evidence that COVID-19 was ever detected in the premises.

For the reasons stated above, plaintiff has established a *prima facie* case that defendant is liable under the lease, and defendant has failed to raise a triable issue of fact in opposition. Moreover, there is no dispute that all rent and additional charges that accrued prior to defendant vacating the premises remain due and owing. As set forth above, defendant is not entitled to a rent abatement. A question remains as to future rent for the remainder of the lease term. Defendant maintains that it is not required to pay future rent after exercising its right to terminate the lease early; however, as set forth above, defendant is not entitled to take advantage of that provision. Nor has the lease been terminated, since absent application of the early termination provision defendant cites no provision of the lease allowing it to unilaterally terminate the lease by vacating the premises early. The lease provides that defendant will be liable for "any expected Rent through the Lease expiration or other termination" (NYSCEF Doc. No. 11, § 26). Additionally, it is settled law that "[o]nce [a] tenant abandon[s] the premises prior to the expiration of the lease . . . the landlord [is] within its rights under New York law to do nothing and collect the full rent due under the lease" (*Holy Props. v Cole Prods.*, 87 NY2d 130, 134 [1995]). Thus, defendant remains liable for future rent through the expiration of the lease, less any rent collected by plaintiff after reletting the premises if it chooses to do so (*id.*). Because

plaintiff has only submitted calculations of rent due and owing as of the date of its motion, a trial on damages must be held to determine the full amount of plaintiff's damages.

Accordingly, it is hereby

ORDERED that the plaintiff's motion for summary judgment is granted as to liability; and it is further

ORDERED that the defendant is found liable to plaintiff on the first cause 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 counsel are directed to appear for a status conference on July 6, 2022, at 10:00 AM at the Courthouse, 111 Centre Street, Room 1166.

This constitutes the Decision and Order of the court.

ENTER:

6/6/2022
DATE

LOUIS L. NOCK, J.S.C.

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