GG Columbus Circle LLC v Subway Real Estate Corp.
2022 NY Slip Op 32041(U)
June 30, 2022
Supreme Court, New York County
Docket Number: Index No. 154376/2020
Judge: Lori Sattler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02TR

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GG COLUMBUS CIRCLE LLC,

Plaintiff,

- v -

SUBWAY REAL ESTATE CORP., SUBWAY REALTY LLC, HEALTHY FOOD ENTERPRISES, III, INC.,

Defendant.

INDEX NO. 154376/2020

MOTION DATE 04/13/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

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HON. LORI SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 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, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 99, 100, 101, 102, 103, 104, 105, 106, 107, 114

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

In this action seeking damages for an alleged breach of lease, plaintiff GG Columbus Circle LLC ("Plaintiff") moves pursuant to CPLR 3212 for summary judgment on its first cause of action against defendants Subway Real Estate Corp. ("Subway Real Estate") and Subway Realty LLC ("Subway Realty") (collectively, "Subway defendants") in the amount of $243,564.06 for unpaid rent and additional rent; for summary judgment on its fourth cause of action against the Subway defendants as to liability for attorneys' fees and setting the matter down for a hearing to affix such fees; and, pursuant to CPLR 3211(b), for dismissal of all affirmative defenses of the Subway defendants and Defendant Healthy Food Enterprises, III, Inc. ("HFE"). In the alternative, if summary judgment is not granted in its favor, Plaintiff moves for an order pursuant to CPLR 3124 compelling defendants to comply with discovery. The Subway defendants oppose the motion.

Defendant HFE opposes the portions of Plaintiff's motion that seek to dismiss its affirmative defenses and cross-moves for summary judgment pursuant to CPLR 3212 dismissing the complaint as against it. Plaintiff opposes the cross-motion.

BACKGROUND

Plaintiff is the owner and landlord of the building located at 314 West 58th Street. A Subway sandwich franchise operated in the commercial space on the building's westerly ground floor ("the Premises") from 2003 through 2020. It is undisputed that a valid lease existed for the Premises between Plaintiff and the Subway defendants from September 1, 2003 through August 31, 2018.[1] According to Plaintiff, a lease extension agreement extended the lease from September 1, 2018 through December 31, 2020. The identity of the tenant's signatory and therefore the validity of the lease extension agreement is in dispute.

Defendant HFE states that it operated a Subway franchise on the Premises in 2019 and 2020, and concedes rent was not paid after March 2020. A prior decision of the Court found that HFE vacated the premises on January 8, 2021 (*GG Columbus Circle LLC v Subway Real Estate Corp. et al*, Sup Ct NY County, April 13, 2022, Hom, J.) (NYSCEF Doc No. 122). Plaintiff commenced this action against the Subway defendants and HFE for breach of the lease, as extended by the lease extension, seeking unpaid rent after March 2020.

The Subway defendants are comprised of Subway Real Estate and Subway Realty. According to the Complaint, Subway Real Estate dissolved on December 3, 2018, and re-formed as Subway Realty on December 4, 2018. This entity controls Subway's leasing operations. The Subway defendants' affiant states that nonparty Doctor's Associates Inc. is a company in the "Subway system" in charge of licensing franchises for Subway restaurants. Nonparty Restaurex

[1] Plaintiff acquired the Building in 2014. The lease was entered into by a predecessor-in-interest.

Developments Inc. ("Restaurex") is Subway's local business development team. It is undisputed that these entities fall within or otherwise support Subway's corporate structure.

Subway Real Estate entered into a written lease agreement ("the Lease") with Plaintiff's predecessor-in-interest for the Premises. Executed on September 1, 2003, the Lease provided for a 15-year term. A Supplemental Rider to the Lease provides that Subway Real Estate Corp. may assign the Lease or "sublet the Premises to any bona-fide licensee/franchisee of Doctor's Associates Inc. . . . doing business as a registered Subway sandwich shop, without the prior consent of or written notice to the Landlord" and that such "subletting shall not alter [Subway's] responsibility to [Plaintiff] under the Lease" (NYSCEF Doc No. 83, Supplemental Rider at ¶ R2). Paragraph R8 of the Supplemental Rider further provides that Plaintiff would provide Subway Real Estate with 90 days' notice of any default committed by a sublessee or assignee of Subway Real Estate (*id.* at ¶ R8).

Subway Real Estate entered a sublease for the Premises with a sublessee ("First Sublessee"), dated September 30, 2003 (NYSCEF Doc. No. 84, "Sublease"). The First Sublessee assigned the sublease to a second sublessee ("Second Sublessee") via a signed agreement on October 27, 2004 (NYSCEF Doc. No. 85, "Assignment"). The Second Sublessee assumed the First Sublessee's obligations as sublessee under the Assignment (*id.*). The Second Sublessee subsequently entered into a franchise agreement with Doctor's Associates, Inc. to operate a Subway restaurant and pay royalties for this operation. It is unclear from the papers when HFE began operating the Subway, how HFE came to occupy the Premises, whether HFE signed a franchise agreement with Doctor's Associates, Inc., and what the relationship is, if any, between HFE and the Second Sublessee.

Plaintiff asserts that the parties, by their predecessors-in-interest, extended the lease term from August 31, 2018 to December 31, 2020 via an Extension Lease Agreement signed on February 23, 2011 (NYSCEF Doc. No. 52, "Lease Extension"). Plaintiff argues that Subway Real Estate later confirmed the Lease Extension by signing two Estoppel Certificates, purportedly executed on July 2, 2014, and September 19, 2019 (NYSCEF Doc. No. 61). The 2014 certificate does not indicate the identity of the signatory, and the 2019 certificate is signed by an individual referred to as "Islam Bejoy" (*id.*). According to the affidavit of Bejoy Islam annexed to HFE's cross-motion, Mr. Islam is "an affiliate and representative" of HFE who assisted his mother in operating his family's Subway store on the Premises in 2019 and 2020 (NYSCEF Doc. No. 92, "Islam Affidavit" ¶ 1).

The Subway defendants dispute the validity and admissibility of the Lease Extension. The document designates Subway Real Estate Corp. as the Tenant; however, the Subway defendants assert that it was not signed by their representative and the identity of the signatory is unknown to them. The Subway defendants maintain that the Estoppel Certificates were likewise not signed by Subway or any person with authority on Subway's behalf (Loinig affidavit ¶ 39). They state that Islam Bejoy "has no connection" to Subway (*id.* at ¶ 40).

Plaintiff further contends that Restaurex, the Subway defendants' local business development team, confirmed the lease extension (Gorjian affidavit ¶ 38-39). On August 3, 2018, the final month of the initial Lease's term, the Regional Leasing Director for Restaurex wrote to Plaintiff's agent about extending the Lease beyond August 31, 2018, and followed up two days later, stating: "I understand both you and the franchisee believe we have 2 more years left on our lease" (NYSCEF Doc. No. 62; NYSCEF Doc. No. 80, Loinig affidavit ¶ 24). Plaintiff's

representative responded by sending an email with documents labelled "Subway extension.pdf" and "Subway - Estoppel.pdf" attached (NYSCEF Doc. No. 62).

Plaintiff states that a Subway franchise continued to operate on the Premises after the Lease's term ended on August 31, 2018, that it was run by either the Subway defendants or their subtenant, and that HFE was a subtenant and franchisee of the Subway defendants at the Premises (Gorjian Affidavit ¶ 13). Plaintiff further maintains that the Subway defendants continued to pay rent for the Premises through March 2020, after which time they failed to pay any rent (*id.* at ¶ 32, 24). Plaintiff submits a rent ledger indicating monthly rental payments in the amount of $18,500 made by an entity designated as "Subway Real Estate Corp" from January 16, 2017 through March 6, 2020 (NYSCEF Doc. No. 53, "Ledger"). Plaintiff does not submit proof verifying the source of these payments or whether they were in fact made by the Subway defendants or their franchisee or subtenant.

The Subway defendants concede that HFE used the Premises after the Lease expired on August 31, 2018 (Loinig affidavit ¶ 37), and HFE likewise agrees it operated a Subway restaurant at the Premises during 2019 and 2020 (Islam Affidavit ¶ 1). However, both the Subway defendants and HFE deny that HFE was a subtenant of Subway (*id.*; Islam Affidavit ¶ 3-4). The Subway defendants maintain that rent was paid directly to Plaintiff by HFE and HFE had no relationship with Subway, therefore they never ratified the Lease Extension (*id.* at ¶ 41; NYSCEF Doc. No. 89 at 4-5). For its part, HFE argues it cannot be found liable because it has no lease agreement with Plaintiff and is not a subtenant of Subway, who did have an agreement with Plaintiff. Neither the Subway defendants nor HFE provides an explanation for how HFE would have been able to operate a Subway franchise on the Premises during the relevant period without a lease or other formal agreement.

DISCUSSION

Plaintiff's Motion for Summary Judgment and Dismissal of Subway's Affirmative Defenses

"[T]he 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 Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*id.*). "'[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient' for this purpose" (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988] [internal citations omitted]). "[A]verments merely stating conclusions, of fact or of law, are insufficient to defeat summary judgment" (*Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 383 [2004] [internal citations and quotation marks omitted]).

Plaintiff's First Cause of Action Against Subway Defendants: Breach of Contract

Plaintiff moves for summary judgment on its first cause of action for breach of contract in which it seeks unpaid rent and additional rent due pursuant to the Lease Extension against the Subway defendants. Plaintiff maintains that the Lease Extension demonstrates the existence of a valid lease from September 1, 2018 through December 31, 2020. In the alternative, Plaintiff argues that, if the signed agreement is invalid or inadmissible, the Subway defendants nonetheless ratified the Lease Extension by continuing to use the Premises and by paying rent in the amount specified by the extension.

A lease agreement is governed by contract law (*see, e.g., Geraci v Jenrette*, 41 NY2d 660, 665 [1977] ["[A] lease . . . is generally more than a simple conveyance of an interest in land for a

fixed period of time. Typically, it is also a contract which requires the parties, particularly the tenant, to fulfill certain obligations while the lease is in effect."]). A breach of contract claim requires that a plaintiff show "the existence of a contract; the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp*., 79 AD3d 425, 426 [1st Dept 2010]; 22 NY Jur 2d, Contracts § 9).

A plaintiff establishes the existence of an enforceable agreement by showing an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound (*Kowalchuk v Stroup*, 61 AD3d 118, 121 [1st Dept 2009]). General Obligations Law § 5-703(2) stipulates that "[a] contract for the leasing of a longer period than one year . . . is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing" (*see also Geraci*, 41 NY2d at 664). A notarized signature on a document creates a rebuttable presumption that the signature is valid (*MTGLQ Invs., L.P. v Vazquez*, 190 AD3d 616 [1st Dept 2021]; *Seaboard Sur. Co. v Earthline Corp.*, 262 v AD2d 253 [1st Dept 1999]; *see* CPLR 4538).

The Court finds that there is a dispute of material facts with respect to the validity of the purported Lease Extension. Plaintiff presents the Lease Extension as prima facie evidence of the existence of a lease as between it and the Subway defendants. However, the Subway defendants meet their burden by presenting the affidavit of Aimee Loinig, legal counsel to an entity affiliated with the Subway defendants, denying that the Lease Extension was signed by an individual with any connection to the Subway defendants (Loinig affidavit ¶¶ 26-30).

In the alternative, Plaintiff argues that it should be granted summary judgment on its breach of contract claim because the Subway defendants ratified the Lease Extension. A principal may ratify an otherwise invalid lease executed by an agent lacking authority (*see Vebuliunas v*

Overstrom, 189 AD3d 653, 654 [1st Dept 2020] [finding that plaintiff lessee ratified lease and easement agreement executed by agent who lacked authority], *citing Holm v C.M.P. Sheet Metal, Inc.*, 89 AD2d 229, 232-233 [4th Dept 1982]; *see also* 7 Warren's Weed New York Real Property § 80.11 [2022]). "Ratification occurs when a party accepts the benefits of a contract and fails to act promptly to repudiate it" (*Allen v Riese Org., Inc.*, 106 AD3d 514, 517 [1st Dept 2013]). Ratification "must be performed with full knowledge of the material facts relating to the transaction, and the assent must be clearly established and may not be inferred from doubtful or equivocal acts or language" (*Holm*, 89 AD2d at 233; *see also* 57 NY Jur Estoppel, Ratification, and Waiver § 96).

Plaintiff fails to meet its burden of showing the absence of a dispute of material facts as to whether the Subway defendants ratified the purported Lease Extension. Although the ledger presented by Plaintiff states that "Subway Real Estate Corp" made monthly rent, utilities, and tax payments to Plaintiff for the Premises, the Subway defendants deny that they paid rent to Plaintiff. While it may defy credulity that Subway would allow an unrelated entity to operate a Subway franchise without forming a relationship with the realty corporation that exists to sublease to franchisees, the Subway defendants nevertheless maintain that "[P]laintiff was collecting the rent from [HFE], which has no relation to Subway" (NYSCEF Doc. No. 89 at 4), and Plaintiff does not present evidence demonstrating that the payments were in fact made by the Subway defendants. The Court notes that the emails between Plaintiff's agent and Restaurex appear to contradict the Subway defendants' claims that they were not aware of the Lease Extension. However, as issues of fact exist, the branch of Plaintiff's motion for summary judgment against the Subway defendants on its first cause of action must be denied.

Plaintiff's Fourth Cause of Action: Attorneys' Fees

The Court denies Plaintiff's motion for summary judgment on its cause of action against the Subway defendants for attorneys' fees as premature in light of the denial of the request for summary judgment on the breach of contract claim.

Subway Defendants' Affirmative Defenses

Plaintiff moves to dismiss all of defendants' affirmative defenses. CPLR 3211(b) provides that "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." "[T]he plaintiff bears the heavy burden of showing that the defense is without merit as a matter of law" (*Granite State Ins. Co. v Transatlantic Reins. Con.*, 132 AD3d 479, 481 [1st Dept 2015]). Furthermore, the allegations in a defendant's answer "must be viewed in the light most favorable to the defendant" (*id.*). However, "bare legal conclusions are insufficient to raise an affirmative defense" (*Robbins v Growney*, 229 AD2d 356, 358 [1st Dept 1996]; *see also The Carlyle, LLC v Beekman Garage LLC*, 133 AD3d 510, 511 [1st Dept 2015]).

Plaintiff's motion to dismiss the Subway defendants' first affirmative defense, failure to state a cause of action, is denied. "[N]o motion lies under CPLR 2311(b) to strike this affirmative defense as it amounts to an endeavor by the plaintiff to test the sufficiency of his or her own claim" (*Lewis v U.S. Bank N.A.*, 186 AD3d 694 [2d Dept 2020]).

The Court further denies the branch of Plaintiff's motion seeking to dismiss Subway's second, third, fourth, fifth, and sixth affirmative defenses. These defenses assert, respectively, that the Lease Extension was invalid because it was not signed by the Subway defendants or an authorized agent, that there is no landlord-tenant relationship between Plaintiff and the Subway defendants, that a month-to-month tenancy between Plaintiff and HFE exists, and that the Subway defendants are not in possession of the Premises. As the Court has denied summary judgment on

Plaintiff's breach of contract claim based on the existence of material questions of fact with respect to the defenses, dismissal is unwarranted.

Under their seventh and ninth affirmative defenses, the Subway defendants argue that even if they were bound by the Lease Extension, their performance under it is excused because the COVID-19 pandemic and the government response thereto rendered performance impossible and/or constituted a frustration of purpose of the lease. The Appellate Division, First Department has rejected effects of the COVID-19 pandemic as bases for the affirmative defenses of impossibility and frustration of purpose in the context of commercial leases where lessees' businesses continued to operate with reduced revenues (*Fives 160th LLC v Zhao*, 204 AD3d 439 [1st Dept 2022]; *558 Seventh Ave. Corp. v Times Sq. Photo*, 194 AD3d 561 [1st Dept 2021]; *see also Warner v Kaplan*, 71 AD3d 1, 5 [1st Dept 2009] ["where performance is possible, albeit unprofitable, the legal excuse of impossibility is not available"]; *Gap, Inc. v 170 Broadway Retail Owner, LLC*, 195 AD3d 575, 577 [1st Dept 2021] ["The doctrine of frustration of purpose does not apply as a matter of law where, as here, the tenant was not completely deprived of the benefit of its bargain"] [internal citations and quotation marks omitted]). The Subway defendants do not assert that the store on the Premises was permanently closed or that they were completely deprived of the benefit of the bargain under the lease agreement. The Court therefore grants Plaintiff's motion to dismiss the Subway defendants' seventh and ninth affirmative defenses.

The Subway defendants' tenth affirmative defense is similarly dismissed. Under it, the Subway defendants aver that the COVID-19 pandemic and the government response constituted a casualty that suspended their rent obligations. A tenant is not entitled to rent abatement for a "casualty" where the relevant 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 (*Gap, Inc.* at 577). Here, Article 9 of the Lease contemplates damage by "fire or other casualty" that causes damage to the Premises or otherwise renders them unusable (Lease at 9). The Lease does not contemplate loss of use due to the COVID-19 pandemic and consequently the Subway defendants' casualty defense is dismissed.

The Court further grants Plaintiff's motion to dismiss the Subway defendants' eighth, eleventh, twelfth, and thirteenth affirmative defenses, which assert that Plaintiff's claims are barred by the doctrine of temporary commercial impracticability, that Plaintiff failed to credit the security deposit against its alleged damages, that Plaintiff overcharged for utilities, and that Plaintiff overcharged for the Subway defendants' real estate tax contribution. The Subway defendants fail to provide a proper factual basis for these defenses, which amount to no more than "bare legal conclusions" (*The Carlyle, LLC* at 511).

HFE's Cross Motion for Summary Judgment

HFE moves for summary judgment pursuant to CPLR 3212 dismissing Plaintiff's second cause of action, which alleges HFE's breach of contract. While HFE concedes it operated a store on the Premises, it avers that it was not a party to the Lease and was not a subtenant to the Subway defendants at the Premises. It therefore argues it cannot be held liable for unpaid rent and summary judgment must be granted. HFE does not explain how it was able to operate a Subway franchise in the Columbus Circle area of Manhattan without executing a lease agreement for the commercial space.

HFE's motion for summary judgment is denied. In its breach of contract claim against HFE, Plaintiff alleges that HFE is responsible for rent under the Lease Extension as the subtenant of the Subway defendants. While there is no privity of contract between a prime landlord and a subtenant (*Dorador v Trump Palace Condominium*, 190 AD3d 479, 480 [1st Dept 2021]), a court

may deny summary judgment where it appears from affidavits "that facts essential to justify opposition may exist but cannot then be stated" (CPLR 3212[f]; *see Old Republic Constr. Ins. Agency of N.Y., Inc. v Fairmont Ins. Brokers, Ltd.*, 111 AD3d 553 [1st Dept 2013] [finding defendant entitled to disclosure about audits used by plaintiffs to calculate premium increases]).

Issues of fact exist that are material to determining whether there was a contractual relationship between any of the parties, which ones, and when. HFE concedes it maintained a store on the Premises but denies having a formal relationship with Plaintiff or the Subway defendants. The affidavit of HFE's affiliate, Bejoy Islam, is bereft of information regarding the relationship between Plaintiff, HFE, and the Subway defendants. HFE submits no further exhibits in support of its motion for summary judgment and does not explain why this individual's signature appears on the Estoppel Certificate dated September 19, 2019. The outstanding questions of fact about the relationship between the parties prevent the Court from rendering summary judgment on this cause of action.

For the same reasons, the Court denies HFE's motion for summary judgment on Plaintiff's fifth cause of action for attorneys' fees. Questions of fact regarding the relationship between HFE, the Subway defendants, and Plaintiff render summary judgment inappropriate on the question of whether HFE is bound by Article 51 of the Rider to the Lease.

However, HFE's motion for summary judgment dismissing Plaintiff's claim against it for declaratory judgment of entitlement to *pendente lite* rent and additional rent under the Lease under its third cause of action is granted. A landlord is not entitled to payment of rent *pendente lite* where the tenant has vacated the premises (*The Gap, Inc.* at 578). The Court has previously found that HFE no longer occupied the Premises from January 8, 2021 onwards (NYSCEF Doc. No. 122). For the reasons set forth in that decision, Plaintiff's third cause of action is dismissed.

Plaintiff's Motion to Dismiss HFE's Affirmative Defenses

Plaintiff further moves to dismiss HFE's 29 affirmative defenses as not stated or otherwise without merit. The motion to dismiss HFE's first affirmative defense, failure to state a cause of action, is denied (*Lewis*, 186 AD3d 694).

HFE's second through twentieth affirmative defenses consist of one-sentence assertions alleging, *inter alia*, that Plaintiff's claims are barred by doctrines of unclean hands, unjust enrichment, and equitable estoppel; that Plaintiff has not suffered any damages as result of acts of HFE or any damages at all; that HFE acted in good faith; that Plaintiff failed to mitigate damages; that the Complaint is barred by Plaintiff's culpable conduct; that Plaintiff is estopped "under the theory of payment and offset"; that there is no privity; that HFE is wrongly named and Plaintiff has failed to name necessary parties; that Plaintiff is barred by the Statute of Frauds; and that Plaintiff is barred by the covenant of good faith and fair dealing. These amount to "bare legal conclusions" that are insufficient to raise a defense (*The Carlyle, LLC* at 511). As a result, Plaintiff's motion to dismiss HFE's second through twentieth affirmative defenses is granted.

HFE's twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, and twenty-seventh affirmative defenses are premised upon the alleged effects of the COVID-19 pandemic on HFE's business and, if the Court does find that a valid lease existed, HFE's ability to perform under that lease as a result of those effects. The parties disagree on the extent to which the Subway restaurant was impacted by the COVID-19 pandemic. HFE maintains that the restaurant was shuttered for months due to pandemic restrictions and that the decrease in foot traffic after reopening eliminated the restaurant's viability and led to the shutdown and eventual vacancy of the restaurant (Islam Affidavit ¶ 3-4). HFE's papers do not specify exactly when in 2020 the Subway store reopened. In contrast, Plaintiff asserts that the restaurant continued to

operate during the pandemic as an "essential business" (Gorjian Affidavit ¶ 49). In either case, HFE closed the store and vacated the Premises by January 8, 2021.

A commercial tenant may not be excused from performance under a lease based on theories of impossibility, commercial impracticability, frustration of purpose, or casualty due to the effects of the pandemic or government responses to it (*Fives 160th LLC*, 204 AD3d 439; *558 Seventh Ave. Corp.*, 194 AD3d 561; *Gap, Inc.*, 195 AD3d 575). Further, pandemic-related restrictions do not qualify as a taking under Article 10 of the Lease because they did not physically take any part or the whole of the Premises for public or quasi-public use (*see also 111 Fulton St. Investors Llc v Fulton Quality Foods Llc*, 2021 NYLJ LEXIS 113 [Sup. Ct. New York County 2021]). Finally, HFE's assertion that Plaintiff was unable to perform under the lease by failing to deliver possession of the premises under the contract is without merit as HFE admits that it operated a store on the Premises during 2019 and 2020. Accordingly, Plaintiff's motion to dismiss these affirmative defenses is granted.

The Court finds that HFE's twenty-eighth affirmative defense concerning utilities overcharges, when viewed in the light most favorable to HFE, has merit and therefore denies Plaintiff's motion to dismiss this defense. The Court notes that HFE's affiant claims that Plaintiff "sought to collect approximately double the Premises' average historical monthly charge for electricity usage" for the period of April to June 2020, during which HFE alleges electrical appliances on the Premises were unplugged (Islam affidavit ¶ 16). However, the HFE fails to provide a basis for its twenty-ninth affirmative defense related to overcharges on real estate taxes, and as such the Court dismisses this defense.

Accordingly, it is hereby:

ORDERED that Plaintiff's motion for summary judgment on its first and fourth causes of action against defendants Subway Real Estate Corp. and Subway Realty LLC is denied; and it is further

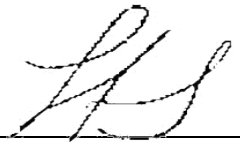
ORDERED that Plaintiff's motion to dismiss the affirmative defenses of defendants Subway Real Estate Corp. and Subway Realty LLC is granted in part and denied in part and the seventh, eighth, ninth, tenth, eleventh, twelfth, and thirteenth affirmative defenses of defendants Subway Real Estate Corp. and Subway Realty LLC are dismissed; and it is further

ORDERED that defendant HFE's motion for summary judgment seeking dismissal of Plaintiff's second, fourth, and fifth causes of action is denied; and it is further

ORDERED that the motion of defendant Healthy Food Enterprises III, Inc. for summary judgment is granted and Plaintiff's third cause of action is dismissed with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that Plaintiff's motion to dismiss HFE's affirmative defenses is granted in part and denied in part and the second through twenty-seventh and twenty-ninth affirmative defenses of defendants Healthy Foods Enterprises III, Inc. are dismissed; and it is further

ORDERED that Plaintiff's motion to compel discovery is granted to the extent of directing counsel to appear for a Preliminary Conference on August 10, 2022, at 11:30 AM.



6/30/2022
DATE

LORI SATTLER, J.S.C.

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