

**133 E. 58th St., LLC v Honors N.Y. Ctr. for Bridge,
Inc.**

2022 NY Slip Op 32772(U)

August 15, 2022

Supreme Court, New York County

Docket Number: Index No. 151709/2021

Judge: Louis L. Nock

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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. LOUIS L. NOCK **PART** **38M**

Justice

-----X

133 E. 58TH STREET, LLC,

Plaintiff,

- v -

HONORS NEW YORK CENTER FOR BRIDGE, INC., and
GAIL GREENBERG,

Defendants.

-----X

INDEX NO. 151709/2021

MOTION DATE 05/10/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (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, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, and 63

were read on this motion and cross-motion for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.

Upon the foregoing documents, and upon due deliberation, defendants’ motion for summary judgment is granted in part and denied in part, and the plaintiff’s cross-motion for summary judgment is denied, based on the following memorandum decision.

Background

In this commercial landlord-tenant action, defendants Honors New York Center for Bridge, Inc. (“Tenant”), and Gail Greenberg (“Greenberg”) move for summary judgment dismissing the verified complaint of plaintiff 133 E. 58th Street, LLC (“Landlord”), and for summary judgment on Greenberg’s counterclaim. Landlord cross-moves for summary judgment in its favor in the amount of unpaid rent and items of additional rent outstanding against Tenant, and against Greenberg as guarantor of the lease; for its reasonable attorneys’ fees; and for summary judgment dismissing defendants’ affirmative defenses and Greenberg’s counterclaim.

Tenant is a “non-membership bridge organization” (NYSCEF Doc. No. 22 ¶ 3). Primarily, it provides instruction in the game of bridge, and space for both casual and duplicate bridge games (*id.*, ¶¶ 6-7, 10-12). Tenant maintains a kitchen to prepare food and beverages for its customers, as well as marketing various items of bridge paraphernalia, such as bridge sets, books, playing cards, and other items (*id.*, ¶¶ 6, 8). These offerings, however, are secondary to its primary business of providing bridge instruction and bridge games (*id.*, ¶ 6).

Beginning in May 3, 2002, Tenant’s predecessor in interest leased from Landlord’s predecessor in interest space in the building located at 133 East 58th Street in Manhattan (the “Building”) (NYSCEF Doc. No. 29). Tenant’s predecessor was to use the leased space “for general and executive offices and for the conduct of a private bridge club and for no other purpose” (*id.*, ¶ 2). Presently, Tenant leases the fourteenth floor and a portion of the twelfth floor of the Building (the “Premises”) (NYSCEF Doc. No. 30). Pursuant to the third lease amendment agreement between the parties, the term of the lease runs from October 31, 2016, through October 31, 2021 (NYSCEF Doc. No. 32 at 1). In conjunction with the original lease, and subsequently ratified in various amendments to the lease, Greenberg “unconditionally and absolutely guarantee[d] to landlord the full and prompt payment when due of (i) all amounts payable by tenant pursuant to the Lease” (NYSCEF Doc. No. 34).

Like many commercial tenants throughout New York City, Tenant was severely and adversely affected by the Coronavirus pandemic. As set forth in the affidavit of Scott Levine, Tenant’s officer and shareholder, a game of duplicate bridge – Tenant’s primary form of bridge game – “requires two of the four players at each table to move to another table anywhere from eight to twelve times during the three-hour session” (NYSCEF Doc. No. 22 ¶ 11). Afternoon games of bridge at the premises “typically reached between 50 and 60 tables, meaning that every

15 to 20 minutes, half of the more than 200 players would leave their tables and walk to another table, sit down, and play against two new people” (*id.*, ¶ 12). Because Tenant’s customers, in addition to the movement required during duplicate bridge games, “do not arrive together, leave together, or stay at the same table during games,” the social distancing required by the governor’s Executive Orders and the guidelines issued by the Centers for Disease Control and Prevention (“CDC”) in response to the pandemic “was and remains impossible” (*id.*, ¶ 13). Further, Levine attests that the vast majority of Tenant’s customers “were senior citizens over the age of 65” and were particularly susceptible to Coronavirus infection “due to their age and comorbidities, as well as the location of [Tenant] in midtown Manhattan” (*id.*, ¶ 16). In addition to these logistical problems, Tenant was also subject to the governor’s Executive Orders regarding the pandemic, and, in particular, was required to close off public access as an indoor venue for public amusement, pursuant to Executive Order 202.5 dated March 18, 2020 (*id.*, ¶¶ 18-20; 9 NYCRR 8.202.5). Tenant remains closed to the public and has not paid its rent to Landlord since April 1, 2020 (NYSCEF Doc. No. 22 ¶¶ 23-24).

Landlord commenced this action on February 18, 2021 (NYSCEF Doc. No. 1). Defendants answered and alleged a counterclaim for landlord/commercial-tenant harassment targeting Greenberg and violative of Section 22-902 of the New York City Administrative Code (NYSCEF Doc. No. 9). Shortly after Landlord filed a reply to the counterclaim, defendants made the instant motion (NYSCEF Doc. No. 12). To date, no discovery has taken place.

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 N.Y.*, 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 Assocs., Ltd. v Victoria's Secret Stores, Inc.*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]).

Discussion

Two issues are central to the motion and cross-motion before the court: (i) whether defendants' performance under the lease and the guaranty should be excused due to impossibility of performance; and (ii) whether Greenberg is covered by Section 22-1005 of the New York City Administrative Code (the "Guaranty Law") and, thus, not liable to plaintiff. As the applicability of the Guaranty Law is a comparatively more straightforward matter of statutory interpretation, the court will address that first.

The Guaranty Law:

During the first year of the pandemic, the New York City Council enacted the Guaranty Law, which protected certain guarantors of commercial leases from liability for defaulting tenants. The Guaranty Law provides that:

A provision in a commercial lease or other rental agreement involving real property located within the city, or relating to such a lease or other rental agreement, 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 payment of rent, utility expenses or taxes owed by the tenant under such agreement, or fees and charges relating to routine building maintenance owed by the tenant under such agreement, shall not be enforceable against such natural persons if the conditions of paragraph 1 and 2 are satisfied:

1. The tenant satisfies the conditions of subparagraph (a), (b) or (c):

(a) The tenant was required to cease serving patrons food or beverage for on-premises consumption or to cease operation under executive order number 202.3 issued by the governor on March 16, 2020;

(b) The tenant was a non-essential retail establishment subject to in-person limitations under guidance issued by the New York state department of economic development pursuant to executive order number 202.6 issued by the governor on March 18, 2020; or

(c) The tenant was required to close to members of the public under executive order number 202.7 issued by the governor on March 19, 2020.

2. The default or other event causing such natural persons to become wholly or partially personally liable for such obligation occurred between March 7, 2020 and June 30, 2021, inclusive.

(Administrative Code of the City of N.Y. § 22-1005.)

Plaintiff does not contest that Greenberg is a natural person who is not the tenant under the lease, or that Tenant's alleged default arose during the period set forth in paragraph 2 of the Guaranty Law. Whether Greenberg may be held liable under the guaranty, therefore, depends on whether Tenant satisfies the conditions set forth in paragraph 1, which are further described in Executive Orders 202.3, 202.6, and 202.7, respectively.

Executive Order 202.3 required, so far as is relevant to this matter, that “[a]ny restaurant or bar in the state of New York shall cease serving patrons food or beverage on-premises effective at 8 pm on March 16, 2020, and until further notice shall only serve food or beverage for off-premises consumption” (9 NYCRR 8.202.3). While the record reflects that Tenant, as part of its business, did provide food to its customers for on-premises consumption (NYSCEF Doc. No. 22, ¶ 8), there is nothing in the record that indicates that the court should consider it a “restaurant or bar,” as specified under the Executive Order incorporated by reference into the Guaranty Law. Nor do any of the other provisions of Executive Order 202.3 require that Tenant cease operations. Similarly, Executive Order 202.7 required that various personal care services

be closed to the public, and defendants do not claim that Tenant operates such a business (9 NYCRR 8.202.3).

Executive Order 202.6 requires a more technical analysis. The order provided that “[e]ach employer shall reduce the in-person workforce at any work locations by 50% no later than March 20 at 8 p.m. Any essential business or entity providing essential services or functions shall not be subject to the in-person restrictions” (9 NYCRR 8.202.6). Guidance from Empire State Development (“ESD”) determines which businesses are essential and which are not (*id.*). The Guaranty Law provides, in turn, that the guarantor of any “non-essential retail establishment” subject to such limitations is not liable for the business’ rent default (NYC Admin. Code § 22-1005[1] [b]). However, neither Executive Order 202.6 or the Guaranty Law defines the phrase “non-essential retail establishment.” The administrative guidance issued by ESD details which businesses should be considered essential in great detail, but still does not define the phrase “non-essential retail establishment.”¹

The Appellate Division, First Department, has yet to speak on the issue of what constitutes a non-essential retail establishment. Several trial courts have interpreted the language of the Guaranty Law to provide some outer bounds to the definition, which interpretations this court concurs in. In *ESRT Empire State Bldg., LLC v Radulescu LLP* (2022 NY Slip Op 31681 [U], 2022 WL 1620414 [Sup Ct N.Y. 2022]), the defendant tenant was a law firm. In holding that the Guaranty Law did not cover such an establishment as a non-essential retail establishment, the court reviewed and analyzed the “Declaration of legislative intent and findings” pertaining to the Guaranty Law, and stated that the purpose of the law was to protect, among other entities, “non-food service establishments in the ‘retail trade sector’ to include ‘the

¹ See, Guidance on Executive Order 202.6 (<https://esd.ny.gov/guidance-executive-order-2026>) as of August 10, 2022.

clothing stores industry, the furniture and home furnishings stores subsector, and the sporting goods, hobby, book, and music stores subsector” (*id.*, Slip Op at *2). Finding that a business such as a law firm was not intended to be covered, the court denied the defendant guarantors’ cross-motion for summary judgment dismissing the complaint against them.

Similarly, in *SLG Graybar Mesne Lease LLC v Arthur V. Fox C.P.A., P.C.* (2021 WL 3772714 [Sup Ct, N.Y. County 2021]), the court considered whether an accounting firm was a non-essential retail establishment. The court observed that the defendants (the accounting firm and the guarantor) asserted that the Guaranty Law should be “broad and unqualified,” extending to “every type of retail business . . . whether it sells goods at retail or services at retail, and whether it sells these goods or services from an office or a storefront” (*id.*, at *3). Relying on the “declaration of legislative intent and findings published with the Guaranty Law,” the court rejected this interpretation, finding it to be “plainly overbroad and ripe for abuse” (*id.*). As the court stated, the businesses referenced in the declaration of legislative intent and findings “require indoor occupancy at a retail location in order to function and generate profits” (*id.*). In addition, the court considered the use provisions of the lease, and found that the lease “does not contemplate use of the premises as a retail establishment” (*id.* at *4).

Concurring with those principles, this court, in like fashion, finds that the tenant in this case is not a non-essential retail establishment as contemplated by the Guaranty Law. Simply put, Tenant does not operate a retail location. The lease, as amended (and as with the lease in *SLG Graybar, supra*), does not contemplate that the Premises can be used for a retail establishment. Rather, the lease in this case allows only for “general and executive offices and/or for the conduct of a private bridge club and for no other purposes” (NYSCEF Doc. No. 30 ¶ 14[d]). To the extent that Tenant also provides food services to its patrons and sells various

items of bridge-related paraphernalia: by Tenant’s own admissions, these services are secondary to its primary business (NYSCEF Doc. No. 22 ¶ 6 [“The core business of (Tenant) is to provide, for a fee, bridge instructions and bridge games”]). This business, even considering the ancillary aspects of it, does not fit within any of the businesses described in the declaration of legislative intent and findings or in those cases where trial courts have previously found that this provision of the Guaranty Law potentially applied (*e.g.*, *Federation LLC v R & D Precious Metals Inc.*, 2022 NY Slip Op 32560 [U], 2022 WL 3011219 at **11 [Sup Ct N.Y. County 2022] [“Davidov argues that Admin Code § 22-1005 does apply to him because the Premises was more than just a mere office – he ran his jewelry business in the Premises where he sold and displayed diamonds and jewelry”]; *JMB Capital Partners Lending, LLC v Shin*, 74 Misc 3d 1209 [A], 2022 NY Slip Op 50087 [U] at *2 [Sup Ct N.Y. County 2022] [“Additionally, the leased premises were to be used solely for the retail sale and supply of beauty products and related items”]).

The cases cited by the defendants herein are not to the contrary. In two of them, the defendant tenant operated a spa and a restaurant, respectively, both of which are covered by different Executive Orders and, accordingly, different provisions of the Guaranty Law than is at issue here (*see*, *Fifty E. Forty Second Co. LLC v Noy LLC*, 2021 NY Slip Op 31681 [U] at *3 [Sup Ct N.Y. County 2021] [defendant operated a spa]; *204 E. 38th LLC v Sons of Thunder LLC*, 2020 NY Slip Op 33862 [U] at *5 [Sup Ct N.Y. County 2020] [defendant operated a restaurant]). In the third case cited by defendants herein, the court stated that the defendant operated a retail establishment, but provided no further details as to what specific kind of business defendant operated (*27 Morton, L.P. v MDS Fashions, Ltd.*, 2020 NY Slip Op 33861 [U] at *4 [Sup Ct N.Y. County 2020]). None of these cases addresses the initial question of what constitutes a non-essential retail establishment.

Because the court finds that the Guaranty Law does not apply to prevent liability from attaching to Greenberg, Greenberg cannot establish *prima facie* entitlement to summary judgment dismissing the claims against her, and so much of defendants' motion seeking summary judgment dismissing plaintiff's claims against Greenberg is denied. Further, because the Guaranty Law does not apply, plaintiff did not engage in prohibited commercial tenant harassment by seeking to enforce the guaranty, and so much of plaintiff's cross-motion seeking dismissal of Greenberg's counterclaim for violation of Section 22-902 of the New York City Administrative Code is granted.

Impossibility of Performance:

Separate from the interpretation of the Guaranty Law, defendants also argue that Tenant's default, and thus Greenberg's potential liability as the guarantor, are barred by the common-law doctrine of impossibility of performance. "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. 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., Inc.*, 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 Ave. Corp. v Times Square Photo Inc.*, 194 AD3d 561, 561-62 [1st Dept] [holding that reduced revenues due to the COVID-19 pandemic did not render performance impossible], *appeal dismissed* 37 NY3d 1040 [2021]). "[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. Assocs.*, 161 AD2d 269, 271 [1st Dept 1990]).

In a series of decisions issued at the beginning of last year, and continuing through this year, the Appellate Division, First Department, has consistently found that where a commercial tenant is able to continue its business in some form in spite of the restrictions brought on by the pandemic, impossibility of performance does not apply to excuse a tenant’s obligation to pay rent. In *558 Seventh Ave. Corp. v Times Square Photo, Inc.* (194 AD3d 561 [1st Dept], *appeal dismissed* 37 NY3d 1040 [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 impossibility of performance or frustration of purpose as defenses to liability (*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.*, *Gap, Inc. v 44-45 Broadway Leasing Co. LLC*, 206 AD3d 503, 504 [1st Dept 2022] [“Plaintiffs admittedly were allowed to provide curbside and in-store pickup on June 8, 2020, and to reopen at half capacity, with masking and social distancing, on June 22, 2020”]; *Knickerbocker Retail LLC v Bruckner Forever Young Social Adult Day Care Inc.*, 204 AD3d 536, 537 [1st Dept 2022] [rejecting frustration of purpose defense where “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”]).

In analyzing the above line of appellate cases, two common factors predominate. First, the tenants at issue were frequently able to continue their operations, albeit in reduced form (*Gap, Inc.*, 206 AD3d at 504 [“Plaintiffs admittedly were allowed to provide curbside and in-store pickup . . . and to reopen at half capacity”]; *Fives 160th, LLC*, 204 AD3d at 440 [Defendants were not “prevented from using the space or operating their restaurant”]; *Valentino U.S.A., Inc.*, 203 AD3d at 480 [“even if its ability to provide a luxury experience was rendered more difficult,” the tenant’s performance was not impossible]; *558 Seventh Ave. Corp.*, 194 AD3d at 561-562 [“defendants acknowledge that they eventually reopened for curbside service and that they were able to gain access to the premises]). Second, where the closing or modification of the tenant’s business was occasioned solely as a result of the governor’s Executive Orders or other government restriction, such orders were temporary, and the Appellate Division, First Department, found that such temporary restrictions cannot support a defense of impossibility (*Gap, Inc.*, 206 AD3d at 504 [“We have already rejected plaintiff Gap’s contention that Executive Order No. 202.8 rendered it objectively impossible to perform its operations as a retail store where, as here, Gap filed its complaint after reopening was allowed”]; *Knickerbocker Retail LLC*, 204 AD3d at 537 [“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”]).

The holdings issued by the undersigned in a series of commercial landlord-tenant cases heard since the onset of the pandemic are consistent with the foregoing determinative factors considered by the Appellate Division, First Department. In *21 E. 62nd Street Realty LLC v Enterprise Restaurant LLC* (2021 WL 2651101 [Sup Ct N.Y. County 2021]), this court considered whether impossibility of performance applied to the case of a restaurant attempting to operate a sidewalk café when its regular premises were shutdown, in the face of alleged interference from the landlord distinct of governmental restrictions. In construing and applying the Appellate Division, First Department's, then-recent decision in *558 Seventh Ave. Corp.*, *supra*, this court held that impossibility of performance depends on the factual context of each case, noting that the Appellate Division, First Department, itself based its decision in *558 Seventh Ave. Corp.*, in substantial part, on the tenant's demonstrated ability to continue to operate its business (*see, 558 Seventh Ave. Corp.*, 194 AD3d at 561-562; *21 E. 62nd St. Realty LLC*, 2021 WL 2651101 at *3). As this court noted in *21 E. 62nd St. Realty LLC*, the circumstances in that particular case gave rise to genuine issues of fact "regarding whether and for what period of time the purpose of this Lease might have been frustrated and whether and for what period of time defendant's performance of its specific Lease-defined purpose was rendered impossible, whether through gubernatorial charge or landlord intervention" (2021 WL 2651101 at *4).

Following this court's decision in *21 E. 62nd St. Realty LLC*, this court has continued to apply the principles of the appellate line of cases noted above, as the cases that have come before this court all involved tenants whose businesses were able to continue in some reduced form (*see, e.g., Gallagher's Stud, Inc. v Gallagher's Famous, LLC*, 2022 NY Slip Op 32378 [U] at *3 [Sup Ct N.Y. County 2022] ["Moreover, Tenant'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”]; *Lin-Dan Garage Corp. v Beneficial 21 Parking LLC*, 2022 NY Slip Op 31421 [U] at *7 [Sup Ct N.Y. County 2022] [“Tenant was able to operate the parking garage and take in 80% of their revenue from April through October 2019 during the time relevant to the motion”]; *933 Broadway, LLC v Godiva Chocolatier, Inc.*, 2022 NY Slip Op 31238 [U] at *2 [Sup Ct N.Y. County 2022] [“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. Defendant continued to operate the café in this manner until it voluntarily shut down on November 6, 2020”] [record reference omitted]).

In this matter, though, as in *21 E. 62nd Street Realty LLC*, there are unavoidable issues of fact in the record as to whether Tenant’s performance was impossible. As was argued by Tenants before this court, it is difficult to conceive of an entity whose business is more uniquely susceptible to the pandemic than Tenant’s. Tenant’s customer base is almost exclusively senior citizens, and the increased risk and comorbidities associated with Coronavirus infection among this cohort are a matter of public record (NYSCEF Doc. No. 22 ¶ 16). The game of bridge, which is the center of Tenant’s business, is played by four people sitting around a small table for an extended period of time, or, in the case of duplicate bridge, by more than 200 people circulating throughout a single room and sitting for extended periods of time at multiple small tables (*id.*, ¶¶ 10-12). Social distancing requirements were impossible to comply with (*id.*, ¶ 13). Moreover, Tenant occupies the 14th floor of a midtown-Manhattan office building and has no access to any outdoor space such as other commercial tenants have used to operate their businesses when indoor operation was either impossible or impracticable. As of the briefing of this motion practice, Tenant still had not reopened for business (NYSCEF Doc. No. 22 ¶ 24).

Unlike any of the appellate cases surveyed above, there are, in this case, genuine questions of material fact as to whether the tenant had any means of operating its primary business, *whatsoever*, on account of social distancing restrictions. At argument, counsel for Landlord suggested possible ways in which Tenant could have continued its business (*see*, NYSCEF Doc. No. 63 at 14:25-16:14); but such suggestions only serve to raise issues of fact which cannot be resolved on a motion for summary judgment (*44-45 Broadway Leasing Co., LLC v 45th St. Hospitality Partners LLC*, 198 AD3d 451, 452 [1st Dept 2021]).

The cases cited by Landlord are distinguishable. As with the appellate cases cited hereinabove, the tenants in Landlord's cited cases were able to continue their businesses, albeit in reduced format (*see, e.g., Bay Plaza Community Ctr., LLC v Bronx Vistasite Eyecare, Inc.*, 2021 NY Slip Op. 31568 [U] at *2 [Sup Ct N.Y. County 2021] ["Defendant observes that it was completely shut down from March 20, 2020 through June 20, 2020 and then operated in a limited capacity to late August 2020. It maintains that it has only been able to operate at 80% of its pre-pandemic capacity"]; *35 E. 75th St. Corp. v Christian Louboutin L.L.C.*, 2020 NY Slip Op 34063 [U] at *5 [Sup Ct N.Y. County 2020] ["The subject matter of the contract – the physical location of the retail store – is still intact. And defendant is permitted to sell its products. The issue is that it cannot sell enough to pay the rent"]; *CAB Bedford LLC v Equinox Bedford Ave, Inc.*, 2020 NY Slip Op 34296 [U] at *5 [Sup Ct N.Y. County 2020] ["Defendants ran an 'upscale gym' for many years prior to the Covid-19 pandemic and, after some painful months, are now permitted to operate (although at a limited capacity)"]). For the reasons stated above, and unlike in these cases cited by Landlord, there are genuine questions in this particular case as to whether Tenant was able to operate its business *at all*. As there are such unavoidable issues of fact regarding

whether impossibility of performance applies in this matter, the balance of the motion and cross-motion for summary judgment must be denied.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment dismissing the verified complaint, and awarding judgment to Greenberg on her counterclaim, is denied; and it is further

ORDERED that so much of plaintiff's cross-motion that sought summary judgment dismissing the counterclaim is granted, and the Clerk of the Court is directed to enter judgment in favor of plaintiff dismissing the counterclaim. The remainder of the action is severed and shall continue; and it is further

ORDERED that the balance of plaintiff's cross-motion is denied; and it is further

ORDERED that the parties are directed to appear for a preliminary conference at the Courthouse, 111 Centre Street, Room 1166, New York, New York, on September 14, 2022, at 10:00 a.m. The parties are directed to meet and confer regarding discovery prior to the conference, and may submit a proposed preliminary conference order to the Principal Court Attorney of this Part (Part 38) at ssyaggy@nycourts.gov.

This constitutes the decision and order of the court.

ENTER:



<u>8/15/2022</u> DATE			<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> SETTLE ORDER	<input checked="" type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> OTHER
			<input type="checkbox"/> REFERENCE