SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: **HON. BARRY R. OSTRAGER** **PART** **IAS MOTION 61EFM**

Justice

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SERIES PC OF HCI-CERBERUS PCNY OWNER LP, HCI-CERBERUS PCNY PC TRS LLC and HCICERBERUS PCNY WH TRS LL,

Plaintiffs,

- v -

DIAMOND RESORTS INTERNATIONAL MARKETING, INC.,

Defendant.

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INDEX NO.	655285/2021
MOTION DATE	
MOTION SEQ. NO.	003

DECISION + ORDER ON MOTION

HON. BARRY R. OSTRAGER

On September 6, 2022, the Court heard oral argument on plaintiffs' Motion Sequence 003 seeking to dismiss defendant's affirmative defenses. In accordance with the transcript of proceedings of September 6, 2022 and as further established here, the motion is resolved as follows.

A motion to dismiss affirmative defenses pursuant to CPLR 3211(b) is granted if the plaintiff can demonstrate that the defenses do not apply under the factual circumstances of the case or that defendant failed to state a defense. *Bank of Am., N.A. v. 414 Midland Ave. Assoc., LLC*, 78 A.D.3d 746, 748. The Court should apply the same standard to motions under CPLR 3211(b) as it does under CPLR 3211(a)(7): the pleading is afforded a liberal construction, the facts alleged are accepted as true, and the pleading's proponent is accorded the benefit of every favorable inference. *See id*. at 748–49, *citing Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

Plaintiffs' motion to dismiss defendant's second affirmative defense for frustration of purpose[1] is granted and the motion is dismissed as a matter of law. The parties' underlying

[1] The first affirmative defense is tantamount to a general denial which is not contested.

purpose in entering into the Agreements was for the lease and licensing of commercial spaces at plaintiffs' Hotels. Defendant makes no argument it was entirely deprived of its access to the commercial spaces and merely argues that the COVID-19 pandemic deprived defendant of access to anticipated numbers of Hotel guests. In the context of the COVID-19 pandemic, New York courts have found that frustration of purpose is not a basis to avoid commercial real estate rent payments due to reduced revenues. *See 558 Seventh Ave Corp. v. Times Square Photo Inc.*, 194 A.D.3d 561, 562 (1st Dept. 2021); *see also Gap, Inc. v. 170 Broadway Retail Owner, LLC*, 195 A.D.3d 575, 577 (1st Dept 2021) (dismissing cause of action for recission based on frustration of purpose as a matter of law because the tenant was not completely deprived of the benefit of its bargain).

Plaintiffs' motion to dismiss defendant's third affirmative defense for impossibility, impracticability, and illegality is granted as a matter of law. These defenses are limited to the destruction of the means of performance. Where impossibility or difficulty is occasioned only by financial difficulty or economic hardship, performance of a contract is not excused. *See 407 East 61st Garage, Inc. v. Savoy Fifth Ave, Corp.*, 23 N.Y.2d 275, 281 (1968). Defendant does not submit any evidence or explanation of how performance was impossible, rather than being difficult due to the pandemic. The illegality defense is also without merit and must also be dismissed because defendant makes no allegation which goes to the legality of the actual obligations under the Agreements. Defendant contends that the government orders entered into in response to the COVID-19 pandemic rendered it "inadvisable or illegal" for defendant to meet and connect with guests in furtherance of defendant's marketing activities, but this does not address the legality of defendant's obligation under the Agreements, which is to pay rent, room fees, and concierge fees in exchange for plaintiffs' leasing and licensing of the spaces.

The motion to dismiss defendant's fourth affirmative defense for failure of consideration is granted. Assuming the allegations contained in defendant's answer are true, there is no support for defendant's claim there was failure of consideration by plaintiffs. Defendant fails to allege that the leased/licensed spaces were not made available to it by plaintiffs. In fact, defendant acknowledges that it did occupy portions of the PC Hotel for a time, thus the defense does not apply. *See, e.g., Hackensack Cars, Inc. v. Beverly*, 140 A.D.2d 254, 254 (1st Dept. 1988).

Plaintiffs' motion to dismiss defendant's fifth affirmative defense for Force Majeure is granted. The Force Majeure provisions at issue contains narrow language which does not encompass the COVID-19 pandemic. Defendant also does not claim that the pandemic affected defendant's ability to pay rent, as acknowledged by defendant on the transcript of proceedings of September 6, 2022. No party has cited any case where a Court has applied a narrowly drafted Force Majeure clause identical to the one at issue here to excuse performance of the obligation to pay rent because of Covid-19 business interruptions.

Plaintiffs' motion to dismiss defendant's sixth affirmative defense for contractual defenses is granted as mere surplusage. The pleadings in support of the affirmative defense are conclusory and in any event the defense is duplicative of the Force Majeure defense.

Plaintiffs' motion to dismiss defendant's seventh affirmative defense for waiver/estoppel/ acquiescence/laches is granted in part. The laches defense is dismissed as defendant concedes this defense does not apply. The motion to dismiss as to the defenses of waiver, acquiescence, and estoppel is denied. It is undisputed that the parties held negotiations or discussions regarding the effect of the COVID-19 pandemic on the parties' obligations under the Agreements. Thus, it is premature at this stage to dismiss the waiver/estoppel/acquiescence defense as questions of

fact exist as to the defense's applicability and whether plaintiffs waived any part of the Agreements, including the No Waiver provision contained in the lease.

Plaintiffs' motion to dismiss defendant's ninth affirmative defense for consent and ratification, as well as plaintiffs' motion to dismiss defendant's eleventh affirmative defense for unconscionability, is granted. Defendant concedes that these defenses cannot be maintained.

Defendant's eighth affirmative defense for unenforceable penalty and tenth affirmative defense for failure to mitigate damages are dismissed without prejudice to defendant amending the answer to reassert these defenses with more specificity.

Plaintiffs' motion to dismiss defendant's twelfth affirmative defense reserving the right to amend the answer is granted for failure to state a defense. CPLR 3025 governs defendant's right to amend its pleading "at any time by leave of court or by stipulation of all parties."

Defendant is granted leave to file a motion for a second amended answer. The motion must be filed within 60 days of this Order and must be accompanied by a red-lined version of the Amended Answer demonstrating the proposed changes to the pleading. The parties are encouraged to consent to an amended answer to avoid the need for further motion practice on this issue.

Accordingly, it is hereby

ORDERED that the motion to dismiss by plaintiffs is granted as to the second, third, fourth, fifth, sixth, eighth, ninth, tenth, eleventh, and twelfth affirmative defenses, and granted in part as to the seventh affirmative defense, and those defenses are dismissed; and it is further

ORDERED that all counsel shall appear on November 21, 2022 at 12:00p.m. for a status conference. The appearance will be via Microsoft Teams.

Dated: September 7, 2022

BARRY R. OSTRAGER, 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