SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARY V. ROSADO** **PART** **33**

Justice

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D&D BUILDING COMPANY LLC

Plaintiff,

- v -

AFC VENTURES CORP.,

Defendant.

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INDEX NO. 157703/2020

MOTION DATE 02/14/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 44, 45, 46, 47, 49, 51, 52, 55

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Upon the foregoing documents, and oral argument, which took place on August 9, 2022 where Simon Reiff, Esq. appeared for D&D Building Company LLC ("Landlord") and Jeremy J. Krantz, Esq. appeared for AFC Ventures Corp. ("Tenant"), Landlord's motion seeking summary judgment on its monetary claims is granted in part and denied in part, and Tenant's cross-motion seeking to dismiss Landlord's first cause of action pursuant to CPLR §§ 3211(a)(7) and 3212 is withdrawn as moot (NYSCEF Doc. 49).

I. Procedural Background

Landlord filed its summons and complaint on September 21, 2020 seeking (1) to eject Tenant; (2) money damages for rent arrears and (3) attorneys' fees (NYSCEF Doc. 1). Tenant failed to file a responsive pleading, so Landlord moved for default judgment on January 12, 2021 (NYSCEF Doc. 6). On January 28, 2021, the parties entered a stipulation where Landlord agreed to withdraw its motion for default judgment and allowed Tenant an extension of time to file an Answer (NYSCEF Docs. 15-16). Tenant filed its answer on February 2, 2021 (NYSCEF Doc. 17). Landlord then filed the instant action seeking summary judgment on all three of its causes of action

and seeking dismissal of Tenant's affirmative defenses on January 19, 2022 (NYSCEF Doc. 20). Tenant cross-moved seeking to dismiss Landlord's first cause of action seeking ejectment (NYSCEF Doc. 29). Pursuant to stipulation entered on April 20, 2022, and after briefing on this motion was complete, Tenant agreed to surrender possession of the premises to Landlord and provide a $100,000.00 payment (NYSCEF Doc. 48).

At oral argument, the parties confirmed that Landlord regained possession of the premises. Therefore, Tenant's cross-motion is now moot, and Landlord no longer seeks summary judgment on its first cause of action seeking ejectment. However, still pending is Landlord's motion for summary judgment on its second and third causes of action and dismissal of Tenant's affirmative defenses.

II. Factual Background

Landlord and Tenant entered a ten-year lease (the "Lease") whereby Landlord leased Showroom 1707 at 979 Third Avenue, New York, New York, 10022 (the "Premises") (NYSCEF Doc. 24 at ¶ 5). According to the affidavit of Morris Sutton, the Vice-President of Tenant, the building in which the Premises is located is known as the "Decoration and Design Building", and the building operates like a mall where customers come to view multiple decoration and design showrooms (NYSCEF Doc. 30 at ¶¶ 28-31). Indeed, the Lease stated that the Premises were to be used for the "display and sale of furniture, textiles, lighting and related accessories, at wholesale and to the trade only and incidental office use in connection with Tenant's business." (NYSCEF Doc. 2 at § 4.01).

The Lease required Tenant to pay rent, additional rent in the form of a real estate tax escalation charge, and electrical charges (*id.* at §§ 3.01, 22.01, and 23.01). Landlord alleges that Tenant ceased paying Landlord its obligations under the Lease beginning in April of 2020

(NYSCEF Doc. 1 at ¶ 10). Landlord further alleges that it served Tenant a rent demand on June 19, 2020 demanding $73,647.74 in unpaid base and additional rent or to surrender possession of the Premises (*id.* at ¶ 11). Landlord alleges that Tenant did not pay the rent demand leading to initiation of this action in September 2020. The Lease expired on July 31, 2021, with $583,051.98 owed in unpaid rent (NYSCEF Doc. 24 ¶ 16). Landlord also alleges it is owed unpaid use and occupancy in the amount of $549,466.73 for the months of August 2021 through January 2022 (*id.*) Tenant argues its obligations under the Lease were excused due to the Covid-19 pandemic and accompanying executive orders, and due to Landlord barring customers from entering the building (NYSCEF Doc. 30 at ¶¶ 28, 35-37).

III. Discussion

A. Applicable Standards

The standard of review on a motion to dismiss affirmative defenses pursuant to CPLR § 3211(b) is similar to that used under CPLR §3211(a)(7) (*87th Street Realty v Mulholland*, 62 Misc3d 213, 215 [Civ Ct, New York City 2018]). The movant bears the burden of establishing the defense or counterclaim is without merit as a matter of law (*534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 541 [1st Dept 2011]). This burden is a heavy one (*Alpha Capital Anstalt v General Biotechnology* Corporation, 191 AD3d 515 [1st Dept 2021]). The allegations in the answer must be liberally construed and viewed in the light most favorable to the non-movant (*182 Fifth Ave v Design Dev. Concepts*, 300 AD2d 198, 199 [1st Dept 2002]). It is inappropriate to dismiss a defense where there remain questions of fact requiring trial (*Granite State Ins. Co. v Transatlantic Reins. Co.*, 132 AD2d 479, 481 [1st Dept 2015]).

"Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact." (*Vega v*

Restani Const. Corp., 18 NY3d 499, 503 [2012]). The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. *See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (*see Banco Popular North Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]). To show prima facie entitlement to summary judgment on a breach of contract claim, Plaintiff must prove the existence of a contract, Plaintiff's performance, Defendant's breach, and damages (see *Markov v Katt*, 176 AD3d 401, 402 [1st Dept 2019]).

B. Affirmative Defenses

Landlord asserts that all eleven of Tenant's affirmative defenses should be dismissed. Tenant's first affirmative defense is that the Complaint is jurisdictionally defective because it fails to properly describe the premises and lacks a floor plan. This cause of action must be dismissed because the Lease for the premises is incorporated and attached as an exhibit to the Complaint, so there can be no doubt that the premises at issue are properly described (NYSCEF Doc. 2).

The second and sixth affirmative defenses (which are duplicative of each other) state that the amount of money sued for in the Complaint is not owed by the Tenant to the Landlord because some of the money sought has been paid to Landlord. Since the facts of the docket show that Tenant has stipulated to pay $100,000.00 to Landlord, this affirmative defense does have merit and should not be dismissed (NYSCEF Doc. 49).

The third affirmative defense asserts that Landlord has failed to state a cause of action. However, Tenant only provides one short and conclusory sentence as to this affirmative defense. The Court finds this affirmative defense to be without merit as Landlord has sufficiently alleged causes of action for breach of contract and attorneys' fees.

The fourth and fifth affirmative defenses assert that due to *force majeure* and governmental restrictions, Tenant is excused from its obligations under the terms of the Lease. However, the lease does not contain a *force majeure* clause, and this Court may not add or imply such a clause (*Fives 160th, LLC v Zhao*, 2014 AD3d 439, 440 [1st Dept 2022] [holding tenant cannot assert force majeure to excuse performance under lease due to Covid-19 where there is no *force majeure* clause in lease]). Although Tenant claims the pandemic and resulting executive orders frustrated the purpose of the lease and made it impossible for Tenant to use the Premises for the sole purpose of the lease, this is objectively contradicted by Tenant's own affidavit in opposition to Landlord's motion for summary judgment. In that affidavit, the Vice-President of Tenant admits that "between on or about June 8, 2020 through June 22, 2020, New York City non-essential businesses such as AFC were permitted to reoccupy their spaces" (NYSCEF Doc. 30). Therefore, although Tenant's business was temporarily shuttered and disrupted by the pandemic, since Tenant's business reopened shortly after the pandemic began, the purpose of the lease was not frustrated, and Tenant's performance was not rendered impossible (*558 Seventh Ave. Corp. v Times Square Photo Inc.*, 194 AD3d 561, 561-562 [1st Dept 2021]). Thus, both the fourth and fifth affirmative defenses should be dismissed.

The seventh affirmative defense claims that the complaint fails to set forth with specificity the money Tenant owes Landlord and fails to detail how the amounts alleged were calculated. The Court finds this affirmative defense to be conclusory and meritless, as in its Complaint, Landlord

is not required to set forth with specificity the money Tenant owes Landlord, but merely put Tenant on notice of the claims Landlord is alleging against Tenant. The specific amounts owed and how those amounts are calculated may be established through discovery or admissible evidence on a motion for summary judgment. Therefore, the seventh affirmative defense is dismissed.

The eighth affirmative defense claims that all causes of action must be dismissed because the allegations asserted in the first cause of action and the second cause of action contradict each other. Since the first cause of action has been withdrawn pursuant to stipulation, this affirmative defense is now moot and should be dismissed.

The ninth affirmative defense states that Landlord failed to adequately plead its corporate status as required by CPLR § 3015(b) and therefore the complaint should be dismissed. The Court deems dismissal of the Complaint merely because of a technical pleading omission to be unwarranted, especially when Tenant and Landlord had a nearly decade long business relationship and know of Landlord's corporate status. Moreover, the Court finds that Landlord has partially complied as its status as an "LLC" is readily apparent from the caption (*see also* CPLR § 2001 [at any stage of an action, so long as a substantial right of a party is not prejudiced, a court may disregard a mistake, omission, defect or irregularity]).

The tenth cause of action, which asserts that Landlord is precluded from seeking the money sued for in the Complaint pursuant to the Lease, is similarly conclusory and a mere sentence long. Tenant provides no further facts or allegations as to what basis Landlord is estopped or precluded from seeking the rent arrears. Thus, this cause of action is dismissed.

Finally, the eleventh cause of action, which pertains to Landlord's first cause of action seeking ejectment, is moot and should be dismissed as Landlord no longer is pursuing its first cause of action pursuant to the stipulation between the parties (NYSCEF Doc. 49).

C. Summary Judgment

Landlord has met its prima facie burden on its breach of contract claim. The existence of the Lease is not in dispute. Landlord performed its obligations under the Lease by making the premises available. Tenant does not dispute that it has not paid rent thereby breaching its obligations under the Lease, and Landlord has suffered damages by not receiving the rental income expected per the terms of the Lease (*Thor Gallery at S. Dekalb, LLC v Reliance Mediaworks (USA) Inc.*, 143 AD3d 498 [1st Dept 2016] [landlord entitled to summary judgment where it established the existence of the lease, tenant's failure to pay rent, and calculation of amounts due under lease]).

Contrary to Tenant's contention, the Court finds that the Cherniak Affidavit lays a proper foundation for the admissibility of the rental arrears ledger to be admitted into evidence under the business records exception. Mr. Cherniak testified via sworn affidavit that the ledger was made in the ordinary course of business by the accounting department of the Landlord's managing agent, and that he has personal knowledge of the record as the accounting department is under his direct supervision (NYSCEF Doc. 24 at ¶ 16). As such, Landlord has met its prima facie burden and the burden now lies with Tenant to show a genuine issue of material fact to defeat Landlord's motion for summary judgment.

As previously discussed, Tenant's *force majeure*, impossibility, and frustration of purpose arguments do not suffice to deny Landlord summary judgment pursuant to precedent, the absence of a *force majeure* clause in the Lease, and the fact that Morris Sutton admitted in his affidavit that Tenant had access to the premises. As such, Tenant fails to raise a triable issue of fact as to the $549,466.73 owed in rental arrears from April 2020 through the Lease's expiration on July 31, 2021.

Tenant disputes Landlord's demand for use and occupancy in the amount of $549,466.73 for the months of August 2021 through January 2022 by asserting the amount sought is an unenforceable penalty or not supported by evidence since there was no appraiser to assert that the amount sought is fair market value. Landlord rebuts this argument by pointing to the clear, plain, and unambiguous Lease language, to which Tenant agreed. The Lease states in §28.02:

> "[i]n the event Tenant shall remain in possession of the Demised Premises after the expiration or other termination of the term of this Lease, such holding over shall not constitute a renewal or extension of this Lease. Landlord may, at its option, elect to treat Tenant as one who is not removed at the end of the term, and thereupon be entitled to all of the remedies against Tenant provided by law in that situation or Landlord may elect to construe such holding over as a tenancy from month-to-month, subject to all of the terms and conditions of this Lease, except as to the duration thereof, and the minimum rent shall be due, in either of such events, at a monthly rental rate equal to one and one half times for the first thirty (30) days and thereafter two (2) times, the monthly installment of minimum rent which would otherwise be payable for such month, together with any and all additional rent."

Since Tenant remained in possession past the expiration of the Lease, pursuant to the terms of the Lease, Tenant is liable to Landlord for one and one-half times the rent for the first month and two times the rent for every month thereafter, plus all additional rent. A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms (*Center for Specialty Care, Inc. v CSC Acquisition I, LLC*, 185 AD3d 34 [1st Dept 2020]). This rule has even greater force in the context of real property transactions, in which commercial certainty is of paramount concern, especially where the instrument was negotiated between sophisticated business entities (*id.*). Unambiguous terms of a lease will not be disregarded for the purposes of alleviating a hard or oppressive bargain (*George Beck Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 219 [1978]). Moreover, a liquidated damages clause providing for two times the existing rent in the event of a holdover is not an unenforceable penalty (*Tenber Associates v Bloomberg L.P.*, 51 AD3d 573, 574 [1st Dept 2008]). Thus, pursuant to the plain and

unambiguous terms of the Lease, existing precedent, and the undisputed facts that Tenant agreed to the Lease and remained in the Premises despite the Lease terminating without paying any rent, Landlord is entitled to $549,466.73 in use and occupancy for the months of August 2021 through January 2022.

Tenant also disputes the amount owed for the real estate tax escalation ("RET") charges and the electrical charges. As Tenant points out, there are no records reflecting the RET charges to the building, nor any records of RET charges delivered to Tenant as required by § 22.01(b) of the Lease. Moreover, Landlord has not proffered any testimony in support of its motion for summary judgment stating that RET charges were delivered to the Tenant as required by § 22.01(b) of the Lease. Therefore, Landlord has not established its prima facie burden showing breach of the Lease for failure to pay RET charges as Landlord has not set forth adequate proof of its own performance under the Lease, nor is there sufficient documentary evidence constituting the amount of the RET Charges. The same goes for the electric charges sought by Landlord, as there has been no documentation setting forth the basis for the electric charges. Based on the evidence proffered, Landlord has not met its burden on its motion for summary judgment seeking the RET and electric charges.

Finally, Landlord is granted summary judgment on its third cause of action for attorneys' fees. Lease section 16.06 expressly allows landlord to collect attorneys' fees in addition to arrears in rent and additional rent. Because Landlord initiated this proceeding to collect arrears in rent and additional rent, and to eject Tenant from the premises, and Landlord has succeeded in regaining possession of the premises and obtaining a judgment for rent arrears, Landlord is entitled to an award of reasonable attorneys' fees. Therefore, Landlord's motion for summary judgment on its third cause of action is granted.

Accordingly, it is hereby

ORDERED that AFC Ventures Corp motion seeking to dismiss D&D Building Company LLC's first cause of action seeking ejectment is withdrawn as moot pursuant to the stipulation entered between the parties on April 21, 2022 (NYSCEF Doc. 49); and it is further,

ORDERED that AFC Ventures Corp.'s first, third, fourth, fifth, seventh, eighth, ninth, tenth, and eleventh affirmative defenses are dismissed; and it is further,

ORDERED that Landlord D&D Building Company LLC's motion for summary judgment on its second cause of action seeking damages related to Tenant's breach of contract is granted in part, and the Clerk is directed to enter judgment against AFC Ventures Corp and in favor of D&D Building Company LLC in the amount of $1,073,658.93, for rent from April 2020 through July 2021 and holdover use and occupancy from August 2021 through January 2022, plus interest at the statutory rate as calculated by the Clerk of the Court, plus costs, and disbursements as calculated and taxed by the Clerk of the Court; and it is further

ORDERED that D&D Building Company LLC's motion for summary judgment on its second cause of action seeking damages related to AFC Ventures Corp's breach of contract is denied without prejudice to the extent it seeks real estate tax escalation and electrical charges due; and it is further

ORDERED that this matter be set down for a hearing to determine the amount, if any, due D&D Building Company LLC in further use and occupancy that may have accrued from February 2022 until AFC Ventures Corp's surrender of the Premises, at which time it will also be determined the amount of damages owed D&D Building Company LLC from AFC Ventures Corp's failure to pay real estate tax escalation charges and electrical charges; and it is further

ORDERED that D&D Building Company LLC's motion for summary judgment on its third cause of action against AFC Ventures Corp seeking attorneys' fees is granted; and it is further

ORDERED that the portions of D&D Building Company LLC's action that seeks the recovery of attorney's fees, use and occupancy from February 2022 through June 15, 2022, and arrears for real estate tax escalation charges and electrical charges against AFC Ventures Corp, is severed and referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for the D&D Building Company LLC shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,[1] upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that such service upon the Special Referee 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)].

This constitutes the decision and order of the Court.

10/20/2022
DATE

Mary V Rosado
HON. MARY V. ROSADO, 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	x REFERENCE

[1] Available on the Court's website at www.nycourts.gov/supctmanh under the "References" link on the navigation bar.