

<b>150 Greene Realty LLC v Chelsea Morning Green St. LLC</b>
2022 NY Slip Op 33678(U)
October 25, 2022
Supreme Court, New York County
Docket Number: Index No. 653583/2020
Judge: Louis L. Nock
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

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

*Justice*

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150 GREENE REALTY LLC,

Plaintiff,

- v -

CHELSEA MORNING GREEN STREET LLC,

Defendant.

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INDEX NO. 653583/2020

MOTION DATE 10/05/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, and 30

were read on this motion for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.

Upon the foregoing documents, it is hereby ordered that plaintiff’s motion for partial summary judgment (Motion Seq. No. 001) is decided in accordance with the following memorandum.

**Background**

Plaintiff 150 Greene Realty LLC (“Plaintiff”) asserts three causes of action against Chelsea Morning Green Street LLC (“Defendant”) for unpaid rent (seeking \$383,703.26), breach of the lease requirement to leave the premises in good order (seeking \$30,000), and attorneys’ fees. Defendant asserts six affirmative defenses. Plaintiff now moves for partial summary judgment on the first cause of action for unpaid rent.

Plaintiff and Defendant entered into a lease on January 9, 2019, for the term of January 1, 2019, through December 31, 2023 (Lease, NYSCEF Doc. No. 11). The leased premises, which are commercial premises, is located at 150 Greene Street, New York, New York (Complaint, NYSCEF Doc. No. 2 ¶ 3). As alleged, and as attested to in the Plaintiff’s supporting affidavit

(NYSCEF Doc. No. 10), on April 1, 2020, Defendant defaulted on its rent obligations, and on July 31, 2020, Defendant vacated the premises (Doc. No. 2 ¶¶ 6, 8).

Defendant “sold high-end clothing and merchandise, at discounted prices, through weekly advertised ‘flash sales’” that would attract substantial amounts of customers (Opposition Affidavit, NYSCEF Doc. No. 18 ¶¶ 6-12; *see*, Opposition Memorandum, NYSCEF Doc. No. 23 at 4). When the 2020 COVID-19 pandemic started in March 2020, Defendant closed its doors for three months due to government mandates (Opposition Affidavit, NYSCEF Doc. No. 18 ¶ 19). In June 2020, Defendant decided that its “crowd-based business would no longer be viable” and permanently vacated the premises after concerns from neighboring residents about the crowds (NYSCEF Doc. No. 18 ¶¶ 14-25; *see*, NYSCEF Doc. No. 23 at 4-5).

Plaintiff now moves for summary judgment on its first cause of action for unpaid rent and Defendant asserts three affirmative defenses including impossibility of performance, frustration of purpose, and the action being precluded by the lease’s casualty clause.

#### **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

Defendant argues that impossibility of performance and frustration of purpose are viable defenses to a claim for unpaid rent when such impossibility or frustration is alleged to have been caused by COVID-19 pandemic circumstances. However, the Appellate Division, First Department, has held that a “tenant was not completely deprived from using premises as intended under lease agreements by temporary COVID-19 restrictions” and, thus, the doctrine of frustration of purpose is inapplicable (*The Gap, Inc. v 44-45 Broadway Leasing Co. LLC*, 206 AD3d 503 [2022]). The Appellate Division has also held that when “restrictions did not render it objectively impossible for tenant to operate its retail clothing stores” the doctrine of impossibility is unavailable as an affirmative defense to tenant’s rent obligations under the lease (*id.*). Furthermore, “even if the reopening restrictions made” a tenant’s ability to provide a “store experience more difficult, the pandemic did not render their performance impossible, as ‘the leased premises were not destroyed’” (*The Gap, Inc., supra*, at 504).

Here, although Defendant was subject to the three-month restriction to opening its store, this was a temporary restriction. Although Defendant states that it decided not to re-open on account of what it perceived as community concern (*see*, Opposition Memorandum, NYSCEF Doc. No. 23 at 4-5), this court must apply the Appellate Division’s aforementioned test requiring Defendant to be “completely deprived” of the leasehold or “objectively impossible” for it to operate its business (*The Gap, Inc., supra*). The defenses of impossibility of performance and frustration of purpose do not excuse Defendant from its obligations under the lease, per the guidance handed down by the Appellate Division, First Department.

Defendant next argues that a casualty clause in the lease precludes summary judgment for the plaintiff. The casualty clause is as follows:

If the demised premises are totally damaged or rendered wholly unusable by fire or other casualty, then the rent and other items of additional rent as hereinafter expressly provided shall be proportionately paid up to the time of the casualty and thenceforth shall cease until the date when the demised premises shall have been repaired and restored by Owner (or sooner reoccupied in part by the Tenant then rent shall be apportioned as provided in subsection (b) above).

(Lease, NYSCEF Doc. No. 11 ¶ 9.) Defendant posits that the premises were wholly unusable by casualty within the meaning of the clause due to the community concern referenced hereinabove.

However, Defendant's choice to not re-open on account of such concern does not mean that the premises were objectively rendered "wholly unusable." Additionally, the lease provides:

Owner and Tenant shall each be excused for the period of any delay in the performance of any obligations hereunder except for the payment of rent and additional rent, when prevented from so doing by cause or causes beyond either party's control, which shall include, without limitation, all labor disputes, civil commotion, war, warlike operations, invasion, rebellion, hostilities, military or usurped power, sabotage, governmental regulations or controls, fire or other casualties or inability to obtain any material or service or through Acts of God.

(Lease, NYSCEF Doc. No. 11 ¶ 83.) The lease is clear that government regulations or other interruptions do not excuse rent obligations.

The Answer additionally asserts affirmative defenses of failure to state a cause of action; statute of limitations; laches; and waiver or estoppel (Answer, NYSCEF Doc. No. 4). However, Defendant does not treat or explain these defenses in its opposition papers. "By his silence in his opposition brief, defendant concedes" that these defenses should be dismissed (*Steffan v Wilensky*, 150 AD3d 419, 420 [1<sup>st</sup> Dept 2017]). But distinct of Defendant's silence on those purported affirmative defenses, the court is in concurrence with Plaintiff's counsel's observations as to the substantive non-merit of said defenses, as explicated in Plaintiff's counsel's affirmation (NYSCEF Doc. No. 7 ¶¶ 48-55).

Turning to the matter of damages for the first cause of action for unpaid rent, Defendant argues that Plaintiff has not sufficiently demonstrated the arrears owed without submission of a

ledger – although Plaintiff’s principal submits his affidavit testimony regarding the arrears (*see*, NYSCEF Doc. No. 10) – and further argues that there may be an issue of Plaintiff attempting to collect double rent for the month of August 2020 (\$76,308) after immediately reletting the premises (*see*, NYSCEF Doc. No. 23 at 5-6). Plaintiff, in response, asserts in an affidavit that the Premises were not re-let until September 2020 and, therefore, Defendant is wrong in asserting that double rent is being sought for the month of August 2020 (*see*, Reply Affidavit, NYSCEF Doc. No. 24 ¶ 17). The conflicting assertions regarding the state of the premises in August 2020 constitute an issue of fact regarding August 2020 rent, precluding summary judgment on that aspect of the claim. Plaintiff will have an opportunity to try to prove that aspect of its claim at trial.

Plaintiff seeks the sum of \$2,163.26 for Defendant’s Real Estate Tax escalation obligation (*see*, Lease, NYSCEF Doc. No. 11 ¶ 43), which is calculable at 21% of the difference between the current year and base year Real Estate Tax obligation for the premises. Plaintiff’s managing agent performed the calculation in its letter to Defendant dated June 17, 2020 (NYSCEF Doc. No. 14), by noting the base amount of \$188,115 for base tax year commencing July 1, 2018, and ending June 30, 2019 (*see, id.*, at unnumbered p. 2). The New York City Finance Department’s itemization of current year tax obligation is cited at \$196,449 (*see, id.*, Exhibit). The difference between \$196,449 (current year obligation) and \$188,115 (base year obligation) comes to \$8,334. Applying the lease’s 21% rate to that sum arrives at 1,750.14.<sup>1</sup> The court includes that sum in its within grant of summary judgment for the plaintiff.<sup>2</sup>

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<sup>1</sup> The difference between Plaintiff’s requested sum of \$2,163.26 for this element of the claim, and the court’s lesser sum of \$1,750.14 grounded in the Department of Finance figures, is \$413.12, which shall be reflected in the decretal calculation at the conclusion of this decision and order.

<sup>2</sup> Defendant touts as an issue of the fact (Opp. Mem. [NYSCEF Doc. No. 23] at 5), an assertion by Plaintiff’s managing agent that Plaintiff actually *paid* the current year taxes (and, no less, in a greater sum than the Finance Department’s invoiced sum of \$196,449) (*see*, NYSCEF Doc. No. 14 at unnumbered p. 2 [stating it as 198,416.24]). It is a red herring. The lease’s 21% tax escalation obligation of the tenant is not conditioned on the landlord’s

Lastly, Defendant contends that it is entitled to a credit related to its purchase of permits for a build-out of the leased space (*see*, NYSCEF Doc. No. 23 at 5-6). Defendant submits three checks totaling \$7,968.02 that it paid an architect to obtain permits for the buildout (Checks, NYSCEF Doc. No. 22, Affidavit in Opposition, NYSCEF Doc. No. 18 ¶ 54). The lease states that Defendant is entitled to a build-out rent credit “subject to Owner’s approval of the Tenant Build Out Work Plans” (Lease, NYSCEF Doc. No. 11 ¶ 41 [D]). However, said build-out rent credit provision of the lease conditions the credit on completion of the build-out within the timeframe of 24 months from the commencement date of the lease (*see, id.*). Defendant’s assertion of entitlement to a rent credit is, by its nature, an affirmative defense to Plaintiff’s rent claim (*see*, Answer [NYSCEF Doc. No. 4], Third Affirmative Defense) and, as such, places the burden of proving satisfaction of the pre-condition squarely on Defendant (*e.g., Brignoli v Balch, Hardy & Scheinman, Inc.*, 178 AD2d 290 [1<sup>st</sup> Dept 1991]). Defendant submits no proof that it satisfied the completion deadline condition for the earning of a build-out credit. Thus, the court rejects Defendant’s assertion of entitlement to a build-out credit in opposition to summary judgment for Plaintiff.

Accordingly, the court grants Plaintiff’s motion for summary judgment on the first cause of action as hereinafter set forth, except to the extent of its claim for rent arrears for the month of August 2020, which issue is severed for trial along with the remaining claims asserted in the complaint (second and third causes of action).

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showing of actual *payment* of the taxes; just on the amount of the tax obligation. There is no necessity to try any issue concerning what, if anything, Plaintiff actually paid the Department of Finance. The Department’s bill for \$196,449 alone is sufficient for this aspect of Plaintiff’s claim.

Accordingly, it is hereby

ORDERED that Plaintiff's motion for partial summary judgment on its first cause of action is granted to the extent that the Clerk of the Court shall enter judgment in favor of plaintiff 150 Greene Realty LLC and against defendant Chelsea Morning Green Street LLC in the principal sum of \$306,982.14, with interest accrued thereon at the statutory rate from the date of default – April 1, 2020 – and continuing to so accrue until the date of satisfaction of judgment; and it is further

ORDERED that the remaining issues in this case, including the question of plaintiff's entitlement to August 2020 rent, together with the second and third causes of action asserted in the complaint, shall be severed for trial or evidentiary hearing; and it is further

ORDERED that a status conference will be held before the undersigned at the Courthouse located at 111 Centre Street, Room 1166, New York, New York, on November 17, 2022, at 10:00 a.m.

This will constitute the decision and order of the court.

ENTER:



<u>10/25/2022</u>				<u>LOUIS L. NOCK, J.S.C.</u>
DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				OTHER
				REFERENCE