SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

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D&D BUILDING COMPANY LLC

Plaintiff,

- v -

206 E. 59TH ST. GARAGE CORP.,

Defendant.

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INDEX NO. 155778/2020

MOTION DATE 09/07/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63

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

Upon the foregoing documents, Plaintiff D&D Building Company LLC's ("Landlord") motion for summary judgment against Defendant 206 E. 59th Street Garage Corp. ("Tenant") is granted.

I. Procedural Background

Landlord filed its Complaint against Tenant on July 28, 2020, seeking ejectment, a money judgment for rent arrears, and attorneys' fees (NYSCEF Doc. 1). Tenant filed its Answer on October 5, 2020, asserting fifteen affirmative defenses, the vast majority of which assert, in different manifestations, frustration of purpose and impossibility due to Covid-19 (NYSCEF Doc. 5). On May 10, 2021, Landlord filed a motion seeking use and occupancy *pendente lite* in the amount of $32,814.94 (NYSCEF Doc. 19). The motion was resolved via stipulation, wherein Tenant agreed to pay Landlord $35,428.67 per month beginning September 10, 2021 until this action was finally resolved by adjudication or stipulation (NYSCEF Docs. 34-35). These payments for use and occupancy were to be credited against amounts Tenant may owe under the Lease (*id.*) The note of issue was filed on March 31, 2022 (NYSCEF Doc. 38). Landlord made this motion

for summary judgment on August 16, 2022 (NYSCEF Doc. 39). Landlord is seeking dismissal of Defendant's affirmative defenses pursuant to CPLR § 3211(b), a judgment of possession and issuance of a warrant of ejectment on its first cause of action, a money judgment in the amount of $538,071.45, and an award of attorneys' fees (*id.*).

II. Factual Background

Landlord and Tenant entered into a written lease on January 23, 1984, commencing on February 1, 1984, and expiring on January 31, 2029 (the "Lease") (NYSCEF Doc. 2). The Lease was for a parking garage on the ground floor, cellar, sub-cellar floor 1, and sub-cellar floor 2 at 210 East 59th Street (the "Premises") (*id.*). Tenant was obligated to pay base rent, electric inclusion charges as additional rent, electric escalation charges as additional rent, and water charges as additional rent (*id.*). Allegedly, Tenant defaulted in payment of base rent and additional rent beginning in April 2020 (NYSCEF Doc. 1 at ¶ 11).

On June 4, 2020, Landlord sent Tenant a rent demand requesting $98,471.89, which represented unpaid base and additional rent then due and owing (NYSCEF Doc. 3). The rent demand provided Tenant with the option to either pay the amounts owed in full by June 25, 2020 or surrender possession of the Premises (*id.*). On June 19, 2020, Tenant paid $20,000 to Landlord but informed Landlord that Tenant was having difficulty projecting future revenue and that committing to a payment plan was "problematic" (NYSCEF Doc. 11). Thus, Landlord initiated this lawsuit on July 28, 2020 (NYSCEF Doc. 1).

Since initiating of the lawsuit, Tenant's financial documents produced in discovery show that Tenant's profits have increased post-pandemic from their pre-pandemic levels (NYSCE Doc. 51). Tenant remains in possession of the premises, and the rent arrears have purportedly accrued to $538,071.45 (NYSCEF Doc. 40 at ¶ 38).

In its memorandum of law in opposition to Landlord's motion for summary judgment, Tenant argues that Landlord is in breach of paragraph 59 of the Lease and therefore summary judgment is inappropriate. Paragraph 59 of the Lease reads as follows:

> If at any time or times during the term of the Lease, the rents reserved in this lease shall not be fully collectable for reason of any order or regulation, or direction of a public officer or body pursuant to law then Tenant shall enter into such agreements and take such steps as Landlord may legally request to enable Landlord to collect the maximum rents which may from time to time during the continuance of such legal rent restriction be legally permissible (but not in excess of the amounts reserved under the Lease).

Tenant argues that because of executive orders issued in March of 2020, paragraph 59 of the Lease was invoked and excused Tenant's responsibility to pay full rent (NYSCEF Doc. 31). However, Tenant concedes in its memorandum of law that the executive orders issued by Governor Cuomo in March of 2020 that parking garages such as the one Tenant operated were considered essential transportation infrastructure which was allowed to remain open (*id.*). Tenant further asserts that paragraph 59 has a condition which requires Landlord to negotiate a new rent with Tenant when an executive order affects Tenant's ability to pay rent, and since Landlord never negotiated a new rent, Tenant is not required to pay.

In response, Landlord refutes Tenant's interpretation of paragraph 59 (NYSCEF Doc. 32). Landlord argues that paragraph 59 only applies to a law that abates or regulates rent, not orders that may adversely impact Tenant's business (*id.*). Landlord also points out that Tenant has not shown any regulation or executive order in response to Covid-19 that eliminated a commercial tenant's obligation to continuing paying rent.

III. Discussion

A. Landlord's CPLR § 3211(b) Motion to Strike Tenant's Affirmative Defenses

The standard of review on a motion to dismiss 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]). However, conclusory and boilerplate affirmative defenses should be dismissed (*Bankers Trust Co. v Fassler*, 49 AD2d 855[1st Dept 1975]; *366 Audubon Holding, LLC v Morel*, 22 Misc.3d 1108[A] [Sup. Ct., NY County 2008]).

Tenant's first through fourth, eighth, and fifteenth affirmative defenses all in one way or another deal with the doctrines of frustration of purpose, impossibility, or intervening acts due to Covid-19 and accompanying executive orders (NYSCEF Doc. 5 at ¶¶ 31-34; 38; 45-50). Although Tenant claims the pandemic and resulting executive orders frustrated the purpose of the lease and made it impossible for Tenant to perform, this is objectively contradicted by Tenant's own memorandum of law where Tenant concedes that its business, namely a parking garage, was allowed to stay open and was an essential business (NYSCEF Doc. 54). The purpose of the lease was not frustrated, and Tenant's performance was not rendered impossible because Tenant was never prohibited, by law or the landlord, from operating its parking garage business (*558 Seventh*

Ave. Corp. v Times Square Photo Inc., 194 AD3d 561, 561-562 [1st Dept 2021]). Therefore, these affirmative defenses should all be dismissed.

Tenant's fifth affirmative defense asserting its performance is excused for failure of consideration is similarly dismissed. Besides this affirmative defense being conclusory, boilerplate, and a mere sentence long, it is well established that even the slightest consideration is sufficient to support the most onerous contractual obligations (*Mencher v Weiss*, 306 NY 1 [1953]; *Roffe v Weil*, 161 AD2d 509, 510 [1st Dept 1990]). Here, it is undisputed Tenant has full use of the parking garage at all times, therefore, Tenant's contention that its obligations were excused for lack of consideration are wholly without merit.

Tenant's sixth affirmative defense which claims Landlord has not sustained any losses or damages because of the conduct alleged in the Complaint is similarly meritless. Although Tenant asserts in this affirmative defense that Covid-19 governmental orders and provisions of the Lease toll the collection of rent payment, this is completely conclusory, and, upon Landlord's motion, Tenant has failed to proffer any evidence showing that its rent was tolled or abated. While Tenant points to paragraph 59 of the Lease to assert it is entitled to a rent abatement, the Court finds this argument to be contrary to the clear and unambiguous terms of the lease (*Center for Specialty Care, Inc. v CSC Acquisition I, LLC*, 185 AD3d 34 [1st Dept 2020] [reciting the axiomatic principle of New York contract law that a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms').

Paragraph 59 of the Lease plainly and clearly states that if "the rents reserved in this lease shall not be fully collectable for reason of any order or regulation" then Landlord may renegotiate rent with Tenant "during the continuance of such legal rent restriction[s]" (NYSCEF Doc. 2 at ¶ 59). There were no legal rent restrictions during Tenant's months of non-payment. Indeed, there

is myriad precedent enforcing commercial leases which obligate tenants to pay rent during the Covid-19 pandemic. 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]). The rule in favor of enforcing complete, clear and unambiguous contracts 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 (*Center for Specialty Care, Inc. v CSC Acquisition I, LLC*, 185 AD3d 34 [1st Dept 2020]). As paragraph 59 clearly states that it comes into effect "during the continuance of legal rent restrictions" and there were no legal rent restrictions for commercial tenants during the Covid-19 pandemic, Tenant's sixth affirmative defense, like all other affirmative defenses relying on paragraph 59 of the Lease, must be dismissed.

Tenant's remaining seventh, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth affirmative defenses are all conclusory, boilerplate, and a mere sentence long (NYSCEF Doc. 5 at ¶¶37, 39-43). These affirmative defenses respectively plead material breach; breach of the covenant of good faith and fair dealing; waiver, estoppel and/or laches; prescriptive or constructive eviction; unclean hands and/or promissory estoppel; lack of causation, and unconscionability (*id.*). None of these affirmative defenses are pled with even the slightest bit of factual or legal support. Nor have these affirmative defenses been substantiated at all in Tenant's opposition to Landlord's motion. Accordingly, these affirmative defenses are each dismissed (*366 Audubon Holding, LLC v Morel*, 22 Misc.3d 1108[A] [Sup. Ct., NY County 2008] [dismissing multiple affirmative defenses which were boilerplate, conclusory, and lacked factual and legal support]). Thus, the branch of Landlord's motion which seeks to strike Tenant's affirmative defenses is granted in its entirety.

B. Landlord's CPLR § 3012 Motion for Summary Judgment

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]).

Landlord has met its prima facie burden. As a preliminary matter, Tenant, although acknowledging Landlord's statement of material facts, declined to file a response to Landlord's statement of material facts. Moreover, even disregarding Tenant's omission, there is no dispute as the existence and validity of the Lease as Tenant actually has asserted affirmative defenses based on certain provisions of the Lease. Further, it is undisputed that Landlord has performed under the lease, as Tenant has remained in possession of the premises and has been turning a profit by operating its garage business (NYSCEF Doc. 51). Finally, Landlord has shown Tenant breached the Lease by failing to pay rent and additional rent, and Landlord has shown damages by not

receiving amounts due and owing per the terms of the Lease (NYSCEF Doc. 43). Since Landlord has proven the existence of the Lease, Landlord's performance under the Lease, Tenant's breach, and Landlord's damages, the burden now shifts to Tenant to establish the existence of material issues of fact which require a trial.

The only material issue of fact Tenant raises in opposition to Landlord's motion for summary judgment is whether or not Landlord breached the contract by failing to negotiate a lower rent under Paragraph 59 of the Lease (*see generally* NYSCEF Docs. 54-55). Although Tenant attempts to introduce extrinsic evidence about the intent of the parties in drafting Paragraph 59 of the Lease, the Court, absent an ambiguity in the contract, is barred from considering this extrinsic evidence (*Riverside Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61 [1st Dept 2008] [holding that extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous]). As discussed in the section of this decision dealing with Tenant's affirmative defenses, the plain, clear, and unambiguous language of Paragraph 59 states that it is only operative during the continuance of a legal rent restriction (NYSCEF Doc. 2 at ¶ 59). It is worth reiterating here, in line with many other decisions from the First Department, that there was no law or order which prohibited the collection of rent from commercial tenants during Covid-19 (*Fives 160th, LLC v Zhao*, 2014 AD3d 439, 440 [1st Dept 2022]; *558 Seventh Ave. Corp. v Times Square Photo Inc.*, 194 AD3d 561, 562 [1st Dept 2021]; *Gap, Inc. v 170 Broadway Retail Owner, LLC*, 195 AD3d 575 [1st Dept 2021]). Therefore, because the lease is plain and unambiguous, Landlord has shown its prima facie entitlement to summary judgment, and Tenant has failed to show any triable issue of fact regarding its non-payment of rent under the Lease, Landlord's motion for summary judgment is granted in its entirety.

Accordingly, it is hereby,

ORDERED that Plaintiff D&D Building Company LLC's motion to strike Defendant 206 E. 59th Street Garage Corp.'s affirmative defenses pursuant to CPLR § 3011(b) is granted in its entirety; and it is further

ORDERED that Plaintiff D&D Building Company LLC is granted summary judgment on its first cause of action seeking ejectment against Defendant 206 E. 59th Street Garage Corp.; and it is further

ADJUDGED that Plaintiff D&D Building Company LLC is entitled to possession of the parking garage on the ground floor, cellar, sub-cellar floor 1, and sub-cellar floor 2 located at 210 East 59th Street, New York, New York 10022, and the Sheriff of the City of New York, County of New York, upon receipt of a certified copy of this Order and Judgment and payment of proper fees, is directed to place Plaintiff D&D Building Company LLC in possession accordingly; and it is further,

ADJUDGED that immediately upon entry of this Order and Judgment, Plaintiff D&D Building Company LLC may exercise all acts of ownership and possession of the parking garage on the ground floor, cellar, sub-cellar floor 1, and sub-cellar floor 2 located at 210 East 59th Street, New York, New York 10022, including entry thereto, as against Defendant 206 E. 59th Street Garage Corp.; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of Plaintiff D&D Building Company LLC on its second cause of action for breach of contract against Defendant 206 E. 59th Street Garage Corp from April 2020 through August 2022 in the amount of $538,071.45, plus statutory interest as calculated by the Clerk of the Court; and it is further

ORDERED that Plaintiff D&D Building Company LLC is granted summary judgment on its third cause of action for attorneys' fees, costs, and disbursements, and is directed to submit an affirmation in support of attorneys' fees within 30 days of entry of this order via NYSCEF and by email with a copy to all counsel to SFC-Part33-Clerk@nycourts.gov; and it is further

ORDERED that any opposition to said affirmation shall be submitted within 10 days thereafter; and it is further

ORDERED that within 10 days of entry of this decision and order, Plaintiff D&D Building Company LLC shall serve a copy of this Order with notice of entry upon Defendant 206 E. 59th Street Garage Corp.

This constitutes the decision and order of the Court.

11/7/2022
DATE

Mary V Rosado
HON. MARY V. ROSADO, J.S.C.

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