Experience NY Now Inc. v 126 W. 34th St. Assoc. L.L.C.
2022 NY Slip Op 33877(U)
November 14, 2022
Supreme Court, New York County
Docket Number: Index No. 654775/2020
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

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EXPERIENCE NY NOW INC.,

Plaintiff,

- v -

126 WEST 34TH STREET ASSOCIATES L.L.C.,

Defendant.

INDEX NO. 654775/2020

MOTION DATE 04/14/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. NANCY BANNON:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101

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

I. INTRODUCTION

In this action wherein the plaintiff souvenir vendor seeks, *inter alia*, a declaration that it is excused from its performance under a commercial lease agreement with the defendant landlord, the plaintiff moves (1) pursuant to CPLR 3212 for summary judgment on the first through fourth causes of action of the amended complaint and (2) pursuant to CPLR 3211, or, in the alternative, CPLR 3212, to dismiss the defendant's counterclaims for unpaid rent and contractual attorney's fees. The defendant opposes the motion and cross-moves (1) pursuant to CPLR 3025 to amend its counterclaims to add additional unpaid rent accrued since the filing of its answer and (2) pursuant to CPLR 3212 for summary judgment dismissing the amended complaint and awarding the amounts sought in the amended counterclaims. For the following reasons, the plaintiff's motion is denied and the defendant's cross-motion is granted in part.

II. BACKGROUND

The parties entered into a written commercial lease agreement on September 16, 2019, modified by a rider also dated September 16, 2019, for a term set to expire on September 30, 2029 (the lease). The plaintiff agreed to make monthly rental and additional rental payments to the defendant and to use and occupy the subject premises, which is the Herald Square area of Manhattan, "for retail sales of tourist apparel and souvenirs, general merchandise, and food items, and drink and for no other purpose." Pursuant to Paragraph 63 of the lease, the plaintiff provided a security deposit in the form of a letter of credit issued by BankUnited, N.A., in the amount of $210,000.00 (the letter of credit). The lease, pursuant to Paragraph 42 and Paragraph 63 thereof, permitted the defendant to draw upon the letter of credit to cure the plaintiff's default after any applicable notice and cure period provided elsewhere in the lease. Alternatively, the security deposit was to be returned to the plaintiff within three business days after the end of the lease term and after delivery of possession of the premises to the defendant in the event the plaintiff "fully and faithfully" performed under the terms and conditions of the lease.

Paragraph 26 of the lease, entitled "Inability to Perform," (Paragraph 26) provided as follows:

> This lease and the obligation of [the plaintiff] to pay rent hereunder and perform all of the other covenants and agreements hereunder on part of [the plaintiff] to be performed shall in no way be affected, impaired, or excused because [the defendant] is unable to fulfill any of its obligations under this lease, or to supply, or is delayed in supplying, any service expressly or impliedly to be supplied, or is unable to make, or is delayed in making, any repair, additions, alterations or decorations, or is unable to supply, or is delayed in supplying, any equipment, fixtures or other materials, if [the defendant] is prevented or delayed from doing so by reason of strike or labor troubles, government preemption or restrictions, or by reason of any rule, order or regulation of any department or subdivision thereof of any government agency, or by reason of the conditions of which have been or are affected, either directly or indirectly, by war or other emergency, or when, in the judgment of [the defendant], temporary interruption of such services is

> necessary by reason of accident, mechanical breakdown, or to make repairs, alterations or improvements.

Paragraph 60 of the lease, entitled "Force Majeure," (Paragraph 60) further provided that:

> Anything in this Lease to the contrary notwithstanding, neither [the defendant] nor [the plaintiff] shall be in default in the performance of any provisions of this Lease to the extent such performance shall be delayed or prevented by strike, war, act of God, or other cause beyond the control of [the] party seeking to excuse performance.

In contrast to many other commercial leases, Paragraph 60 contained no carveout for rental obligations.

Due to the COVID-19 pandemic and attendant decreases in tourism and sales, the plaintiff's business began to decline in early 2020. On January 30, 2020, the World Health Organization (WHO) declared that the "unprecedented" COVID-19 outbreak constituted a public health emergency. The U.S. Secretary of Health and Human Services declared a nationwide public health emergency arising from COVID-19 the following day. In March 2020, the WHO announced that the COVID-19 outbreak had risen to the level of a global pandemic. Then President Trump eventually, albeit reluctantly, followed suit, recognizing and declaring that the rampant spread of COVID-19 and mounting death toll constituted a national emergency.

The threat posed in the state of New York was deemed particularly serious. On March 7, 2020, Governor Andrew Cuomo issued Executive Order No. 202, declaring a statewide disaster emergency. On March 20, 2020, the Department of Homeland Security issued a "major disaster declaration" in New York. Consequently, state officials began taking actions to address the COVID-19 crisis by, among other things, issuing government orders limiting or prohibiting the operation of businesses to combat the transmission of the virus in such environments. Ultimately, on March 20, 2020, Governor Cuomo issued Executive Order 202.8, requiring "non-

essential" businesses, including the plaintiff's souvenir shop, to reduce their in-person work force by 100% no later than March 22, 2020. Also on March 20, 2020, Mayor Bill DeBlasio issued Emergency Executive Order No. 102, implementing similar restrictions on in-person retail operations in New York City.

On March 16, 2020, the plaintiff notified the defendant by letter that, effective March 11, 2020, it was invoking Paragraph 60 and ceasing its rental payments due to the COVID-19 pandemic and attendant restrictions on its business "until this situation is resolved." The defendant did not respond to the plaintiff's letter. On August 19, 2020, however, the defendant, by its managing agent, sent a rent demand notice (the demand) to the plaintiff seeking payment of monthly rent due under the lease from April 2020 through August 2020. On August 26, 2020, the plaintiff responded, stating that the demand was defective because, *inter alia*, the plaintiff had invoked Paragraph 60. On September 4, 2020, the defendant drew down on the plaintiff's letter of credit. On September 22, 2020, the plaintiff vacated the premises and provided the defendant with notice of lease termination, purporting to be effective immediately.

Approximately one week thereafter, the plaintiff commenced the instant action. In the amended complaint, filed on December 18, 2020, the plaintiff asserts claims sounding in breach of contract (first cause of action), conversion (sixth cause of action), and money had and received (seventh cause of action) and seeking a declaratory judgment and rescission of the lease on theories of frustration of purpose, impossibility, and failure of consideration, (second, third, and fourth causes action), and pursuant to Section 227 of the New York Real Property Law (NYRPL) (fifth cause of action). On January 15, 2021, the defendant filed an answer to the amended complaint with counterclaims sounding in breach of contract and seeking unpaid rent

(first counterclaim) and contractual attorney's fees (second counterclaim). Discovery was completed, and the Note of Issue filed, as of October 31, 2021. This motion ensued.

III. LEGAL STANDARDS

A. CPLR 3212

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). In opposition, the nonmoving party must demonstrate by admissible evidence the existence of a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). However, if the initial burden is not met by the movant, summary judgment must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, 64 NY2d 851; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013); O'Halloran v City of New York, 78 AD3d 536 (1st Dept. 2010). This is because "summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.'" Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

B. CPLR 3211

On a motion to dismiss for failing to state a cause of action under CPLR 3211(a)(7), the pleading is to be afforded a liberal construction and the court should accept as true the facts alleged in the pleading, accord the pleading the benefit of every reasonable inference, and only

determine whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994).

Pursuant to CPLR 3211(b), a "party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." The burden is on the plaintiff to demonstrate that the defenses are without merit as a matter of law. See Granite State Ins. Co. v Transatlantic Reinsurance Co., 132 AD3d 479 (1st Dept. 2015); 534 East 11th Street Housing Dev. Fund v Hendrick, 90 AD3d 541 (1st Dept. 2011). In reviewing such a motion, "the allegations set forth in the answer must be viewed in the light most favorable to the defendant." Granite State Ins. Co. v Transatlantic Reinsurance Co., supra at 481; see 182 Fifth Avenue LLC v Design Development Concepts, Inc., 300 AD2d 198 (1st Dept. 2002).

C. CPLR 3025

Leave to amend a pleading should be freely granted absent evidence of substantial prejudice or surprise, or unless the proposed amendment is palpably insufficient or patently devoid of merit. See CPLR 3025(b); JPMorgan Chase Bank, N.A. v Low Cost Bearings NY, Inc., 107 AD3d 643 (1st Dept. 2013). The burden is on the party opposing the motion to establish substantial prejudice or surprise if leave to amend is granted. See Forty Cent. Park S., Inc. v Anza, 130 AD3d 491 (1st Dept. 2015).

IV. DISCUSSION

A. Plaintiff's Motion

In support of its application for summary judgment on the first through fourth causes of action of the amended complaint and to dismiss the defendant's counterclaims, the plaintiff submits, *inter alia*, the affidavit of its president, Eddie Gindi; the subject lease agreement; the

letter of credit issued by BankUnited, N.A., in the amount of $210,000.00; the rent demand notice and the plaintiff's response thereto; a letter from the defendant to BankUnited, N.A., requesting drawdown on the plaintiff's letter of credit; the termination notice the plaintiff sent to the defendant on September 22, 2020; and numerous public statements, guidance, and executive orders related to the COVID-19 pandemic and attendant limitations on public retail activities and tourism beginning in early 2020.

i. First Cause of Action

In order to establish entitlement to judgment as a matter of law on its breach of contract claim, a plaintiff must demonstrate (1) the existence of a contract, (2) the plaintiff's performance under the contract; (3) the defendant's breach of that contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010). Here, while no party contests the validity of the underlying lease, the plaintiff admits that it did not perform pursuant to the express terms of the contract insofar as it ceased paying rent as of April 2020. Nonetheless, the plaintiff claims that Paragraph 60 excused its performance of payment obligations under the lease indefinitely because the COVID-19 pandemic and attendant government restrictions constituted a force majeure event within the meaning of that clause. Thus, according to the plaintiff, it was not in default in August 2020, when the defendant demanded payment, and the defendant's decision to draw down on the plaintiff's letter of credit was in breach of the lease.

Force majeure clauses, like the clause contained at Paragraph 60 of the parties' lease, "are to be interpreted in accord with their purpose, which is 'to limit damages in a case where the reasonable expectation of the parties and the performance of the contract have been frustrated by

circumstances beyond the control of the parties.'" Constellation Energy Services of New York, Inc. v New Water Street Corp., 146 AD3d 557, 558 (1st Dept. 2017) (quoting United Equities Co. v First National City Bank, 52 AD2d 154, 157 [1st Dept. 1976]); see also Goldstein v Orensanz Events LLC, 146 AD3d 492, 492-93 (1st Dept. 2017). "[W]hen the parties have themselves defined the contours of force majeure in their agreement, those contours dictate the application, effect, and scope of force majeure." Id. at 558 (quoting Route 6 Outparcels, LLC v Ruby Tuesday, Inc., 88 AD3d 1224, 1225 [3rd Dept. 2011]). Courts construing a force majeure clause must do so narrowly, so that "only if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused." Kel Kim Corp. v. Cent. Mkts., Inc., 70 NY2d 900, 902-03 (1987). Thus, even where catchall phrases are used in a force majeure clause, "the general words are not to be given expansive meaning; they are confined to things of the same kind or nature as the particular matters mentioned." Id. at 903.

Paragraph 60 of the lease specifically lists as events constituting force majeure - "strike," "war," and "act of God." While the pandemic and attendant government restrictions plainly do not constitute a "strike" or "war," whether the spread of COVID-19 itself constitutes an "act of God" presents a closer question. Acts of God have been held to encompass sudden and catastrophic natural occurrences such as floods, earthquakes, or hurricanes, as well as a sudden death or severe illness. See, e.g., Gleeson v Virginia Midland Railroad Co., 140 US 435, 439 (1891); Hertler v Mullen, 159 NY 28, 37 (1899); see also Black's Law Dictionary (11th ed. 2019) (defining "act of God" as "an extraordinary interruption by a natural cause [such as a flood or earthquake] of the usual course of events that experience, prescience, or care cannot reasonably foresee or prevent"). In this regard, the plaintiff observes that a federal trial court in the Southern District of New York has reasoned that the COVID-19 pandemic should be classified

as a "natural disaster" insofar as it is a natural event causing great damage or loss of life. See JN Contemporary Art LLC v Phillips Auctioneers LLC, 507 F Supp 3d 490, 501 (SDNY 2020). The defendant disagrees, asserting that natural disasters caused by weather and sudden illnesses, deaths, or disabilities "are markedly different from the COVID-19 pandemic."

The court need not resolve the parties' dispute as to COVID-19's classification as an "act of God" at this juncture because Paragraph 60's definition of force majeure also includes the broader catchall, "or other cause beyond the control of [the] party seeking to excuse performance." The court finds that this phrase covers both the COVID-19 pandemic and the attendant restrictions imposed on the plaintiff's business.

Analogous catchall phrases referring to circumstances or causes beyond a party's control have been examined by both the Second Circuit Court of Appeals and the Appellate Division, First Department, in the wake of the COVID-19 pandemic. In its review of the trial court's decision in JN Contemporary Art LLC v Phillips Auctioneers LLC, the Second Circuit held in March 2022 that "the COVID-19 pandemic and the orders issued by New York's governor that restricted how nonessential businesses could conduct their affairs during the pandemic constituted 'circumstances beyond our or your reasonable control'" and were covered by the force majeure clause at issue in that case. See JN Contemporary Art LLC v Phillips Auctioneers LLC, 29 F4th 118, 123-24 (2nd Cir. 2022). Subsequently, the First Department, in an action to recover unpaid rent and holdover rent under an expired lease, held that the defendant tenant had a "colorable defense" that the lease's force majeure provision, which included as force majeure events "other causes beyond the reasonable control of the performing party," excused the tenant's timely removal of its property based in part on the COVID-19 pandemic and attendant government restrictions. 850 Third Avenue Owner, LLC v Discovery Communications, LLC,

205 AD3d 498, 498 (1st Dept. 2022) (citing JN Contemporary Art LLC v Phillips Auctioneers LLC, 29 F4th 118, 123-24 [2nd Cir. 2022]).

Here, as in the cases before the Second Circuit and First Department, the words preceding the catchall phrase "other cause beyond the control of [the] party seeking to excuse performance," including "strike," "war," and "act of God," constitute events "of a type that cause large-scale societal disruptions, are beyond the parties' control, and are not due to the parties' fault or negligence." JN Contemporary Art LLC v Phillips Auctioneers LLC, 29 F4th 118, 124 (2nd Cir. 2022). The COVID-19 pandemic and the state's orders restricting the activities of nonessential businesses are events of the same kind or nature. See Kel Kim Corp. v. Cent. Mkts., Inc., supra at 903. Therefore, they are events that could have triggered the protections of Paragraph 60.

That the parties also included Paragraph 26 in the lease does not affect this conclusion. Paragraph 26 dictates that the plaintiff's obligation to pay rent under the lease shall not be impaired by the defendant's inability to perform any obligation under the lease due to, *inter alia*, "government preemption or restrictions," or "by war or other emergency." While this provision, standing alone, would otherwise operate to bar the plaintiff's claim, it is accompanied by Paragraph 60. Paragraph 60 is preceded by the language, "Anything in this Lease to the contrary notwithstanding," which conclusively indicates that the parties intended Paragraph 60 to supersede Paragraph 26 in the event of a conflict. See, e.g., Warberg Opportunisitc Trading Fund, L.P. v GeoResources, Inc., 112 AD3d 78, 83 (1st Dept. 2013) ("notwithstanding" provision overrides any conflicting provisions within contract).

Nonetheless, in order to demonstrate that performance is excused under Paragraph 60, the plaintiff is required to show that the force majeure it identifies "delayed or prevented" its

performance under the lease. See Kel Kim Corp. v. Cent. Mkts., Inc., supra at 902-03 ("[O]nly if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused"). The plaintiff contends, and the defendant does not dispute, that the plaintiff was required to temporarily close its doors to the public on or about March 20, 2020, when the New York State on PAUSE Program began, forcing nonessential businesses like the plaintiff's to reduce their in-person work force by 100%. Governor Cuomo's PAUSE order, as applicable to New York County, was extended until June 6, 2020. Thereafter, New York City began reopening, albeit with restrictions. Beginning on June 8, 2020, retailers were permitted to offer curbside pickup and dropoff services. On June 22, 2020, they could resume in-store services at 50% capacity. However, the plaintiff never offered retail pickup services and never reopened. Rather, the plaintiff asserts that because "tourists were no longer traveling to New York City," "completely destroy[ing]" the plaintiff's "ability to sell souvenirs to NYC tourists," the plaintiff made the decision to permanently shutter its business.

New York's PAUSE order briefly prevented the plaintiff from opening to the public. However, the plaintiff admits that at all relevant times before its September 2020 vacatur it occupied the premises and kept the premises stocked with retail goods. The plaintiff was never prevented from using the leased space and the leased premises were not destroyed. In June 2020, well before the plaintiff vacated the premises and filed the complaint, the plaintiff could have, but chose not to, resume retail sales to the public. Under these circumstances, the plaintiff has not met its burden of establishing that COVID-19 and attendant government restrictions prevented it from performing its rental obligations under the lease.

Though the court is sympathetic to the plaintiff's hardship, the appellate authority in this state has been uniform: a commercial tenant's performance of rental obligations is not rendered

impossible by New York's PAUSE order where, as here, the premises are not destroyed, (Valentino U.S.A., Inc. v 693 Fifth Owner LLC, 203 AD3d 480, 480 [1st Dept. 2022]; McLearen Square Shopping Center Herndon, Va. Limited Partnership v BadaNara, LLC, 208 AD3d 1034, 1037 [2022]), the tenant could access and use the premises during the period of nonpayment, (558 Seventh Ave. Corp. v Times Square Photo Inc., 194 AD3d 561, 562 [1st Dept. 2021]; 457 West 50th Street, LLC v Charlie Boy Enterprises, Inc., 76 Misc 3d 138[A], *1 [App. Term, 1st Dept. 2022]), and reopening on a limited basis was allowed prior to the filing of the tenant's complaint, (Gap, Inc. v 44-45 Broadway Leasing Co. LLC, 206 AD3d 503, 504 [1st Dept. 2022]; Gap, Inc. v 170 Broadway Retail Owner, LLC, 195 AD3d 575, 577 [1st Dept. 2021]). The foregoing cases are concerned specifically with the application of the common law impossibility doctrine. Nonetheless, they are instructive here, since the plaintiff has argued for the application of Paragraph 60 on the basis that force majeure prevented it from paying rent for reasons largely identical to those set forth by the commercial tenants, and rejected by the courts, in the appellate cases cited.

That the plaintiff invokes Paragraph 60 to excuse its rental obligations indefinitely, even after it was permitted to resume sales to the public in June 2020, further illustrates the deficiencies of its force majeure-based claims. The plaintiff's decision not to reopen, though understandable, was based on its assessment of the financial viability of its business during a pandemic. This is distinct from the pandemic or government restrictions themselves preventing the business from operating. The plaintiff does not allege, for example, that it could not operate its business due to the illness of its principal with COVID-19. Nor does the plaintiff allege that it was categorically prohibited from accessing the premises or, beginning in June 2020, from selling its souvenirs in a manner compliant with government regulations. Rather, like all brick-

and-mortar retail businesses in New York City, the plaintiff was faced with the prospect of a severe decline in sales as a result of temporary restrictions on its operations and a decimated tourism industry. The prospect of reduced profits, and not sudden illness or government restriction, prompted the plaintiff to close its doors for good. Notably, the plaintiff does not dispute that its business was not strictly limited to souvenirs and that not all of its customers were tourists, such that the temporary restriction on travel was fatal to the business. Indeed, as stated, the lease permits the plaintiff to also sell "general merchandise, and food and drink items" to anyone, not just tourists.

That the plaintiff's default was the result of an economic decision distinguishes the plaintiff's claims from those at issue in JN Contemporary Art LLC v Phillips Auctioneers LLC, where the defendant had terminated its agreement to sell a painting because the COVID-19 pandemic and attendant shutdown orders directly prevented it from holding an in-person auction; or in 850 Third Avenue Owner, LLC v Discovery Communications, LLC, where the defendant alleged it could not remove its property within five days of its lease termination because commercial movers were prohibited from entering the leased premises due to the pandemic.

Moreover, economic hardship, even if not the fault of the plaintiff, is not included within the ambit of Paragraph 60 under any reasonable interpretation. A failing business model, even if the failure is large-scale, is plainly an occurrence of a different type than a "strike," "war," or "act of God." Paragraph 60 contains no indication that it can apply to excuse a party's nonperformance based on governmental restrictions or social circumstances that limit the party's ability to make a profit, rather than completely preventing or delaying the party from carrying out the use contemplated by the lease. Cf. 55 Oak Street LLC v RDR Enterprises, Inc., 2022 ME 28 (2022). To be sure, nothing in the lease indicates that the diminished, or even destroyed,

economic viability of a business model constitutes force majeure. See id. A contrary interpretation would result in a dramatic expansion of the meaning of Paragraph 60, in abrogation of the principles of narrow interpretation applicable to such clauses.

Finally, it is well-settled that force majeure clauses, even broadly drafted, excuse nonperformance only where the reasonable expectation of the parties and the performance of the contract have been frustrated by circumstances unforeseeable to or beyond the control of the parties. Goldstein v Orensanz Events LLC, supra at 492-93. In this regard, that a business model might cease to be profitable is foreseeable in every commercial lease, and a store owner's decision to cut its losses by ceasing operations is not an event beyond the control of the store owner. Cf. Route 6 Outparcels, LLC v Ruby Tuesday, Inc., 88 AD3d 1224, 1126 (3rd Dept. 2011) ("Economic factors are an inherent part of all sophisticated business transactions and, as such, while not predictable, are never completely unforeseeable."). The plaintiff's decision to permanently shutter its business due to financial considerations brought about by government regulations does not constitute a force majeure event. See Macalloy Corp. v Metallurg, Inc., 284 AD2d 227 (1st Dept. 2001).

Thus, the plaintiff cannot be excused from its rent obligations pursuant to Paragraph 60. In light of the foregoing, the defendant properly demanded payment and held the plaintiff in default when no payment was made. Moreover, the defendant properly drew down on the plaintiff's letter of credit in September 2020. The plaintiff fails to meet its initial burden in demonstrating *prima facie* entitlement to judgment on the first cause of action sounding in breach of contract.

ii. Second Cause of Action

The plaintiff's second cause of action seeks a declaration that the lease was terminated on the ground of frustration of purpose. The plaintiff argues that the COVID-19 pandemic was an unforeseeable event that so completely frustrated the purpose of the lease agreement that the parties should be discharged from their obligations thereunder.

The frustration of purpose doctrine "offers a defense against enforcement of a contract when the reasons for performing the contract cease to exist due to an unforeseeable event which destroys the reasons for performing the contract." Structure Tone, Inc. v Universal Services Group, Ltd., 87 AD3d 909, 912 (1st Dept. 2011). "In order to invoke the doctrine of frustration of purpose, the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense." Center for Specialty Care, Inc. v CSC Acquisition I, LLC, 185 AD3d 34, 42 (1st Dept. 2020) (quoting Warner v Kaplan, 71 AD3d 1, 6 [1st Dept. 2009]) (quotation marks omitted). "Examples of a lease's purposes being declared frustrated have included situations where the tenant was unable to use the premises as a restaurant until a public sewer was completed, which took nearly three years after the lease was executed ... and where a tenant who entered into a lease of premises for office space could not occupy the premises because the certificate of occupancy allowed only residential use and the landlord refused to correct it." Id. at 42-43.

Importantly, frustration of purpose is not available "where the event which prevented performance was foreseeable and provision could have been made for its occurrence." Id. at 43 (quoting Warner v Kaplan, supra at 6) (quotation marks omitted). Moreover, economic hardship and reduced revenues alone, even if occasioned by an arguably unforeseeable circumstance such as a pandemic, do not warrant application of the frustration of purpose doctrine. See Gap, Inc. v

170 Broadway Retail Owner, LLC, supra; 558 Seventh Ave. Corp. v Times Square Photo Inc., supra.

Under the facts presented, the plaintiff fails to demonstrate that the purpose of the lease was frustrated. First, the court notes that the plaintiff's invocation of the lease's force majeure clause as excusing its performance contradicts its argument that the COVID-19 pandemic and attendant government restrictions were unforeseeable and unaddressed when the parties entered the lease. Paragraph 26 of the lease provides further evidence that the parties attempted to address the risks of shutdown that materialized in 2020 when they executed the lease.

Most significantly, even if the court were to accept the plaintiff's assertion that the COVID-19 pandemic and attendant government restrictions were unforeseeable to the parties, the plaintiff avers only that its souvenir business was temporarily subjected to "in-person workplace restrictions," and that restrictions on tourism and foot traffic in Herald Square would have made reopening "absolutely foolish." However, it is well-settled that mere restrictions on capacity or the diminished profitability of a party's business model due to the pandemic do not amount to a complete frustration of the purpose of the lease. See Gap, Inc. v 44-55 Broadway Leasing Co. LLC, supra; Valentino U.S.A., Inc. v 693 Fifth Owner LLC, supra; Gap, Inc. v 170 Broadway Retail Owner, LLC, supra; 558 Seventh Ave. Corp. v Times Square Photo Inc., supra. Further, while the plaintiff was forced to close its doors completely for approximately two months, a two-month closure out of a ten-year lease did not frustrate the overall purpose of the lease. See 558 Seventh Ave. Corp. v Times Square Photo, Inc., supra (temporary shuttering of electronics and repair store due to executive orders did not frustrate purpose of lease); CAB Bedford LLC v Equinox Bedford Ave, Inc., supra at *2 ("A gym being forced to shut down for a few months does not invalidate obligations in a fifteen-year lease."); Greater New York Auto.

Dealers Ass'n, Inc. v City Spec, LLC, 70 Misc 3d 1209(A) (N.Y. Civ. Ct. 2020) ("[E]ven if Respondent were forced by the Executive Order to close in-person operations at the Premises, a four-month closure out of a five-year lease did not frustrate the overall purpose of the Lease.").

Accordingly, the plaintiff does not establish entitlement to judgment on the second cause of action.

iii. Third Cause of Action

The third cause of action seeks rescission of the lease on the ground that the COVID-19 pandemic and resulting governmental restrictions rendered the parties' performance of the lease impossible.

Impossibility is a defense to a breach of contract action "only when … performance [is rendered] objectively impossible … by an unanticipated event that could not have been foreseen or guarded against in contract." Kel Kim Corp. v Central Markets, Inc., supra at 902; see 407 East 61st Garage, Inc. v Savoy Fifth Ave. Corp., 23 NY2d 275, 281 (1968) ("[T]he excuse of impossibility of performance is limited to the destruction of the means of performance by an act of God, vis major, or by law."). Impossibility may excuse performance of a contract if such performance is rendered impossible by intervening governmental activities, but only if those activities are unforeseeable. RW Holdings, LLC v Mayer, 131 AD3d 1228 (2nd Dept. 2015) (quoting Pleasant Hill Dev., Inc. v Foxwood Enters., LLC, 65 AD3d 1203 [2nd Dept. 2009]).

The impossibility defense to contract performance should be applied narrowly, "due in part to judicial recognition that the purpose of contract law is to allocate risks that might affect performance and that performance should be excused only in extreme circumstances." Kel Kim Corp. v Central Markets, Inc., supra at 902. "[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 East 61st Garage, Inc. v Savoy Fifth Ave. Corp., supra at 281-82; see Valenti v Going Grain, Inc., 159 AD3d 645 (1st Dept. 2018) (failure to pay rent as agreed and ensuing eviction proceeding did not excuse performance under contract of sale); Urban Archaeology Ltd. v 2017 E. 57th Street LLC, 68 AD3d 562 (1st Dept. 2009) (economic downturn did not excuse tenant's performance under lease).

The plaintiff's impossibility argument fails. As explained above, the lease contains provisions reflecting that the risks to the plaintiff's business that materialized in 2020 were foreseeable to the parties, even if they were beyond the parties' control. Further, even if the COVID-19 pandemic and attendant government restrictions were wholly unforeseeable, the plaintiff cannot claim that the means of the parties' performance under the lease were thereby destroyed. The lease required the payment of rent in exchange for the plaintiff's occupancy of the premises. At all relevant times, the plaintiff was permitted to occupy the premises. New York's PAUSE order preventing the plaintiff from opening to the public was temporary and, by the time the plaintiff filed its complaint, had not been operative for many months. It does not serve as a basis for invoking the impossibility doctrine. See Gap, Inc. v 170 Broadway Retail Owner, LLC, supra at 577; McLearen Square Shopping Center Herndon, Va. Limited Partnership v BadaNara, LLC, supra at 1037. Further, while restrictions on in-person business and the limitations on tourism in New York City made the plaintiff's ability to provide an in-person souvenir shopping experience more difficult, even prohibitively so, the pandemic did not render the plaintiff's performance impossible since the leased premises were not destroyed. See Valentino U.S.A., Inc. v 693 Fifth Owner LLC, supra at 480; Gap, Inc. v 44-45 Broadway Leasing Co. LLC, supra at 504. The plaintiff's allegation that revenues have decreased to the

point that it would be "foolish" to continue pursuing a business model does not equate to impossibility or impracticability.

Thus, the doctrine is unavailable to the plaintiff here. The plaintiff fails to establish entitlement to judgment as a matter of law on the third cause of action.

iv. Fourth Cause of Action

The fourth cause of action seeks to rescind the lease based on the plaintiff's assertion that the COVID-19 pandemic led to a "failure of consideration" for the lease agreement. "Failure of consideration exists wherever one who has promised to give some performance fails without his or her fault to receive in some material respect the agreed quid pro quo for that performance." Fugelsang v Fugelsang, 131 AD2d 810, 811 (2nd Dept. 1987); see In re Estate of Wirth, 5 NY3d 875, 876 (2005) (citing 2–5 Corbin, Contracts § 5.20 [2005]).

The plaintiff avers that it did not receive its bargained-for consideration under the lease because it expected to be able to operate its souvenir retail establishment in an area well-trafficked by tourists visiting New York City. However, the lease merely provides that the defendant shall make available certain premises for the plaintiff's occupancy and retail of souvenirs and other goods; it provides no guarantee of the profitable use of the premises. Since the defendant did, in fact provide the premises to the plaintiff, and the plaintiff was permitted to operate a retail business from the premises both before and during the COVID-19 pandemic, there is no merit to the plaintiff's argument that consideration for the lease did not exist. Thus, the fourth cause of action is dismissed.

v. Defendant's Counterclaims

As set forth above, the plaintiff fails to establish any basis for the avoidance of its rental and additional rental payments under the lease beginning in March 2020, which the plaintiff does

not dispute it has not paid. For the same reasons, the plaintiff does not demonstrate that it properly terminated the lease by letter on September 22, 2020. Contrary to the plaintiff's assertions, the defendant's lawful demand that the plaintiff pay rent due under the lease did not breach the covenant of quiet enjoyment at Paragraph 22 of the lease. Nor does Paragraph 60, even if it had applied, permit the plaintiff to terminate the lease in the event of force majeure. To be sure, the plaintiff's termination was based not upon any provision in the lease. Rather, it was premised on the defendant's purported breach of the lease and the plaintiff's theories of frustration of purpose and impossibility.

The plaintiff has neither established the defendant's breach nor shown that any equitable theory of rescission is available to it. Thus, the lease term continues, and the plaintiff continues to be liable for payments due under the lease. The plaintiff is not entitled to the dismissal of the defendant's breach of contract counterclaims seeking such payments and contractual attorney's fees.

B. Defendant's Cross-Motion

i. Amendment

The defendant seeks to amend its counterclaim seeking rent and additional rent due and owing through November 30, 2020, to include rent and additional rent that has accrued since the filing of the counterclaim. The defendant avers that, as of the filing of its motion, $1,095,840.85 is due under the lease. A ledger reflecting this sum is attached to the defendant's moving papers. The branch of the defendant's cross-motion seeking to amend the first counterclaim to include a demand for rent and additional rent due and owing through September 30, 2021, is granted inasmuch as the amendment is not palpably insufficient and devoid of merit, and the plaintiff has not established, or even alleged, any prejudice that would result from amendment.

However, to the extent that the defendant seeks to amend its pleading "to include any additional rental amounts incurred up through and including the time of trial," its application is denied. As a general matter, "no action can be brought for future rent in the absence of an acceleration clause." Beaumont Offset Corp. v Zito, 256 AD2d 372, 373 (2nd Dept. 1998); see also Islip U-Slip LLC v Gander Mtn. Co., 2 F Supp 3d 296, 303 (NDNY 2014) ("New York law states that absent an acceleration clause in a lease, the breach of a lease does not entitle a landlord to make a claim for all future rents under the lease."). The lease at issue here contains no such clause. The defendant has elected to move for summary judgment on its counterclaims seeking rent owed through September 30, 2021. The defendant cannot also elect to maintain such counterclaims to the extent they would only seek future rents. The denial of this branch of the defendant's application is, of course, without prejudice to the defendant's asserting new claims for rent due under the lease once those claims accrue, i.e., become due, in a new action.

ii. First and Second Counterclaim

The defendant is entitled to summary judgment as to liability on its first and second counterclaims, as amended.

As to the first counterclaim, the defendant's proof, which includes, *inter alia*, the affidavit of its member, Dennis Erani, the lease, and a tenant ledger report reflecting amounts owed by the plaintiff through September 2021, demonstrates (1) the existence of a contract, (2) the defendant's performance under the contract, (3) the plaintiff's breach of that contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010); Flomenbaum v New York Univ., 71 AD3d 80 (1st Dept. 2009). It is well-settled that a lease is a contract which is subject to the same rules of construction as any other agreement. See George

Backer Mgt. Corp. v Acme Quilting Co., Inc., 46 NY2d 211 (1978); New York Overnight Partners, L.P. v Gordon, 217 AD2d 20 (1st Dept. 1995), aff'd 88 NY2d 716 (1996). As the court has discussed, the plaintiff admits it stopped paying rent and additional rent to the defendant as of March 11, 2020. The plaintiff presents no basis for excusing its obligations under the lease.

The defendant establishes entitlement to damages on the first counterclaim in the sum of $1,067,001.95, which represents base rent due and owing under the lease through September 30, 2021. The defendant also seeks additional rent, as quantified in provisions in the rent ledger for electricity, gas, and water and sewer charges. However, the plaintiff avers in its opposition papers that no provision in the lease required it to pay the defendant for electricity or gas. The plaintiff further observes that Paragraph 46 of the lease obligated the plaintiff to pay water meter servicing charges "within 30 days of presentation of the bill" reflecting such charges. The plaintiff denies ever having been presented with a water bill. The defendant has not submitted any water bill. In fact, the defendant does not raise any argument on reply to oppose the plaintiff's representations that the additional rent charges in the ledger are improper. Accordingly, the defendant does not establish entitlement to the additional rent it seeks.

The defendant is entitled to contractual attorney's fees, sought pursuant to its second counterclaim, as provided for under Paragraph 55 of the lease. See generally Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010); Coopers & Lybrand v Levitt, 52 AD2d 493 (1st Dept. 1976). The defendant's application for attorney's fees is granted to the extent that the defendant may submit an attorney's affirmation, billing records or invoices, and any other supporting proof within 60 days of the date of this order and shall notify the Part 42 Clerk of any such filing.

iii. Dismissal of Amended Complaint

The plaintiff's first through fourth causes of action of the amended complaint must be dismissed for the reasons discussed herein.

The fifth cause of action seeks a declaration that the lease has been cancelled in accordance with Section 227 of the NYRPL. Section 227 provides, in relevant part, that a lessee or occupant of a building may quit and surrender possession of the leasehold premises where the premises "is destroyed or so injured by the elements, or any other cause as to be untenantable, and unfit for occupancy." This statutory provision is plainly inapplicable here. While the plaintiff alleges that COVID-19 and attendant government restrictions on business and travel rendered his souvenir business unprofitable, it is undisputed that the subject premises has not been physically harmed or altered in any way. Thus, the fifth cause of action is dismissed.

The sixth cause of action, sounding in conversion, and the seventh cause of action, sounding in money had and received, are each premised on the plaintiff's assertion that the defendant's draw down on the plaintiff's letter of credit was wrongful. However, as previously discussed, the defendant's draw down was a proper and lawful exercise of its rights under the lease. The sixth and seventh cause of action are dismissed.

V. CONCLUSION

Accordingly, it is

ORDERED that the plaintiff's motion (1) pursuant to CPLR 3212 for summary judgment on the first through fourth causes of action of the amended complaint and (2) pursuant to CPLR 3211, or, in the alternative, CPLR 3212, to dismiss the defendant's counterclaims for unpaid rent and contractual attorney's fees, is denied in its entirety; and it is further

ORDERED that the defendant's cross-motion (1) pursuant to CPLR 3025 to amend its counterclaims to add additional unpaid rent accrued since the filing of its answer and (2) pursuant to CPLR 3212 for summary judgment dismissing the amended complaint and awarding the amounts sought in the amended counterclaims, is granted to the extent provided herein, and otherwise denied; and it is further

ORDERED that the defendant's amended counterclaim seeking $1,095,840.85 under the parties' lease, in the form annexed to the defendant's moving papers, is deemed the operative counterclaim; and it is further

ORDERED that the Clerk shall enter judgment in favor of the defendant, and against the plaintiff, on the first amended counterclaim in the sum of $1,067,001.95, plus statutory interest from September 30, 2021; and it is further

ORDERED that judgment on the issue of liability on the second amended counterclaim seeking attorney's fees is granted, and the defendant is granted leave to submit supplemental proof to establish the amount of fees incurred, if so advised, within 60 days of the date of this order and shall notify the Part 42 Clerk of any such filing; and it is further

ORDERED that the amended complaint is dismissed in its entirety.

This constitutes the Decision and Order of the court.

DATED: November 14, 2022

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON