SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART 36**
Justice

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WTC TOWER 1 LLC,
Plaintiff,
- v -
PISON STREAM SOLUTIONS INC.,
Defendant.

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INDEX NO. 651331/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39

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

Plaintiff WTC Tower 1 LLC moves for summary judgment under a commercial lease seeking (1) $456,508.30 for unpaid rent through January 29, 2021; (2) $668,164.59 for liquidated damages for use and occupancy from, January 29, 2021, through the date of this motion; and (3) attorneys' fees and costs. Plaintiff further seeks dismissal of defendant's affirmative defenses and counterclaims. After a review of the relevant case law and statutes, the motion is granted.

On August 14, 2019, plaintiff WTC Tower 1 LLC, as landlord, and defendant Pison Stream Solutions Inc., as tenant, entered into a written lease agreement ("lease") to rent commercial space located at One World Trade Center in Suite J on the 49th floor ("premises") (NYSCEF Doc. No. 32 at ¶ 1, *Statement of Undisputed Material Facts* ["SUMF"]). The lease commenced on August 14, 2019 and expired on October 31, 2022 (*id.* at ¶ 1, 3). Pursuant to the lease, defendant was obligated to pay plaintiff fixed rent and additional rent for the premises in equal monthly installments (*id.* at ¶ 5).

On August 26, 2020, the parties entered into a written letter agreement ("letter agreement"), in which plaintiff agreed to forbear the rent due and payable under the lease for the period from April 1, 2020 through July 30, 2020, in the aggregate amount of $233,542.83 ("forborne rent") (*id.* at ¶ 14). As additional rent, defendant was obligated to pay plaintiff the forborne rent with accrued interest in equal monthly installments of $118,034.58 ("monthly repayment amount") from August 1, 2020 through September 30, 2020 (*id.* at ¶ 15). Defendant was also obligated to pay plaintiff reasonable out-of-pocket attorneys' fees and costs incurred in connection with the preparation and enforcement of the letter agreement, and deliver to plaintiff a replacement letter of credit, the failure of which would be deemed a material default under the lease (*id.* at ¶ 16-17). Defendant also agreed that the lease remained and continued unmodified, in full force and effect (*id.* at ¶ 19).

As of January 8, 2021, defendant did not pay to plaintiff rent due and owed for the period from August 1, 2020 through and including January 31, 2021, in the aggregate sum of $455,811.41 ("default arrears") (*id.* at ¶ 20). Plaintiff served defendant a "Five Day Notice of Default dated January 8, 2021" and thereafter served upon defendant a "Three Day Notice of Cancellation" dated January 22, 2021 ("termination notice") after defendant failed to cure the default (*id.* at ¶ 21, 24, 27). The termination notice informed defendant that the lease would terminate as of January 29, 2021

("termination date") (*id.* at ¶ 29). Tenant failed to vacate the premises after the termination date and this failure continued through the date of the filing of this motion (*id.* at ¶ 30; NYSCEF Doc. Nos. 13 at ¶ 11, *Pensabene's affirmation*; NYSCEF Doc. No. 14 at ¶ 35, *Engelhardt's affidavit*).

Pursuant to the lease, plaintiff is entitled to liquidated damages for use and occupancy ("holdover damages") of two times the amount of fixed rent and additional rent payable by defendant under the lease (SUMF at ¶ 33). This total amount equals $133,519.44 per month, which is two times the amount of monthly fixed rent ($65,499.25) and the monthly fixed expense charge ($1,260.47).

Furthermore, Section 30.03 of the lease, provides that if either landlord or tenant commenced an action based on a default by either party under the lease, "the prevailing party shall recover its reasonable attorneys' fees, disbursements and court costs from the other party in connection with such matter" (NYSCEF Doc. No. 20).

Plaintiff commenced this action by verified amended complaint dated March 23, 2021, seeking unpaid rent and damages under the lease for the period from September 1, 2020 through the date of this motion (NYSCEF Doc. Nos. 32 at ¶ 36; 3, *verified amended complaint*).

It is well-settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Once this showing has been 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 of the action or show that "facts essential to justify opposition may exist but cannot [now] be stated." (CPLR 3212 [f]; see *Zuckerman*, 49 NY2d at 562.) Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment. (see *Zuckerman*, 49 NY2d at 562.)

Here, plaintiff has made a *prima facie* showing of entitlement to judgment as a matter of law by providing (1) documentary evidence of the written lease agreement between the parties; (2) documentary evidence of the letter agreement which the parties subsequently signed; (3) evidence in the form of an affidavit by the Senior Managing Director of the management company for plaintiff of defendant's failure to pay rent and additional rent due and owed; and (4) evidence in the form of an affidavit by the Collections Manager for the management company for plaintiff of defendant's failure to pay rent and additional rent due and owed. (see *ESRT 501 Seventh Ave., LLC v Regine, Ltd.*, 206 AD3d 448, 449 [1st Dept 2022].)

Defendant has not meaningfully opposed the motion. It has not submitted a statement of facts specifically responding to each of the facts alleged in plaintiff's SUMF, and consequently those facts are deemed admitted (see NYCRR 202.8-g[b]-[c]; *Gelinas v 35 West 26th Street Realty LLC*, 2022 NY Slip Op 33236[U], **3 [Sup Ct, NY County 2022]; *Emmanuel v Metropolitan Transp. Auth.*, 2022 NY Slip Op 32791[U], **3 [Sup Ct, Kings County 2022].) Its opposition papers consist solely of an affirmation from defendant's counsel suggesting that mandatory mediation would be a preferable course, that the COVID-19 pandemic excused defendant's performance, and that any judgment would be uncollectible. However, New York courts have consistently held that an

affirmation or affidavit of an attorney without personal knowledge of the facts is insufficient to oppose a motion for summary judgment. (see *GTF Mktg. Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 968 [1985]; *Schwartz v 170 W. End Owners Corp.*, 161 AD3d 693, 693 [1st Dept 2018].) Furthermore, the affirmation fails to set forth any facts relevant to this action. And, while defendant asks that the court establish a discovery schedule, it does not "appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated" (CPLR 3212[f]; *see Natoli v Trader Joe's E. Inc.*, 198 AD3d 572, 573 [1st Dept 2021] ["Defendants failed to identify what information is in the exclusive control of plaintiff that would raise a material issue of fact"]). Nor has defendant asserted that it has served any discovery demands or that any remain unanswered.

CPLR 3211(b) allows for dismissal of one or more defenses where that defense is not stated or has no merit. Conclusory affirmative defenses, such as those which state the name of a legal theory but provide no facts, will be dismissed. (see *Bankers Trust Co v Fassler*, 49 AD2d 855 [1st Dept 1975].) Neither "plaintiff nor the court ought to be required to sift through a boilerplate list of defenses, or 'be compelled to wade through a mass of verbiage and superfluous matter' . . . to divine which defenses might apply to the case." (*Scholastic Inc. v Pace Plumbing Corp.*, 129 AD3d 75, 79 [1st Dept 2015], *quoting Barsella v City of New York*, 82 AD2d 747, 748 [1st Dept 1981].) Furthermore, "the failure to raise pleaded affirmative defenses in opposition to a motion for summary judgment renders those defenses abandoned and thus subject to dismissal." (*Wells Fargo Bank, N.A. v Brooks*, 2016 NY Slip Op 31869[U], **3-4 [Sup Ct, Suffolk County 2016], citing *New York Commercial Bank v J Realty F Rockaway, Ltd.*, 108 AD3d 756 [2d Dept 2013]; see also *Starkman v City of Long Beach*, 106 AD3d 1076 [2d Dept 2013].) Similarly, summary judgment on counterclaims is properly granted if the assertions in opposition fail to raise any material issue of fact. (see *GRG Group, Inc. v Ravenal*, 247 AD2d 201 [1st Dept 1998].)

Defendant pleads six affirmative defenses and three counterclaims, but only alludes to two affirmative defenses in opposition, namely the doctrine of force majeure and the impossibility of performance and frustration of purpose. Therefore, the remaining affirmative defenses and counterclaims that were not raised in defendant's opposition papers to a motion for summary judgment are deemed abandoned and are dismissed.

Defendant's force majeure defense is also dismissed because Article 15.02 of the lease (NYSCEF Doc. No. 20) states that defendant is obligated to pay rent, which "shall in no way be affected, impaired or excused . . . by reason of Force Majeure." The lease defines "force majeure" to include, *inter alia*, governmental regulation, governmental restriction, emergencies, Acts of God, epidemics, and quarantine restrictions (lease, Article 1.01, lines 119-25). Defendant thus "explicitly contracted out" of such a defense (*450 7th Ave. Associates LLC v T. S. Anand & Co. CPA's, P.C.*, 2022 NY Slip Op 31072[U], *4 [Sup Ct, NY County 2022].)

Defendant's impossibility defense is dismissed for similar reasons. The impossibility defense is narrowly construed because it has been widely recognized that the purpose for parties to have a contract is so that risks that may affect performance are allocated in said contract. (see *Kel Kim Corp. v Central Mkts.*, 70 NY2d 900, 902-903 [1987]). This defense is inapplicable at hand because events such as the pandemic were addressed in the lease (*id.* at 902 [a party's performance is excused "only when the destruction of the subject matter of the contract or the means of performance makes

performance objectively impossible" and the impossibility must have been caused by an unanticipated event that could not have been foreseen or guarded against in the contract"].) Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted in its entirety; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant on the first cause of action in the amount of $456,508.30, with interest from September 1, 2020, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant on the second cause of action in the amount of $668,164.59; and it is further

ORDERED that plaintiff's claim for attorneys' fees is granted and hereby referred to a Special Referee to hear and determine pursuant to CPLR 4317(b), provided that the following provision is complied with; and it is further

ORDERED that within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendant, as well as, the Clerk of the Court, who shall enter judgment accordingly; and it is further

ORDERED that counsel for plaintiff shall, within twenty (20) days after this decision and order is uploaded to NYSCEF, serve a copy of this order with notice of entry, together with a completed Information Sheet, 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 service upon the Clerk of the Court and 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); and it is further

ORDERED that plaintiff's motion to dismiss the defendant's affirmative defenses and counterclaims is granted.

December 6, 2022

HON. VERNA L. SAUNDERS, JSC

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**	X **REFERENCE**