SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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INDEX NO. 650748/2021

ELK 220 EAST 23RD LLC,
Plaintiff,

MOTION SEQ. NO. 001

- v -

DECISION + ORDER ON MOTION

NEW YORK CITY OPERA, INC.,
Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 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

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

Plaintiff alleges that it entered into a lease with defendant, dated January 31, 1984, for a retail store located at 220 East 23rd Street, Store #1, basement, and mezzanine, New York, NY 10010 ("premises"). After several amendments and extensions of the lease, the Seventh Amendment and Extension of Lease extended the agreement from February 1, 2016, through January 31, 2021 ("Seventh Amendment"). Plaintiff sets forth that the lease required defendant to pay fixed rent and additional rent, which defendant has failed to pay since October 1, 2019. Hence, plaintiff alleges that defendant has breached its obligations under the lease for failure to pay fixed rent and additional rent in the amount of $545,185.60 for the period of October 1, 2019, through January 18, 2021 (first cause of action). Plaintiff further asserts that pursuant to Article 19 of the lease, defendant is required to pay plaintiff reasonable attorneys' fees, disbursements, and expenses incurred by plaintiff in connection with a default of the lease by defendant (second cause of action) (NYSCEF Doc. No. 1, *summons and complaint*).

In its answer, defendant admits it entered into the lease with plaintiff, but denies the remaining allegations. Defendant asserts the following affirmative defenses: failure to state a cause of action (first affirmative defense); complaint barred by the doctrines of ratification, course of conduct, and/or accord and satisfaction (second affirmative defense); frustration of purpose, force majeure, impracticability arising out of the COVID-19 pandemic (third affirmative defense); laches, acquiescence, equitable estoppel, waiver, and/or unclean hands (fourth affirmative defense) (NYSCEF Doc. No. 4, *answer*).

Plaintiff now moves, pursuant to CPLR 3212, for summary judgment in its favor and against defendant seeking an order: granting judgment on its first cause of action in the amount of $500,763.86, plus interest; granting judgment on its second cause of action for attorneys' fees, plus interest; and dismissing defendant's affirmative defenses with prejudice (NYSCEF Doc. No. 5, *notice of motion*). Plaintiff argues that defendant asserts only boilerplate affirmative defenses in its answer. As to the first affirmative defense of failing to state a cause of action, plaintiff articulates that it has properly pleaded that the lease is a contract formed between the parties, that

it performed thereunder, and that defendant failed to pay fixed rent and additional rent from October 1, 2019, entitling it to damages. The second affirmative defense, asserts plaintiff, must be dismissed because course of conduct is not a recognized defense to the non-payment of rent under New York law, as plaintiff relied on the terms of the lease to assert its breach of lease claim. Furthermore, plaintiff maintains that Article 24 of the lease and paragraph 12(c) of the Seventh Amendment to the lease provide that the defense of accord and satisfaction are inapplicable because where defendant has breached the lease, plaintiff's acceptance of rent from defendant with the knowledge that lease has been breached does not cure the breach (NYSCEF Doc. No. 9, *memo of law*, pg 9). Turning now to the third affirmative defense of frustration of purpose/impossibility and force majeure, plaintiff contends that there is no common law doctrine of force majeure under New York law. Plaintiff asserts that the defense of impossibility is unpersuasive because the premises were not destroyed during the pandemic period, and defendant's obligation to pay rent was not rendered impossible. Furthermore, plaintiff maintains that to the "extent that Executive Order number 202.8 required defendant to reduce its in person workforce by 100%, said restriction was only effective from March 20, 2020, through June 22, 2020, when New York City entered Phase II of reopening." In addition, plaintiff asserts that Article 26 of the lease demonstrates that the parties contemplated governmental restrictions and/or emergency —such as the COVID-19 pandemic — would not affect defendant's payment obligation under the lease (*id.*, at pg 13-14). Additionally, plaintiff argues that defendant has failed to plead the fourth affirmative defense with any type of particularity, in violation of CPLR 3013. Lastly, plaintiff posits it should be awarded a judgment in the amount of $500,763.86 against defendant for damages due through January 31, 2021 (first cause of action); and a judgment for attorney fees incurred (second cause of action) (*id.*, at pg 20-21). To this point, plaintiff proffers a rent ledger and the affidavit of Abner Ohebshalom ("Ohebshalom"), a member of plaintiff, who articulates how the rent owed to plaintiff was calculated (NYSCEF Doc. Nos. 8, 28; *affidavit of Abner Ohebshalom; rent ledger*).

In opposition, defendant argues that its frustration of purpose affirmative defense is appropriate because questions as to foreseeability of an unprecedented global health issue such as the COVID-19 pandemic cannot be resolved via summary proceedings (NYSCEF Doc. No. 31, *opposition memo*, pg. 8). Specifically, defendant contends that its frustration of purpose claim is entirely tenable, and at the very least, should not be decided before the parties have had the opportunity to conduct discovery. Foreseeability, as it relates to the doctrine of frustration of purpose, according to defendant, is an inherently factual—and not legal—matter. Defendant states that the unforeseeable effects of the COVID-19 pandemic may relieve a party from performing its contractual obligations. Defendant asserts that as a not-for-profit entity, it "is merely seeking relief from rent that could not be paid due to the pandemic's disruptions and is not seeking rescission of a contract at a time when it is able to perform" (*id.*, at pg 12). As for its impossibility of performance defense, defendant claims that for months, it was barred from operating at all as a result of the COVID-19 restrictions. Furthermore, defendant argues that even when it could reopen at the premises, it still could not operate the retail business as contemplated in the lease due to government restrictions and health and safety requirements. To this point, defendant proffers the affidavit of Kristin Sampson ("Sampson"), its Director of Operation, who avers that defendant entered into the lease to operate the store in a heavily trafficked area of New York City, and without such an exchange, the proposed arrangement made little sense. Thus, when the lease was entered into, occurrences that could disrupt

economic activities in the magnitude that the COVID-19 pandemic has caused was not envisioned. Now, "[a]lthough NYC Opera made its best efforts to navigate the pandemic, including by attempting to bargain with plaintiff on numerous occasions, its operations were decimated by the COVID-19 disruption, rendering its continued payment obligations under the lease impossible, impracticable, and inconsistent with its not-for-profit mission" (NYSCEF Doc. No. 32, *Sampson affidavit*, ¶8). Defendant contends that because some courts have ruled that contractual parties could not have foreseen the societal effect of the pandemic, the shift of risk language contained in the lease creates additional issues of fact (*id.*, at pg 14).

In reply, plaintiff articulates that defendant does not oppose that part of plaintiff's motion which seeks dismissal of defendants first, second, and fourth affirmative defenses. Plaintiff argues that the frustration of purpose, force majeure, impracticability arising out of the COVID-19 pandemic defense (third affirmative defense) is barred by "the clear terms of Article 26 of the [l]ease which state that [d]efendant's obligation to pay rent is not excused in the event of 'government preemption in connection with a National Emergency or by reason of any rule, order or regulation of any department or subdivision thereof of any government agency'" (NYSCEF Doc. No. 7, *reply*, pg 7). As for defendant's argument that discovery is necessary to ascertained whether events such as COVID-19 was foreseeable at the time of contract, plaintiff contends that the parties' intent is embodied in the four corners of the lease. Lastly, plaintiff posits that defendant cannot avail itself of CPLR 3212 because it has failed to demonstrate that any evidence relevant to its opposition rests in the exclusive knowledge of the plaintiff, and hence, discovery is not necessary.

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).

A landlord seeking summary judgment against a tenant for breach of rental obligations satisfies its *prima facie* evidentiary burden by proving the existence of a lease, landlord's performance under the lease, tenant's nonpayment of rent, the total debt due, and a description of the how the amounts due were calculated (see *Thor Gallery At S. DeKalb, LLC v Reliance Mediaworks (USA) Inc.*, 143 AD3d 498, 498 [1st Dept 2016]).

Here, plaintiff met its *prima facie* entitlement to summary judgment by submitting the undisputed lease. There is no dispute concerning plaintiff's performance. Also, the rent ledger, along with the explanations contained in the Ohebshalom affidavit, establish defendant's nonpayment and the debt outstanding.

Defendant has failed to raise an issue of fact to defeat the motion because, although it relies on its third affirmative defense as a basis for the denial of the motion, the argument is unpersuasive. The First Department has declared that the "invocation of the pandemic as

grounds for application of the doctrines of frustration of purpose or impossibility is an approach this Court has squarely rejected – even, at times, where the business of the party seeking application of such doctrines was temporarily suspended" (*Pentagon Fed. Credit Union v Popovic,* 217 AD3d 480, 481 [1st Dept 2023]). In *Knickerbocker Retail LLC v Bruckner Forever Young Social Adult Day Care Inc.*, 204 AD3d 536, 537 (1st Dept 2022), the First Department further ruled that a temporary suspension of a business' operations during the pandemic as a result of a government directive cannot be a basis for a frustration of purpose affirmative defense. Furthermore, a party asserting the affirmative defense of impossibility must show "destruction of the subject matter of the contract or [that] the means of performance makes performance objectively impossible" and that "where performance is possible, albeit unprofitable, the legal excuse of impossibility is not available" (*Warner v Kaplan*, 71 AD3d 1, 5 [1st Dept 2009].)

It is undisputed that Executive Order number 202.8 required defendant to reduce its in-person workforce by 100%, from March 20, 2020, through June 22, 2020, but the lease was set to terminate on January 31, 2021. Contrary to defendant's contention, the purpose of the parties' long-term lease agreement was not completely defeated by the temporary cessation of operations pursuant to the executive order and defendant still had access to the premises when it was allowed to reopen. While it is not lost on the court the economic impact of government COVID-19-related regulations upon business activities such as that of defendant's business, defendant has not demonstrated that the loss of business as a result of the pandemic makes performance objectively impossible (see *Triad 11 E., LLC v Midoriya, Inc.*, 216 AD3d 540, 541 [1st Dept 2023] citing *Fives 160th, LLC v Qing Zhao*, 204 AD3d 439, 439-440 [1st Dept 2022]). Likewise, defendant has not established that its rent payment obligations under the lease was predicated on its business being viable, and in any case, "performance of a contract is not excused where impossibility is occasioned by financial difficulty or economic hardship" (*Valenti v Going Grain, Inc.*, 159 AD3d 645, 645 [1st Dept 2018], citing *407 East 61st Garage, Inc. v Savoy Fifth Ave. Corp.*, 23 NY2d 275, 281 [1968]). Therefore, the portion of the motion for summary judgment seeking dismissal of defendant's frustration of purpose and impossibility of performance affirmative defense (third affirmative defense) is granted.

Addressing now the remainder of the affirmative defenses, plaintiff seeks their dismissal, arguing they are all boilerplate and conclusory. A review of the record reveals that the remainder of the affirmative defenses are merely stated in boilerplate and conclusory manner. Furthermore, insofar as defendant has not addressed that plaintiff's branch of plaintiff's motion seeking dismissal of those affirmative defenses, they are deemed abandoned (see *Wing Hon Precision Indus. Ltd. v Diamond Quasar Jewelry, Inc.*, 154 AD3d 550, 551 [1st Dept 2017]; *Carey & Assoc., LLC v 521 Fifth Ave. Partners, LLC*, 130 AD3d 469, 470 [1st Dept 2017]). Based on the foregoing, the remainder of defendants' affirmative defenses are dismissed.

Plaintiff has also established its entitlement to attorney fees and disbursement and defendant has not opposed that branch of the motion. "Under the [general] rule, attorney's fees are incidents of litigation, and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" (*Sage Sys., Inc. v Liss*, 39 NY3d 27, 30-31 [2022], quoting *Hooper Assoc. v AGS Computers.*, 74 NY2d 487, 491 [1989]). Here, the lease provides for plaintiff's recovery of attorney's fees and disbursement

(NYSCEF Doc. No. 13, *lease,* ¶*19*). Thus, the issue with respect to attorney's fees shall be determined by a special referee. All other arguments have been considered and are either without merit or need not be addressed. Accordingly, it is hereby

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

ORDERED that that branch of plaintiff's motion seeking dismissal of defendant's affirmative defenses is granted; and it is further

ORDERED that that branch of plaintiff's motion seeking the principal sum of $500,763.86, plus interest (first cause of action) is granted; and it is further

ORDERED that Clerk of Court shall enter a money judgment in favor of plaintiff and against defendant for the principal sum of $500,763.86, plus interest (first cause of action), plus costs and disbursements; and it is further

ORDERED that the branch of plaintiff's motion for summary judgment seeking attorney fees, incurred in this action is referred to a special referee (second cause of action); 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 upon the Clerk of the Court, who shall enter judgment accordingly; 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).

This constitutes the decision and order of this court.

September 12, 2023

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**