SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **42**

Justice

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200 EAST 36TH OWNERS CORP.,

Plaintiff,

- v -

N.Y.C. WAREHOUSE, INC. D/B/A POOKIE & SEBASTIAN, and NEW YORK CITY LANGUAGE, INC. D/B/A POOKIE & SEBASTIAN,

Defendants.

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INDEX NO. 656376/2022

MOTION DATE 05/16/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 38, 39 were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

I. INTRODUCTION

This is a breach of contract action to recover, *inter alia*, $476,841.09 in unpaid rent and additional rent due under a commercial lease between the plaintiff landlord, owner of commercial property at 200 East 36th Street in Manhattan, and defendant N.Y.C. Warehouse, Inc. d/b/a Pookie & Sebastian (Warehouse, Inc.) and pursuant to an agreement between the plaintiff and defendant New York City Language, Inc. d/b/a Pookie & Sebastian (Language, Inc.). The plaintiff moves pursuant to CPLR 3212 for partial summary judgment on its first and fourth causes of action and pursuant to CPLR 3211(b) to dismiss the defendants' affirmative defenses. The defendants oppose the motion. The motion is granted in part.

II. BACKGROUND

The plaintiff first entered into a lease agreement with Warehouse, Inc., as tenant, in October 2002 for a commercial unit on the ground floor of the subject property. Warehouse, Inc. operated a boutique retail shop called Pookie & Sebastian on the premises. In October 2011, the plaintiff and Warehouse, Inc. entered into a renewed lease for the premises for a term commencing on November 1, 2011, and expiring on October 31, 2021 (the lease).

Pursuant to Article 4 of the lease, the tenant was obligated to pay the landlord rent in the amount of $11,343.50 per month for the period commencing November 1, 2018, and ending on October 31, 2019; $11,683.80 per month from November 1, 2019, to October 31, 2020, and $12,034.32 per month from November 1, 2020 to October 31, 2021.

Pursuant to Article 5 of the lease, the tenant was obligated to pay the landlord additional rent, which included tax escalations, late charges, and interest. With regard to tax obligations, Article 5(B)(4) provided that the landlord must render an annual statement of taxes due from the tenant, and tax payments as shown on the statement were payable "within thirty (30) days after delivery." However, Article 5(B)(8) provided that the landlord's failure to deliver any tax statements "shall not in any way be deemed to be a waiver of, or cause [the landlord] to forfeit or surrender, its rights to collect any items of additional rent which may have become due pursuant to this Article during the term of this lease.

Article 5 of the lease further provided that "if [the landlord] makes any expenditures or incurs any obligations for the payment of money in connection therewith including, but not limited to, attorneys [sic] fees in instituting, prosecuting, or defending any action or proceeding, such sums paid or obligations incurred with interest and costs shall be deemed to be additional rent hereunder."

Article 44 provided that the tenant's obligation to pay the rent and additional rent:

> "shall not be affected, diminished, or excused if by reason of unavoidable delay (as hereinafter defined) [the landlord] fails or is unable to supply any services or make any repairs or perform any work which under this Lease [the landlord] has expressly agreed to supply, make or perform, provided that the Demised Premises are not untenantable in whole or in substantial part (or unreachable by elevator) for more than 60 consecutive days after the Commencement Date."

The Article further defined "unavoidable delays" to include "the enactment of any law or issuance of any governmental order, rule or regulation … prohibiting or restricting performance of work of the character required to be performed by [the landlord] under this Lease."

In Article 14 of the lease, the plaintiff acknowledged that it retained $42,735.48 which Warehouse, Inc. paid it as a security deposit under the 2002 lease, and the parties agreed that it was "for the full and faithful performance of the provisions of this lease, including without limitation, the timely payment of all Base Rent and Additional Rent." The same article further

provides that the plaintiff may "use, apply or retain the whole of any part of the Security to the extent required to cure any default of Lessee's and reimburse Lessor for any damages or expenses (including, without limitation, counsel fees) incurred by reason of such default."

Article 27(H) provided that the "Lessee shall not have the right and shall not interpose any set-off or counterclaim of any kind whatsoever other than mandatory counterclaims required under the New York Civil Practice Law and Rules."

By 2016 Warehouse, Inc. was in rent arrears. On May 11, 2016, the plaintiff and defendant Language, Inc., identified as the "tenant" and "successor-in-interest" to Warehouse, Inc., entered into a "Settlement Agreement" with the plaintiff wherein Language, Inc. acknowledged owing arrears (representing unpaid rent, late fees and attorney's fees) of $39,073.98 through April 30, 2016. The plaintiff waived the late fees and attorney's fees and the tenant agreed to pay $34,100.37 in installments over one year's time. Both the lease and settlement agreement were signed by Kevin Matuszak, as principal of both entities.

The Settlement Agreement provides, in Section 5, that in addition to the payment schedule for arrears, the "tenant will continue to make payments for all future and current monthly rent payments and all other payments due pursuant to the Lease in a timely manner" and that failure to make all such payments under the lease "will result in a late fee being assessed for that month as well as all attorney's fees incurred by Landlord as a result thereof." In Section 7, the parties agree that "nothing herein shall be deemed a waiver of modification of either party's rights pursuant to the Lease and nothing herein shall prevent either party from otherwise enforcing any of its rights and remedies pursuant to the Lease." Sections 6 and 8 authorize the Landlord to commence legal action in the event of any breach by the Tenant. Section 11 provides that "the parties expressly acknowledge and agree that should any party be required to commence legal action due to the other party's breach of this agreement and/or to enforce any provision of this agreement, the breaching party shall be liable to the non-breaching party for all attorney's fees, costs and expenses occurred [sic] in such legal action."

The defendants again began to accrue arrears starting in August 2019, paying less than the full monthly rent and additional rent and paid none at all starting in May 2020.

By a letter dated October 7, 2020, the defendants informed the plaintiff that, due to the economic effects of the COVID-19 pandemic and the temporary government-mandated closure of some retail businesses, the Warehouse, Inc. was forced to close the store. In the letter,

signed by Tim Horner, the defendants represent that the company was being dissolved and the assets were being liquidated, and "that the company's current obligations, excluding those in respect to the lease, substantially exceed its assets." The defendants offered to surrender the premises as of October 31, 2020, a year prior to expiration of the lease. There is no response letter from the plaintiff. The defendants vacated the premises on October 31, 2020, and failed to make any payment thereafter. Consequently, for the period from August 1, 2019, to October 31, 2021, the expiration date of the lease, the defendants failed to pay all rent and additional rent and accrued total arrears of $446,608.85.

The plaintiff commenced this action on May 19, 2022. In the complaint, the plaintiff alleges that the defendants are in arrears of $476,841.09 and asserts four causes of action: (1) breach of contract, alleging that the defendants breached the lease by failing to pay the arrears and seeking money judgment in the amount of the arrears, with interest at a rate of 12% per annum from September 1, 2019; (2) account stated, seeking the same relief as in the first cause of action; (3) unjust enrichment, seeking the same relief as in the first cause of action; and (4) attorneys' fees pursuant to Article 5 of the lease, seeking an amount to be determined at trial. The defendants answered the complaint on June 14, 2022, asserting general denials and fifteen affirmative defenses.

On August 24, 2022, the plaintiff filed the instant motion for partial summary judgment, seeking judgment on the first and fourth causes of action in the sum of $446,608.85 and dismissal of all of the defendants' affirmative defenses. The defendants oppose the motion.

III. DISCUSSION

A. Summary Judgment - First Cause of Action – Breach of Contract

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once the movant meets this burden, it becomes incumbent upon the party opposing the motion to come forward with proof in admissible form to raise a triable issue of fact. See Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra. In addition, "the court, upon a

summary judgment motion, may search the record and grant judgment to the non-moving party without necessity of notice or cross motion." Abramovitz v Paragon Sporting Goods Co., 202 AD2d 206, 208 (1st Dept. 1994); see Maggio v 24 W. 57 APF, LLC, 134 AD3d 621 (1st Dept. 2015).

In support of its motion, the plaintiff submits, *inter alia*, an affirmation of counsel, the lease, the Settlement Agreement, the defendants' Letter to the plaintiff dated October 7, 2020, and an arrears ledger. The plaintiff also submits two affidavits of Christa Boyse, who is employed by AKAM Associates Inc. (AKAM), the managing agent for the plaintiff, and is the current property manager for the subject commercial property. In her first affidavit, Boyse avers that she is "familiar with the day-to-day operations of Plaintiff" and that she oversees the collection of rent, taxes, late fees, interest and attorneys' fees owed by the defendants. She further avers that the arrears ledger is a "true and accurate copy of the ledger statement, reflecting all outstanding amounts owed by Defendants." In her reply affidavit, Boyse avers that the plaintiff did not relet the premises to a new tenant until February 1, 2022, and that the plaintiff retains the defendants' security deposit of $42,735.48.

The plaintiff's proof establishes, *prima facie*, (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendants' 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). The court notes that the plaintiff seeks to hold both defendants liable although defendant Language, Inc. was not a party to the lease, and Warehouse, Inc. was not a party to the Settlement Agreement. However, as the defendants do not dispute that both are liable, liability is joint and severable.

In opposition, the defendants fail to raise any triable issue of fact. They submit, *inter alia*, an affidavit of Kevin Matuszak, principal of both defendants, fifteen (15) rent checks each dated approximately a month apart from January 1, 2019, to March 2, 2020, the 2002 lease, showing less than the full amount owed, and an affirmation of the defendants' counsel. The defendants do not dispute that they defaulted under the lease after March 2020. Instead, the gravamen of the defendants' opposition is that they were excused from payments after March 2020 under

Article 44 of the lease, which they read expansively to be a "force majeure" clause, arguing that the premises were rendered "untenantable" within the meaning of the lease terms due to the COVID-19-related governmental shutdown.

However, under Article 44, the defendants' obligation to pay rent and additional rent is only excused if the plaintiff fails to make certain required repairs to the Premises because of an "unavoidable delay" *and* this delay causes the Premises to be untenantable for more than 60 consecutive days. The defendants have not alleged that the plaintiff failed to perform any work at the Premises or to supply any services required under the lease due to the pandemic.

The defendants unpersuasively conflate the contractual definition of "unavoidable delays" and the meaning of the term "untenantable." "[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." Greenfield v. Philles Records, 98 NY2d 562, 569 (2002). It has long been held that the plain meaning of "untenantable" is that the premises are rendered "unfit for occupancy." See, e.g., Meserole v Hoyt, 161 NY 59 (1899); Tallman v Murphy, 120 NY 345 (1890); Floyd-Jones v Schaan, 129 AD 82 (1st Dept. 1908). That definition survives today. Courts continue to define "untenantable" to mean an uninhabitable condition caused by physical destruction or injury to the premises, whether through fire, flood, or the operation of other elements. See See Piecraft Wantagh, LLC v Willow Wood Assoc., L.P., 216 AD3d 1010 (2nd Dept. 2023); Andreas v 186 Tenants Corp., 208 AD3d 406 (1st Dept. 2022); Jara v Costco Wholesale Corp., 178 AD3d 687 (2nd Dept. 2019).

Other provisions of the parties' lease support this meaning of "untenantable." Article 55(C) allows the plaintiff to treat as a default the defendants' vacatur, abandonment, or desertion of the Premises "except during any period the demised premises are rendered untenantable by reason of fire or casualty or because of (the defendants') permitted repairs or alterations)." Article 23, entitled "Fire, Casualty," provides that the defendants have the right to terminate the lease "[i]f following the occurrence of a fire or other casualty, the Premises shall remain untenantable for a period of two hundred seventy (270) consecutive days." Thus, the meaning of "untenantable" in the context of the lease refers physical damage or destruction of the premises, which did not occur here.

To the extent the defendants argue that the defenses of impossibility of performance or frustration of purpose should excuse their obligations under the lease, the argument is

unavailing. First, no such language appears in the lease. Second, the defendants' arrears did not commence upon the onset of the pandemic. They had been accruing since August 2019. And, although the court is sympathetic to the defendants' 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]).

Also in regard to the breach of contract cause of action, the defendants challenge the plaintiff's calculation of damages by arguing that (1) the rent ledger is not admissible evidence, (2) they met all monetary obligations through March 2020, (3) the plaintiff incorrectly applied the contractual late fees, (4) they did not owe any real estate taxes as additional rent as the plaintiff did not send them statements or invoices and (5) there should be a set-off in the amount of any government loans received by the plaintiff. None of these arguments have merit.

Contrary to the defendants' contention, the arrears ledger is in admissible form since it is authenticated by Christa Boyse in her affidavit dated August 23, 2022. See CPLR 4518(a); Muslar v Hall, 214 AD3d 77, 82 (1st Dept. 2023); Epic W14 LLC v Malter, 212 AD3d 575, 575-576 (1st Dept. 2023).

Contrary to the defendants' contention, the 15 rent checks they submitted, dated from January 1, 2019 to March 2, 2020, do not demonstrate that the defendants were current in their obligations before March 2020, as those check amounts, which were correctly reflected in the rent ledger, were less than the full monthly obligation for those months.

Contrary to the defendants' contention, the rent ledger shows that the plaintiff properly applied the contractual late fee rate of 4% per month in accordance with Article 6 of the lease, by charging one-time late fees on the rent that was unpaid in each month. Cf. Clean Air Options, LLC v Humanscale Corp., 142 AD3d 923 (1st Dept. 2016). (4) While the plaintiff does

not dispute that it did not send any invoice or statement of real estate taxes to the defendants as per Article 5(B)(7) of the lease, this omission is of no moment as the very next subsection, Article 5(B)(8), expressly provides that the landlord's failure to provide such tax statements does not cause the landlord to "forfeit or surrender" its rights to collect such real estate taxes.

Furthermore, any receipt of governmental loans or grants is irrelevant to the defendants' obligations under the lease, as Article 27(H) provides that the tenant has no right to interpose any "set-off … of any kind whatsoever." Nor was the plaintiff under an obligation or duty to the tenant to relet, or attempt to relet abandoned premises in order to minimize damages." Holy Props. Ltd., L.P. v Kenneth Cole Prods., 87 NY2d 130, 133 (1995); 172 Van Duzer Realty Corp. v Globe Alumni Student Assistance Assn., Inc., 24 NY3d 528 (2014); BP 399 Park Ave. LLC v Pret 399 Park, Inc., 150 AD3d 507 (1st Dept. 2017). Notably, in her reply affidavit, Boyse avers that the plaintiff did not relet the premises to a new tenant until February 1, 2022. No proof to the contrary is proffered by the defendants. Indeed, the defendants do not state whether they received any government loans or grants.

Finally, the defendants' assertion that the plaintiffs' motion is premature as there is outstanding discovery is specious. While discovery is not completed, the defendants "fail[] to establish how discovery will uncover further evidence or material in the exclusive possession" of the plaintiff. Kent v 534 East 11th Street, 80 AD3d 106, 114 (1st Dept. 2010). '[T]he party invoking CPLR 3212(f) must show some evidentiary basis supporting its need for further discovery." Green v Metropolitan Transp. Auth. Bus Co., 127 AD3d 421 423 (1st Dept. 2015). It is well settled that mere hope or speculation that discovery may uncover evidence to defeat the motion is insufficient. See Reyes v Park, 127 AD3d 459 (1st Dept. 2015); Alcaron v Ucan White Plains Housing Dev. Fund Corp., 100 AD3d 431 (1st Dept. 2012). The defendants are relying on mere hope and speculation.

Notably, the defendants served a demand on the plaintiff on or about June 10, 2022, and the plaintiff properly responded with specific objections to the demands as "overbroad, vague and burdensome" and otherwise improper under CPLR article 31. For example, the defendants demanded "the names and addresses of all persons known to have witnessed or having knowledge of any facts related to claims made in this lawsuit", "copies of any lease agreements and contracts entered by the plaintiff and any other entity .. for the subject premises from 2020 to present", "documents reflecting any Covid-related forgivable loans taken and received by the

plaintiff" and "copies of any written (including electronic) correspondence between the parties from 2011 to present, related to subject premises."

For these reasons, the plaintiff is entitled to summary judgment on the first cause of action. Because the parties do not dispute that the plaintiff retains a security deposit in the amount of $42,735.48, that amount is subtracted from the amount demanded. The plaintiff is accordingly awarded judgment against the defendants, jointly and severally, in the amount of $403,873.37, with contractual interest a rate of 12% per annum from September 1, 2020, through entry of judgment, and at the 9% statutory rate thereafter. See CPLR 5001(b).

B. Summary Judgment – Fourth Cause of Action – Attorney's Fees

In the fourth cause of action, the plaintiff seeks reimbursement for attorneys' fees incurred as a result of the defendants' default under the lease terms. It is well settled that attorney's fees are recoverable where, as here, there is a specific contractual provision for that relief. See Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010). The parties' Settlement Agreement, in Sections 5,6,7,8 and 11, expressly provides for the payment of attorney's fees in the event of a default by the tenant in paying rent. The parties do not dispute the validity of the Settlement Agreement or any terms contained therein. Indeed, they operated under both the lease and Settlement Agreement from 2016 onward. Sections 5,6,7,8 and 11 of the Settlement Agreement together require the tenant "to make payments for all future and current monthly rent payments and all other payments due pursuant to the Lease in a timely manner" or incur "a late fee … for that month as well as all attorney's fees incurred by Landlord as a result thereof" and that in the event of litigation arising from a breach of the lease, "the breaching party shall be liable to the non-breaching party for all attorney's fees, costs and expenses occurred [sic] in such legal action." Section 7 makes clear that the Settlement Agreement supplements but also preserves the parties' rights under the lease.

Indeed, in the complaint, the plaintiff specifically cites to "Section 5" of the Lease, which entitles it to "recover its reasonable attorney's fees in connection with defendants' default under the Lease" and alleges that the defendants breached the lease by failing to pay rent and additional rent. This language tracks the language of and corresponds to Section 5 of the Settlement Agreement. The defendants misread or incorrectly interpret this language to refer only to Section 5(A) of the lease, which also entitles the plaintiff to attorney's fees, but in limited circumstances – only in connection with the plaintiff's performance of any obligation of the

defendants on the defendants' behalf. That is, Section 5(A) "clearly requires that the tenant owe an obligation to a third party so that the landlord can perform it in the tenant's stead." See Frank B. Hall & Co. v Orient Overseas Assoc., 84 AD2d 338, 342 (1st Dept. 1982) *aff'd* 56 NY2d 965 (1982). However, the defendants' reliance on Frank B. Hall & Co. is misplaced as the only attorney's fees provision in the subject agreement there contained limiting language. That is, there was no Settlement Agreement or other type of modification with a clear and unequivocal provision authorizing attorney's fees for a default in rent payments as there is in this case.

In sum, while Section 5(A) of the lease provides only that the landlord may seek to recover attorney's fees incurred in connection with performing an obligation on behalf of the tenant, Section 5 of the subsequent Settlement Agreement, along with Sections 6,7,8, and 11, expressly provide for attorney's fees that result from the defendants' default in rent obligations under the lease. Therefore, the plaintiff is granted summary on this cause of action on the issue of liability. However, the plaintiff has not submitted any billing statements, invoices, attorney affirmation or any other proof to support any amount of attorney's fees incurred. The plaintiff may submit such supplemental papers within 60 days. .

C. Dismissal of Affirmative Defenses

In moving to dismiss an affirmative defense, the plaintiff bears the burden of showing that "the defense is without merit as a matter of law." Granite State Ins. Co. v Transatlantic Reins. Co., 132 AD3d 479, 481 (1st Dept. 2015); 534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick, 90 AD3d 541, 541 (1st Dept. 2011). "The allegations set forth in the answer must be viewed in the light most favorable to the defendant." Granite State Ins. Co. v Transatlantic Reins. Co., supra; 182 Fifth Ave. v Design Dev. Concepts, 300 AD2d 198, 199 (1st Dept. 2002). The defendants' fifteen affirmative defenses, even if viewed in the light most favorable to them, must be dismissed pursuant to CPLR 3211(b).

Initially, the court notes that all fifteen affirmative defenses are improperly asserted in a conclusory manner in the answer without any detail or factual allegations and are thus subject to dismissal. See Commissioners of State Ins. Fund v Ramos, 63 AD3d 453 (1st Dept. 2009); Manufacturers Hanover Trust Co. v Restivo, 169 AD2d 413 (1st Dept. 1991). CPLR 3013 expressly requires that all "statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or

defense." Most notably, the first affirmative defenses is stated as "plaintiff's claims are barred, in whole or part, by its unjust enrichment, waiver, laches, estoppels, lack of privity and standing, and unclean hands", without more.

Furthermore, the defendants fail to even address the first (except for the defense of unjust enrichment), second, seventh, eight, eleventh, and thirteenth affirmative defenses in their opposition to the plaintiff's motion for summary judgment. Thus, those defenses are deemed waived. See Bosco Credit V Trust Series 2012-1 v Johnson, 177 AD3d 561 (1st Dept. 2019); NY Commercial Bank v J. Realty F Rockaway, Ltd., 108 AD3d 756 (2nd Dept. 2013). The remainder of the affirmative defenses are without merit.

The part of the first affirmative defense that asserts unjust enrichment is dismissed for the further reason that this is a breach of contract action. As a general rule, where, as here, a party seeks to recover under an express agreement, no cause of action lies to recover for unjust enrichment. See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382 (1987); JDF Realty, Inc. v Sartiano, 93 AD3d 410 (1st Dept. 2012). Nor do the defendants states any cognizable claim for unjust enrichment, which requires a party to demonstrate that (i) the other party was enriched, (ii) at that party's expense, and (iii) "it is against equity and good conscience to permit the [other party] to retain what is sought to be recovered." Paramount Film Distrib. Corp. v State, 30 NY2d 415, 421 (1972) (citations omitted). In their opposing papers, the defendants argue only that the plaintiff was unjustly enriched by its receipt of replacement lease income, insurance proceeds, or COVID-19-related government loans. However, the defendants have alleged no facts showing that the plaintiff received any such funds and, even if they did receive fund, it cannot be argued that any such enrichment was at the defendants' expense. See Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173 (2011). Furthermore, the parties' lease expressly prohibits any set-off or counterclaim alleging unjust enrichment. This fact requires dismissal of the sixth affirmative defense.

In the third, fourth, ninth, tenth, twelfth, fourteenth, and fifteenth affirmative defenses, the defendants essentially argue that Article 44 of the lease excused them from their obligations to the plaintiff once the COVID-19 pandemic started in March 2020. As discussed herein, this argument is meritless.

The fifth affirmative defense alleging the plaintiff's failure to mitigate damages is dismissed as neither the lease nor the law requires the landlord to relet the premises or

otherwise mitigate its damages. See Holy Props. Ltd., L.P. v Kenneth Cole Prods., supra; 172 Van Duzer Realty Corp. v Globe Alumni Student Assistance Assn., Inc., supra; BP 399 Park Ave. LLC v Pret 399 Park, Inc., supra.

D. Remaining Causes of Action

Inasmuch as the two remaining causes of action of the complaint, for an account stated and unjust enrichment, are duplicative of and seek the same relief as granted herein on the breach of contract cause of action, they are no longer viable and are deemed withdrawn by the plaintiff. To be sure, the plaintiff has not demonstrated that the defendants "received [and] retained without objection" any invoices sent to them by the plaintiff (Scheichet & Davis, P.C. v Nohavicka, 93 AD3d at 478 (1st Dept. 2012), *quoting* Gamiel v Curtis & Reiss-Curtis, P.C., 60 AD3d 473, 474 [1st Dept. 2009]) and, as stated above, where a plaintiff seeks to recover under an express agreement, unjust enrichment is inapplicable. See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., supra; JDF Realty, Inc. v Sartiano, supra.

IV. CONCLUSION

Accordingly, and upon the foregoing papers, it is

ORDERED that the branch of the plaintiff's motion which is for summary judgment on the first cause of action, breach of contract, is granted, and the plaintiff is awarded money judgment in the sum of $403,873.37, plus costs and interest, and it is further

ORDERED that the Clerk shall enter judgment in favor of the plaintiff, 200 East 36th Owners Corp., and against the defendants, N.Y.C. Warehouse, Inc. d/b/a Pookie & Sebastian and New York City Language, Inc. d/b/a Pookie & Sebastian, jointly and severally, in the sum of $403,873.37, plus costs and contractual interest a rate of 12% per annum from September 1, 2020, through entry of judgment, and at the 9% statutory rate thereafter, and it is further

ORDERED that the branch of the plaintiff's motion which is for summary judgment on the fourth cause of action, for attorney's fees, is granted on thus issue of liability, and the plaintiff is granted leave to file supplemental papers to establish the amount to be awarded, within 60 days of the date of this order, and shall promptly notify the Part 42 Clerk of any such filing, and it is further

ORDERED that the branch of the plaintiff's motion which is for dismissal of the defendants' affirmative defenses is granted, and the defendants' fifteen affirmative defenses are dismissed, and it is further

ORDERED that the second and third causes of action in the complaint are deemed withdrawn.

This constitutes the Decision and Order of the court.

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

12/1/2023
DATE

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