

**Paramount Leasehold, L.P. v Krasny Off., Inc.**

2024 NY Slip Op 31725(U)

May 16, 2024

Supreme Court, New York County

Docket Number: Index No. 650522/2021

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. DEBRA A. JAMES**

**PART 59**

*Justice*

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**INDEX NO. 650522/2021**

PARAMOUNT LEASEHOLD, L.P.,

**MOTION DATE 06/30/2022**

Plaintiff,

**MOTION SEQ. NO. 001**

- v -

THE KRASNY OFFICE, INC., and GARY KRASNY,

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 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, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91

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

ORDER

Upon the foregoing documents, it is

ORDERED that the cross-motion of the defendants The Krasny Office, Inc. and Gary Krasny to strike the note of issue, is denied; and it is further.

ORDERED that the motion of plaintiff for summary judgment striking the affirmative defenses and dismissing the counterclaims interposed in defendants' answer is granted; and it is further

ORDERED to the extent that it seeks partial summary judgment in its favor on the complaint, the motion of plaintiff Paramount Leasehold, L.P., is granted as to liability, and pursuant to CPLR § 4317, the court having on its own motion determined to consider the appointment of a referee to determine as follows, the issue of

damages separately triable and not requiring a trial by jury is involved, it is now hereby

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to determine the following individual issues of fact, which are hereby submitted to the JHO/Special Referee, as follows:

- (1) The amount of rent and additional rent incurred by defendants under the lease and guaranty; and
- (2) The reasonable value of attorney's fees and disbursements, incurred by plaintiff in prosecuting this action,

each of which plaintiff shall recover from defendants The Krasny Office, Inc. and Gary Krasny;

and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) at the "References" link), shall assign this matter at the initial appearance to an available

JHO/Special Referee to determine as specified above; and it is further

ORDERED that the parties, accompanied by their counsel, shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED and ADJUDGED that pursuant to CPLR § 4319, the Clerk is directed to enter judgment in favor of plaintiff Paramount Leasehold, L.P. and against the defendants The Krasny Office, Inc.

and Gary Krasny, in accordance with the Report of the aforementioned Special Referee, without any further application.

DECISION

In this action, plaintiff Paramount Leasehold, L.P. seeks damages against defendants for breach of a commercial lease executed by the defendant The Krasny Office, Inc. (the "Tenant") and guaranteed by co-defendant Gary Krasny, and moves for summary dismissal of defendants' affirmative defenses and counterclaims. Defendant's oppose such motion and cross move to vacate the note of issue.

Defendants' cross motion must be dismissed as untimely under 22 NYCRR § 202.21(e). Nor have defendants demonstrated that the need for further discovery is any more than a mere hope. See Prestige Decorating and Wallcovering, Inc. v US Fire Ins. Co., 59 AD3d 406, 407 (1<sup>st</sup> Dept 2008).

Defendants' counterclaims seeking declaratory relief are without merit and shall be dismissed. See The Gap, Inc. v 44-45 Broadway Leasing Co., Inc, 206 AD3d 503 (1<sup>st</sup> Dept 2022).

In opposition to plaintiff's motion for summary judgment, the defendants raise the affirmative defenses of impossibility and frustration of purpose stemming from the COVID-19 pandemic, which resulted in government mandated closures of certain businesses and industries. Tenant serves theatrical performers and asserts that

it was impossible to continue doing business in light of the government shutdown.

The lease executed by the parties unambiguously provides that the rent shall be paid by the defendant The Krasny Office, Inc. (the "Tenant") "without set-off or deduction." (NYSCEF Doc. No. 024, Preamble). The lease also expressly provides that the Tenant's obligations under the lease

"shall in no wise be affected, impaired or excused\* \* \* by reason of strike or labor troubles or any cause whatsoever including, but not limited to, 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 which have been or are affected, either directly or indirectly, by war or other emergency."

(NYSCEF Document Number 024, ¶ 27.)

Courts have held that the reduction in revenue caused by the pandemic is not a sufficient basis to claim that the lease was frustrated or that performance was rendered impossible. See 558 Seventh Ave. Corp. v Times Square Photo Inc., 194 AD3d 561, 562 (1st Dept 2021). It is well established that "the doctrine of frustration of purpose . . . is not available where the event which prevented performance was foreseeable and provision could have been made for its occurrence". Warner v. Kaplan, 71 AD3d 1, 6 (1st Dept 2009). Similarly, "where performance is possible, albeit unprofitable, the legal excuse of impossibility is unavailable"

Id., at 5-6. The remaining affirmative defenses are likewise without merit.

Finally, the defendants fail to establish that the Tenant satisfied the conditions set forth in NYC Admin Code § 22-1005 for tolling of liability under a personal guaranty, to wit, defendants have not shown that

- (1) tenant was required to cease serving patrons food or beverages for on-premises consumption or to cease operation under executive order number 202.3 issued by the governor on March 16, 2020; or
- (2) tenant was a non-essential retail establishment subject to in-person limitations; or
- (3) tenant was required to close to members of the public under executive order number 202.7 issued by the governor on March 19, 2020.

*Debra A. James*

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<b>5/16/2024</b>			<b>DEBRA A. JAMES, J.S.C.</b>		
<b>DATE</b>					
<b>CHECK ONE:</b>	<input type="checkbox"/>	<b>CASE DISPOSED</b>	<input checked="" type="checkbox"/>	<b>NON-FINAL DISPOSITION</b>	
	<input type="checkbox"/>	<b>GRANTED</b>	<input type="checkbox"/>	<b>GRANTED IN PART</b>	<input type="checkbox"/> <b>OTHER</b>
	<input type="checkbox"/>	<b>DENIED</b>	<input type="checkbox"/>	<b>SUBMIT ORDER</b>	
<b>APPLICATION:</b>	<input type="checkbox"/>	<b>SETTLE ORDER</b>	<input type="checkbox"/>	<b>FIDUCIARY APPOINTMENT</b>	<input checked="" type="checkbox"/> <b>REFERENCE</b>
<b>CHECK IF APPROPRIATE:</b>	<input type="checkbox"/>	<b>INCLUDES TRANSFER/REASSIGN</b>			