SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

----------X

1140 BROADWAY LLC,

Plaintiff,

- v -

BOLD FOOD, LLC, KBFK RESTAURANT CORP.

Defendants.

----------X

INDEX NO. 652674/2020

MOTION DATE 11/24/2020

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, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

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

The motion by plaintiff for summary judgment is granted as to liability only.

Background

In this commercial landlord-tenant case, plaintiff (the landlord) moves for summary judgment. It claims that defendant Bold Food (the tenant) leased a portion of the twelfth floor at plaintiff's building in Manhattan as office space. Defendant KBFK entered into a good guy guarantee in connection with the lease, which expired in February 2022. Plaintiff contends that the tenant stopped paying rent in February 2020 and eventually vacated the space on June 30, 2020, five months later.

In opposition, defendants cite the ongoing pandemic as the reason the tenant stopped paying rent. They argue that performing under the contract was objectively impossible and therefore any default was excusable. Defendants also rely on the frustration of purpose doctrine to excuse the tenant's failure to pay rent. Defendant Bold Food observes that its primary services

involve managing and consulting for a group of restaurants and the shutdown of restaurants renders its business model unprofitable. Defendants argue in the alternative that there must be an inquest to determine the precise amount plaintiff is due.

In reply, plaintiff argues that the impossibility and frustration of purpose defenses are inapplicable and fail as a matter of law. Plaintiff also insists that the guarantor must be held liable and that its damages are not disputed.

Discussion

To be entitled to the remedy of summary judgment, the moving party "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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec*,

Ltee, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

As an initial matter, the Court grants plaintiff's motion as to liability and rejects defendants' reliance on the doctrines of impossibility and frustration of purpose. The Court empathizes with the many business that have been adversely affected by the ongoing pandemic; here, both the landlord and the tenant have undoubtedly faced significant hardship.

The doctrine of frustration of purpose requires that "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"(*Crown IT Services, Inc. v Koval-Olsen*, 11 AD3d 263, 265, 782 NYS2d 708 [1st Dept 2004]). "[T]his doctrine is a narrow one which does not apply unless the frustration is substantial"(*id*.). Here, the lease was for office space in a building and the tenant's business was devastated by a pandemic. That does not fit into the narrow doctrine of frustration of purpose. Simply put, defendants could no longer afford the rent because restaurants no longer needed the management help that the tenant provides.

This is not a case where the office space leased was destroyed or where a tenant rented a unique space for a specific purpose that can no longer serve that function (such as a factory that was condemned after the lease was signed or a agreeing to rent costumes for a specific play to be performed at a specific theater on specific dates but the theater burned down before the first rental date). To be clear, the Court takes no position on what circumstances might permit the implication of a frustration of purpose doctrine under a generic office lease. The Court merely concludes that it does not apply here, where the tenant rented office space, the tenant's industry experienced a precipitous downfall and the tenant to no longer be able pay the rent.

Similarly, the Court finds that the impossibility doctrine does not compel the Court to deny the motion. "Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract" (*Kel Kim Corp. v Cent. Markets, Inc.*, 70 NY2d 900, 902, 524 NYS2d 384 [1987]).

It is critical to point out that the tenant merely provided restaurants with consulting services. It was not shut down by any public health directives. In other words, the tenant was one step removed from the governor's public health orders relating to restaurants because their business assists restaurants.[1] It appears that restaurants no longer needed assistance with human resources, payroll or accounting, not because of anything plaintiff did (or failed to do). Sometimes that happens in business—an industry changes overnight.

And although restaurants were required to scale back certain operations (such as indoor dining) because of the pandemic, they were not fully shut down. Many food establishments decided to shut down because of the financial consequences from both the pandemic and the public health orders, but that does not mean there was a "destruction of the subject matter" contemplated in the contract at issue here, which was for office space on the twelfth floor of an office building. The Court is unable to find that the doctrine of impossibility has any application here.

[1] To be clear, the Court takes no position on whether a restaurant could successfully rely on the doctrines of impossibility or frustration of purpose. That issue is not before the Court in this motion.

Summary

The undisputed fact is that the lease was for office space in a building and the tenant stopped making payments. Nothing in the lease provides a remedy for a situation like this. The landlord never agreed to make paying the rent contingent on the tenant being able to afford it. The Court declines to step in and unilaterally modify the parties' contract and tell the landlord that it should not be able to enforce the agreement it signed with a tenant.

And the parties included a safeguard: this landlord agreed to a good guy guaranty, thus lessening the guarantor's risk if the tenant went out of business so long as certain obligations were satisfied. The guarantor is only responsible for rent for the time the tenant is actually in possession and had the power to return the premises to the landlord. Here, the tenant waited five months to return the premises to the landlord – yet the tenant and guarantor ask this Court to absolve them of their obligations. The Court declines to ignore a clear contractual provision designed to address the situation at issue here—where the tenant stops paying the rent and retains possession of the premises.

However, the Court finds that a hearing is required to assess the amount of damages plaintiff is due. Defendants argued that the security deposit has not been deducted from the damages requested although plaintiff explains in reply that any amount it is awarded should be deducted by the amount of the security deposit. This is an indication of the lack of proof as to plaintiff's actual damages. Plaintiff did not provide a ledger or any documentation demonstrating how it calculated the amount it seeks. While plaintiff attached the affidavit of its agent (NYSCEF Doc. No. 8), that does not show how it totaled the rent, additional rent, reasonable attorneys' fees, any damages or interest. In fact, Mr. DiFiore asks, in the alternative, that the Court refer this matter to a special referee to fix the amount of damages.

To the extent that defendants argue that the ongoing pandemic should constitute a "casualty" that could entitle defendants to an abatement, that claim is denied. That portion of the lease refers to physical damage, not the failure of defendants' business to retain its clients.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment is granted as to liability only and there shall be a trial to determine the amount of damages due to plaintiff, and plaintiff is directed to file a note of issue on or before December 15, 2020.

12/3/2020
DATE

ARLENE P. BLUTH, J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

----------X

35 EAST 75TH STREET CORPORATION

Plaintiff,

- v -

CHRISTIAN LOUBOUTIN L.L.C.,

Defendant.

----------X

INDEX NO. 154883/2020

MOTION DATE 12/08/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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

were read on this motion to/for SUMMARY JUDGMENT.

The motion by plaintiff for summary judgment on its three causes of action seeking rent, additional rent and legal fees is granted.

Background

In this commercial landlord tenant case, plaintiff claims that defendant (the tenant in a building owned by plaintiff) has not paid rent since March 3, 2020. It argues that the total due is comprised of the monthly payments of rent and real estate tax escalation charges for 2020/21.

In opposition, defendant admits it has not paid the rent since March. Instead, it argues that the Court cannot grant summary judgment under the impossibility and frustration of purpose doctrines. Defendant argues that the ongoing pandemic implicates these doctrines and absolves defendant of its obligations under the lease.

It contends that when it signed the lease in 2013 no one could have predicted that there would be an infectious disease that would shut down the vast majority of businesses. Defendant points out that its entire business was built on a highly visible and well trafficked retail location

on the Upper East Side. In other words, the lack of customer traffic has decimated the store's revenues.

Defendant complains that plaintiff refused to negotiate a mutually acceptable resolution and instead brought this action. It questions why plaintiff has made this motion instead of proceeding to discovery about defendant's counterclaims and affirmative defenses. Defendant brings counterclaims for frustration of purpose to terminate the lease, frustration of purpose for a rent abatement, impossibility of performance to rescind the lease and impossibility of performance for a rent abatement. It also asserts six affirmative defenses including failure to state a cause of action, impossibility of performance, frustration of purpose, failure of consideration, illegality and failure to mitigate.

In reply, plaintiff maintains that the sole dispute in this case is whether the effects of the ongoing pandemic are a sufficient defense to paying rent due under a lease. It argues that the equitable defenses raised by plaintiff are inapplicable and have historically had narrow application. Plaintiff points out that the parties included a force majeure clause for unforeseen events in the lease but this provision did not relieve defendant of its obligation to pay rent. Plaintiff also argues that there have been many reasons why retail stores have succeeded or failed over the years and that is simply a risk defendant took when it entered into a lease that extended from 2013 through 2029.

It insists that application of defendant's logic would call into question the enforceability of all contracts when economic circumstances change. Plaintiff speculates that if a tenant could get out of a lease when the market is difficult, then presumably a landlord could terminate a lease when the market is competitive and charge a higher rent.

Discussion

To be entitled to the remedy of summary judgment, the moving party "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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id*.). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

There is no doubt that the ongoing pandemic has decimated retail stores across New York City. It has made it nearly impossible for some businesses to pay the rent and the Court empathizes with the difficulties facing these establishments. But this Court is tasked with assessing whether any of the doctrines defendant has identified raise an issue of fact that might

compel the Court to deny the instant motion. As discussed below, the Court finds that defendant has not raised a valid issue of fact and the Court grants the motion.

Frustration of Purpose

The doctrine of frustration of purpose requires that "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"(*Crown IT Services, Inc. v Koval-Olsen*, 11 AD3d 263, 265, 782 NYS2d 708 [1st Dept 2004]). "[T]his doctrine is a narrow one which does not apply unless the frustration is substantial"(*id*.).

Contrary to defendant's argument, this doctrine has no applicability here. This is not a case where the retail space defendant leased no longer exists, nor is it even prohibited from selling its products. Instead, defendant's business model of attracting street traffic is no longer profitable because there are dramatically fewer people walking around due to the pandemic. But market changes happen all the time. Sometimes businesses become more desirable (such as the stores near the newly-completed Second Avenue subway stops) and other times less so (such as the value of taxi medallions with the rise of ride-share apps). But unforeseen economic forces, even the horrendous effects of a deadly virus, do not automatically permit the Court to simply rip up a contract signed between two sophisticated parties.

Of course, defendant would not have entered into the lease if it knew there would be a pandemic that negatively affected the retail market. But that is not sufficient to invoke the frustration of purpose doctrine (*PPF Safeguard, LLC v BCR Safeguard Holding, LLC*, 85 AD3d 506, 924 NYS2d 391 [1st Dept 2011] [finding that Hurricane Katrina was not a sufficient basis to implicate the frustration of purpose doctrine to excuse payment in New Orleans-based self-storage contract]).

Impossibility

"Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract" (*Kel Kim Corp. v Cent. Markets, Inc.*, 70 NY2d 900, 902, 524 NYS2d 384 [1987]).

Similarly, the impossibility doctrine does not compel the Court to deny the instant motion. The subject matter of the contract—the physical location of the retail store—is still intact. And defendant is permitted to sell its products. The issue is that it cannot sell enough to pay the rent. That does not implicate the impossibility doctrine. As the First Department found in connection with a case about the failure to pay under a commodity swap contract, "Defendant's performance may have been rendered financially disadvantageous by circumstances unforeseen by the parties at the time of the contract's making. However, financial disadvantage to either of the contracting parties was not only foreseeable but was contemplated by the contract, even if the precise causes of such disadvantage were not specified. In any event, it is not a basis for reliance upon the impossibility of performance doctrine" (*Gen. Elec. Co. v Metals Resources Group Ltd.*, 293 AD2d 417, 418, 741 NYS2d 218 [1st Dept 2002]).

And, here, the parties actually included a force majeure clause in the lease that specifically provided that it would *not* excuse defendant from having to pay rent (NYSCEF Doc. No. 11, ¶ 26[c]). Instead, it purported to extend the period of performance for whatever the delay may have been (*id.*). It did not contemplate that defendant could simply walk away with nearly a decade left on the lease and not pay any more rent.

Summary

The Court grants the motion and dismisses defendant's affirmative defenses and counterclaims. To the extent that defendant claims there was a lack of consideration (its fourth affirmative defense) that argument is without merit. The contract was for a retail space, which defendant occupied and ran its business out of starting in 2013. This is not a situation where some outside force (like a zoning change) prevented defendant from operating its store. And, as plaintiff pointed out, defendant failed to respond to plaintiff's arguments with respect to the first, fifth and sixth affirmative defenses.

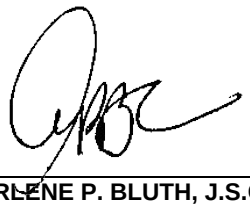
These are difficult times for landlords and tenants (both commercial and residential) in New York City. And while the Court recognizes the financial hardships that defendant has faced, it must also observe that plaintiff's faces challenges too. Even though defendant is not paying the rent, plaintiff still has its own obligations (such as paying property taxes) that must be fulfilled. Permitting the doctrines of impossibility or frustration of purpose to rescind an otherwise valid lease would simply allocate the loss to plaintiff. It is not this Court's role to ignore a contract and decide *sua sponte* who should take the financial loss.

Under these circumstances, where defendant signed a lease in 2013 and ran a retail store for many years before the pandemic, the Court finds that plaintiff has met its burden as a matter of law.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary is granted and the affirmative defenses and counterclaims asserted by defendant are severed and dismissed, and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of $1,680,454.73 plus interest from November 30, 2020; and it is further

ORDERED that the issue of reasonable attorneys' fees is severed and a virtual hearing will be scheduled by the Clerk of this part.



12/9/2020
DATE

ARLENE P. BLUTH, J.S.C.

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