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

**PRESENT:** **HON. LAURENCE LOVE** **PART** **63M**

***Justice***

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READE BROADWAY ASSOCIATES

Plaintiff,

- v -

YUEN & ASSOCIATES INC.,

Defendant.

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**INDEX NO.** 150986/2021

**MOTION DATE** 08/30/2021

**MOTION SEQ. NO.** 002

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57

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

Upon the foregoing documents, the motion is decided as follows:

Plaintiff commenced the instant action by filing a summons and verified complaint on January 28, 2021 alleging causes of action for 1) ejectment, 2) unpaid rent, and 3) attorney's fees. As described in plaintiff's complaint, plaintiff is the owner of a building known as 305 Broadway, New York, New York. Defendant is the tenant of the commercial space known as Suite 806 on the eighth floor in the Building pursuant to a written lease dated November 21, 2014, made between Plaintiff as landlord, and defendant, as tenant ("Lease"). The Lease was subsequently extended to January 31, 2025 by an Agreement dated November 21, 2019. Beginning in March, 2020, defendant failed to make the required rental payments pursuant to the lease. In an Order dated May 20, 2021, this Court partially granted defendant's motion to dismiss to the extent that plaintiff's claims for accelerated damages to the end of the lease were stricken from the complaint and found that plaintiff's first cause of action seeking ejectment was moot. Defendant interposed an answer on May 31, 2021, containing twenty-three affirmative defenses.

Plaintiff now moves for an Order pursuant to CPLR § 3212, granting Plaintiff partial summary judgment, seeking on plaintiff's second cause of action, a judgment for the rent in the amount of $35,894.95, amending the pleadings to conform to the evidence pursuant to CPLR 3025(c) and dismissal of Defendant's affirmative defenses.

Summary Judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595 (1980). The function of the court when presented with a motion for Summary Judgment is one of issue finding, not issue determination. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Weiner v. Ga-Ro Die Cutting, Inc.*, 104 A.D.2d331, 479 N.Y.S.2d 35 (1st Dept., 1984) *aff'd* 65 N.Y.2d 732, 429 N.Y.S.2d 29 (1985). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dep't 1989). Summary judgment will only be granted if there are no material, triable issues of fact *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957).

In support of its motion, plaintiff submits the affidavit of Israel Itkowitz, the Managing Agent of plaintiff, Reade Broadway Associates, together with the relevant deed, lease, extension of lease, drawdown notice, notice of default, and termination letter, which establish as follows: Defendant is the tenant of the commercial space known as Suite 806, 305 Broadway, New York,

New York (“Premises”) pursuant to a written lease dated November 21, 2014. The Lease was extended and modified by a letter agreement dated November 21, 2019, which, among other things, extended the Lease term through January 31, 2025. Defendant last paid rent in March 2020. As such, pursuant to the Lease terms Plaintiff served a Notice to Drawdown on Security and Replenish. Upon Defendant's failure to replenish its security deposit as requested in the Drawdown Notice, Plaintiff served a fifteen (15) day Notice of Default ("Default Notice") advising Defendant that it needed to replenish its security deposit, or the Lease would be terminated. Defendant failed to cure its default and Plaintiff served a five (5) day Notice of Cancellation ("Cancellation Notice") terminating Defendant's tenancy effective December 16, 2020. Pursuant to the Lease Agreement, Tenant agreed to pay to Landlord base rent for the period of February 1, 2020 through January 31, 2021, in the amount of $2,125.00 each month totaling $25,500.00 per annum. Pursuant to the Lease Agreement, Tenant agreed to pay to Landlord base rent for the period of February 1, 2021 through January 31, 2022, in the amount of $2,188.75 each month totaling $26,265.00 per annum. Tenant further agreed to pay to Landlord, as additional rent, interest as late fee charges at the rate of 12% APR from the date due to the date paid on such rent and additional rent outstanding ten (10) business days after it is due. Pursuant to the Lease at Paragraph "19", Tenant also agreed to pay, as additional rent, Plaintiff's attorneys' fees. As of August 2021, a total of $35,894.95 is owed. As such, plaintiff has established a *prima facie* entitlement to partial summary judgment.

In opposition, defendant submits the affirmation of Sean C. Yuen, the President of defendant, which is a nullity as defendant is not permitted to affirm as an attorney pursuant to CPLR 2106 as same is a party to this action.

The sole affirmative defenses which defendant raises that are relevant to the instant action are those of frustration of purpose/impossibility of performance, the Covid-19 pandemic as a casualty under article 9 of the Lease, and failure to credit amounts paid.

The frustration of purpose doctrine applies where the purpose was "so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense." *Crown IT Servs., Inc. v. Koval-Olsen*, 11 A.D.3d 263, 265 (1st Dep't 2004). Said doctrine applies where "as a result of unforeseeable events, performance by party X would no longer give party Y what induced him to make the bargain in the first place." *United States v. Gen. Douglas MacArthur Senior Vill., Inc*., 508 F.2d 377, 381 (2d Cir. 1974); see also, *PPF Safeguard, LLC v. BCR Safeguard Holding, LLC*, 85 A.D.3d 506, 508 (1st Dept 2011) (frustration of purpose applies "when a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract").

The doctrine of impossibility or impracticability applies where performance is "objectively" impossible due to the "destruction of the means of performance" by a force majeure event or the enactment of law rendering performance illegal. See, *407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 280 (1968) (holding that, "[g]enerally, however, the excuse of impossibility of performance is limited to the destruction of the means of performance by an act of God, vis major, or by law"). The "impossibility" must be caused by "an unanticipated event that could not have been foreseen or guarded against in the contract." *Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d 900, 902 (1987).

Neither doctrine is applicable in the instant action. While defendant has established that both the purpose of the contract was frustrated and that use of the premises as a law office was

briefly rendered illegal, the lease specifically guards against the circumstances at issue. Pursuant to Paragraph 27 of the lease,

> This lease and the obligation of Tenant to pay rent hereunder and perform all of the other covenants and agreements hereunder on part of Tenant to be performed shall in no wise be affected, impaired or excused because Owner is unable to fulfill any of its obligations under this lease, or to supply, or is delayed in supplying, any service expressly or impliedly to be supplied, or is unable to make, or is delayed in making, any repair, additions, alterations or decorations, or is unable to supply, or is delayed in supplying any equipment, fixtures, or other materials, if Owner is prevented or delayed from so doing 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.

As Paragraph 27 of the lease contains a carve-out requiring the continued payment of rent in the instant situation, defendant cannot use same to establish an issue of fact precluding summary judgment.

Tenant claims that the casualty clause of the Lease (Paragraph 9) also precludes plaintiff's claims, citing, *Gap, Inc. v. 170 Broadway Retail Owner, LLC*, 2020 NY Slip Op 33623(U), 4 (Sup. Ct. NY Co. 2020). The Court notes that after the submission of defendant's opposition papers, said Order was reversed by the Appellate Division, First Dept., which held "… 'plaintiff is not entitled to a rent abatement under the lease "due to loss of use of all or a portion of the Demised Premises due to [a] Casualty[.]' That portion of the lease refers to singular incidents causing physical damage to the premises and does not contemplate loss of use due to a pandemic or resulting government lockdown (see *Gap Inc. v. Ponte Gadea New York LLC*, —— F.Supp.3d ——, 2021 WL 861121, [S.D. N.Y. 2021]; *1140 Broadway LLC v. Bold Food, LLC*, 2020 N.Y. Slip Op. 34017(U) 2020 WL 7137817 [Sup. Ct., N.Y. County 2020]; *Dr. Smood New York LLC v. Orchard*

*Houston, LLC*, 2020 N.Y. Slip Op. 33707(U), 2020 WL 6526996 [Sup. Ct., N.Y. County 2020]; but see *188 Ave. A Take Out Food Corp. v. Lucky Jab Realty Corp*., 2020 N.Y. Slip Op. 34311(U), 2020 WL 7629597 [Sup. Ct., N.Y. County 2020])." *Gap, Inc. v. 170 Broadway Retail Owner, LLC*, 195 A.D.3d 575 (2d. Dept. 2021). As such, defendant's contentions are without merit on the issue of casualty. Based upon same, defendant's contention that plaintiff breached the lease by failing to abate the rent is similarly without merit.

The Court has considered defendant's additional contentions and finds them to be without merit. As such, it is hereby

ORDERED that the plaintiff's motion for partial summary judgment on plaintiff's second cause of action, is GRANTED; and it is further

ORDERED that defendant's affirmative defenses and counterclaims are hereby DISMISSED; and it is further

ORDERED that an assessment of damages against defendant is directed, and it is further

ORDERED that a copy of this order with notice of entry be served by the movant upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is directed, upon the filing of a note of issue and a certificate of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office 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)].

1/3/2022
DATE

LAURENCE LOVE, J.S.C.

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| 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 | REFERENCE |