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

BATH & BODY WORKS, LLC successor in interest to BATH & BODY WORKS, INC.,

Plaintiff,

-against-

304 PAS OWNER LLC, successor in interest to 304 PARK AVENUE SOUTH LIMITED LIABILITY COMPANY,

Defendant.

Index No.: 651836/2020

COMPLAINT

Plaintiff, Bath & Body Works, LLC successor in interest to Bath & Body Works, Inc. ("Plaintiff"), by and though their attorneys, Davidoff Hutcher & Citron LLP, bring the following Complaint against Defendant 304 PAS Owner LLC successor in interest to 304 Park Avenue South Limited Liability Company ("Defendant"). The allegations of the Complaint are based on the knowledge of Plaintiff, and on information and belief, including the investigation of counsel and review of publicly available information.

NATURE OF THE ACTION

1. This action seeks rescission of a commercial property lease, and a declaration that the lease is unenforceable as a result of the COVID-19 Pandemic and the related government-mandated shutdowns (including Governor Cuomo's "New York State on PAUSE" Executive Order). In sum, the total standstill of business, commerce, and everyday life in New York City has completely and unforeseeably frustrated the purposes of the lease, and has rendered performance impossible.

2. Plaintiff operates its Bath & Body Works[1] retail store at 304 Park Avenue South, New York, New York ("304 PAS"). In exchange for the ability to operate at this location, Plaintiff agreed to pay Defendant, *inter alia*, a monthly rent of $63,202.50

3. From a business perspective, that hefty sum was justified by the daily crowds maneuvering throughout this this prime Manhattan neighborhood. Located at the corner of East 23rd Street and Park Avenue South, 304 PAS sits at the center of Manhattan's Flatiron District, and a block from Madison Square Park. Flatiron is a bustling and diverse neighborhood, offering some of New York's most popular restaurants, and a dynamic retail environment blending fashion, beauty, home furnishing, and self-care stores. It is an expensive and fashionable residential area, as well as a prime tourist destination, boasting some 6,500 hotel rooms and some of the City's famed architectural highlights.

4. Flatiron is located near the MTA's 23rd Street and 28th Street Stations, which are both major transportation centers servicing over 39,000,000 riders in 2018. It is also close to the PATH's HOB-33, JSW-33 trains, thus offering seamless regional access, and a short walk from both Grand Central Terminal and Pennsylvania Station. Steps from the Flatiron Building, the headquarters of Credit Suisse, and adjacent to Shake Shack's first restaurant, the Park Avenue South location was a prime location for Bath & Body Works.

5. The foot-traffic accompanying such a prime Manhattan residential, tourist, and business neighborhood were material factors in Plaintiff's decision to agree to a rent of nearly $65,000 per month (and, indeed, Defendant's ability to charge that amount).

6. But in March 2020, all of New York went dark. The COVID-19 pandemic, unprecedented in scope and destruction, spawned a massive and severe government response that

[1] Bath & Body Works is a bath shop retail chain, specializing in shower gels, lotions, fragrance mists, perfumes, creams, candles, and home fragrances.

has completely shuttered Bath & Body Works' Park Avenue South store since mid-March. During this shutdown, and continuing to the present day, Plaintiff has been expressly prohibited from operating its Park Avenue South retail store. The shutdown has, thus, utterly and irreversibly frustrated the purpose of the parties' agreement, and indeed rendered both parties' performance impossible. While the parties may have contemplated certain gradual ups and downs of tourism, the economy, seasonal habits, and the like, the COVID-19 shutdown is unlike anything ever before experienced in America in terms of severity and duration, and could not have been foreseen.

7. Even when retail is eventually permitted to reopen around the Flatiron District, government officials have announced that any reopening will be phased over many months. In other words, there is no "switch to flip," that will return the parties to their pre-COVID posture and suddenly cause shoppers to appear in the Flatiron District.

8. To the contrary, it is indisputable that New York City's business landscape has been shattered, and is forever altered. Nobody can predict if or when the Flatiron District's residents (who fled in droves), visitors (who cancelled plans to come) and businesses (which have been shuttered) will return, or how the inevitably forthcoming social distancing requirements during any "phased reopening" will impact retail. COVID-19 remains virulent, and businesses have been advised of extensive and mandatory guidelines intended to offer some measure of protection. Despite those restrictions, the experience of shopping for bath products in a retail store has been altered forever. All that is known with certainty is that it will be years before retail has even a chance of returning to New York City in its pre-COVID form, which indeed formed the material assumptions and the fundamental basis upon which the parties relied.

9. In other words, the purpose of spending a monthly rent of $63,202.50 to operate a retail store is completely frustrated and performance impossible when that store cannot open. The

same is true when the subject store can open at only a marginal capacity, or when customers are too fearful of profound illness and potential death to venture out to shop.

10. Thus, as explained below, this Court should declare that the lease is rescinded as a result of the COVID-19 Pandemic and/or the Executive Orders which prohibited Plaintiff from operating its business at the Retail Premises (as defined below).

PARTIES

11. Bath & Body Works, LLC is a Limited Liability Company, organized under the laws of the State of Delaware, authorized to conduct business in the State of New York, and currently maintains its principal place of business at Three Limited Parkway, Columbus, Ohio 43230.

12. Bath & Body Works, LLC is the successor in interest to a lease agreement entered by Bath & Body Works, Inc. on April 5, 1996.

13. 304 PAS Owner LLC is a Limited Liability Company, organized under the laws of the State of Delaware, authorized to conduct business in the State of New York, and currently maintains its principal place of business at 420 Lexington Avenue, New York, New York 10170.

14. 304 PAS Owner LLC is the owner of the building located at 304 Park Avenue South, New York, New York.

15. Defendant 304 PAS Owner LLC is a subsidiary of SL Green Realty Corp. an S&P 500 company and New York City's largest office landlord. SL Green Realty Corp. is a fully integrated real estate investment trust, or REIT.

16. Defendant 304 PAS Owner LLC is the successor in interest to a lease agreement entered into by 304 Park Avenue South Limited Liability Company on April 5, 1996.

JURISDICTION AND VENUE

17. The Court has jurisdiction over Defendant pursuant to CPLR 301 and 302(a) since Defendant owns real property within the State of New York.

18. Venue is proper in New York County pursuant to CPLR 503(a) in that Plaintiff and Defendant reside in the County of New York and this litigation concerns real property located in the County of New York.

COMMERICAL LEASE

19. On or about April 5, 1996, Bath & Body Works, Inc. (predecessor in interest to Bath & Body Works, LLC), entered into a written commercial lease with 304 Park Avenue South Limited Liability Company (predecessor in interest to 304 PAS Owner LLC), for portions of a building located at 304 Park Avenue South, New York, New York (hereafter referred to as the "Original Lease").

20. The Original Lease was extended *via* the Modification and Extension of the Lease Agreement dated January 31, 2011 (the "Amended Lease," which together with the Original Lease is collectively referred to herein as the "Lease").

21. Plaintiff and Defendant entered the Lease with the basic expectation that Plaintiff could operate the premises as a first-class retail location.

22. Pursuant to the terms of the Original Lease, Plaintiff had demised a portion of the ground floor, of 304 Park Avenue South, New York, New York to operate a first-class retail location for "Bath & Body Works" (the "Retail Premises").

23. The Original Lease commenced on or about August 9, 1996 and expired on or about August 31, 2011.

24. In exchange for the permission to operate, Plaintiff first paid Defendant Fixed Annual Rent in the amount of $255,000 per *annum* ($21,250 per month), which by the end of the term of the Original Lease went up to $373,345.50 per *annum* ($31,112.12 per month).

25. Near the end of the first term of the Original Lease, Plaintiff and Defendant sought to extend the Term of the Lease to January 31, 2027.

26. Accordingly, in the Amended Lease, Plaintiff agreed to pay Defendant $675,000.00 per *annum* (for the period from September 1, 2011- August 31, 2014); $715,500.00 per *annum* (for the period from September 1, 2014 - August 31, 2017); $758,430.00 per *annum* (for the period from September 1, 2017 - August 31, 2020); $834,270.00 per *annum* (for the period from September 1, 2020 - August 31, 2023); and $917,700.00 per *annum* (for the period from September 1, 2023 - January 31, 2027). *See* Paragraph FOURTH (a)(i) of the Amended Lease.

27. Accordingly, the Rent for the months of March, April, May, and June 2020 was $63,202.50, per month.

28. Plaintiff has faithfully performed all of its obligations under the Lease including the payment of rent until April 1, 2020 to Defendant.

29. Plaintiff's Retail Premises have been closed since March 17, 2020 because of the COVID-19 Pandemic and Governor Cuomo's "New York State on PAUSE" Executive Order (and related Executive Orders).

30. Under these sweeping government restrictions, Plaintiff's Retail Premises were deemed "non-essential businesses" and were required by law to shutter indefinitely. Any retail activity at the location would violate the State's orders, and could potentially subject Plaintiff to criminal violations and penalties.

31. As a result of its total inability to operate its retail store at the Retail Premises – by government order – Plaintiff stopped paying rent, its performance under the Lease having been excused by, *inter alia*, the doctrines of frustration of purpose and impossibility of performance.

32. On May 11, 2020, Defendant provided Plaintiff with a notice of default, since Plaintiff did not pay the "Fixed Annual Rent" for the Retail Premises for April and May, 2020, aggregating $126,405, and demanded Plaintiff to cure on or before May 23, 2020.

33. On June 4, 2020 – ten days after the filing of the Summons With Notice in this action – Defendant provided Plaintiff with a notice of termination, purporting to cancel the Lease effective June 9, 2020, and demanding that Plaintiff quit and surrender the Retail Premises as of that date.

34. The Lease expires on January 31, 2027.

35. However, owing to the frustration of purpose and/or impossibility of performance caused by the COVID-19 Pandemic, and the related government shutdown orders, Plaintiff has elected to rescind the Lease as asserted herein.

FRUSTRATION OF PURPOSE AND IMPOSSIBILITY OF PERFORMANCE

36. Plaintiff and Defendant entered the Lease with the principal and basic expectation that Plaintiff could operate the Retail Premises as a first-class retail location for its Bath & Body Works brand.

37. The operation of the Retail Premises as a first-class retail location was equally important to both Plaintiff and Defendant.

38. In fact, Defendant required Plaintiff to assent to Section 49(B) of the Original Lease, which required Plaintiff to "keep the demised premises open for business on all days, other

than Sundays and holidays, during the customary business hours that other retail stores in the Building or general vicinity are open for business…"

39. Thus, the express terms of the Lease make clear that both parties recognized that the Lease's principal purpose was the operation of a first-class retail location.

40. Without Plaintiff's ability to operate as a first-class retail location at the Retail Premises, neither party would have entered the Lease.

41. Unfortunately, as a result of the governmental restrictions resulting from the COVID-19 Pandemic, Plaintiff is expressly precluded from operating any retail location at the Retail Premises, and thus the very purpose of the Lease has been completely frustrated insofar as, *inter alia*, Plaintiff has been deprived of its use of the Retail Premises for the full term that Plaintiff was promised under the Lease. Indeed, it was a fundamental and material expectation that Plaintiff would have access to the Retail Premises for the full term of the Lease (not just some portion thereof).

42. COVID-19 has paralyzed the entire world, having killed more than 100,000 Americans and infected millions more. The disease has spread exponentially, shutting down retail stores, schools, jobs, professional sports seasons, and life as we know it.

43. The New York City Metropolitan Area has been the hardest hit region in America.

44. On March 7, 2020, Governor Andrew M. Cuomo issued Executive Order No. 202. The order, issued in response to the rapidly escalating COVID-19 public health emergency, stated that "a disaster [was] impending in New York State, for which the affected local governments [would be] unable to respond adequately" and therefore the declaration of "a State disaster emergency for the entire State of New York" was necessary (Executive Order [A. Cuomo] No. 202).

45. At that time in early March, the number of confirmed COVID-19 cases in New York State was less than 100 (Jesse McKinley and Edgar Sandoval, Coronavirus in NY: Cuomo Declares State of Emergency, NY Times, Mar. 7, 2020, https://nyti.ms/2XkHaZW); a month later, that number exceeded 138,000 (NY Virus Deaths Hit New High, but Hospitalizations Slow, NY Times, Apr. 7, 2020, https://nyti.ms/3aOzvXz).

46. In the ensuing days and weeks, the Governor, in a series of executive orders, aimed to "flatten the curve" and slow the spread of COVID-19 by limiting large gatherings of people (*see, e.g.*, Executive Order 202.1 [ordering the 30-day postponement or cancelation of "[a]ny large gathering or event for which attendance is anticipated to be in excess of five hundred people"]; Executive Order 202.3 [modifying the large gathering order in Executive Order 202.1 to gatherings where "more than fifty persons are expected in attendance"]; Executive Order 202.10 [cancelling or postponing all "(n)on-essential gatherings of individuals of any size for any reason"]).

47. On March 16, 2020, as the crisis worsened, New York City Mayor Bill de Blasio issued Emergency Executive Order No. 100, imposing restrictions on various types of retail locations. As such at the close of business on March 16, 2020, Plaintiff suspended all retail operations at the Retail Premises to comply with applicable governmental orders and guidelines, and to protect the health and safety of its employees, customers, and the surrounding community.

48. On March 18, 2020, Governor Cuomo issued Executive Order 202.6, requiring non-essential businesses to reduce their in-person work force by 50%. Plaintiff's store at the Retail Premises was deemed "non-essential." By this time, business and commerce in New York City was already at a virtual standstill.

49. These efforts culminated in the issuance of Executive Order 202.8, on March 20, 2020, which ordered all nonessential businesses and nonprofit organizations to ***"reduce [their] in-***

person workforce at any work locations by 100% no later than March 22[, 2020] at 8 p.m." (Executive Order 202.8) (emphasis added).

50. Pursuant to these extraordinary and unforeseeable executive acts and decrees, Plaintiff was *required* to close all of its operations at the Retail Premises (despite having paid full rent for the month of March 2020). The Bath & Body Works store at the Retail Premises remains shuttered to this day by government order.

51. The COVID-19 Pandemic and Executive Order 202.8 have completely frustrated the very purpose of the Lease, and made it impossible for the parties to perform.

52. Because of the COVID-19 Pandemic, Plaintiff cannot operate its retail store at the Retail Premises consistent with the parties' fundamental understanding, purpose, and expectation at the time the lease was entered.

53. Because of Executive Order 202.8, Plaintiff cannot operate its retail store at the Retail Premises consistent with the parties' fundamental understanding, purpose, and expectation at the time the lease was entered.

54. Plaintiff's inability to operate its store has completely frustrated the purpose of the Lease and rendered performance impossible.

55. In fact, Defendant acknowledged in the Original Lease that Plaintiff's inability to operate its store at the Retail Premises would frustrate the purpose of the Lease, and provided at Section 9(c) of the Original Lease, that:

> if the demised premises are totally damaged or ***rendered wholly unusable*** by fire or ***other casualty***, then the rent and other items of additional rent as hereinafter expressly provided shall be proportionately paid up to the time of the casualty and thenceforth shall cease until the date when the premises shall have been repaired and restored by Owner (or sooner reoccupied in part by Tenant then rent shall be apportioned as provided in subsection (b) above),

> subject to Owner's right to elect not to restore the same as hereinafter provided…

56. Today marks the ***eighty-third consecutive day*** of closure at the Retail Premises.

57. The COVID-19 Pandemic and related government shutdown orders – altering every aspect of business and life in New York City – were neither foreseen nor foreseeable by any party to the Lease.

58. Nevertheless, it is clear that from the Lease that both parties understood that the operation of a retail business at the Retail Premises – amid the hustle-bustle of the Flatiron District – was ***the primary purpose*** of the Lease, and the inability to operate as a retail business in that setting would entitle Plaintiff to an abatement of rent and a rescission of the Lease.

59. Accordingly, as a result of the COVID-19 Pandemic and Executive Orders, the Lease is rescinded by the legal doctrines of frustration of purpose and impossibility of performance.

FIRST CAUSE OF ACTION
(Rescission For Frustration of Purpose)

60. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

61. An actual controversy of a justiciable nature exists between Plaintiff and Defendant concerning the rights and obligations of the parties under the Lease.

62. Specifically, Defendant seeks to enforce the Lease despite the fact that the Lease is rescinded under the doctrine of frustration of purpose.

63. Under New York law, frustration of purpose applies to a situation where an unforeseen event has occurred which, in the context of the entire transaction, destroys the

underlying reasons for performing such contract, thus operating to discharge a party's duties of performance.

64. As a result of COVID-19 and/or Governor Cuomo's Executive Orders, Plaintiff is prohibited from operating its business at the Retail Premises and all other Permitted Uses set forth in the Lease.

65. Plaintiff's inability to operate its business because of a pandemic was completely outside of Plaintiff's control and was neither foreseeable nor foreseeable at the time the Lease was entered. When retail activities are permitted to resume, the government has announced that any reopening will be at marginal capacity for the foreseeable future. It will, thus, be years before consumer retail behavior and/or Flatiron business district activity levels recover to pre-COVID levels. This, too, was unforeseeable.

66. Plaintiff has a legally protectable interest in this controversy.

67. Specifically, Plaintiff has a pecuniary interest in a declaration that it has no obligation to continue to pay rent or other expenses to Defendant commencing on March 17, 2020 (the first date that operations at the Retail Premises were shuttered).

68. Therefore, Plaintiff seeks a declaratory judgment of its rights under the doctrine of frustration of purpose.

69. Specifically, Plaintiff seeks a declaration from this Court that the Lease is rescinded as a result of the COVID-19 Pandemic and/or the Executive Orders, which prohibited Plaintiff from operating its business at the Retail Premises.

70. Plaintiff further seeks a declaration that Defendant wrongfully declared a default under the Lease.

71. This controversy is ripe for adjudication and a judicial declaration is necessary to end the present controversy.

SECOND CAUSE OF ACTION
(In the Alternative – Rescission Based on Impossibility of Performance)

72. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

73. The Lease requires Defendant to tender the Retail Premises for use as a retail store.

74. The Lease requires Plaintiff to use the Retail Premises as a retail store.

75. The law of impossibility of performance provides that performance of a contract will be excused if such performance is rendered impossible by, *inter alia*, intervening governmental activities.

76. COVID-19 and/or the Executive Orders have rendered performance by both Plaintiff and Defendant impossible. Indeed, since mid-March, and continuing for months, governmental regulations have outlawed the operation of a retail store at the Retail Premises. Thus, performance under the Lease has been rendered impossible.

77. The impossibility occasioned by COVID-19 and/or the Executive Orders – as well as the "phased" reopening at marginal capacity only – was unforeseen at the time the Lease was entered into and cannot be attributed to Plaintiff or Defendant.

78. This controversy is ripe for adjudication and a judicial declaration is necessary to end the present controversy.

THIRD CAUSE OF ACTION
(In the Alternative – Reformation of Lease)

79. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

80. Plaintiff's ability to operate a retail store at the Retail Premises was the parties' mutual purpose in entering the Lease, as both parties understood at the time of contracting, and but for its right to operate such a retail store, Plaintiff would not have entered the Lease.

81. When Plaintiff was forced to cease all retail operations at the Premises, the purpose of the Lease was frustrated and impossible to effectuate due to no fault of Plaintiff. Plaintiff's obligations under the Lease became impossible and impracticable to perform, and Plaintiff was deprived of the consideration it received in exchange for entering the Lease.

82. Plaintiffs' inability to operate its business because of a pandemic and/or the related government shutdown order was completely outside of Plaintiff's control and was neither foreseen nor foreseeable at the time the Lease was entered.

83. The Parties would not have entered the Lease had they known that Plaintiff would have been unable to operate a retail store at the Retail Premises, and Plaintiff's ability to use the Retail Premises as a retail store was the sole consideration Plaintiff received under the Lease.

84. It was the Parties' intent that Plaintiff would not pay rent or other consideration for the Retail Premises if such use was rendered impossible or impracticable. Had the Parties been able to anticipate the events of the COVID-19 crisis at the time of contracting, the Parties would have provided language expressly stating their true intent.

85. An actual controversy exists between the Parties concerning their respective rights under the Lease, and Plaintiff has no adequate remedy at law.

86. In the alternative to Plaintiff's claims relating to the rescission of the Lease, Plaintiff is entitled to judicial reformation of the Lease to reflect the Parties' true intent that Plaintiff would have no obligation to pay rent once it was deprived of the use of the Retail Premises

and that the Lease would terminate automatically when Plaintiff was deprived of its use of the Retail Premises as originally contemplated by the Lease.

FOURTH CAUSE OF ACTION
(In the Alternative – Declaratory Judgment Under Article 9 of the Lease)

87. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

88. An actual controversy of a justiciable nature exists between Plaintiff and Defendant concerning the rights and obligations of the parties under the Lease.

89. Specifically, the parties disagree on whether Section 9 of the Original Lease entitles Plaintiff to an abatement of rent.

90. Under Article 9(b) of the Original Lease:

> if the demised premises are partially damaged or rendered partially unusable by fire or other casualty, the Building (if applicable) and the demised premises shall be repaired by and at the expense of Owner and the rent and other items of additional rent, until such repair shall be substantially completed, or such earlier date on which repairs would have been completed but for delays (including, without limitation, delays in submitting plans) caused by Tenant, shall be apportioned from the day following the casualty according to the part of the premises which is usable.

91. Under Article 9(c) of the Original Lease:

> if the demised premises are totally damaged or rendered wholly unusable by fire or other casualty, then the rent and other items of additional rent as hereinafter expressly provided shall be proportionately paid up to the time of the casualty and thenceforth shall cease until the date when the premises shall have been repaired and restored by Owner (or sooner reoccupied in part by Tenant then rent shall be apportioned as provided in subsection (b) above), subject to Owner's right to elect not to restore the same as hereinafter provided…

92. As a result of COVID-19 and/or the Executive Orders, the Retail Premises have been rendered wholly unusable.

93. Therefore, Plaintiff seeks a declaratory judgment that the Defendant wrongfully declared a default under the Lease, as Section 9(b) and(c) of the Original Lease entitles Plaintiff to an abatement of rent when a casualty such as COVID-19 renders the Premises wholly or partially unusable.

94. This controversy is ripe for adjudication and a judicial declaration is necessary to end the present controversy.

FIFTH CAUSE OF ACTION
(Breach of Contract)

95. Plaintiffs repeat and reallege each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

96. Prior to the Lease's termination and/or rescission, the Lease constituted a binding enforceable contract.

97. Defendant breached the contract by, among other things, demanding that Plaintiff pay rent and/or other expenses that were not owed under the Lease; demanding, collecting and subsequently failing to reimburse Plaintiff for excess charges paid in advance under the Lease before the COVID-19 crisis (such as March 2020 rent for periods in which the Retail Premises were required to be shuttered); and later failing to reimburse Plaintiff for the prorated amount of the rent, charges and other expenses attributable to the period that Plaintiff has been deprived of its use of the Retail Premises.

98. Plaintiff performed all of its obligations under the Lease except those that were waived, excused or rendered impossible and/or impractical.

99. Plaintiff is entitled to a judgment against Defendant in an amount to be proven at trial.

SIXTH CAUSE OF ACTION
(Money Had and Received)

100. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

101. Plaintiff's ability to operate a retail store at the Retail Premises was the parties' mutual purpose in entering the Lease, as both parties understood at the time of contract.

102. But for its right to operate a retail store, Plaintiff would not have entered the Lease.

103. When Plaintiff was forced to cease all retail operations at the Retail Premises, the purpose of the Lease was frustrated and impossible to effectuate due to no fault of Plaintiff. At that point, Plaintiff's obligations under the Lease became impossible and impracticable to perform, and Plaintiff was deprived of the consideration it received in exchange for entering the Lease.

104. This sudden mandatory cessation of retail operations at the Retail Premises was unforeseeable and not contemplated by the parties at the time the Lease was entered.

105. The parties would not have entered the Lease had they known that Plaintiff would have been unable to operate a retail store at the Retail Premises, and Plaintiff's ability to use the Retail Premises as a retail store constituted the primary consideration it received under the Lease.

106. Plaintiff has previously paid rent and other consideration to Defendant, in an amount to be proved at trial, for the period of time that Plaintiff was prohibited from operating a retail store at the Retail Premises.

107. Defendant benefitted from these payments to Plaintiff's detriment.

108. Under principles of good conscience, Defendant should not be allowed to retain the rent and other consideration paid for the period of time that Plaintiff was unable to operate a retail store at the Retail Premises as originally contemplated by the Lease.

109. Plaintiff is entitled to a judgment in its favor equal to the amount that Plaintiff has previously overpaid as rent and as other consideration to Defendant, in an amount to be proven at trial, for the period of time that Plaintiff was barred from operating a retail store at the Retail Premises as originally contemplated by the Lease.

SEVENTH CAUSE OF ACTION
(Unjust Enrichment)

110. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

111. Plaintiff's ability to operate a retail store at the Retail Premises was the parties' mutual purpose in entering the Lease, as both parties understood at the time of contract.

112. But for its right to operate a retail store, Plaintiff would not have entered the Lease.

113. When Plaintiff was forced to cease all retail operations at the Premises, the purpose of the Lease was frustrated and impossible to effectuate due to no fault of Plaintiff. At that point, Plaintiff's obligations under the Lease became impossible and impracticable to perform, and Plaintiff was deprived of the consideration it received in exchange for entering the Lease.

114. This sudden mandatory cessation of retail operations at the Retail Premises was unforeseeable and not contemplated by the parties at the time the Lease was entered.

115. The parties would not have entered the Lease had they known that Plaintiff would have been unable to operate a retail store at the Retail Premises, and Plaintiff's ability to use the Retail Premises as a retail store was the sole consideration it received under the Lease.

116. Plaintiff has previously paid rent and other consideration to Defendant, in an amount to be proved at trial, for the period of time that Plaintiff was unable to operate a retail store at the Retail Premises.

117. Defendant has been unjustly enriched from these payments to Plaintiff's detriment.

118. Under principles of good conscience, Defendant should not be allowed to retain the rent and other consideration paid for the period of time that Plaintiff was unable to operate a retail store at the Premises as originally contemplated by the Lease.

119. Plaintiff is entitled to restitution in an amount equal to the amount that Plaintiff has previously overpaid as rent and as other consideration to Defendant, in an amount to be proven at trial, for the period of time that Plaintiff was barred from operating a retail store at the Retail Premises as originally contemplated by the Lease.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in Plaintiff's favor as follows:

A. On the first cause of action, declaring that the Lease is rescinded and of no further force and effect, pursuant to the doctrine of frustration of purpose;

B. Alternatively, on the second cause of action, declaring that the Lease is rescinded and of no further force and effect, pursuant to the doctrine of impossibility of performance.

C. Alternatively, on the third cause of action, reforming the Lease to reflect the Parties' true intent that Plaintiffs have no obligation to pay rent once Plaintiff was deprived of the use of the Premises and that the Lease would terminate automatically when Plaintiff was deprived of its use of the Premises as originally contemplated by the Lease;

D. Alternatively, on the fourth cause of action, a judgment that the Defendant wrongfully declared a default under the Lease, as Article 9(b) and(c) of the Original Lease entitles Plaintiff to an abatement of rent when a casualty such as COVID-19 renders the Premises wholly or partially unusable.

E. On the fifth cause of action, awarding Plaintiff money damages for Defendant's breaches of the Lease, including reimbursement for the rents and other expenses paid for the period of time that Plaintiff was deprived of its use of the Retail Premises as originally contemplated in the Lease;

F. On the sixth cause of action, awarding Plaintiff money damages to reimburse Plaintiff for the rents and other expenses paid for the period of time that Plaintiff was deprived of its use of the Retail Premises as originally contemplated in the Lease;

G. On the seventh cause of action, awarding Plaintiff money damages to reimburse Plaintiff for the rents and other expenses paid for the period of time that Plaintiff was deprived of its use of the Retail Premises as originally contemplated in the Lease;

H. Awarding attorneys' fees and costs incurred by Plaintiff in the prosecution of this lawsuit;

I. Awarding prejudgment interest on all amounts due; and

J. Awarding such other and further relief as this Court deems just, proper, and equitable.

Dated: June 8, 2020
New York, New York

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