

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

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

Index No. 651836/2020

Plaintiff,

v.

**ANSWER, AFFIRMATIVE
DEFENSES, AND
COUNTERCLAIMS**

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

Defendant.

304 PAS OWNER LLC, successor in interest to 304 PARK AVENUE SOUTH LIMITED LIABILITY COMPANY (“Defendant” or “Owner”), by its counsel, Meister Seelig & Fein LLP, submits this Answer, Affirmative Defenses, and Counterclaims in response to the Complaint (“Complaint”) of BATH & BODY WORKS, LLC, successor in interest to BATH & BODY WORKS, INC. (“Plaintiff” or “Tenant”):

NATURE OF THE ACTION

1. Neither admits nor denies the allegations set forth in paragraph 1 of the Complaint as it merely describes the relief sought therein; to the extent a response is required, Owner denies that Tenant is entitled to the relief set forth in paragraph 1 of the Complaint.

2. Denies the allegations set forth in paragraph 2 of the Complaint, except admits that Tenant operated a retail store at 304 Park Avenue South, New York, New York and that Tenant was obligated to pay rent pursuant to the parties’ lease agreement.

3. Denies the allegations set forth in paragraph 3 of the Complaint, except admits that Tenant’s retail store is located in Manhattan’s Flatiron District.

4. Denies the allegations set forth in paragraph 4 of the Complaint, except admits that

Tenant's retail store is accessible by public transportation.

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 5 of the Complaint.

6. Neither admits nor denies the allegations contained in paragraph 6 of the Complaint, which state legal conclusions to which no response is required; to the extent a response is required, Owner admits that cases of COVID-19 were identified in New York City in March 2020 and denies the remaining allegations contained in paragraph 6 of the Complaint.

7. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 7 of the Complaint.

8. Neither admits nor denies the allegations contained in paragraph 8 of the Complaint, which state legal conclusions to which no response is required; to the extent a response is required, Owner denies the allegations contained in paragraph 8 of the Complaint.

9. Neither admits nor denies the allegations contained in paragraph 9 of the Complaint, which state legal conclusions to which no response is required; to the extent a response is required, Owner denies the allegations contained in paragraph 9 of the Complaint.

10. Neither admits nor denies the allegations set forth in paragraph 10 of the Complaint as it merely describes the relief sought therein; to the extent a response is required, Owner denies that Tenant is entitled to the relief set forth in paragraph 10 of the Complaint.

PARTIES

11. Admits the allegations set forth in paragraph 11 of the Complaint.

12. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 12 of the Complaint and respectfully refers the Court to the document referenced therein, which speaks for itself, for a true and accurate recitation of its

contents.

13. Admits the allegations set forth in paragraph 13 of the Complaint.

14. Admits the allegations set forth in paragraph 14 of the Complaint.

15. Denies the allegations set forth in paragraph 15 of the Complaint and avers that 304 PAS Owner LLC is affiliated with SL Green Realty Corp., an S&P 500 company and New York City's large office landlord and that SL Green Realty Corp. is a real estate investment trust.

16. Admits the allegations set forth in paragraph 16 of the Complaint.

JURISDICTION AND VENUE

17. Admits the Court has jurisdiction over the parties to this action and denies the remaining allegations contained in paragraph 17 of the Complaint.

18. Admits venue is proper in New York County and denies the remaining allegations contained in paragraph 18 of the Complaint.

COMMERCIAL LEASE

19. Denies the allegations set forth in paragraph 19 of the Complaint and respectfully refers the Court to the document referenced therein, which speaks for itself, for a true and accurate recitation of its contents.

20. Denies the allegations set forth in paragraph 20 of the Complaint and respectfully refers the Court to the documents referenced therein, which speak for themselves, for a true and accurate recitation of their contents.

21. Denies the allegations set forth in paragraph 21 of the Complaint and respectfully refers the Court to the document referenced therein, which speaks for itself, for a true and accurate recitation of its contents.

22. Denies the allegations set forth in paragraph 22 of the Complaint and respectfully

refers the Court to the document referenced therein, which speaks for itself, for a true and accurate recitation of its contents.

23. Denies the allegations set forth in paragraph 23 of the Complaint and respectfully refers the Court to the document referenced therein, which speaks for itself, for a true and accurate recitation of its contents.

24. Denies the allegations set forth in paragraph 24 of the Complaint and respectfully refers the Court to the document referenced therein, which speaks for itself, for a true and accurate recitation of its contents.

25. Denies the allegations set forth in paragraph 25 of the Complaint, except admits that Owner and Tenant extended the lease term to January 31, 2027.

26. Denies the allegations set forth in paragraph 26 of the Complaint and respectfully refers the Court to the document referenced therein, which speaks for itself, for a true and accurate recitation of its contents.

27. Admits the allegations set forth in paragraph 27 of the Complaint.

28. Denies the allegations set forth in paragraph 28 of the Complaint.

29. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 29 of the Complaint.

30. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 30 of the Complaint.

31. Denies the allegations set forth in paragraph 31 of the Complaint, except admits that Tenant failed to pay rent owed as of April 1, 2020.

32. Denies the allegations set forth in paragraph 32 of the Complaint and respectfully refers the Court to the document referenced therein, which speaks for itself, for a true and accurate

recitation of its contents.

33. Denies the allegations set forth in paragraph 33 of the Complaint and respectfully refers the Court to the document referenced therein, which speaks for itself, for a true and accurate recitation of its contents.

34. Admits the allegations set forth in paragraph 34 of the Complaint.

35. Neither admits nor denies the allegations contained in paragraph 35 of the Complaint as it merely describes the relief sought therein; to the extent a response is required, Owner denies that Tenant is entitled to the relief set forth in paragraph 35 of the Complaint.

FRUSTRATION OF PURPOSE AND IMPOSSIBILITY OF PERFORMANCE

36. Denies the allegations set forth in paragraph 36 of the Complaint and respectfully refers the Court to the document referenced therein, which speaks for itself, for a true and accurate recitation of its contents.

37. Denies the allegations set forth in paragraph 37 of the Complaint.

38. Denies the allegations set forth in paragraph 38 of the Complaint and respectfully refers the Court to the document quoted therein, which speaks for itself, for a true and accurate recitation of its contents.

39. Denies the allegations set forth in paragraph 39 of the Complaint and respectfully refers the Court to the document referenced therein, which speaks for itself, for a true and accurate recitation of its contents.

40. Denies the allegations set forth in paragraph 40 of the Complaint.

41. Denies the allegations set forth in paragraph 41 of the Complaint.

42. Denies the allegations set forth in paragraph 42 of the Complaint, and denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in

paragraph 42 of the Complaint concerning Tenant's characterization of the scope and effect of COVID-19.

43. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 43 of the Complaint.

44. Denies the allegations set forth in paragraph 44 of the Complaint and respectfully refers the Court to the document quoted therein, which speaks for itself, for a true and accurate recitation of its contents.

45. Denies the allegations set forth in paragraph 45 of the Complaint and respectfully refers the Court to the documents referenced therein, which speak for themselves, for a true and accurate recitation of their contents.

46. Denies the allegations set forth in paragraph 46 of the Complaint and respectfully refers the Court to the documents quoted therein, which speak for themselves, for a true and accurate recitation of their contents.

47. Denies the allegations set forth in paragraph 47 of the Complaint and respectfully refers the Court to the document referenced therein, which speaks for itself, for a true and accurate recitation of its contents.

48. Denies the allegations set forth in paragraph 48 of the Complaint and respectfully refers the Court to the document referenced therein, which speaks for itself, for a true and accurate recitation of its contents.

49. Denies the allegations set forth in paragraph 49 of the Complaint and respectfully refers the Court to the document quoted therein, which speaks for itself, for a true and accurate recitation of its contents.

50. Denies the allegations set forth in paragraph 50 of the Complaint and respectfully

refers the Court to the documents referenced therein, which speak for themselves, for a true and accurate recitation of their contents.

51. Denies the allegations set forth in paragraph 51 of the Complaint.

52. Denies the allegations set forth in paragraph 52 of the Complaint.

53. Denies the allegations set forth in paragraph 53 of the Complaint.

54. Denies the allegations set forth in paragraph 54 of the Complaint.

55. Denies the allegations set forth in paragraph 55 of the Complaint and respectfully refers the Court to the document quoted therein, which speaks for itself, for a true and accurate recitation of its contents.

56. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 56 of the Complaint.

57. Denies the allegations set forth in paragraph 57 of the Complaint.

58. Denies the allegations set forth in paragraph 58 of the Complaint.

59. Neither admits nor denies the allegations contained in paragraph 59 of the Complaint, which state legal conclusions to which no response is required; to the extent a response is required, Owner denies the allegations contained in paragraph 59 of the Complaint.

FIRST CAUSE OF ACTION
(Rescission For Frustration of Purpose)

60. Owner repeats and realleges each and every allegation contained in paragraphs 1 through 59, as if fully set forth herein.

61. Denies the allegations contained in paragraph 61 of the Complaint.

62. Denies the allegations contained in paragraph 62 of the Complaint except affirmatively states that the Lease is valid and should be enforced.

63. Neither admits nor denies the allegations contained in paragraph 63 of the

Complaint, which purport to describe legal doctrines, and to which no response is required.

64. Denies the allegations set forth in paragraph 64 of the Complaint.

65. Denies the allegations set forth in paragraph 65 of the Complaint.

66. Neither admits nor denies the allegations contained in paragraph 66 of the Complaint, which state legal conclusions to which no response is required; to the extent a response is required, Owner denies the allegations contained in paragraph 66 of the Complaint.

67. Neither admits nor denies the allegations contained in paragraph 67 of the Complaint, which state legal conclusions to which no response is required; to the extent a response is required, Owner denies the allegations contained in paragraph 67 of the Complaint.

68. Neither admits nor denies the allegations set forth in paragraph 68 of the Complaint as it merely describes the relief sought therein; to the extent a response is required, Owner denies that Tenant is entitled to the relief set forth in paragraph 68 of the Complaint.

69. Neither admits nor denies the allegations set forth in paragraph 69 of the Complaint as it merely describes the relief sought therein; to the extent a response is required, Owner denies that Tenant is entitled to the relief set forth in paragraph 69 of the Complaint.

70. Neither admits nor denies the allegations set forth in paragraph 70 of the Complaint as it merely describes the relief sought therein; to the extent a response is required, Owner denies that Tenant is entitled to the relief set forth in paragraph 70 of the Complaint.

71. Neither admits nor denies the allegations set forth in paragraph 71 of the Complaint as it merely describes the relief sought therein; to the extent a response is required, Owner denies that Tenant is entitled to the relief set forth in paragraph 71 of the Complaint.

SECOND CAUSE OF ACTION

(In the Alternative – Rescission Based on Impossibility of Performance)

72. Owner repeats and realleges each and every allegation contained in paragraphs 1

through 71, as if fully set forth herein.

73. Denies the allegations set forth in paragraph 73 of the Complaint and respectfully refers the Court to the document referenced therein, which speaks for itself, for a true and accurate recitation of its contents.

74. Denies the allegations set forth in paragraph 74 of the Complaint and respectfully refers the Court to the document referenced therein, which speaks for itself, for a true and accurate recitation of its contents.

75. Neither admits nor denies the allegations contained in paragraph 75 of the Complaint, which purport to describe legal doctrines, and to which no response is required.

76. Denies the allegations set forth in paragraph 76 of the Complaint.

77. Denies the allegations set forth in paragraph 77 of the Complaint.

78. Neither admits nor denies the allegations set forth in paragraph 78 of the Complaint as it merely describes the relief sought therein; to the extent a response is required, Owner denies that Tenant is entitled to the relief set forth in paragraph 78 of the Complaint.

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

79. Owner repeats and realleges each and every allegation contained in paragraphs 1 through 78, as if fully set forth herein.

80. Denies the allegations set forth in paragraph 80 of the Complaint.

81. Denies the allegations set forth in paragraph 81 of the Complaint.

82. Denies the allegations set forth in paragraph 82 of the Complaint.

83. Denies the allegations set forth in paragraph 83 of the Complaint.

84. Denies the allegations set forth in paragraph 84 of the Complaint.

85. Neither admits nor denies the allegations contained in paragraph 85 of the

Complaint, which state legal conclusions to which no response is required; to the extent a response is required, Owner denies the allegations contained in paragraph 85 of the Complaint.

86. Neither admits nor denies the allegations set forth in paragraph 86 of the Complaint as it merely describes the relief sought therein; to the extent a response is required, Owner denies that Tenant is entitled to the relief set forth in paragraph 86 of the Complaint.

FOURTH CAUSE OF ACTION

(In the Alternative – Declaratory Judgment Under Article 9 of the Lease)

87. Owner repeats and realleges each and every allegation contained in paragraphs 1 through 86, as if fully set forth herein.

88. Neither admits nor denies the allegations contained in paragraph 88 of the Complaint, which state legal conclusions to which no response is required; to the extent a response is required, Owner denies the allegations contained in paragraph 88 of the Complaint.

89. Neither admits nor denies the allegations set forth in paragraph 89 of the Complaint as it merely describes the relief sought therein; to the extent a response is required, Owner denies that Tenant is entitled to the relief set forth in paragraph 89 of the Complaint.

90. Denies the allegations set forth in paragraph 90 of the Complaint and respectfully refers the Court to the document quoted therein, which speaks for itself, for a true and accurate recitation of its contents.

91. Denies the allegations set forth in paragraph 91 of the Complaint and respectfully refers the Court to the document quoted therein, which speaks for itself, for a true and accurate recitation of its contents.

92. Denies the allegations set forth in paragraph 92 of the Complaint.

93. Neither admits nor denies the allegations set forth in paragraph 93 of the Complaint as it merely describes the relief sought therein; to the extent a response is required, Owner denies

that Tenant is entitled to the relief set forth in paragraph 93 of the Complaint.

94. Neither admits nor denies the allegations set forth in paragraph 94 of the Complaint as it merely describes the relief sought therein; to the extent a response is required, Owner denies that Tenant is entitled to the relief set forth in paragraph 94 of the Complaint.

FIFTH CAUSE OF ACTION
(Breach of Contract)

95. Owner repeats and realleges each and every allegation contained in paragraphs 1 through 94, as if fully set forth herein.

96. Neither admits nor denies the allegations contained in paragraph 96 of the Complaint, which state legal conclusions to which no response is required; to the extent a response is required, Owner admits that the Lease constitutes a binding and enforceable contract and denies the remaining allegations contained in paragraph 96 of the Complaint.

97. Denies the allegations set forth in paragraph 97 of the Complaint.

98. Denies the allegations set forth in paragraph 98 of the Complaint.

99. Denies the allegations set forth in paragraph 99 of the Complaint.

SIXTH CAUSE OF ACTION
(Money Had and Received)

100. Owner repeats and realleges each and every allegation contained in paragraphs 1 through 99, as if fully set forth herein.

101. Denies the allegations set forth in paragraph 101 of the Complaint.

102. Denies the allegations set forth in paragraph 102 of the Complaint.

103. Denies the allegations set forth in paragraph 103 of the Complaint.

104. Denies the allegations set forth in paragraph 104 of the Complaint.

105. Denies the allegations set forth in paragraph 105 of the Complaint.

- 106. Denies the allegations set forth in paragraph 106 of the Complaint.
- 107. Denies the allegations set forth in paragraph 107 of the Complaint.
- 108. Denies the allegations set forth in paragraph 108 of the Complaint.
- 109. Denies the allegations set forth in paragraph 109 of the Complaint.

SEVENTH CAUSE OF ACTION
(Unjust Enrichment)

110. Owner repeats and realleges each and every allegation contained in paragraphs 1 through 109, as if fully set forth herein.

- 111. Denies the allegations set forth in paragraph 111 of the Complaint.
- 112. Denies the allegations set forth in paragraph 112 of the Complaint.
- 113. Denies the allegations set forth in paragraph 113 of the Complaint.
- 114. Denies the allegations set forth in paragraph 114 of the Complaint.
- 115. Denies the allegations set forth in paragraph 115 of the Complaint.
- 116. Denies the allegations set forth in paragraph 116 of the Complaint.
- 117. Denies the allegations set forth in paragraph 117 of the Complaint.
- 118. Denies the allegations set forth in paragraph 118 of the Complaint.
- 119. Denies the allegations set forth in paragraph 119 of the Complaint.

PRAYER FOR RELIEF

120. Denies that Tenant is entitled to any relief sought in the “WHEREFORE” clause.

AFFIRMATIVE DEFENSES

First Affirmative Defense

121. The Complaint fails to state a claim upon which relief can be granted.

Second Affirmative Defense

122. Tenant’s claims are barred, in whole or in part, by documentary evidence, namely

the Lease, which specifically obligates Tenant to continue to pay rent even if a *force majeure* event occurs.

Third Affirmative Defense

123. Tenant's claims are barred by its material breach of the lease agreement at issue in this action.

Fourth Affirmative Defense

124. Tenant's claims are barred, in whole or in part, because Tenant suffered no damages.

Fifth Affirmative Defense

125. Tenant failed to mitigate its alleged damages.

Sixth Affirmative Defense

126. Tenant's equitable and quasi-contract claims in the Complaint are barred by the existence of express agreements between Tenant and Owner.

Seventh Affirmative Defense

127. Owner is entitled to set off any obligation to Tenant by the amounts Tenant owes Owner on its Counterclaims set forth below.

Eighth Affirmative Defense

128. Owner hereby gives notice that Owner intends to rely upon any other defense or defenses that may become available or appear during pretrial proceedings in this action and hereby reserve the right to amend this Answer to plead and assert any such additional affirmative defenses and/or counterclaims as they become known and appropriate during the course of litigation.

COUNTERCLAIMS

129. Owner, as owner of the building known as 304 Park Avenue South, New York, New York (the “Building”), for its counterclaims against Tenant under a lease for certain retail premises located at the Building (the “Retail Premises”), alleges as follows:

NATURE OF THE OWNER’S COUNTERCLAIMS

130. These counterclaims seek recovery from Tenant for certain moneys owed as rent and/or damages under the parties’ lease in connection with the termination of that lease following Tenant’s default in payment of rent.

PARTIES

131. Owner is a limited liability company duly formed and existing under the laws of the State of Delaware and authorized to do business in the State of New York, with its principal office c/o SL Green Realty Corp., 420 Lexington Avenue, New York, New York 10170.

132. Tenant is a limited liability company duly formed and existing under the laws of the State of Delaware with its principal office at Three Limited Parkway, Columbus, Ohio 43230.

FACTUAL BACKGROUND

The Underlying Lease

133. On or about April 5, 1996, Tenant entered into an agreement of lease, as related to certain store/retail space in the Building (*i.e.*, the Retail Premises), with a predecessor in interest of Owner. That agreement, as subsequently amended, constitutes the “Lease.”

134. The stated expiration date of the Lease is January 31, 2027.

135. The Lease provides, *inter alia*, that:

(a) Tenant is required to pay, on the first day of each month, the monthly installments of the “Fixed Annual Rent” due for the Retail Premises (see original Lease § 1, and

the “modification” dated as of January 31, 2011, article “Fourth”);

(b) Tenant is required to pay certain additional rent charges;

(c) if Tenant defaults in payment of any rent relating to the Retail Premises, Owner can issue a 10-day notice to cure [original Lease ¶ 17(1)]; and if Tenant fails to cure within that time, Owner may terminate the Lease on 5 days’ notice (*id.*);

(d) following termination, under original Lease ¶ 18, Owner is entitled to ongoing liquidated damage, as provided therein, and

(e) Tenant is thereafter liable for attorneys’ fees (original Lease ¶ 19; Supplemental Rider ¶ 51).

136. In addition, the parties allocated in the Lease the business/economic risks of circumstances that might lead to a closure of the Retail Premises, and Tenant agreed that it would in all such circumstances remain liable to pay its rent. Thus:

(a) in the opening (un-numbered) paragraph of the Lease, Tenant agrees to pay its rent “without any set off or deduction whatsoever”;

(b) in Supplemental Rider ¶ 26, Tenant recognized that a variety of “force majeure” events might occur — but specifically agreed that no such events would “excuse Tenant from the payment of any monetary sums ... due ... under ... this Lease”;¹ and

¹ Thus, Supplemental Rider ¶ 26 provided:

In the event Tenant shall be delayed or hindered in or prevented from the performance of any act required under this Lease by reason of strikes, lockouts, labor troubles, inability to procure materials, failure of power, restricted governmental law or regulations, rights, insurrection, war or other reason of a like nature not the fault or within the control of Tenant, then performance of such act shall be excused for the period of the delay, and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay, provided Tenant is diligently pursuing performance. The foregoing, however, shall not operate to excuse Tenant from the payment of any monetary sums or charges

(c) Tenant even recognized the possibility that a government entity might issue “mandatory controls,” yet agreed that such would not “abate or suspend Tenant’s obligation to pay rent....”²

137. Thus, Tenant plainly considered, in entering into the Lease, the possibility that its Retail Premises might be forced to close due to various circumstances — yet Tenant agreed that it would nevertheless be obligated to pay its rent except in circumstances not relevant here.³

due or payable under the terms of this Lease.

Notably, where the lease’s *force majeure* clause expressly excepts the tenant’s obligation to pay rent, that exception will be enforced against the tenant. See *LIDC I, LLC v. Sunrise Mall, LLC*, 46 Misc. 3d 885, 890-91 (Sup. Ct. Nassau Co. 2014).

² Thus, Rider ¶ 51 (“Miscellaneous”), in its 4th un-numbered paragraph, states:

In the event any governmental entity promulgates or revises any law, or issues mandatory controls or voluntary guidelines relating to the use or conservation of energy, water, gas, light or electricity, or the provision of any other utility or service furnished by Owner in the Building, Owner may, in its reasonable discretion take any appropriate action to comply with such provision of law, mandatory controls or voluntary guidelines, including the making of alterations to the Building subject to the terms of this Lease and except as otherwise provided herein, neither Owner’s actions nor its failure to act shall entitle Tenant to any damages, abate or suspend Tenant’s obligation to pay rent and additional rent or constitute or be construed as a constructive or other eviction of Tenant.

³ These “contract” provisions thus negate any claim that Tenant’s obligation to pay rent is excused by reason of, *inter alia*, “frustration of purpose,” or related common law excuses of “impossibility” or “commercial impracticality.” Thus, in *Urban Archeology Ltd. v. 207 East 57th Street LLC*, 2009 WL 8572326 (Sup. Ct. N.Y. Co. Sept. 10, 2009) (Sherwood, J.), plaintiff-tenant argued that its obligation to pay rent should be excused because, it said, “the circumstances which are serving to frustrate performance under the terms of the Lease are due to an unforeseeable and extreme occurrence ...” (at *2).

But the Court dismissed plaintiff’s argument, explaining (at *5):

The contract here was entered into by sophisticated commercial parties who could have anticipated the possibility that future events might result in financial disadvantage on the part of either party, even if the precise cause or extent of such financial disadvantage was not foreseen at the time the contract was executed

138. Owner has at all times continued to provide to Tenant all required Building services, and the Building has at all times remained “open.”

Tenant’s Default, and the Termination of the Lease in Respect of the Retail Premises

139. Tenant failed to pay the monthly installment of the Fixed Annual Rent for its Retail Premises, in the amount of \$63,202.50 each due as of April 1 and May 1, respectively, resulting in total arrears in the amount of \$126,405.00.

140. Owner duly issued a notice to cure dated May 11, 2020, stating that Tenant’s time to cure, by paying its arrears, ended on May 23, 2020.

141. Tenant failed to make any payment on account of any of the arrears.

142. Indeed, on or about May 25, 2020, Tenant filed a summons with notice seeking, *inter alia*, “rescission” of the Lease; and on June 8, 2020, Tenant filed the complaint in the above-captioned action requesting the foregoing relief.⁴

[citing to *General Electric Co. v. Metals Resources Group, Ltd.*, 293 A.D.2d 417 (1st Dep’t 2002)]. [Emphasis added].

And the First Department affirmed, 68 A.D.3d 562 (1st Dep’t 2009) (“An economic downturn could have been ... guarded against in the lease”).

See likewise, *e.g.*, *Fifth Ave. of L.I. Realty Assoc. v. KMO-361 Realty Assoc.*, 211 A.D.2d 695 (2d Dep’t 1995); and *Gander Mountain Co. v. Islip U-Slip LLC*, 923 F. Supp. 2d 351, 360 (N.D.N.Y. 2013) (“Commercial frustration applies only where the parties could not have provided for the frustrating event through contractual safeguards”), *aff’d*, 561 Fed. App’x 48 (2d Cir. 2014). *Gander Mountain* also explained that the doctrine of “impossibility” and of “frustration of purpose” are alike in that “the underlying principle of both defenses is foreseeability,” “both require unforeseeability” [citation omitted],” and both are accordingly defeated when the risk of the adverse circumstances at issue ““should have been guarded against in the contract” [citation omitted],” 923 F. Supp. 2d at 362-63.

Notwithstanding that Owner had explained the foregoing principle to Tenant, Tenant has persisted in its deliberate decision to default in payment of rent.

⁴ A tenant can only seek rescission if and after it has surrendered the premises; *see, e.g.*, *Edgar A. Levy Leasing Co., Inc. v. Siegel*, 230 N.Y. 634, 637 (1921). Accordingly, by

143. On June 4, 2020, Owner duly issued a notice of termination of the Lease in respect of the Retail Premises effective June 9, 2020 (but reserved all rights).

144. Tenant failed to pay the monthly installment of the Fixed Annual Rent for its Retail Premises due June 1, 2020 in the amount of \$63,202.50. Thus, the total amount of arrears is now \$189,607.50.

145. At the present rate, Owner's damages will be in excess of \$500,000 by November 1, 2020.

146. Even if Tenant surrendered possession of the Retail Premises today, and it has not, it will take at least one year for Owner to re-lease and build-out the Retail Premises for a replacement tenant. Owner will also incur costs such as the cost of providing a replacement tenant with a customary free rent period and brokerage commissions and attorneys' fees.

147. Here, given that Tenant has commenced an action seeking rescission of the Lease, Owner's assumption that it will not receive income from the Retail Premises until at least June 2021 is entirely justified. Thus, Owner is entitled to damages in an amount to be determined at trial, but which is in excess of \$1,000,000.00.

**FIRST COUNTERCLAIM
BREACH OF LEASE**

148. Owner repeats and realleges each and every allegation contained in paragraphs 1 through 147, as if fully set forth herein.

149. The Lease is a valid, enforceable contract.

150. Owner fully performed its obligations under the Lease.

151. Tenant breached the lease when it failed to pay the required monthly installments

demanding "rescission," Tenant has, *inter alia*, waived any requirements that Owner provide any further notices to Tenant.

of the Fixed Annual Rent and other charges due under the Lease.

152. By virtue of the foregoing, Tenant is liable to Owner in an amount to be determined at trial which is not less than \$1,000,000.00, a portion of which will accrue after the date of this complaint, plus interest and reasonable attorneys' fees.

PRAYER FOR RELIEF

WHEREFORE, Owner respectfully requests that judgment be entered as follows:

- (a) against Tenant on the first counterclaim in an amount to be determined at trial which is not less than \$1,000,000.00, a portion of which will accrue after the date of this Complaint, plus interest and reasonable attorneys' fees;
- (b) the costs and disbursements of this action; and
- (c) granting Owner such other and further relief as may be just and proper.

Dated: New York, New York
June 29, 2020

MEISTER SEELIG & FEIN LLP

By: /s/ Stephen B. Meister
Stephen B. Meister, Esq.
Howard S. Koh, Esq.

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304 PAS OWNER LLC