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

----------X Index No.: 652605/2020

VALENTINO U.S.A., INC.,

Plaintiff,

-against-

693 FIFTH OWNER LLC,

Defendant.

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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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PRELIMINARY STATEMENT

Defendant 693 Fifth Owner LLC ("693 Fifth") respectfully submits this memorandum of law in support of its motion to dismiss the complaint of plaintiff Valentino U.S.A., Inc. ("Valentino") pursuant to CPLR 3211(a)(1), 3211(a)(7) and 3211(c). The complaint in this action rests on theories of frustration of the venture and impossibility of performance, with constructive and actual eviction added for good measure. Each of these claims is deficient legally (CPLR 3211 (a)(1) & (7)), if not factually (CPLR 3211(c)) as well. Thus, the Court should grant the motion to dismiss.

In brief, Valentino, an internationally renowned purveyor of luxury goods and services, is a tenant under a long-term commercial lease with 693 Fifth (the "Lease") for retail space at 693 Fifth Avenue, New York, New York (the "Building") located in the "Plaza District" between East 54th and East 55th Streets. By way of this action, Valentino seeks to escape from the Lease almost nine years prematurely. The Lease now requires Valentino to pay annual base rent of $18,975,000.00, a sum that increases over time to $22,476,145.00 per annum. Valentino claims that it can no longer earn the level of profit from its salon that it contemplated subjectively at Lease inception in 2013, due to the Covid-19 pandemic and Governor Cuomo's emergency executive orders that temporarily shuttered retail establishments.[1]

Both as a matter of fact and law, Valentino contracted away whatever right it might otherwise have had to cease paying rent on account of the pandemic and EOs. Section 21.11 of the Lease expressly recites that cataclysmic events or governmental closure orders do not excuse Valentino from paying rent. Section 9.1 of the Lease requires Valentino to obey governmental orders. See pp. 10-12, below.

[1] We respectfully request that given that Valentino rented retail space in the Plaza District on Fifth Avenue at a rental rate that is currently nearly $19,000,000 per annum, the Court take judicial notice that Valentino is indeed a "sophisticated party" within the meaning of the case law concerning contract interpretation and enforcement. See pp. 6-7, below.

Not insignificant is the fact that, in or about April 27, 2020, Valentino apparently sought and obtained from the United States Treasury a so-called "PPP loan" of $2,000,000-5,000,000 (according to the Treasury website), sufficient to fund between one and three months' rent at the current Lease rental rate. This alone surely undermines Valentino's claims of frustration and impossibility.

In sum, even though the Lease constitutes a freely negotiated commercial contract between sophisticated parties, each represented by counsel, Valentino wants this Court to set it free based upon Valentino's claim that the business operation permitted by the Lease is no longer sufficiently profitable. As the Court of Appeals noted in 407 E. 61st Garage, Inc. v. Savoy Corp., 23 N.Y.2d 275 (1968), its landmark case on frustration and impossibility, financial loss does not frustration or impossibility make: "[T]he applicable rules do not permit a party to abrogate a contract, unilaterally, merely upon a showing that it would be financially disadvantageous to perform it; were the rules otherwise, they would place in jeopardy all commercial contracts." Id. at 282.

To allow Valentino to jettison its Lease liability would, to paraphrase the Court of Appeals, jeopardize all commercial leases in New York City, if not the whole of New York State. Further, it would have the unintended but likely consequence of depriving landlords of the rental streams necessary to pay real estate taxes and maintain their properties, the real-time results of which would include erosion of the City's tax base, and, quite possibly, compromise the safety of the City's populace.

OVERVIEW OF THE COMPLAINT'S LEGAL INSUFFICIENCIES

At the outset, regardless of the legal doctrine Valentino attempts to invoke, the Lease itself requires Valentino to pay its rent in the face of cataclysms, such as a pandemic. Lease Section 22.11. See p. 10, below.

Second, frustration is legally deficient because the possibility of a pandemic and governmental orders requiring closure were foreseeable and could have been guarded against, and indeed were (as set forth at length below). 407 E. 61St Garage. See pp.9-13, below.

Third, it is not impossible for Valentino to pay its rent even if its revenues have fallen. See pp.14-16, below.

Fourth, it is well-settled that a claim for constructive eviction requires the tenant to allege that it has voluntarily vacated its rented premises. Barash v. Pennsylvania Term. Real Estate Corp., 26 N.Y.2d 77 (1970). For a claim for actual eviction, the tenant must allege that the landlord physically ousted it from occupancy. Id. Valentino's complaint makes no such allegations – nowhere does it allege that Valentino has voluntarily vacated or been ousted from its premises. See pp. 17-18, below.

THE COMPLAINT'S ALLEGATIONS

Valentino's complaint (the "Complaint", a copy of which is annexed to the accompanying affirmation of Casey Slamani, in-house counsel of 693 Fifth's parent company, Fimilac SA, as Exhibit C), filed on June 21, 2020, alleges eight causes of action (discussed at length below). All rest on a common core of factual allegations.

The Complaint begins with the recitation that Valentino "is the American branch of 'Valentino' – an internationally renowned luxury fashion company with retail boutiques located around the world." (Complaint, p.1) By the Lease, dated May 3, 2013, Valentino rented the lower level, ground floor, second floor and third floor (the "Premises") for the period beginning on August 1, 2013 and ending on July 31,

2029 (a copy of the Lease is annexed to the Slamani Aff. as Exhibit A).[2] Complaint ¶3.[3] The Lease requires Valentino to "'use and occupy the Premises solely and exclusively for the display and retail sale of women's wear, menswear, accessories, shoes, fragrances and handbags and/or…other luxury items….'" Complaint ¶5; Lease §5.01. It requires Valentino to continuously operate as a Valentino store, but for one day only. Complaint ¶9; Lease §5.04 Valentino did so: "[C]onsistent with the prestige and reputation of the immediate Fifth Avenue neighborhood, Valentino provided its clientele with a world-renowned array of products including clothing, shoes and bags, and also offered expert fittings and tailoring at the Premises." Complaint ¶7.

Valentino alleges that as of the date of the Complaint – June 21, 2020 – it was current in its rent payments. Complaint ¶4. That allegation was and – and remains – patently false. As detailed in the Slamani Aff., Valentino ceased paying rent in February 2020. In mid-June, 2020, it paid one month's rent, but has so far not paid for July (a copy of the rent arrearage report is annexed to the Slamani Aff. as Exhibit D). Thus, by virtue of the Lease and the Guaranty, respectively, Valentino and VFG, the guarantor, now owe 693 Fifth $3,180,241.78 on account of unpaid rent for June and July, 2020.

At the end of January 2020, the federal government had declared a state of emergency on account of Covid-19. Complaint ¶14. As a result, Governor Cuomo issued Executive Orders ("EOs") that resulted in the closure of non-essential retail stores, Valentino's included. Complaint ¶15. Valentino closed on March 17, 2020. Complaint ¶17. As of June 21, 2020 the restrictiveness of the EOs had eased, but Valentino alleges that it nevertheless "is unable to offer in-boutique retail sales, or associated services

[2] The Lease was made in 2013 between Valentino, as tenant, and Thor 693 LLC, 693 Fifth's predecessor-in-title. Valentino was represented by counsel. See Lease Article 20 (requiring service of notices on Valentino's counsel, Pavia & Harcourt LLP). (693 Fifth later bought the Building, thereby becoming Valentino's landlord.)

[3] The Complaint (¶77) properly alleges that Valentino Fashion Group S.p.A. ("VSG") signed a written guaranty of the Lease (the "Guaranty") (copy annexed to the Slamani Aff. as Exhibit B).

such as fittings, as originally contemplated by the parties, and as the company operated before the Covid-19 pandemic, services which are vital to its business and central to the Lease's purpose." Complaint ¶18.

We note, though, that as of July 22, 2020 Valentino was open for business at the Premises, presumably subject to social distancing and other requirements necessary to thwart the spread of the virus (photographs, taken on July 22 of the exterior of the Valentino premises and of a notice posted on the inside of the Valentino salon, are annexed to the accompanying affidavit of Natacha Azevedo as Exhibit A).

Beyond merely alleging a present inability to operate "as the company operated before" the pandemic, Valentino indulges in the purely self-serving speculation that it will not be able to operate properly in the future: "[E]ven in a post-pandemic New York City (should such a day arrive), the social and economic landscapes have been radically altered in a way that has drastically, if not irreparably, hindered Valentino's ability to conduct high-end retail business at the premises." Complaint ¶19. In this regard, we reiterate that on or about April 27, 2020, Valentino apparently sought and obtained a "PPP loan" which, alone, sufficiently undermines Valentino's frustration and impossibility claims.

On June 19, 2020, Valentino gave 693 Fifth written notice that Valentino intended to vacate the Premises by December 31, 2020 (a copy of the notice is annexed to the Slamani Aff. as Exhibit E). Complaint ¶26. For a business that claims it can no longer operate at the Premises as it intended, six (6) months' notice is a considerable lead time, which ends, not coincidentally, just after the conclusion of the holiday sales season, which is, for many retailers, sustaining in and of itself.

FACTS OUTSIDE THE COMPLAINT

Items outside the complaint are not generally considered on a motion to dismiss; however, we believe that the following is germane and necessary to any considered determination of this motion.

Beginning in March 2020, as the impact of Covid-19 became apparent, Valentino reached out to 693 Fifth to request rent relief. See Slamani Aff., ¶ 12. Discussions then followed at the highest levels of their respective companies, and included Gianfranco Ditadi, Valentino's CEO and Thomas Piquemal, Fimilac's Deputy Chief Executive Officer. See Slamani Aff., ¶ 12. As a result of the ongoing discussions, 693 Fifth, acting through Mr. Piquemal, offered to defer two months of rent, to be paid by December 31, 2020. Two weeks later, Gianfranco Ditadi, CEO of Valentino, responded: Valentino wanted an additional month of rent deferral, the entirety to be repaid over the eight years of the remaining Lease term. Thereafter, Valentino fell silent. Particularly given the relative proximity of their respective positions, 693 Fifth believed that the parties had been engaged in good faith, constructive negotiations, likely to conclude in short measure with Valentino receiving rent relief acceptable to each side. See Slamani Aff., ¶ 15. Apparently, Valentino thought otherwise, but played its cards close to the vest. See Slamani Aff., ¶ 16. It was not until six weeks later that Valentino next surfaced, by way of its notice to 693 Fifth of its intent to vacate the Premises by December 31, 2020. See Slamani Aff.

THE RELEVANT LEASE PROVISIONS

In this matter, the Lease controls – particularly because it is unambiguous and the parties are sophisticated. An apt summary of the law is found in 501 Fifth Ave. Co. v. Roberts, Index No. 652111/2019, 4-5 (Sup. Ct., N.Y. Cty. 2019):

> Because the lease is unambiguous on its face, and neither party claims otherwise, the court enforces the lease's plain meaning without the need for extrinsic evidence to discern the parties' intent. 159 MP Corp. v. Redbridge Bedford, LLC, 33 N.Y.3d 353, 358-59 (2019); 2138747 Ontario, Inc. v. Samsung C&T Corp., 31 N.Y.3d 372, 381 (2018); Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P., 13 N.Y.3d 390, 403-404 (2009); Ashwood Capital, Inc. v. OTG Mgt., Inc., 99 A.D.3d 1, 8 (1st Dep't 2012). The fact that sophisticated businesspersons negotiated the lease at arm's length further compels enforcement of the written agreement according to its terms. 159 MP Corp. v. Redbridge Bedford, LLC, 33 N.Y.3d at 359; Riverside S. Planning Corp. v. CRP/Extell

Riverside, L.P., 13 N.Y.3d at 403; Vermont Teddy Bear Co. v. 538 Madison Realty Co., 1 N.Y.3d 470, 475 (2004). See 2138747 Ontario, Inc. v. Samsung C&T Corp., 31 N.Y.3d at 381; Ashwood Capital, Inc. v. OTG Mgt., Inc., 99 A.D.3d at 7.

The Lease contains numerous provisions that bear on, and, indeed, conclusively determine, the dispute:

First, Section 2.3: Valentino promises to pay its rent "without any abatement, set-off or deduction whatsoever…."

Second, Section 22.11: In the event of a governmental closure order or cataclysm, Valentino must continue to pay its rent.[4]

Third, Section 9.1: Valentino is required to comply with present and future governmental orders, whether foreseen or unforeseen.[5]

Fourth, Section 4.1: Valentino is not entitled to any set-off in rent liability based upon condition of Premises.

Fifth, Sections 4.1(b) and 21.2: 693 Fifth makes no warranties and in entering into Lease, Valentino relies on nothing outside Lease.

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[4] "In the event that either party shall be...prevented from the performance of any act required hereunder by reason of strikes, labor troubles, inability to procure labor or materials, failure of power, restrictive governmental laws or regulations, riots, insurrection, war, acts of terrorism, acts of God, floods, hurricanes, windstorms, fire or other casualty, condemnation or other reason of a similar or dissimilar nature beyond the reasonable control of the party...doing acts required under...this Lease, then the performance of such act shall be excused for the period of the Unavoidable Delay....[N]othing contained in this Section shall operate to excuse Tenant from the prompt payment of Rent or any other payments or charges required by the terms of this Lease....Delays or failures to perform resulting from lack of funds shall not be deemed Unavoidable Delays."

[5] "Tenant, at its sole cost and expense, shall comply with all laws, codes, orders, rules, statutes, ordinances, requirements and regulations of all federal, state, local and municipal governments, agencies and authorities…(collectively, 'Laws')(whether any Laws are in effect on, or enacted or made effective after, the date hereof, whether contemplated or foreseen on the date hereof or not) which shall impose any…duty upon Landlord or Tenant with respect to the Premises or the use or occupancy thereof…."

Sixth, Section 22.1: a covenant of quiet enjoyment is conditioned upon Valentino's abiding by all of its Lease obligations.[6]

OVERVIEW OF THE EIGHT CAUSES OF ACTION

The eight causes of action of the Complaint each rest, as noted above, on Valentino's purported inability to occupy the Premises as originally contemplated in the Lease. Valentino seeks: first, a declaration that the purpose of the Lease has been frustrated, thereby entitling Valentino to terminate without consequence; second, a declaration that because of frustration of the purpose of the Lease, Valentino's rent obligations are suspended until it can once again fully occupy the Premises; third, a claim for rescission based upon impossibility of performance of Valentino's Lease obligations; fourth, a claim for a rent abatement based upon impossibility of performance of Valentino's Lease obligations; fifth, rescission based upon failure of consideration – namely, that because Valentino purportedly can no longer operate in the Premises, it should be freed from its Lease obligations; sixth, for a claim for actual or constructive eviction based upon a claim that 693 Fifth has failed to take precautions against the effects of Covid; seventh, for a declaration that VFG's guaranty is void; and, finally, eighth, an injunction preventing 693 Fifth from terminating the Lease before December 31, 2020 so as to permit Valentino to wind down its operations in the Premises.

Implicit, if not explicit, in each of the causes of action is the misguided notion that under the Lease, 693 Fifth, as landlord, is required to control circumstances well beyond the Premises and/or the Building, in failure of which, Valentino maintains that it should receive judicial asylum from the arm's-length agreement that it negotiated and into which it entered (the Lease).

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[6] "Tenant, upon keeping, observing and performing all of the covenants and agreements of this Lease on its part to be kept, observed and performed, shall lawfully and quietly hold, occupy and enjoy the Premises during the term of this Lease…."

STANDARD OF REVIEW

Each of the claims is legally deficient, but for different reasons: some are barred by the express, controlling provisions of the Lease itself and some because the law does not recognize them as legally cognizable.

Three CPLR provisions serve as the vehicle for this motion: CPLR 3211(a)(1)(the bar of documentary evidence); CPLR 3211(a)(7)(failure to state a cause of action); and, CPLR 3211(c)(consideration of facts on a dismissal motion). Under 3211(a)(1), the document relied upon – typically, the very contract from which the plaintiff's cause of action purports to spring – must conclusively establish a defense to the asserted action as a matter of law. Goldman v. Metropolitan Life Ins. Co., 5 N.Y.3d 561, 571 (2005). Under 3211(a)(7), a court tests the pleading to determine whether the cause of action states a legally cognizable claim. Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977). Finally, under CPLR 3211(c), a court may consider evidentiary material on a motion to dismiss so long as it notifies the parties that it is going to do so.[7]

ARGUMENT

I. Valentino May Not Invoke Frustration of Purpose Both Because The Pandemic Was Foreseeable And Because The Lease Itself Allocates to Valentino The Risk of Its Inability to Operate in The Premises.

Valentino's first and second causes of action are based on the doctrine of so-called frustration of purpose. The first cause of action seeks to rescind the Lease and the second to suspend Valentino's rent obligation until the Covid-19 pandemic ends and the EOs are lifted.

[7] Part of the argument on certain causes of action rests on sworn statements by 693 Fifth that Valentino has not paid rent. At another point, based on a notice posted on the inside of the Valentino exterior entry door fronting on Fifth Avenue, we assert that Valentino is open for business. These are evidentiary items. See CPLR 3211(c).

A. The Frustration Doctrine Defined.

The frustration doctrine, which is narrowly applied, Crown It Servs. v. Koval-Olsen, 11 A.D.3d 263 (1st Dep't 2004), is defined thus: "Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary." Gander Mountain Co. v. Islip U-Slip LLC, 923 F.Supp.2d 351, 359 (N.D.N.Y.2013), aff'd, 561 Fed. Appx. 48 (2d Cir. 2014)(applying New York law)(citation omitted)(emphasis supplied). Here, the express language of the Lease not only indicates – but expressly states – the contrary.

B. Even in The Absence of Foreseeability, The Lease Allocates to Valentino The Risk of Closure.

Even if, arguendo, the Covid-19 pandemic and EOs requiring closure of retail stores were not foreseeable (and the Lease indicates to the contrary), the Lease expressly allocates the risk of closure in those circumstances to Valentino. It must in all events continue to pay its rent.

First, Section 21.11, "Unavoidable Delays," recites that in the face of cataclysmic events – "failure of power, restrictive governmental laws or regulations, riots, insurrection, war, acts of terrorism, acts of God, floods, hurricanes, windstorms, fire or other casualty, condemnation or other reason of a similar or dissimilar nature." (emphasis supplied) – Valentino must continue to pay its rent: "[N]othing contained in this Section shall operate to excuse Tenant from the prompt payment of Rent or any other payments or charges required by the terms of this Lease." (emphasis supplied) Moreover, Valentino expressly agreed that its own lack of funds – such as would be the case because of the salon's poor financial performance – would be no excuse: "Delays or failures to perform resulting from lack of funds shall not be deemed Unavoidable Delays."

Section 21.11 lists supervening, cataclysmic events that might thwart Valentino's performance of its obligations under the Lease. Notably, the clause goes beyond the events named, reciting as it does that it covers other events "of a similar or dissimilar nature." A pandemic and EOs that prevent Valentino from operating are supervening events that, in theory, prevent Valentino from operating. Section 21.11 addresses these events' impact on Valentino's operations in the Premises, and expressly recites that no such supervening event excuses Valentino from paying rent. See LIDC I v. Sunrise Mall, LLC, 46 Misc.3d 885, 891 (Sup. Ct., Nassau Cty. 2014)("[R]ent is excepted under the leases' force majeure clause, and non-payment of rent is the stated default. It [rent] thus had to be paid…."). Thus, by virtue of Section 21.11, Valentino contractually ceded whatever right it might have had to argue that the frustration doctrine allows it to walk away from its rental obligation under the Lease.

Second, Section 9.1 places the onus on Valentino to comply, at its own cost and expense, with governmental orders affecting its occupancy of the Premises:

> Tenant, at its sole cost and expense, shall comply with all…orders…of all…state…governments (collectively, 'Laws')(whether any Laws are in effect on, or enacted or made effective after, the date hereof, whether contemplated or foreseen on the date hereof or not) which shall impose any…duty upon Landlord or Tenant with respect to the Premises or the use or occupancy thereof….

Thus, in and to the extent that, arguendo, the EOs are preventing Valentino from conducting business in the Premises, that inability was and remains a risk that Valentino accepted for itself under the Lease.

New York courts enforce contractual allocations of risk. In Urban Archaeology Ltd. v. 207 E. 57th St. LLC, 68 A.D.2d 562 (1st Dep't 2009), the tenant sued, claiming that because of the Great Recession of 2008, it need not proceed with a lease that it had signed just before that recession took hold. The purpose of the lease, it argued, had been frustrated. Relying on the provisions of the very lease that the tenant had signed, the court granted the landlord's CPLR 3211(a)(1) motion to dismiss:

> The force majeure clause of the parties' lease agreement contemplates either party's inability to perform its obligations under the lease due to "any cause whatsoever" beyond the party's control—other than financial hardship. This clause conclusively establishes a defense to plaintiff's claim that it is excused from performing under the lease by reason of the effect that the downturn in the economy has had on it.

Id. at 562. See also International Paper Co. v. Rockefeller, 161 A.D. 180, 185 (3d Dep't 1914)("The defendant is not excused from delivering the live spruce suitable for pulp wood which survived the fire by the mere fact that its location upon the tract is such that it would be very expensive for him to deliver it.").

The Lease itself conclusively disposes of Valentino's frustration claim. Thus, the Court should dismiss Valentino's first two causes of action pursuant to CPLR 3211(a)(1).

C. The Pandemic and The EOs Were Reasonably Foreseeable.

Not only does the Lease, by its terms, preclude a frustration claim, but the events giving rise to Valentino's frustration claims were reasonably foreseeable, and thus, if Valentino had negotiated differently, the Lease could have guarded against them. For this separate reason, the frustration claims warrant dismissal pursuant to CPLR 3211(a)(1).

First, the pandemic was foreseeable. We respectfully request that the Court take judicial notice of pandemics occurring in the years leading up to the 2013 Lease signing: the SARS pandemic of 2002 and the H1N1 pandemic of 2009 and the wide publicity they received. As for the need to close because of EOs, the Lease itself deals with that issue by requiring Valentino generally to obey governmental orders. See Lease Section 9.1.

The application of these principles is illustrated in Sage Realty Corp. v. Jugobanka D.D. New York Agcy., 1998 U.S. Dist. LEXIS 15756* at 14-15 (S.D.N.Y. 1998)(applying New York law). There, a Yugoslavian bank was a tenant under a long-term lease in a Manhattan office building. Shortly after

signing its lease, the President issued an Executive Order that prevented the bank from accessing assets in the United States, an order that the Treasury Department then implemented by directing the bank to close. The bank then stopped paying rent. In response to the landlord's suit to recover rent, the bank argued that the purpose of the lease had been frustrated and warranted rescission.

In granting summary judgment to the landlord, the court first noted that the closure order was foreseeable because the potential for it, for stated political reasons, was reported in the press in the months leading up to the lease's signing. In addition, the lease contained a provision that closely paralleled Sections 9.1 and 22.11 of the Lease: "[T]he obligation of Tenant to pay rent hereunder…shall in no way be affected, impaired or excused because Landlord is unable to fulfill any of its obligations under this Lease…by reason of any…order or regulation of any…government agency." 1998 U.S.Dist. LEXIS 15756 at *13-14. The Court enforced the provision as written: "Section 33.01 requires the tenant to continue to pay rent where a government action prevents the landlord from performing any of its duties under the lease." Id. at *14-15. See also Urban Archeology ("[A]n economic downturn could have been foreseen or guarded against in the lease.").

The issue is not whether the specific event causing a contracting party to invoke frustration was foreseeable. The relevant foreseeability issue is whether a tenant – particularly a sophisticated one, like Valentino – could reasonably have negotiated its lease to guard against the general risk that supervening events, unrelated to its own conduct, might force closure. The trial court in Urban Archaeology noted as much: "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." 34 Misc.3d 1222(A), 2009 N.Y. Misc. LEXIS 6670 at ***12 (citation omitted)(emphasis supplied). Accord General Elec. Co. v. Metals Res. Group Ltd., 293 A.D.2d 417 (1st

Dep't 2002); In re M&M Transp. Co., 13 B.R. 861, 871 (Bankr. 1981)(applying New York law)("A person who makes an absolute promise is not to be excused from performance when an event destroys the value of the stipulated consideration and when a reasonable inference may be drawn that an express condition would have been inserted had the parties so intended.").

Here, by way of Sections 9.1 and 22.11 the parties did anticipate the consequences of a supervening cataclysmic or other event that might impact upon the Valentino retail store. Together, those sections require Valentino to obey governmental orders and state that no such supervening event will excuse Valentino from paying its rent. Those sections control. Had Valentino been concerned about allocating risk and stemming rent liability should a governmental order require closure during a pandemic, it was incumbent on Valentino to have raised the issue at the bargaining table and obtained a provision addressing its lease obligations in those circumstances. The Lease itself demonstrates that Valentino freely entered into it in the absence of such protection. See Maxton Bldrs., Inc. v. LoGalbo, 68 N.Y.2d 373, 382 (1986) ("[R]eal estate contracts are probably the best examples of arm's length transactions. Except in cases where there is a real risk of overreaching, there should be no need for the courts to relieve the parties of the consequences of their contract. If the parties are dissatisfied…the time to say so is at the bargaining table."). Here, the Lease expressly allocates to Valentino the risk that it must pay rent despite a governmental order requiring closure. The Court should not relieve Valentino of the consequences of this negotiated, arm's-length bargain struck by sophisticated parties, each represented by counsel (the Lease).

For all of these reasons, the Court should dismiss the frustration causes of action.

II. The Impossibility of Performance Claims Are Legally Deficient.

The third and fourth causes of action are based on so-called impossibility of performance. By the third cause, Valentino seeks to rescind the Lease on account of impossibility of performance, and by the fourth,

Valentino seeks to abate its rental obligation until the end of the pandemic/lifting of the EOs. Common to both claims are allegations that Valentino's performance has become impossible because Valentino alleges that is no longer able to use and fully occupy the Premises. Complaint ¶¶ 47 & 55.

As demonstrated below, as a matter of fact and law, Valentino contracted away its right to raise impossibility of performance on account of a pandemic or governmental order, but even had it not done so, as a matter of law, the impossibility doctrine does not apply.

A. The Impossibility Doctrine Defined.

Impossibility of performance is "an inability to perform as promised due to intervening events, such as an act of state or destruction of the subject matter of the contract." United States v. General Douglas MacArthur Senior Village, Inc., 508 F.2d 377, 380 (2d Cir. 1974)(applying New York law). The inability to perform must be objective: "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." Kel Kim Corp. v. Central Mkts., Inc., 70 N.Y.2d 900, 902 (1987). Accord Ogdensburg Urban Renewal Agcy. v. Moroney, 42 A.D.2d 639 (3d Dep't 1973). Finally, "where impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused." 407 E. 61st Garage, 23 N.Y.2d at 281.

B. The Impossibility Doctrine Does Not Apply.

Neither the pandemic nor the EOs renders Valentino's performance of the Lease impossible. The Lease places on Valentino one principal duty: payment of the rent. Lease Article 2.[8] See Sage Realty, 1998 U.S.Dist LEXIS 15766 at *16 ("Jugobanka's primary obligation under the under the lease, to pay

[8] Valentino also had a duty to continuously operate, for one day, as a luxury boutique. Section 5.04. It discharged that duty in 2013, on the day it opened for business.

rent, was not impaired by the Executive Order."). Nothing about the pandemic or the EOs precludes Valentino from carrying out that duty – indeed, Valentino paid its rent for June 2020 – meaning that fulfillment of that duty is not objectively impossible, irrespective of whether Valentino is conducting business. Nothing objectively prevents it from paying rent on a premises where it is not conducting business. See Raner v. Goldberg, 244 N.Y. 438, 440 (1927)("There is obviously no impossibility or illegality in paying the rent, and the landlord by making the lease has conveyed to the tenant the estate for which rent was promised." (citation omitted)). Accordingly, Valentino's potential financial hardship does not amount to impossibility. 407 E. 61st Garage.

C. The Lease Bars The Impossibility Claims.

Above, we demonstrated that the Lease itself bars Valentino's frustration claims. See pp.10-12, above. For the same reasons, the Lease also bars the impossibility claims. In brief, Section 21.11 says that casualty and governmental order do not excuse the payment of rent. Section 9.1 requires Valentino to comply with governmental orders. The Lease thus assigns to Valentino the risk of inability to operate. See, e.g., General Douglas MacArthur Senior Village, 508 F.2d at 381 ("The [impossibility] doctrine comes into play where…the contract does not expressly allocate the risk of the event's occurrence to either party…."). In short, not only does the Lease not excuse Valentino from performing its rental obligation, but the Lease affirmatively and expressly states the direct opposite.[9]

For all of these reasons, the Court should dismiss Valentino's impossibility claims pursuant to CPLR 3211(a)(1).

[9] We adopt also the foreseeability argument that we made above in relation to frustration. See pp. 12-14, above.

III. Valentino's Fifth Cause of Action – for Failure of Consideration – Fails Because The Frustration and Impossibility Claims Fail.

The fifth cause of action seeks rescission because of failure of consideration. As pleaded, the claim states merely that because of Covid-19 and the EOs, Valentino has been deprived of the beneficial use and occupancy of the store. However, this is merely a repackaging of Valentino's claims of frustration of the venture and impossibility of performance. We have demonstrated, above, that each of those claims is legally deficient. See Culver & Thessen, Inc., v. Starr Realty Co. (NE) LLC, 307 A.D.2d 910, 911 (2d Dep't 2003)(dismissing plaintiff-tenant's claim "Since the possibility that the plaintiff would be unable to obtain a permit was anticipated by the parties at the time the agreement was executed, and the risk of failure to terminate on the basis was intentionally placed on the tenant."(emphasis supplied)).

IV. The Sixth Cause of Action – for Actual and Constructive Eviction – Is Legally Deficient Because It Fails to Plead That Valentino Has Relinquished Possession of The Premises.

The sixth cause of action purports to plead an actual and constructive eviction. Complaint ¶¶69-75. The critical element for these claims, which must rest on a breach of a lease's covenant of quiet enjoyment – here, Lease Article 22 – is the tenant's abandonment of all or a portion of the subject premises. In the case of an actual eviction, the abandonment is brought about by the landlord's physical ouster of the tenant. In the case of a constructive eviction, the abandonment is brought about by the landlord's creation of a condition that forces the tenant to leave – such as lack of heat or the presence of vermin. See, e.g., Barash; Dave Herstein Co. v. Columbia Pictures Corp., 4 N.Y.2d 117 (1958).

To be clear, Valentino makes no allegation of abandonment. Nowhere in the Complaint does Valentino allege in words or substance that it has abandoned the Premises. Indeed, the eighth cause of action flatly refutes abandonment and ouster: by that claim, Valentino asks the Court to enjoin 693 Fifth from terminating the Lease before December 31, 2020 so as to permit Valentino to wind up its operations

(again, not coincidentally, after the conclusion of the holiday season). For this reason alone, the claim is legally insufficient and warrants dismissal pursuant to CPLR 3211(a)(7).

In addition, however, the covenant of quiet enjoyment of the Lease is expressly conditioned upon Valentino observing all of its obligations under the Lease. ("Tenant, upon keeping, observing and performing all of the covenants and agreements of this Lease on its part to be kept, observed and performed, shall lawfully and quietly hold, occupy and enjoy the Premises…."). The Court of Appeals has held that such a conditioning of the quiet enjoyment covenant is permissible. Dave Herstein. However, as previously noted, Valentino has not paid base rent for June and July 2020 and is thus in default of its material obligations under the Lease. Accordingly, Valentino may not make a claim for breach of the quiet enjoyment covenant. For this additional reason, the sixth cause of action warrants dismissal.

V. Valentino's Effort to Void VFG's Guaranty Is Meritless.

The seventh cause of action seeks to void the Guaranty. On two distinct bases – each sufficient on its own to warrant dismissal – this cause fails.

First, on the procedure, VFG, the guarantor, is not a party to this action. Valentino, an entity separate from VFG, lacks standing to seek to invoke the possible rights of VFG and, thus, attempt to free VFG from the Guaranty.

Second, on the substance, the Guaranty turns on the validity of the obligations that Valentino undertook under the Lease. As demonstrated above, Valentino has no legally viable basis to attack the validity of the Lease. The absence of any merit to Valentino's challenge to the Lease leaves neither Valentino nor VFG (even were VFG a party) with any basis to challenge the Guaranty.

For these reasons, the Court should dismiss the seventh cause of action.

VI. There Is No Basis to Enjoin 693 Fifth from Terminating The Lease.

Finally, the eighth cause of action seeks to prevent 693 Fifth from terminating the Lease. The effort to prevent 693 Fifth from terminating is premature – at best.

The claim for an injunction seeks "Yellowstone"-like relief. See First Nat'l Stores, Inc. v. Yellowstone Shopping Ctr., Inc., 21 N.Y.2d 630 (1968). However, a Yellowstone injunction is available only where the landlord serves on the tenant a notice that imperils the lease. Here, 693 Fifth has served no such notice upon Valentino. Indeed, to date, 693 Fifth has never even threatened to terminate the Lease. Accordingly, the request for an injunction is speculative at best, and would be prematurely chilling to the ability of 693 Fifth to invoke its rights under the Lease, including the very right to serve a notice to cure. If 693 Fifth serves such a notice, then and only then, would Valentino legitimately have a basis upon which to seek Yellowstone relief. Valentino's premature effort to chill the rights of 693 Fifth is both speculative and legally baseless.

The eighth cause of action thus warrants dismissal.

CONCLUSION

For the foregoing reasons, the Court should dismiss the complaint with prejudice, together with such other, further and different relief as the Court deems just or proper.[10]

Dated: New York, New York
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[10] Section 21.7 of the Lease recites, as relevant here, that if Valentino sues 693 Fifth on a matter arising out of or relating to the Lease, the losing party will pay the prevailing party's reasonable legal fees. Should the relief sought in the within motion be granted, we will make separate application to the Court for our legal fees.