

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

ROSLYN EVENTS CORP.,

Plaintiff,

-against-

BER DUR REALTY CORP.,

Defendant.

Index No.:

**SUMMONS**

Plaintiff designates Nassau County as the place of trial.

Basis of Venue: This action will affect the possession, use, and/or enjoyment of property situated in Nassau County.

**TO THE ABOVE-NAMED DEFENDANT:**

**YOU ARE HEREBY SUMMONED** to answer the Verified Complaint in this action and to serve a copy of your answer upon Plaintiff's attorney within twenty (20) days after service of the summons, exclusive of the day of service (or within thirty (30) days after service is complete if this summons is not personally served upon you within the State of New York); and should you fail to appear or answer within the specified time period, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: New York, New York  
August 4, 2020

**BRONSTER LLP**

By \_\_\_\_\_  
Alexandra C. Mink, Esq.  
*Attorney for Plaintiff*  
156 West 56<sup>th</sup> Street, Suite 902  
New York, New York 10019  
Tel.: (212) 558-9300  
Direct: (347) 246-4875  
Email: amink@bronsterllp.com

TO:

Joseph, Terracciano & Lynam LLP  
*Attorneys for Defendant: Ber Dur Realty Corp.*  
2 Roosevelt Avenue, Suite 200  
Syosset, New York 11791  
(516) 496-0202

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

ROSLYN EVENTS CORP.,

Plaintiff,

-against-

BER DUR REALTY CORP.,

Defendant.

Index No.:

**COMPLAINT**

Plaintiff designates Nassau County as the place of trial. The basis of venue is that this action will affect the possession, use, and/or enjoyment of real property situated in Nassau County.

Plaintiff, Roslyn Events Corp. (“**Plaintiff**”), by and through its attorneys, Bronster LLP, as and for its Complaint against defendant, Ber Dur Realty Corp. (“**Defendant**” or “**Landlord**”) alleges as follows:

**NATURE OF THE ACTION**

1. This is an action seeking, *inter alia*, injunctive and declaratory relief under New York Civil Practice Law and Rules (“CPLR”) §3001 arising out of Defendant’s improper attempt terminate its lease (defined below) with Plaintiff for allegedly failing to make certain rent payments in the midst of the COVID-19 pandemic, as set forth in a purported notice to cure dated July 29, 2020 (the “**Notice to Cure**”).
2. Contrary to the allegations in the Notice to Cure, Plaintiff is not in default of the Lease and does not owe the rental amounts claimed therein.
3. Specifically, Plaintiff does not owe rent as claimed by Defendant by operation of the force majeure clause in the Plaintiff’s lease; under the doctrine of frustration of purpose of the Lease; by operation of the casualty clause in Plaintiff’s lease; and as a result of Plaintiff’s on-going legal obligation to comply with state and

local governmental regulations concerning public safety during the COVID-19 pandemic, which event was unforeseeable and not contemplated under the lease at the time the parties entered into the agreement.

4. Additionally, as the underlying purpose of the lease agreement has been so frustrated by the unforeseeable outbreak of the novel coronavirus and the government's response to it, namely through New York State's executive orders, the lease agreement is void and terminable at the Plaintiff's option.
5. Further, the Defendant owes Plaintiff a refund or rent credit for rent that was overpaid during the period of time between March 16, 2020 and March 31, 2020.
6. Lastly, Defendant, by its actions, has breached the implied covenant of good faith and fair dealing.

#### **PARTIES**

7. Plaintiff is a New York corporation authorized to do business in the State of New York and having a place of business in Nassau County in the State of New York.
8. Upon information and belief, Defendant is a New York corporation authorized to do business in the State of New York and having a place of business in Nassau County in the State of New York.

#### **JURISDICTION AND VENUE**

9. Upon information and belief, Defendant is the landlord of the premises described as 1 Railroad Avenue, Roslyn, New York (the "**Premises**").
10. Pursuant to the lease (as defined more particularly *infra*), Plaintiff is the commercial tenant of the Premises.

11. Thus, jurisdiction is proper under CPLR §302(a)(4), and venue is proper in Nassau County pursuant to CPLR §507.

**THE LEASE**

12. Plaintiff became the tenant of the Premises pursuant to a ten (10) year lease agreement executed on May 19, 2017 by and between Defendant, as landlord, and Plaintiff, as tenant (the “**Lease**”). A copy of the Lease is annexed hereto as **Exhibit A**.

13. Plaintiff has invested over \$500,000.00 in the buildout and development of the Premises for its business purpose. Plaintiff operates the Premises, in compliance with the underlying purpose of the Lease, as an event space and lounge for social and corporate events. The Plaintiff’s business was fully operational at the time that the COVID-19 pandemic struck New York in early 2020.

**THE COVID-19 PANDEMIC**

14. In March 2020, New York State catalogued its first known cases of the novel coronavirus known as COVID-19, an event which has since risen to the level of a global pandemic. As of the date of this filing, more than thirty thousand (30,000) people have died from COVID-19 in New York State alone, and the global death toll numbers over half a million souls.
15. In response to the severity of this deadly crisis, New York State Governor Andrew Cuomo issued a series of executive orders (the “**Executive Orders**”) which, among other things, declared a state disaster emergency for the entire state of New York (“Executive Order No. 202”); mandated that restaurants and bars cease serving patrons food or beverage on-premises from March 16, 2020 onward

(“Executive Order No. 202.3”); ordered all businesses to utilize work from home procedures if possible and to reduce the in-person workforce at any work location by 100% from March 22, 2020 onward (“Executive Order No. 202.8”); canceled all gatherings of non-essential individuals of any size, for any reason (“Executive Order No. 202.10”); declared that the operation of a type of facility or occupancy of any space by more than the number of persons allowed by executive order be deemed a violation of law (“Executive Order No. 202.11”); which restrictions were extended until May 15, 2020 (“Executive Order No. 202.18”); and then further extended until June 7, 2020 (“Executive Order No. 202.29”). The executive orders collectively came to be described as part of the “NYS on PAUSE” program, the restrictions of which were to be phased out as regions met certain public health metrics (“Executive Order No. 202.31”). Copies of the Executive Orders are annexed hereto as **Exhibit B**.

16. Neither the COVID-19 pandemic nor the resultant Executive Orders were anticipated by the parties.
17. In compliance with the above-referenced Executive Orders and the PAUSE program, Plaintiff, like other similar establishments in New York, shuttered its doors on March 16, 2020, after having paid the full rent for that month.

#### **FIVE DAY DEMAND / NOTICE TO CURE**

18. Plaintiff initiated conversations with the Landlord in March, April, and May to discuss the impact of COVID-19 on Plaintiff’s business obligations under the Lease as well as the steps Plaintiff was taking to mitigate that impact (such as applying for federal aid under the Paycheck Protection Program and investigating

- ways to pivot Plaintiff's business by developing a food takeout and delivery operation).
19. In June 2020, Plaintiff and Landlord engaged in discussions to potentially revise the rental obligations under the Lease, given the effect of the Pandemic on possible performance thereof.
  20. Thereafter, Defendant offered to sell and Plaintiff offered to buy the building on which the Premises were located (in accordance with Plaintiff's right of first refusal as discussed in Paragraph 53 of the Lease), an offer for which the Plaintiff is currently seeking financing.
  21. Despite these good faith efforts and the fact that Plaintiff is still currently prohibited by state and local law from operating its business in compliance with the Lease, on July 30, 2020, Landlord served the Plaintiff with a "five day demand" (the "Notice"), declaring Plaintiff in default of the Lease for failure to pay rent for the months of April 2020, May 2020, June 2020, and July 2020.
  22. The Notice stated that, if Plaintiff failed to cure the default at the end of the expiration period (August 5, 2020), Landlord terminate the Lease. See a copy of the Notice annexed hereto as **Exhibit C**.
  23. Defendant effectively seeks to force Plaintiff to break mandatory local and state laws to effectuate the purpose of the Lease.
  24. Plaintiff now moves this Court for relief from the prospect of immediate and irreparable harm from this Defendant.

**PLAINTIFF HAS NOT DEFAULTED AS FORCE MAJEURE EXCUSES**

**PERFORMANCE OF ITS OBLIGATIONS UNDER THE LEASE**

25. The Lease, by its terms, clearly indicates that the COVID-19 pandemic as well as the government regulations issued in response to the pandemic constitute force majeure events that excuse Plaintiff's performance of its obligations thereunder.
26. Paragraph 27 of the Lease defines force majeure as inclusive of several causes or events that justify the delay of performance:
- “The period of time during which Landlord or Tenant are prevented or delayed in the performance of the making of any improvements or repairs *or fulfilling any obligation required under this Lease* due to delays caused by fire, terrorism, catastrophe, strikes or labor trouble, civil commotion, acts of God or the public enemy, governmental prohibitions or regulations, or inability or difficulty to obtain materials, or other causes beyond Landlord's or Tenant's control, shall be added to Landlord's or Tenant's time for performance thereof, and neither Landlord nor Tenant shall have any liability by reason thereof.” (emphasis added)
27. The COVID-19 pandemic and the rules instituted in response fall into not one, but three, of these enumerated bases for force majeure: (i) acts of God, (ii) governmental prohibitions or regulations, and (iii) other causes beyond Landlord or Tenant's control.
28. Plaintiff was forced to shutter its business on March 16, 2020 in compliance with the state mandates and is still unable to fully operate as an event space and late-night lounge, in accordance with Nassau County's Phase 4 guidelines.
29. The executive orders restricted the operation of non-essential businesses and precluded the gathering of groups of any size. The modified orders still regulate the size of groups permitted to be gathered at one time.



30. The executive orders issued in response to COVID-19 constitute government restriction covered by the Lease's force majeure clause and Plaintiff's non-payment of rent during the months in which the executive orders preclude the normal operation of its business.
31. Additionally, the COVID-19 pandemic itself is a force majeure event excusing Plaintiff's performance of the Lease. The pandemic is a natural event not caused by human agency and beyond the prevention or control of human agency.
32. Finally, both the pandemic and the government regulations issued in response fall within the Lease's catch-all provision as both constitute events beyond the control of either party that obstruct the operation of Plaintiff's business under the Lease.

**PLAINTIFF HAS NOT DEFAULTED AS NEW YORK LAW HAS FRUSTRATED THE  
BUSINESS PURPOSE OF THE LEASE**

33. Plaintiff is not in default of the Lease at issue because the government's response to the coronavirus pandemic has frustrated the purpose of the Lease.
34. The purpose of the Lease is to operate an event space and lounge (the "**Permitted Use**"). See **Exhibit A**.
35. The Premises can only be operated according to the terms and intent of the Lease.
36. The Executive Orders make it abundantly clear that the Plaintiff was legally prohibited from operating the Premises according to those terms from March 16, 2020 through and including the present date.
37. Both the COVID-19 pandemic and the government's response to it were completely unforeseeable and unprecedented in modern history.

38. Plaintiff's business, as described in the Lease, is not one in which outdoor dining is possible. Moreover, though Plaintiff's business can resume for limited capacity, it still cannot be not fully operational at 100% capacity, which, as an event space for parties and celebrations for several hundred people at a time, is totally debilitating.
39. The law has frustrated and continues to frustrate the purpose of Plaintiff's lease, both excusing Plaintiff's non-performance of its obligations thereunder and entitling Plaintiff to terminate the Lease at its option.

**PLAINTIFF HAS NOT DEFAULTED AS THE RENT IS ABATED UNDER THE LEASE**

40. The Lease, by its terms, clearly indicates that the rent is abated throughout the duration of the COVID-19 pandemic and the length of time Plaintiff is prevented from accessing and/or using the entire Premises for its business purpose.
41. Paragraph 18 of the Lease states that "if the Demised Premises or the building containing them should be damaged or destroyed during the term by fire *or other insurable casualty*...rent payable under this Lease shall be fully abated during such period of time that Tenant is denied the use and enjoyment of the Demised Premises." See Exhibit A (emphasis added)
42. The casualty triggering Paragraph 18 of the Lease began on or about March 16, 2020, when, pursuant to the Executive Orders previously discussed herein, Plaintiff was legally forced to close its business due to the property and physical damage caused by the COVID-19 virus and the dangerous propensity such virus poses to the public.

43. On March 16, 2020, New York City Mayor Bill de Blasio specifically noted the “property damage and loss” caused by the novel coronavirus. As of May 22, 2020, the Centers for Disease Control and Prevention (the “CDC”) has maintained that “it may be possible that a person can get COVID-19 by touching a surface or object that has the virus on it.” See a copy of the CDC Media Statement annexed hereto as **Exhibit D**.
44. As a result of both the COVID-19 pandemic and the responsive government regulations, Plaintiff was unable to use or access the entire Premises from March 16, 2020 until the present time.
45. Plaintiff cannot be in default for not paying rent for the months alleged by the Defendant as the *rent was contractually abated* during that time under the terms of the Lease.

**DEFENDANT OWES PLAINTIFF A RENT CREDIT**

46. Plaintiff paid the entirety of the rent for March 2020 when it was only able to access and use the Premises for part of the month.
47. Rent was only due and owing to Defendant through March 16, 2020, the date on which Plaintiff incurred the casualty.
48. As a result, the Defendant actually owes the Plaintiff a refund or a rent credit for the dates of March 16, 2020 through and including March 31, 2020.

**DEFENDANT IMPROPERLY SEEKS LATE FEES**

49. The Notice seeks, *inter alia*, late fees in the amount of \$3121.98 against the purported rent amounts owed by Plaintiff.

50. Executive Order No. 202.28 expressly precludes the collection of late fees for the late payment of rent during the time period from March 20, 2020, through August 20, 2020.
51. Even if this Plaintiff did owe rental payments for the months at issue, which it disputes, the amounts claimed by this Defendant violate the existing law.

**AS AND FOR A FIRST CAUSE OF ACTION**

(Declaratory Judgment – No Default)

52. Plaintiff repeats and realleges the allegations contained in paragraphs “1” through “51” above as if set forth at length herein.
53. Upon information and belief, the Notice is a predicate to the Defendant’s rights upon default of the Lease, including termination thereof.
54. Plaintiff disputes that it is in default under the Lease as alleged in the Notice.
55. The COVID-19 pandemic as well as the government orders issued in response to the pandemic triggered the force majeure provision under Plaintiff’s Lease and excused Plaintiff’s performance of its obligations thereunder for the duration of time the events lasted.
56. By operation of the aforementioned force majeure provision, Plaintiff is excused from its rental obligations under the Lease.
57. On or about March 16, 2020, Plaintiff incurred a casualty triggering the casualty clause of the Lease and abating rent until such casualty is remediated and Plaintiff can resume business operations in accordance with the restrictive covenants of the Lease.

58. By operation of the aforementioned casualty clause set forth in the Lease, Plaintiff is not required to pay rent during the time the Premises is affected by the casualty.
59. By virtue of the force majeure provision and the casualty clause, Plaintiff's rent obligation is suspended and/or abated for the duration of an event of force majeure and/or casualty, and such nonpayment of rent is therefore not an event of default as defined in the Lease.
60. Upon information and belief and as described in the Notice, Defendant disputes that it is prohibited from terminating the Lease for a purported default.
61. Plaintiff is ready, willing, and able to cure any default under the Lease as alleged in the Notice, to the extent that this Court finds any existing default.
62. Upon information and belief and as described in the Notice, Defendant intends to terminate Plaintiff's Lease as of August 5, 2020.
63. There is a justiciable controversy between the parties.
64. A judicial determination of the rights and obligations of the parties is necessary in order that such rights and obligations may be determined and adjudged without Plaintiff incurring the danger of losing its valuable leasehold interest and business assets by Defendant taking action with respect to the Lease, including, but not limited to, terminating the Lease.
65. By reason of the foregoing, the Court should declare the rights and obligations of the parties and the nature of the relief to which the Plaintiff may be entitled.
66. Plaintiff has no adequate remedy at law.

**AS AND FOR A SECOND CAUSE OF ACTION**

(Declaratory Judgment – Rent Credit)

67. Plaintiff repeats and realleges the allegations contained in paragraphs “1” through “65” above as if set forth at length herein.
68. Given the casualty event of March 16, 2020, Plaintiff is entitled to a refund or rent credit for the overpayment of rent in the month of March 2020.
69. Defendant has failed to give Plaintiff the rent credit to which it is entitled.
70. Upon information and belief, Defendant disputes Plaintiff’s entitlement to this rent credit.
71. There is a justiciable controversy between the parties.
72. A judicial determination is necessary as to whether Plaintiff is entitled to a rent credit for the period of time from March 16, 2020 to March 31, 2020.
73. By reason of the forgoing, the Court should declare whether Plaintiff is entitled to a rent credit for the period of time from March 16, 2020 to March 31, 2020.
74. Plaintiff has no adequate remedy at law.

**AS AND FOR A THIRD CAUSE OF ACTION**

(Declaratory Judgment – Frustration of Purpose)

75. Plaintiff repeats and realleges the allegations contained in paragraphs “1” through “73” above as if set forth at length herein.
76. Plaintiff’s Lease requires Plaintiff to operate as an event space and lounge.
77. The state and local governmental orders pertaining to the COVID-19 pandemic have wholly frustrated the purpose of the Lease.
78. Both the COVID-19 pandemic and the responsive governmental measures are totally unprecedented and were not foreseeable events.

79. Plaintiff could not have legally operated its event space and lounge on or after March 16, 2020 as a result of the state and local restrictions.
80. At the present moment and for the foreseeable future, governmental restrictions still preclude the operation of Plaintiff's business, as social gatherings and events are still subject to reduced capacity mandates.
81. The law has frustrated the purpose of the Lease to such extent that it has rendered the Lease void and terminable at Plaintiff's option. As a result, Plaintiff can terminate the Lease at its option without penalty or forfeiture of any of its rights, such as the surrender of the security deposit.
82. Alternatively, the law's frustration of the purpose of the Lease excuses Plaintiff for the non-performance of its obligations thereunder, namely, the payment of rent.
83. Upon information and belief, Defendant disputes that the governmental measures have frustrated the purpose of the Lease, that Plaintiff's obligations thereunder as excused as a result of such frustration, and/or that the total frustration renders the Lease void and terminable at the option of the Plaintiff.
84. There is a justiciable controversy between the parties.
85. A judicial determination is necessary as to whether such frustration of the Lease purpose renders the Lease void and terminable at the option of the Plaintiff and/or as to whether Plaintiff is entitled to a rent abatement for the period of time it is subject to governmental prohibitions that frustrate the underlying purpose of the Lease.

86. By reason of the forgoing, the Court should declare whether Plaintiff is entitled to terminate the Lease and/or a rent abatement for the period of time it is subject to governmental prohibitions that frustrate the underlying purpose of the Lease.

**AS AND FOR A FOURTH CAUSE OF ACTION**

(Breach of the Implied Covenant of Good faith and Fair Dealing)

87. Plaintiff repeats and realleges the allegations contained in paragraphs “1” through “85” above as if set forth at length herein.

88. The Lease imposes on Defendant an implied obligation to act in good faith and deal fairly with the Plaintiff in connection with the Lease and the performance of obligations thereunder.

89. Defendant has frivolously and improperly served the Notice to Plaintiff, demanding money and remedies to which it is not entitled.

90. Defendant has refused to consider the revision of the remaining rent structure to reflect the continued effects of the global health emergency and its real and tangible impact on the viability of Plaintiff’s business purpose under the lease.

91. Defendant has forced Plaintiff to turn to this Court for relief, knowing full well that it a business already facing severe financial hardship as a direct result of the COVID-19 pandemic.

92. In doing so, it has acted in bad faith and breached its obligation to deal fairly with Plaintiff, a covenant to which it is implicitly subject under the Lease agreement.

93. Plaintiff has no adequate remedy at law.

94. By reason of the forgoing, Defendant should be preliminarily and permanently enjoined from engaging in such bad faith conduct.



**WHEREFORE**, Plaintiff demands judgment against Defendant as follows:

- A. On the First Cause of Action: (i) declaring that (a) Plaintiff has not breached the Lease and is not in default of the Lease as alleged in the Notice and (b) Defendant cannot terminate the Lease based upon the Notice or the grounds alleged therein; (ii) restraining and enjoining Defendant from (a) taking any action to draw upon the security deposit or possibly terminate the Lease based on the Notice or (b) instituting any actions or proceedings against Plaintiff based on the Notice; or in the alternative, (a) declaring that, if there has been a breach of the Lease, Plaintiff should be afforded reasonable opportunity to cure said breach; and (b) extending the time by which Plaintiff may cure any breach found by the Court to such further time as the Court may direct in order to permit Plaintiff to cure said breach;
- B. On the Second Cause of Action, declaring that Plaintiff is entitled to a rent credit or refund;
- C. On the Third Cause of Action, (i) declaring that, because of the law's frustration of purpose of the Lease, the Lease is void and terminable at the Plaintiff's option, and/or (ii) declaring that Plaintiff's rent obligation is suspended and Plaintiff is entitled to a rent abatement for the period of time during which the relevant governmental restrictions legally prohibit the operation of Plaintiff's business as contemplated under the Lease;
- D. On the Fourth Cause of Action, enjoining the Defendant from engaging in bad faith conduct in breach of the implied covenant of good faith and fair dealing to which it is subject under the Lease; and

