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

VALENTINO U.S.A., INC., Plaintiff, - against- 693 FIFTH OWNER LLC, Defendant.	Index No. 652605/2020 (NYSCEF Case) (Motion Seq. 001) Hon. Andrew Borrok

PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS COMPLAINT

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PRELIMINARY STATEMENT

Plaintiff VALENTINO U.S.A., INC. ("Valentino" or "Plaintiff"),[1] respectfully submits this memorandum of law in opposition to Defendant 693 FIFTH OWNER LLC ("Landlord" or "Defendant")'s motion (Motion Seq. 001), which seeks an order pursuant to CPLR §§ 3211(a)(1), 3211(a)(7) and 3211(c), dismissing Plaintiff's Complaint, dated June 19, 2020 (the "Complaint").

For the reasons detailed below, and in the accompanying Ferrara Affirmation and Bergamo Affidavit, the Court should deny Defendant's motion, in all respects. Specifically, denial is appropriate, as a matter of law, because the causes of action in Plaintiff's Complaint are, unequivocally and sufficiently pleaded and assert viable and legally cognizable claims.

As the Court is aware, the COVID-19 pandemic has drastically impacted New York State, tragically resulting in over 33,000 fatalities and 475,000 positive cases, to date. To combat this crisis, unprecedented governmental restrictions have prohibited and/or severely restricted local businesses, schools, and places where people can eat, shop and assemble. Such historically unparalleled changes have fundamentally altered the economic landscape in a manner that Valentino (or no other tenant) could have possibly foreseen or imagined. Indeed, Valentino's fundamental assumption – that it could use the Premises to operate a high-end fashion retail boutique along a prestigious section of Fifth Avenue, has been completely frustrated. In that regard, Valentino's boutique suffered an unprecedented shutdown, and ongoing governmental restrictions render it impossible to provide its signature in-store experience. See Bergamo Aff., ¶13.

[1] Unless otherwise defined herein, all capitalized terms and/or exhibits referenced herein shall have the meaning as ascribed in the accompanying affirmation of Lucas A. Ferrara, dated September 14, 2020 (the "Ferrara Affirmation") and/or the affidavit of Laurent Bergamo, sworn to on September 14, 2020 (the "Bergamo Affidavit").

Valentino has more than adequately pleaded that these catastrophic developments have impacted its business and, *inter alia*, must now been deemed to have rendered the Lease void and/or terminated, and/or entitle Valentino to an abatement of any rent claimed to be due.

In response, Defendant lacks any meaningful rebuttal – particularly at this pre-Answer stage, when Valentino's allegations must be accepted as true and afforded every possible favorable inference. Rather, Defendant offers the misguided argument (which Valentino vehemently disputes) that two provisions of the Lease somehow bar Valentino's contract, quasi-contract and equitable rights. As outlined below, Defendant's argument fails for several reasons, including the simple fact that neither Valentino nor Defendant ever anticipated, or protected against, a global pandemic, nor is that possibility mentioned in the Lease. Plainly and simply, there is nothing in the Lease which prohibits Valentino's claims; nor would such an amorphous waiver be consistent with public policy.

At this juncture, the only relevant inquiry is whether, looking at the pleadings and deeming those facts to be true, Valentino asserts a cause of action. A plain reading of every one of Valentino's eight (8) causes of action amply shows that it asserts legally viable and cognizable claims.

While Defendant attempts to argue the equities (*i.e.* alleging that Plaintiff hasn't paid rent while receiving P.P.P. loans), those arguments are premature, irrelevant and factually incorrect – further illustrating that dismissal is unwarranted, particularly when material issues of fact remain in dispute. See Bergamo Aff., ¶ 21.

STATEMENT OF FACTS

The Court is respectfully referred to the Ferrara Affirmation and the Bergamo Affidavit for a recital of the salient facts.

ARGUMENT

I.

DEFENDANT FAILS TO MEET THE HIGH STANDARD FOR PRE-ANSWER DISMISSAL

It is well settled, black letter law that the "scope of a court's inquiry on a motion to dismiss under CPLR § 3211 is narrowly circumscribed." *P.T. Bank Cent. Asia, N.Y. Branch v. ABNAMRO Bank N.V.*, 301 A.D.2d 373, 375 (1st Dep't 2003). Indeed, as this Court summarized in *Allergan Fin., LLC v. Pfizer Inc.*, 67 Misc.3d 1206(A) (Sup. Ct. N.Y. 2020), in denying a motion to dismiss:

> On a motion to dismiss pursuant to CPLR § 3211, the court must afford the pleading a liberal construction and accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference and determine only if the facts as alleged fit into any cognizable legal theory (*Leon v Martinez,* 84 NY2d 83 [1994]). . . . . **Finally, under CPLR § 3211(a)(7), the court must only assess whether the plaintiff has a cause of action and not whether the plaintiff has stated one.** (Emphasis supplied.)

After accepting the Complaint's allegations as true, and affording Valentino "every possible favorable inference," Defendant's conclusory claim that Valentino lacks any cause of action falls woefully short.

To the contrary, a plain reading of the Complaint demonstrates Plaintiff adequately asserted each of its eight (8) causes of action.[2]

[2] Seven (7) causes of action seek a declaratory judgment, while the eighth (8th) cause of action seeks an injunction, pursuant to, *inter alia*, *First National Stores, Inc. v. Yellowstone Shopping Center, Inc.,* 21 N.Y.2d 630 (1968).

A. Plaintiff pleads each element of every declaratory cause of action.

i. Plaintiff states a cause of action for "frustration of purpose."

(a) The pleadings are sufficiently structured.

Valentino's first and second causes of action seek a declaration that the Lease and Valentino's obligations thereunder have been terminated and/or the rent abated because the Lease's principal purpose has been frustrated.

To plead a frustration of purpose claim, a party must allege that: (1) an event substantially frustrates a party's principal purpose in entering into a contract; (2) the nonoccurrence of the event was a basic assumption of the contract; and (3) the event was not the fault of the party asserting the defense. See generally Hon. Michael M. Baylson et al., 8 Bus. & Com. Litig. Fed. Cts. § 89:36 (4th ed. 2019).

Commercial tenants have prevailed on frustration of purpose claims when they have pleaded those elements. See *Jack Kelly Partners LLC v. Zegelstein*, 140 A.D.3d 79 (1st Dep't 2016) (lease declared void where tenant was unable to utilize premises for office); *Elkar Realty Corp. v. Mitsuye T. Kamada*, 6 A.D.2d 155 (1st Dep't 1958) (tenant justified in "disavowing" lease where alterations required for tenant's restaurant were thwarted), *cf. Ctr. for Specialty Care, Inc. v. CSC Acquisition I, LLC*, 185 A.D.3d 34 (1st Dep't 2020) (medical facility tenant could not prevail on a "frustration" claim when its contract expressly guarded against a delay in obtaining a specific certificate).

Here, Plaintiff avers each element of a frustration claim.[3] Specifically, Valentino alleges that: (1) the COVID-19 pandemic has undermined and frustrated Valentino's principal purpose in entering into, and continuing with, the Lease – the ability to conduct retail business (See

[3] Plaintiff's second frustration of purpose claims requests alternate relief, and is therefore pleaded separately.

Complaint, ¶29); (2) Valentino and its landlord never assumed that a global pandemic would occur during the Lease term, and did not address or provide for that risk in the Lease (See Complaint, ¶¶6, 10, 29 and 39); and (3) Valentino was not at fault for the pandemic (See Complaint, ¶30).

As the foregoing allegations must be accepted as true, and Plaintiff afforded every possible favorable inference, there can be no dispute that the pleadings are sufficient to survive attack.

On that basis alone, Defendant's motion must be denied.

(b) The Lease does <u>not</u> vitiate Plaintiff's frustration of purpose claim.

While the pleadings, on their face, unequivocally assert a viable cause of action for frustration of purpose, Defendant next attempts to secure a dismissal by misinterpreting and misapplying certain Lease clauses.

In that regard, Defendant cites to two provisions – Lease Sections 9.1 and 21.11. But neither provision addresses a pandemic, nor bars **<u>any</u>** of Valentino's claims.

Specifically, Section 9.1 requires Valentino to comply with rules and regulations concerning the Premises. Examples include: Americans with Disabilities Act and Landmarks Preservation Commission requirements, and local laws addressing sprinklers and façades. Absent is language concerning pandemics or any provision barring or waiving Plaintiff's claims.

Similarly, Section 21.11 provides that "Unavoidable Delays" shall not excuse payment of rent, but does **<u>not</u>** indicate that Valentino preemptively waived any and all contractual, quasi-contractual and/or equitable claims, including the doctrine of frustration of purpose. Additionally, that provision's applicability is limited by its express terms, which provide as follows:

> Section 21.11. Unavoidable Delays and Postponement of Performance. In the event that either party hereto shall be delayed or hindered in or prevented from the performance of any act required hereunder by reasons 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 delayed in performing work or doing acts required under the terms of this Lease (each an "Unavoidable Delay"), then performance of such act shall be excused for the period of the Unavoidable Delay and the period for the performance of any such act shall be extended for a period equivalent to the period of such Unavoidable Delay. Notwithstanding the foregoing, after the Commencement Date, which date shall be subject to an Unavoidable Delay occasioned by the above causes, **nothing 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 (**except as otherwise specifically provided for pursuant to the terms of this Lease**), or shall operate to extend the Term. Delays or failures to perform resulting from lack of funds shall not be deemed Unavoidable Delays. (Emphasis added.)

Simply stated, Section 21.11 of the Lease (a) does **not** expressly refer to pandemics, (b) does **not** contain any language which would act as a waiver of Plaintiff's frustration of purpose claims,[4] and (c) does **not** concern the voiding/termination of the lease (but merely the payment of rent). And, while Plaintiff may not be able to rely on this provision to excuse payment of rent for "Unavoidable Delays" (which, again, does not include the pandemic), the section does **not** bar Plaintiff from relying on other provisions of the Lease, or applicable provisions of governing law (such as the frustration of purpose doctrine), as a basis for termination or as a defense to the payment of rent.

Defendant's impermissible extrapolation of those provisions into a broad "waiver" provision not only violates public policy, but belies the Lease's plain language. Thus, the assertion of a frustration of purpose claim is not prohibited and has been properly and sufficiently alleged.

[4] A waiver must be clear and unequivocal, and no such language is present in the Lease. See *Granite Broadway Dev. LLC v. 1711 LLC*, 44 A.D.3d 594 (1st Dep't 2007).

(c) The Pandemic and the Governor's Executive Orders were not foreseeable.

Defendant alleges that the parties somehow foresaw the COVID-19 public-health crisis, despite the Lease's utter silence concerning pandemics.[5] That specious assertion raises another material issue of fact, and on that basis alone, dismissal is unwarranted.

Putting that aside, Defendant asks the Court to take judicial notice of two prior incidents occurring in 2009 (H1N1) and 2002 (SARS), respectively, (4 years and 11 years before the Lease). Comparing those isolated instances (which had far less impact and death in the United States [in fact, upon information and belief, SARS caused **no** deaths in the United States], resulted in **no** government-ordered closures, **no** social-distancing guidelines, **no** limits or restrictions on retail, **no** economic downturn, **no** limits or restrictions on tourism, etc.) to the COVID-19 pandemic is absurd. Although prior viruses may have occurred, the COVID-19 pandemic's impact, and related Executive Orders, were anything but "foreseeable." To hold otherwise would eviscerate the concept of "foreseeability" and the frustration of purpose doctrine entirely, as any event, no matter how improbable, would theoretically be "foreseeable" with sufficient perfect hindsight.

Significantly, Defendant's cases do not warrant a different result, because in each instance the "foreseeable" event is distinguishable.

In *407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 282 (1968), the Court of Appeals rejected a frustration defense on a summary judgment motion (not a motion to dismiss), because the defendant's unilateral hotel closure as a business decision was not a result of "unanticipated circumstances[]" – and the defendant never made the vital argument that closure was "unforeseen." A business decision to close, based solely on profitability, and not intervening

[5] Defendant's Memorandum of Law, p.13 (NYSCEF Doc. No. 12).

circumstances, cannot constitute an "unforeseeable" event. *407 E. 61st Garage, Inc.* is therefore completely distinguishable.

Likewise, in *Sage Realty Corp. v. Jugobanka, D.D.*, 95 Civ.0323 RJW, 1998 WL 702272, at *2-3 (S.D.N.Y. Oct. 8, 1998), the landlord's first summary judgment motion was denied as premature. Only after discovery was completed, was landlord's second summary judgment motion granted (**not** a motion to dismiss), because defendant's counsel admitted in a deposition that he closely monitored pending financial sanctions that prevented defendant from paying rent. The Court found that careful monitoring of impending sanctions before signing the lease rendered those sanctions "foreseeable." Here, the parties had no idea that there would be a devastating global pandemic which would occur seven (7) years after signing the Lease.

Urban Archaeology Ltd. v. 207 E. 57th St. LLC, 68 A.D.3d 562 (1st Dep't 2009) is similarly inapplicable, because that tenant's claim concerned a *force majeure* provision following an economic downturn. The claim failed, because a downturn in the economy, by itself, was "foreseeable." Here, Valentino is not exercising a contractual *force majeure* right. Instead, Valentino asserts frustration, based on a "virtually cataclysmic, wholly unforeseeable event [that] renders the contract valueless to one party." *United States v. Gen. Douglas MacArthur Senior Vil., Inc.*, 508 F.2d 377, 381 (2d Cir. 1974).

Furthermore, the COVID-19 pandemic is a more complex and distinguishable multifaceted public-health crisis than any economic downturn. Among other things, unprecedented public-health challenges, extremely restrictive governmental orders and regulations, and a substantially worsened economic decline, differentiate the present circumstances from anything that has ever

previously arisen. The pandemic has irretrievably altered and impacted Plaintiff's business operations because of an unprecedented global-health crisis.[6]

Lastly, Defendant cites *Maxton Builders, Inc. v. Lo Galbo*, 68 NY2d 373, 382 (1986) to argue that Valentino should have carved-out a "pandemic" protection. *Maxton* concerned a real-estate sales-contract dispute, not a lease, was decided on summary judgment, and is therefore irrelevant. Defendant cavalierly and conveniently misapplies the doctrine of frustration, and its cited precedent actually supports Valentino's claim that the parties never assumed or anticipated a global pandemic of devastating proportions would occur, and that Valentino would face restrictive pandemic-related governmental shutdowns.

Valentino has therefore adequately pleaded a frustration of purpose claim. Lease sections 9.1 and 21.11 do not bar that claim, and the COVID-19 pandemic must constitute the type of "unforeseeable" event for which the doctrine excuses contractual performance. In any event, if such waiver could arguably be found to exist, such waivers (in the midst of an unprecedented global health crisis) must be deemed unenforceable and violative of public policy.

ii. Plaintiff states a cause of action for "impossibility of performance."

Valentino's third and fourth cause of action seek a declaration that its obligations under the Lease have been rendered impossible, and the Lease and Valentino's obligations thereunder have therefore been rescinded.

To plead a cause of action for impossibility, a party must allege that its performance: (1) has been rendered impossible, by (2) an unforeseeable event outside of that party's control that could not have been guarded against. See *Kel Kim Corp. v. Cent. Markets, Inc.*, 70 N.Y.2d 900

[6] Upon information and belief, earlier pandemics cited by Defendant's counsel did not cause as significant or widespread closure of business as here. See https://www.bloomberg.com/opinion/articles/2020-03-10/how-coronavirus-compares-with-2009-s-h1n1-in-spread-and-reaction, accessed on September 8, 2020.

(1987).

Here, Valentino alleges precisely that. See Exhibit F, Complaint, ¶47. Furthermore, Complaint ¶¶ 17, 23 and 25 further reinforce that the unprecedented governmental orders and restrictive regulations imposed due to the COVID-19 pandemic have rendered Valentino's performance impossible.

Accordingly, as these facts must be accepted as true on this pre-Answer motion, dismissal is entirely inappropriate. And, while Defendant reiterates its claim that Sections 9.1 and 21.11 of the Lease bar an impossibility claim, for the reasons set forth above in Section I(A)(i)(b), that contention is without merit. There is absolutely nothing within those sections (or any other portion of the Lease) that bars Plaintiff's claim or would otherwise act as a legally enforceable waiver.

Notably, Defendant's own case law guides against dismissal. In fact, not a single case cited by Defendant in support of this claim concerns an "unanticipated" event, or a pre-answer motion to dismiss.[7] To the contrary, the Court of Appeals in *Raner v. Goldberg*, 244 N.Y. 438, 441-42 (1927) found that when parties leased a dancehall, with the understanding that such operation required a license, the inability to obtain that license wasn't an "unforeseeable" event.

Likewise, in *Kel Kim Corp.*, a tenant was unable to renew an insurance policy that it was obligated to maintain during the lease (and in fact maintained for a period of years). *Kel Kim Corp.* is distinguishable, because the consequences of a failure to renew an insurance policy is a readily "foreseeable" risk. In *Ogdensburg Urban Renewal Agcy. v. Moroney*, 42 A.D.2d 639 (3d Dep't 1973), a buyer without a financing contingency clause was unable to complete a purchase because it was unable to secure federal funding. That inability to obtain a loan, particularly when a buyer neglects to bargain for a loan contingency provision, was found to be a "foreseeable" risk.

[7] See Footnote 5.

Once again, Defendant's cases are entirely distinguishable, and the COVID-19 health crisis and related governmental shutdowns and regulations materially different. An unprecedented global pandemic simply cannot be compared to a "foreseeable" leasing or contract issue -- such as obtaining a permit, maintaining insurance, or getting a loan.

Furthermore, the COVID-19 pandemic has irretrievably altered the Lease's foundation in at least two fundamental respects: first, governmental shutdowns and/or regulations have prevented, and continue to prevent, Valentino from opening and/or operating as originally anticipated (Complaint, ¶18), and second, Fifth Avenue has been decimated as a "focal point of high-end New York City fashion buyers" (Complaint, ¶10).

In this case, at this early stage of the litigation, there is no indication that the COVID-19 pandemic was anything but an "unanticipated" event. In fact, the Court of Appeals has already noted the unimaginable horrific circumstances the pandemic has caused New Yorkers, citing in a recent decision the "unique" and "unprecedented" challenges created by the COVID–19 pandemic. See *Seawright v. Bd. of Elections in City of New York*, 2020 N.Y. Slip Op. 02993 (Ct. of Appeals May 21, 2020). If "unprecedented" and "unique," as the Court of Appeals has characterized only months ago, how could COVID-related developments have been "anticipated," as a matter of law, back in 2013 (when this Lease was originally executed)?

Valentino has therefore adequately asserted an impossibility claim.

iii. Plaintiff states a cause of action for "rescission."

Valentino's fifth cause of action seeks to rescind the Lease based on a failure of consideration.

The Court of Appeals has long recognized rescission as an available equitable remedy when there is a failure of consideration between contracting parties. See *Callanan v. Powers*, 199

N.Y. 268 (1910). Such a failure "depends on what the parties had in contemplation at the time of the lease." *Elk Realty Co. v. Yardney Elec. Corp.*, 153 N.Y.S2d 730, 731 (App. Term, 1st Dep't 1956). See also *Say-Phil Realty Corp. v. De Lignemare*, 131 Misc.827, 828-29 (N.Y. Mun. Ct. 1928) (holding that, "t]he doctrine of failure of consideration is predicated upon the happening of events which materially change the rights of parties, which events were not within the contemplation of the parties, at the time of the execution of the contract."). Indeed, when parties contemplated a use that is later found to be barred by governmental regulation, the courts have rescinded such leases. See *Mariani v. Gold*, 13 N.Y.S2d 365 (Sup. Ct. N.Y. County 1939) (rescinding lease for premises leased as a health resort, where such use was not approved under the zoning ordinance).

Here, Plaintiff has met its burden of alleging a rescission cause of action by alleging, in part, that:

> 62. The Lease permits, and requires, Plaintiff to use the Premises and operate its high-end fashion retail business in a particular manner.
>
> 63. As consideration for the Lease, Defendant is required to provide the Premises for the use specified and as contemplated by the parties' Lease.
>
> 64. The COVID-19 pandemic, related EOs and other governmental restrictions, have completely deprived Plaintiff, *inter alia*, of the beneficial use and occupancy of the Premises.

See Complaint, ¶¶62-64.

Furthermore, Valentino alleges that the parties contemplated that the tenant would be able to operate as a boutique retail store along a heavily-trafficked, high-end fashion, retail corridor (Complaint, ¶10), and that this expectation was fundamental consideration for the "substantial rent" Valentino agreed to pay.

In opposition, Defendant fails to offer any documentary evidence to rebut the Plaintiff's "failure of consideration" contention. Rather, Defendant merely cites to a single Second Department case, *Culver & Theisen, Inc. v. Starr Realty Co.*, 307 AD2d 910 (2d Dep't 2003). But there, plaintiff-tenant was unable to obtain a permit from the New York City Department of Buildings to install an advertising display in Queens, and subsequently sought to rescind its lease on multiple grounds.

Culver is plainly distinguishable from the present circumstances, based on that court's holding that the ability to obtain a permit was expressly anticipated and factored into the parties lease, prior to its execution, and that tenant received valuable consideration for that risk:

> [T]he 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 that basis was intentionally placed on the plaintiff (*cf. Verschell v Pike,* 85 AD2d 690, 691 [1981]). In consideration of the possibility that the plaintiff would be unable to obtain the permit, the defendant granted the plaintiff a free look period and the right to cancel the lease during that time period (see Jobco-Mitchel Field v Lazarus, 156 AD2d 426, 428 [1989]).

Culver & Theisen, Inc. v. Starr Realty Co., 307 A.D.2d 910, 911 (2d Dep't 2003).

Here, no such consideration was given or offered. In fact, Defendant offers not one scintilla of evidence that Valentino (a) anticipated a global pandemic would decimate its unique, retail boutique business at the time the Lease was signed, or (b) received any form of valuable consideration, such as a cancellation option, or reduced rent, due to that risk.

Accordingly, based on the pleading's facial sufficiency, Defendant's pre-Answer motion to dismiss must be denied.

iv. Plaintiff states a cause of action for "constructive eviction."

To plead a "constructive eviction" claim, Valentino need simply allege that: (a) the tenant's use of the subject premises has been disrupted by its landlord and/or a condition that the landlord is required to remediate, (b) the disruption is substantial and (c) the disruption has resulted in at least a partial abandonment of the premises. See *NYC Goetz Realty Corp. v. Martha Graham Ctr. of Contemporary Dance*, 39 A.D.3d 356 (1st Dep't 2007); see also *Holy Properties Ltd., L.P. v. Kenneth Cole Productions, Inc.*, 208 A.D.2d 394, 395 (1st Dep't 1994), *aff'd*, 87 N.Y.2d 130 (1995).

Here, the Complaint recites each of the forgoing elements. Specifically, Complaint paragraphs 70-71 proffers as follows:

> 70. Defendant has failed to properly maintain the Building and Premises pursuant to the Lease and/or take reasonable and/or necessary precautions and/or measures in light of the COVID-19 pandemic, to ensure that Plaintiff could safely occupy the Premises and/or operate, as originally contemplated by the Lease.
>
> 71. As a result of the foregoing, Defendant has breached the Lease's covenant of quiet enjoyment and/or has actually or constructively evicted Plaintiff from all and/or part of the Premises.

See Exhibit F, Complaint, ¶¶ 70-71.

Thus, there can be no reasonable dispute that Plaintiff has alleged a cause of action for constructive eviction, consistent with controlling case law.

Rather, Defendant harps on the fact that Valentino has failed to completely abandon the Premises. However, the case law has long held that a commercial tenant is entitled to a "reasonable" time to abandon its leased premises, following eviction substantial disruption resulting in at least a partial abandonment of the premises, and that the question of reasonableness is an issue of fact. See *Joseph P. Day Realty Corp. v. Franciscan Sisters for Poor Health Sys., Inc.*, 256 A.D.2d 134, 135 (1st Dep't 1998) (denying motion to dismiss over factual dispute

concerning "reasonableness" of tenant's delay in abandoning); *S.E. Nichols, Inc. v. New Plan Realty Tr.*, 160 A.D.2d 251, 252 (1st Dep't 1990) (holding that, "the abandonment of a department store in an orderly manner may be a lengthy process and that a delay of even several months might be reasonable under certain circumstances (*see, Leider v. 80 Williams St. Co., Inc.,* 22 A.D.2d 952, 255 N.Y.S.2d 999)."); *Zurel U.S.A., Inc. v. Magnum Realty Corp.*, 279 A.D.2d 520, 521 (2d Dep't 2001) (holding that, "[a] delay of three or four months for a commercial tenant to move in an orderly fashion may be considered reasonably prompt[.]"); *135 E. 57th St., LLC v. Calypso Capital Mgt., LP*, 2018 WL 4381741 (Sup. Ct., N.Y. County 2018) (delay of almost nine months not unreasonable).

Here, Plaintiff provided notice during the course of the pandemic, by letter dated July 1, 2020, that Valentino intends to abandon the Premises by December 31, 2020. See Bergamo Aff., ¶17; see also Exhibit F, Complaint, ¶26. From the plain allegations of the Complaint, Plaintiff has therefore set forth a constructive eviction cause of action, and its dismissal, at this early stage of the litigation, is entirely unwarranted.

Moreover, to the extent Defendant raises factual issues concerning the "reasonableness" of Plaintiff's stated intention to abandon the Premises, such factual issues merely highlight the inappropriate and premature nature of pre-Answer dismissal.

v. Plaintiff states a cause of action to void the Guaranty.

Plaintiff also properly asserts a cause of action for a declaratory judgment that the Guaranty is void.

As a matter of law, a guaranty may be voided by the expiration and/or termination of the lease obligations being guaranteed. See, e.g. *In re 504 Assoc. LLC*, 47 Misc.3d 1204(A) (Sup. Ct. Kings County 2015), *judgment entered sub nom. 504 Assoc. LLC v. Nason* (Sup. Ct. Kings County

2015) (holding that, "[t]here can be little question that the expiration of that lease on November 30, 2005 ended Mr. Rogin's guaranty obligation."); *300 E. 96th St. LLC. v. Saka*, 49 Misc.3d 144(A) (App. Term, 1st Dep't 2015).

A guaranty may also be voided by a "substantial" and/or "impermissible" change in the guarantor's obligations under the original agreement. See *Lo-Ho LLC v. Batista*, 62 A.D.3d 558, 560 (1st Dep't 2009); *cf. Fehr Bros., Inc. v. Scheinman*, 121 A.D.2d 13 (1st Dep't 1986) (guarantor that created increased risk remained bound by guaranty). A determination of whether the guaranty has been so modified is a material question of fact to be determined at trial. See *404 Park Partners, L.P. v. Lerner*, 75 A.D.3d 481 (1st Dep't 2010); *Harlorn LLC v. Cheng*, 59 Misc.3d 1221(A) (Sup. Ct. N.Y. County 2018) (denying motion to dismiss).

Here, Valentino adequately pleads that the Guaranty should be declared void for <u>both</u> reasons cited above -- although each would be an independent basis for the declaratory judgment cause of action. In that regard, the Complaint provides, as follows:

> 78. The parties never contemplated that a world-wide COVID-19 pandemic and related EOs would utterly frustrate and/or render impracticable, infeasible, unworkable, and/or impossible Valentino's performance under the Lease.
>
> 79. Had Valentino S.p.A. known of or contemplated such a catastrophic event, it would not have guaranteed Valentino's obligations.
>
> 80. An actual case and justiciable controversy exist since Defendant, as noted in its counsel's June 19, 2020 letter, disputes that Valentino S.p.A.'s Guaranty obligations have been excused or otherwise rendered null and void or otherwise unenforceable.

See Exhibit F, Complaint, ¶¶ 78-80.

Furthermore, Defendant is fully aware that the Guaranty clearly indicates that Plaintiff is a "wholly-owned subsidiary" of the Guarantor. Exhibit B, Guaranty, Paragraph 14. Accordingly, Valentino has standing to seek a declaratory judgment regarding potential liabilities of its parent -

- liabilities that will directly financially impact Valentino, and are intrinsically tied to the Lease. See *In re Kollel Mateh Efraim, LLC*, 406 B.R. 24 (Bankr. S.D.N.Y. 2009). Notably, Defendant fails to cite a single case in support of its conclusory statement that Valentino somehow "lacks standing."[8] Defendant's motion to dismiss this cause of action must therefore be denied.

Having expressly and sufficiently asserted allegations in support of each of Plaintiff's seven (7) declaratory judgment causes of action, Defendant's pre-Answer motion to dismiss must be denied, as a matter of law. Indeed, the very cases cited by Defendant highlight that material issues of fact remain concerning, *inter alia*: (a) the foreseeability of the COVID-19 pandemic; (b) the parties' underlying assumptions concerning the Lease's purpose and retail conditions along Fifth Avenue; (c) what the parties' contemplated at the time the Lease was executed; (d) the reasonableness of Plaintiff's stated intent to abandon the Premises at the end of the year; and (e) whether Guarantor contemplated guaranteeing the Lease in the event of an unprecedented global pandemic. Respectfully, these are issues that are not suitable for resolution at this early stage of the litigation, particularly prior the joinder of issue.

For the foregoing reasons, it is respectfully requested that Defendant's faulty and premature motion be denied, in its entirety.

B. <u>Plaintiff pleads each element of its injunction cause of action</u>.

Finally, the Complaint sets forth Valentino's cause of action for injunctive relief, as follows:

> 86. Because, upon information and belief, Defendant is threatening to terminate Plaintiff's valuable commercial interest in the Premises, Plaintiff would be irreparably harmed absent the grant of an injunction.

[8] Should the Court determine that Guarantor is a necessary party with respect to Plaintiff's seventh cause of action, for a declaratory judgment that the Guaranty is void, Plaintiff shall seek to amend the Complaint to add Guarantor as co-plaintiff.

> 87. Plaintiff lacks an adequate remedy at law.
>
> 88. By reason of the foregoing, Plaintiff is entitled to an order and judgment temporarily, preliminarily, and permanently enjoining Defendant from (a) terminating Plaintiff's tenancy and/or interest in the Premises prior to December 31, 2020 or such other term as the court may otherwise deem applicable, in order to permit Plaintiff to wind down its operations and deliver possession of the Premises to Defendant as required by the Lease, or for such other use as the court may deem appropriate under the circumstances, and/or (b) otherwise removing Plaintiff from possession of the Premises.

See Exhibit F, Complaint, ¶¶ 86-88.

Such an injunction is necessary, based upon Defendant's baseless claim that Valentino is in default in the payment of rent. See, Slamani Affirmation, ¶11. Notably, Defendant does not need to serve a termination notice for Valentino to raise a claim – the mere threat of eviction establishes a viable cause of action. See *Post v. 120 E. End Ave. Corp.*, 62 N.Y.2d 19, 475 N.Y.S.2d 821 (1984). Defendant should not be permitted to seek to evict Valentino, until the present claims are adjudicated.

II.

DEFENDANT FAILS TO PROVIDE ANY EVIDENCE CONCLUSIVELY ESTABLISHING A DEFENSE

Defendant also seeks dismissal of the Complaint pursuant to CPLR §§ 3211(a)(1) and (c).

While CPLR § 3211(a)(1) provides, in relevant part, that a party may move to dismiss a complaint on the basis that "a defense is founded upon documentary evidence[,]" and CPLR § 3211(c) further provides, in relevant part, that: "either party may submit any evidence that could properly be considered on a motion for summary judgment," Defendant has not properly satisfied either of those requisites

The essence of Defendant's argument (which Plaintiff vigorously and vehemently disputes) appears to be that certain sections of the Lease somehow provide a complete defense to

each of Plaintiff's claims for declaratory and injunctive relief. As has been previously noted, Defendant's argument fails for two reasons: first, Defendant's self-serving interpretation of the Lease does not preclude any of Plaintiff's claims, and second, the purported material "evidence" cited by Defendant concerning Plaintiff's alleged nonpayment of rent and/or receipt of PPP loans is wholly inaccurate – thus emphasizing, yet again, why pre-Answer dismissal motions are typically discouraged – particularly when the parties have not engaged in any discovery.

A. Defendant's Self-Serving Interpretation of the Lease Fails.

As set forth above, the Lease does not expressly preclude or vitiate **any** of Valentino's claims. In fact, nothing in Sections 9.1 and/or 21.11 indicates, in any manner, that Valentino "anticipate[d] the consequences of a supervening cataclysmic or other event that might impact upon the Valentino retail store." See Defendant's Memorandum of Law, p.14.[9]

To that point, nothing in Article 9.1 speaks to whether the COVID-19 pandemic was "foreseeable" or "unforeseeable," the parties' intentions and basic assumptions entering into the Lease, or whether it is reasonable to abandon the Premises by the end of the year given the current state of affairs.

Article 21.11 similarly fails to address these, and other material factual, issues. This provision does not speak to any of Valentino's contractual rights in other sections of the Lease, or any quasi-contractual or equitable claims available in law or equity (which exist independently of the Lease).

Furthermore, the absence of any reference to a "pandemic" or "epidemic" renders both provisions ambiguous, and the trier of fact must determine whether the parties intended to impose

[9] In fact, Defendant's extreme argument suggests that Valentino's obligation to pay rent cannot be abated in any manner, by any event, under any circumstances – a position contradicted by controlling precedent for each of Valentino's claims.

an unassailable duty to continue to pay rent, without reprieve, during this "unique" and "unprecedented" COVID-19 pandemic. See *Seawright*, *infra*.

Even if the Court deems Articles 9.1 and 21.11 to be unambiguous, Defendant's motion should still be denied because the Lease fails to resolve each of the following key factual questions in Defendant's favor, required pursuant to *Goshen v. Mut. Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002):

(a) did the parties anticipate or guard against the global COVID-19 pandemic and/or resulting restrictive governmental orders and/or regulations?;

(b) was the Lease entered into based on the fundamental assumption that Fifth Avenue would remain a heavily-trafficked focal point of high-end New York City fashion retail?;

(c) has the pandemic fundamentally destroyed and/or drastically altered the basic consideration for which Valentino bargained?;

(d) has Valentino been forced to abandon its premises?;

(e) did Guarantor assume or agree to take on liability arising from an unprecedented global pandemic?; and

(f) has Defendant served a type of predicate rent demand and/or threatened to prematurely terminate the Lease and/or remove Valentino from the Premises during its wind-down?

Simply, because the Lease cannot "conclusively" resolve **any** one or more of those material factual inquiries in Defendant's favor, dismissal is inappropriate, and Defendant's motion must be denied.

B. Defendant's Claims Concerning Arrears and PPP Loans are Patently False and Wholly Irrelevant.

Defendant's argument relies on "evidentiary items" – an affirmation by Defendant's in-house counsel (the Slamani Affirmation), and photographs annexed to Defendant's counsel's employee's affidavit (the Azevedo Affidavit). That questionable "evidence" cannot provide grounds for the Complaint's dismissal since it is inaccurate and contradicted by the Bergamo

Affidavit.

As the First Department held, in denying a motion to dismiss, "a question of such far-reaching consequence and of such potential mischief as a precedent, should not be determined upon conflicting affidavits." *Sheils v. Sheils*, 32 A.D.2d 253, 256 (1st Dep't 1969).

Defendant's key 'facts' are summarized, in relevant part, as follows:

(a) Slamani Affirmation, ¶10: "Section 21.11 of the Lease expressly recites that cataclysmic events or governmental closure orders do not excuse Valentino from paying rent."

(b) Slamani Affirmation, ¶11 "In mid-June, 2020, Valentino paid one month's rent; however, to date, Valentino is in arrears under the Lease in the sum of $3,180,241. 78 on account of unpaid rent for June and July, 2020 (a copy of 693 Fifth's rent arrearage report for Valentino is annexed hereto and made part hereof as Exhibit D)."

(c) Slamani Affirmation, ¶13: "As a result of our ongoing discussions, 693 Fifth offered to defer two months of Valentino's rent, to be repaid by December 31, 2020."

(d) Defendant's memorandum of law claims that, "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."

These claims are either incorrect or irrelevant, and thus fail to meet the required evidentiary standard.

First, Article 21.11 of the Lease does <u>not</u> contain the terms "cataclysmic events" or "governmental closure orders." See Exhibit A, Lease, Article 21.11. Those terms were apparently invented by Defendant's in-house counsel, and are a total "stretch," if not an utter fabrication.

Second, Valentino is **not** in arrears. See Bergamo Aff., ¶23. The parties agreed to a two-month rent deferral. See Bergamo Aff., ¶11. With the exception of the deferred base rent, Valentino has paid monthly rent. See Bergamo Aff., ¶24. Moreover, Valentino's ability or

inability to pay rent is irrelevant to determining whether its Complaint states a cause of action.

Third, the Azevedo Affidavit, with its accompanying photographs of a purportedly empty store front and street, is not dispositive, because it fails to contradict any of Defendant's allegations concerning its inability to use the Premises as intended, whether the parties foresaw the global COVID-19 pandemic, or whether the parties assumed Fifth Avenue would remain a heavily-trafficked luxury fashion retail destination during the Lease term.[10] Furthermore, Valentino disputes that it enjoys "full and complete" possession of the Premises and pertinent factual questions - - concerning constructive eviction, and whether Valentino's intended abandonment is reasonable - - remain unanswered.

Lastly, while wholly irrelevant, Valentino did ***not*** receive a P.P.P. Loan. See Bergamo Aff., ¶22. Since Defendant's argument is entirely baseless and manufactured, it should be ignored.

III.

PUBLIC POLICY AND EQUITY SUPPORT ADJUDICATION OF PLAINTIFF'S CLAIMS ON THEIR MERITS

As the Court of Appeals recently recognized in *Seawright v. Bd. of Elections in City of New York*, the COVID-19 pandemic has presented New Yorkers, families and businesses alike, with "unique" and "unprecedented" challenges. While existing case law supports the adjudication, and eventual grant, of Plaintiff's claims arising from, *inter alia*, the doctrine of frustration of purpose, public policy and the court's inherent equitable powers also support the application and, if necessary, extension of these precedents to this novel environment.

In many respects, the global COVID-19 pandemic has resulted in more devastation to New York City than almost any other historical event. The impacts, in terms of lost lives, declining

[10] In fact, the photographs show empty Premises, and a Fifth Avenue devoid of any retail shoppers or foot traffic.

physical and mental health of the workforce, lost jobs, shuttered businesses, closed schools, a lingering public-health threat, and a possible resurgence of the virus, have instilled a climate of fear (which will impact the City for many years to come). To move forward, it is critical for the courts to examine the parties' contractual arrangements with an open mind and heart.

Given that Valentino's tenancy was founded upon certain basic assumptions that have been decimated, if not permanently altered by the pandemic and related governmental closures and restrictions, the court should exercise its inherent powers to review and to eventually annul the parties' contractual relationship. Such an outcome is eminently reasonable when a commercial tenant can demonstrate that the foundations of its business, has been irretrievably altered. Plaintiff respectfully proposes that, given the unique circumstances presented, public policy requires this Court to find that Valentino's quasi-contractual and equitable claims apply, particularly in the midst of this current crisis.

Notably, since the New York City Council and New York State Legislature have recognized that commercial tenants are in desperate need of such relief,[11] Valentino should be permitted to exit its Lease, without further harm or delay. That determination would facilitate a more efficient re-leasing or reletting of the Premises. While Defendant may argue that applying claims such as the frustration of purpose doctrine to relieve tenants of their lease obligations would result in a mass exodus of businesses from the city, such contentions are makeweight, for if businesses cannot viably be conducted, that exodus would occur in any event. The issue is whether Defendant should profit from such adverse conditions.

[11] The Court is respectfully asked to take judicial notice of pending legislation such as Senate Bill S7053, that would impose upon commercial landlords an obligation to mitigate their damages. Such legislation follows the 2019 Housing Stability and Tenant Protection Act, and indicates a clear public policy of supporting commercial tenants in these challenging times.

CONCLUSION

For the reasons set forth herein, Plaintiff respectfully requests that the Court deny Defendant's motion (Motion Seq. 001) in all respects, and grant Plaintiff such other and further relief deemed as just and proper under the circumstances including, but not limited, to an award of fees and/or sanctions as against the Defendant for its frivolous and unsubstantial posture in this time of crisis.

Dated: New York, New York
September 14, 2020

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH WORD COUNT LIMIT

I hereby certify pursuant to Rule 17 of the Rules of Practice for the Commercial Division of the Supreme Court of the State of New York that the total number of words in the foregoing document, exclusive of the caption, table of contents, table of authorities, and signature block, is 6,944 according to the "Word Count" function of Microsoft Word, the word-processing system used to prepare the document, and thus that the document complies with the word count limit set forth in Rule 17.

Dated: New York, New York
September 14, 2020

Lucas A. Ferrara
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LUCAS A. FERRARA