SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK
Plaintiff,

Index No.: 156789/2020

-against-

EDISON BALLROOM LLC,

Defendants.
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**THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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## PRELIMINARY STATEMENT

The plaintiff, the Trustees of Columbia University for the City of New York ("Columbia"), submits this Memorandum of Law in support of its Motion for Summary Judgment against Edison Ballroom, LLC ("the defendant" or "Edison") for breach of contract and/or conversion. As will be discussed in greater detail below, Columbia's Motion for Summary Judgment should be granted and the deposit it paid to the defendant should be returned because the Contract between Columbia and the defendant is clear on its face and that because the subject event was barred from taking place due to "governmental authority," Columbia is entitled to a full refund of its deposit as required by the terms of the Contract between the parties.

Accordingly, Columbia requests that the Court issue an Order per CPLR 3212 granting Columbia's Motion for Summary Judgment finding that: (1) the defendant breached the Contract and/or committed a conversion by failing to return Columbia's deposit; and (2) directing the defendant to return the deposit in the amount of $98,878.50, together with interest at 9% from the date of the breach; and (3) ordering the dismissal of defendant's Counterclaim together with such other and further relief as this Court may deem just and proper.

## STATEMENT OF FACTS

Columbia and Edison entered into a Contract on or about December 6, 2019 for an event known as "Barrister's Ball," which was scheduled to take place on March 28, 2020 ("the Agreement" or "the Contract). (annexed hereto as Exhibit A; Summons and Verified Complaint; Exhibit D; Contract). Of note, the Contract was drafted by the defendant. (Exhibit A; Summons and Complaint; Exhibit D; Contract). Per the terms of the Contract, Columbia was obligated to, and did, issue a deposit to Edison in the amount of $98,878.50. (Exhibit A; Summons and Verified Complaint; Exhibit D; Contract; Affidavit of Wendy Johnson sworn to on January 6, 2021 ("Johnson Aff.")).

Per the terms and conditions of the Contract, the defendant expressly agreed, among other things, that:

> Neither party shall be responsible for failure to perform, and **either party may terminate,** this contract due to "**Force Majeure or Acts of God," including, but not limited to** Force Majeure, circumstances beyond its reasonable control, strike, **governmental authority,** terrorism, war in the United States, or unavailability of mass transportation, that make it **illegal, impractical or impossible** for the affected party to hold the event or **enjoy the benefits of this contract. *****
>
> For the Avoidance of doubt, in the event of any failure to perform or termination due to Force Majeure or Acts of God, **Edison shall promptly refund 100% of all payments made by Client to Edison Ballroom including the otherwise non-refundable deposit and Client shall have no further obligations to Edison Ballroom** unless the Client wishes to reschedule the event within 12 months of the event as stated above. Exhibit D; Contract, pp. 14-15, emphasis supplied.

The language of the Contract, drafted solely by the defendant, could not be more clear that upon the occurrence of a Force Majeure event, any monies paid by the client to Edison would be fully refunded. In the matter at bar, due to the global pandemic as a result of COVID-19, Governor Cuomo issued a series of Executive Orders in New York, including 202.10, 202.35, 202.42, and 202.41, which banned and limited non-essential gatherings. (Exhibit A; Summons and Verified Complaint; See Executive Orders 202.10, 202.35, 202.42 and 202.41,

available at: https://www.governor.ny.gov/executiveorders). These Executive Orders were in effect at that time the event was scheduled to be held on March 28, 2020. Id.

There is no doubt and, more importantly, no dispute that The Barrister's Ball did not qualify as an "essential gathering" as defined by the Executive Orders and Governor Cuomo's "PAUSE plan", and was therefore prohibited from taking place by virtue of government edict. (Exhibit A; Summons and Verified Complaint; See Executive Orders 202.10, 202.35, 202.42 and 202.41; Governor Cuomo's 10 point PAUSE plan, available at: https://coronavirus.health.ny.gov/new-york-state-pause (Effective March 22, 2020 at 8:00 p.m., non-essential gatherings of individuals of any size for any reason [e.g. parties, celebrations or other social events] are canceled or postponed at this time); Johnson Aff).

In recognition of and compliance with the Executive Orders, Columbia was compelled to and did cancel the Barrister's Ball. (Exhibit A; Summons and Verified Complaint; Exhibit F; Correspondence; Johnson Aff.). Due demand was made to Edison for return of the deposit on multiple occasions several months ago, including on March 18, 2020, March 19, 2020, and March 23, 2020. (Exhibit A; Summons and Verified Complaint). In addition, this office sent correspondence to the defendant reiterating that the event had been cancelled and demand made for a refund of the deposit. (Exhibit E; Correspondence).

Despite Edison's obligation to "promptly refund 100% of all payments" made by Columbia, including "the otherwise non-refundable deposit," (Exhibit D; Contract, pp. 14-15), Edison has refused to do in excess of 8 months after initial demand was made for the return of the deposit.

In light of the defendant's blatant refusal to refund the deposit, Columbia commenced this lawsuit on August 26, 2020. (Exhibit A; Summons and Verified Complaint). Issue was

joined on September 28, 2020. (Exhibit B; Answer with Counterclaim). Columbia's reply to the defendant's counterclaim was filed on October 14, 2020. (Exhibit C; Reply to Counterclaim).

As will be discussed in greater detail below, the defendant has no defense to the plain terms of the Contract. The provision at issue was drafted by the defendant alone which most assuredly understood that in including the agreement to issue a refund given certain triggering events that it would be bound by its own promise. Instead, by way of counterclaim, Edison seeks to avoid its obligations under the Agreement and requests that the Court hold that the Agreement is "in place" and compel specific performance against Columbia; to wit, that the event should take place at a later juncture when safe to do so. (Exhibit B; Answer with Counterclaim. There is no argument that the global pandemic has placed unprecedented challenges upon everyone. Indeed, the recent viral surge should make clear that the uncertainty of when or if it will ever be safe enough to hold the event underscores the need that the University's money be refunded now. The plain language of the Contract alone compels the return of the deposit to Columbia. (Exhibit D). The defendant should not be permitted to shirk its obligations under the Contract and the deposit, which is Columbia's property, should be refunded.

Accordingly, the Court should grant Columbia's Motion for Summary Judgment in its entirety.

**SUMMARY JUDGMENT STANDARD**

It is well-established that a party seeking summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Alvarez v. Prospect Hosp., 68 NY2d 320, 324 (1986). "Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Id.; See also, Olisanr. LLC v. Hollis Park Manor Nursing Home, Inc., 51 AD3d 651, 652 (2d Dept. 2008). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez, 68 NY2d at 324, citing Zuckerman v. City of New York, 49 NY2d 557, 562 (1980).

Equally well-settled is that overly broad allegations or mere conclusory immaterial non-relevant facts or law, unsupported by competent admissible evidence sufficient to require a trial, are manifestly insufficient to satisfy the burden to defeat summary judgment. See Fileccia v Massapequa Gen. Hosp., 99 AD2d 796 (2d Dept. 1984); Bustamonte v Koval, 98 AD2d 739 (2d Dept. 1983); Pan v Coburn, 95 AD2d 670 (1st Dept. 1983); Himber v Pfizer Labs., 82 AD2d 776 (1st Dept 1981); Baldwin v Gretz, 65 AD2d 876 (3d Dept. 1978); Century Ctr. Ltd. v Davis, 100 AD2d 564 (2d Dept. 1984).

**BREACH OF CONTRACT AND CONTRACT LAW PRINCIPLES:**

Significantly, the essential elements in an action for breach of contract "are the existence of a contract, the plaintiff's performance pursuant to the contract, and damages resulting from the breach." Dee v Rakower, 112 AD3d 204, 209 (2d Dept. 2013); Elisa Dreier Reporting Corp. v Global Naps Network, Inc., 84 AD3d 122, 127 (2d Dept. 2011); Brualdi v IBERIA Lineas Aeraes de España, S.A., 79 AD3d 959, 960 (2d Dept. 2010); JP Morgan Chase v J.H. Elec. of NY, Inc., 69 AD3d 802, 803 (2d Dept. 2010); Furia v Furia, 116 AD2d 694, 695 (2d Dept. 1986).

In addition, "'[t]he fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent.'" Camuso v. Brooklyn Portfolio, LLC, 164 AD3d 739, 741 (2nd Dept. 2018), quoting Greenfield v. Phillies Records, 98 NY2d 562, 569 (2002). "'The best evidence of what parties to a written agreement intend is what they say in their writing.'" Id., quoting Slamow v. Del Col, 79 NY2d 1016, 1018 (1992). "Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." Id. A familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms.

Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing. See, Mercury Bay Boating Club v. San Diego Yacht Club, 76 NY2d 256, 269-270, (1990); Judnick Realty Corp. v. 32 W. 32nd St. Corp., 61 NY2d 819, 822 (1984); Long Is. R.R. Co. v. Northville Indus. Corp., 41 NY2d 455 (1977); Oxford Commercial Corp. v. Landau, 12 NY2d 362, 365 (1963). "Extrinsic evidence 'may not be considered when the intent of the parties can be gleaned from

the face of the instrument.'" Lehman Bros. Intl. (Europe) v. AG Fin. Prods. Inc., 60 Misc.3d 1214(A) (Sup.Ct. N.Y. Co. 201 8), quoting Chimart Assocs. v. Paul, 66 NY2d 570, 572-73 (1986). "[A] contract should be 'read as a whole; ***and if possible it will be so interpreted as to give effect to its general purpose.'" Beal Sav. Bank v. Sommer, 8 NY3d 318, 324-325 (2007), quoting Matter of Westmoreland Coal Co. v. Entech, Inc., 100 NY2d 352, 358 (2003).

Further, "[w]hether or not a writing is ambiguous is a question of law to be resolved by the courts." W.W.W. Assoc. v. Giancontieri, 77 NY2d 157,162 (1990). "Ambiguity exists when, looking within the four corners of the documents, terms are reasonably susceptible of more than one interpretation." AMCC Corp. v. New York City Sch. Constr. Auth., 154 AD3d 673, 676 (2d Dept. 2017). However, in the case of any doubt or ambiguity, a contract must be strictly construed against the drafter of the agreement. See Burgos v. Metro-North Commuter R. R., 40 AD3d 377 (1st Dept. 2007), citing Jacobson v. Sassower, 66 NY2d 991 (1985). The tenets of contract interpretation are applied "with even greater force in commercial contracts negotiated at arm's length by sophisticated, counseled businesspeople." Ashwood Capital, Inc. v. OTG Mgt., Inc., 99 AD3d 1, 7 (1st Dept. 2012). "In such cases, 'courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include.'" Id., quoting Vermont Teddy Bear Co. v. 538 Madison Realty Co., 1 NY3d 470, 475 (2004). See also, Camperlino v. Bargabos, 96 AD3d 1582, 1583 (4th Dept 2012).

## ARGUMENT

## POINT I

## COLUMBIA IS ENTITLED TO SUMMARY JUDGMENT AND RETURN OF ITS DEPOSIT BECAUSE THE EDISON BREACHED THE SUBJECT AGREEMENT AND THE CONRACT EXPRESSLY AND UNAMBIGUOUSLY CALLS FOR THE RETURN OF THE DEPOSIT UNDER THE FORCE MAJEURE CLAUSE.

Columbia is entitled to judgment and return of its deposit because the Force Majeure clause of the Agreement between the parties is triggered and the plain, express terms of the Agreement warrant that Columbia's deposit be refunded. All of the elements for a breach of contract cause of action have been established. (Exhibit A; Summons and Verified Complaint; Exhibit D; Contract. Johnson Aff). Specifically, there was an Agreement between the parties for the defendant to, among other things, host Columbia's Barrister's Ball. (Exhibit A; Summons and Verified Complaint; Exhibit D; Contract; Johnson Aff). It is not disputed that Columbia held up its end of the bargain by issuing to the Edison a deposit in the amount of $98,878.50 as required by the terms and conditions of the Contract. (Exhibit A; Summons and Verified Complaint; Exhibit B; Answer with Counterclaim; Exhibit D; Contract; Johnson Aff). Having done so it was then for the Edison to fulfill its contractual obligations which included refunding the plaintiff's monies in the event that Ball was cancelled.

That obligation was made manifest by the terms and conditions of the Contract by which the defendant expressly agreed, among other things, that:

> Neither party shall be responsible for failure to perform, and **either party may terminate,** this contract due to "**Force Majeure or Acts of God," including, but not limited to** Force Majeure, circumstances beyond its reasonable control, strike, **governmental authority,** terrorism, war in the United States, or unavailability of mass transportation, that make it **illegal, impractical or impossible** for the affected party to hold the event or **enjoy the benefits of this contract. *****
>
> For the Avoidance of doubt, in the event of any failure to perform or termination due to Force Majeure or Acts of God, **Edison shall promptly refund 100% of all payments**

> **made by Client to Edison Ballroom including the otherwise non-refundable deposit and Client shall have no further obligations to Edison Ballroom** unless the Client wishes to reschedule the event within 12 months of the event as stated above. Exhibit D, pp. 14-15, emphasis supplied.

Due to the global pandemic as a result of COVID-19, Governor Cuomo issued a series of Executive Orders in New York, including 202.10, 202.35, 202.42, and 202.41, which banned and limited non-essential gatherings. (Exhibit A; Summons and Verified Complaint; See Executive Orders 202.10, 202.35, 202.42 and 202.41, available at https://www.governor.ny.gov/executiveorders). Those Executive Orders were in effect at that time the event was scheduled to be held on March 28, 2020. Id.

The Barrister's Ball did not qualify as an "essential gathering" as defined by the Executive Orders and Governor Cuomo's "PAUSE plan", and was therefore prohibited from taking place by virtue of government edict. (Exhibit A; Summons and Verified Complaint; See Executive Orders 202.10, 202.35, 202.42 and 202.41; Governor Cuomo's 10 point PAUSE plan, available at: https://coronavirus.health.ny.gov/new-york-state-pause (Effective March 22, 2020 at 8:00 p.m., non-essential gatherings of individuals of any size for any reason [e.g. parties, celebrations or other social events] are canceled or postponed at this time); Johnson Aff). In recognition of and compliance with the Executive Orders, Columbia was compelled to and did cancel the Barrister's Ball. (Exhibit A; Summons and Verified Complaint; Exhibit F; Correspondence; Johnson Aff).

Pursuant to the terms and conditions of the Contract, due demand was made to Edison for return of the deposit on multiple occasions several months ago, including on March 18, 2020, March 19, 2020, and March 23, 2020. (Exhibit A; Summons and Verified Complaint). In addition, this office sent correspondence to the defendant reiterating that the event had been cancelled and demand made for a refund of the deposit. (Exhibit E; Correspondence).

Despite Edison's obligation to "promptly refund 100% of all payments" made by Columbia, including "the otherwise non-refundable deposit," (Exhibit D, pp. 14-15), Edison has breached the Agreement by refusing to return the deposit, now in excess of 8 months after initial demand was made.

Accordingly, Edison has breached the Agreement with Columbia and Columbia is entitled to return of its refund with interest from the date of the breach, together with such other and further relief as the Court deems just and proper.

## POINT II

## IN ADDITION, AND/OR ALTERNATIVELY, COLUMBIA IS ENTITLED TO SUMMARY JUDGMENT AND RETURN OF ITS DEPOSIT BECAUSE EDISON HAS ENGAGED IN CONVERSION OF THE SUBJECT DEPOSIT.

In addition, and/or alternatively, Columbia is entitled to summary judgment and return of its deposit because Edison has engaged in a conversion of the subject deposit.

In New York, "[a] conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession." William Doyle Galleries, Inc. v. Stettner, 167 AD3d 501, 503 (1st Dept.) quoting Colavito v. New York Organ Donor Network, Inc, 8 NY3d 43, 49-50 (2006); see also, Solomon R. Guggenheim Found. v. Lubell, 153 AD2d 143 (1st Dept. 1990). "Two key elements of conversion are (1) plaintiff's possessory right or interest in the property; and (2) defendant's dominion over the property, or interference with it, in derogation of plaintiff's right." Colavito, 8 NY3d at 50.

On these facts, Edison has engaged in conversion of Columbia's property, namely the deposit. The deposit is property belonging to Columbia since the event could not, and did not, take place. Accordingly, Columbia clearly has a possessory right in a deposit that it owns, and which Edison did not (and should not) have been used for an event that never took place.

In addition, Edison continues to exercise dominion over the deposit in derogation of Columbia's right. Despite due demand being made on multiple occasions, and now for over 8 months, Edison has failed to refund Columbia's deposit. Exhibit A; Summons and Verified Complaint; Johnson Aff.; Exhibit E. Edison's control over, and interference with, the deposit has prevented Columbia from exercising all possessory rights to its own property. This includes, but is not limited to, applying the proceeds to other academic, scholastic and/or social events in

Columbia's discretion. In addition, Columbia has been deprived of applying the deposit to an interest-bearing account for growth for nearly a year because of Edison's refusal to return Columbia's own property.

Accordingly, additionally and or alternatively, it is submitted that Columbia is entitled to summary judgment since Edison engaged in conversion of the deposit.

## CONCLUSION

For the reasons set forth herein, Columbia requests that the Court issue an Order per CPLR 3212 granting Columbia's Motion for Summary Judgment finding that: (1) the defendant breached the Contract and/or committed a conversion in failing to return Columbia's deposit; and (2) the defendant must return the deposit in the amount of $98,878.50, together with interest at 9% from the date of the breach; and (3) the Counterclaim must be dismissed, together with such other and further relief as this Court may deem just and proper.

DATED: January 7, 2021

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