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

BROADWAY/72ND ASSOCIATES II, LLC,	:	
	:	Index No. 653760/2020
Plaintiff,	:	
	:	
- against -	:	
	:	
BLOOMINGDALE'S, LLC	:	
(formerly BLOOMINGDALE'S, INC.)	:	
AND MACY'S, INC.,	:	
	:	
Defendants.	:	

PLAINTIFF BROADWAY/72ND ASSOCIATES II, LLC'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

This is a straight-forward breach of contract action. The unambiguous terms of controlling agreements are dispositive. Defendant Bloomingdale's, LLC (formerly Bloomingdale's Inc.) ("Tenant") is obligated to pay rent to plaintiff Broadway/72nd Associates II, LLC ("Landlord") under a commercial lease, and defendant Macy's, Inc. ("Guarantor") guaranteed such rent payments in two separate guarantees. There is no dispute that neither Tenant nor Guarantor (together "Defendants") has paid the amounts Landlord asserts are owed. Instead, Defendants take the position they are not required to pay such rent due to the impact of COVID-19 and certain related New York State Executive Orders. Defendants' position is contrary to undisputed facts and applicable law.

The lease between Landlord and Tenant, more fully referred to below, does not relieve Tenant of the obligation to pay rent, or excuse payment of any other monetary obligation. Article 21 of the lease provides that Tenant's obligation to pay rent is not "affected, impaired or excused" by, among other force majeure events, (1) governmental pre-emption in connection with a national emergency, (2) any rule, order or regulation of any governmental agency, (3) any closure of the building by Landlord or by others reasonably intended to assure the health or safety of any person in response to a national, state or municipal emergency (whether or not officially proclaimed by any governmental authority), or (4) any other cause beyond Landlord's control. The foregoing force majeure events can only relieve Tenant, in accordance with Article 26 of the lease, from certain non-monetary obligations, including Tenant's obligation to occupy and continuously operate its store. But Tenant's monetary obligations, including the payment of rent, are not relieved or excused. Consistent with Article 21 of the lease, Article 26 also provides that Tenant shall not assert these force majeure events, or any other event beyond Tenant's control, as a defense to any demand by

Landlord, or action initiated by Landlord, resulting from Tenant's failure to comply with any of its monetary obligations.

Accordingly, the parties explicitly contemplated the possible closure of the premises leased by Tenant in Landlord's building as a result of rules, orders, and regulations of governmental authorities to assure the health or safety of people in response to national, state, or municipal emergencies. In such event, and in the event of any other cause beyond Landlord's or Tenant's control, the sophisticated parties to the lease unambiguously agreed that Tenant would remain obligated to pay rent and comply with its other monetary obligations.

Defendants cannot now re-write the explicit terms of the parties' bargain by invoking, as they do, the doctrines of frustration of purpose and impossibility of performance. The key factor in both defenses is lack of foreseeability. Here, the parties foresaw, and provided in their lease for, the possibility of health and safety-related national emergencies and related governmental orders. The parties included specific and clear provisions in the lease addressing such possible events, and agreed that Tenant would continue to pay rent, rendering the doctrines of frustration of purpose and impossibility of performance inapplicable.

As addressed below, Tenant is *not* excused from paying rent during the recent closure of its now open premises. Consequently, Guarantor is likewise responsible for payment of the rent Tenant has failed and refused to pay, and other unsatisfied monetary obligations under the lease. Defendants are bound by the terms of their agreements, and summary judgment in Landlord's favor should be granted.

BACKGROUND

The Lease and Guarantee Agreements

Landlord and Tenant entered into a commercial lease agreement, dated March 3, 2015 (the "Lease"), whereby Tenant leased from Landlord premises in a building located at 2085 Broadway,

New York, New York (the "Premises"). (Affidavit of Richard F. Czaja, sworn to October 20, 2020, ("Czaja Aff."), Exhibit A.) Under the terms of the Lease, Tenant is required to make monthly payments of fixed annual rent on or before the first day of each month, in amounts specified in the Lease. (*Id.* at Ex. A, Article 2.)

Article 2(B) of the Lease provides that: "throughout the term of this lease, Tenant shall pay to Landlord, without notice, credit, set off, deduction, counterclaim or reduction (except as may be specifically set forth herein), monthly payments of fixed annual rent" at rates provided for in Article 2 of the Lease ("Monthly Fixed Rent"). (Czaja Aff., Ex. A, Article 2(B).) Article 2 of the Lease provides, in addition to Monthly Fixed Rent, that Tenant shall pay percentage rent, real estate tax escalations, and common charge escalations, as those terms are described and defined in the Lease, (collectively "Additional Rent"), in the manner set forth in the Lease. (*Id.* at Ex. A, Article 2.)

In connection with Tenant's execution of the Lease, Guarantor executed two guarantees, each dated March 3, 2015. (Czaja Aff., Exs. B and C.) One guarantee relates to Tenant's monetary obligations under the Lease through the date Tenant irrevocably and unconditionally vacates and surrenders the Premises (the "Guarantee"). (*Id.* at Ex. B.) The other guarantee relates to Tenant's monetary obligations under the Lease, unrelated to a vacate date, but is limited to $6,562,500 (the "Limited Guarantee" and, together with the Guarantee, the "Guarantees"). (*Id.* at Ex. C.)

In 2015, Tenant took possession of the Premises under the terms of the Lease and continues to occupy them. (Czaja Aff. ¶ 5.) Tenant operates Bloomingdale's The Outlet (the "Store") at the Premises. (*Id.* at ¶ 6.)

Temporary Closure of the Store

On March 7, 2020, Governor Andrew M. Cuomo issued Executive Order No. 202 declaring a Disaster Emergency in the State of New York. (Affidavit of Dean G. Yuzek, sworn to October 20, 2020 ("Yuzek Aff."), Ex. 4.) On March 13, 2020, President Donald J. Trump issued a "Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak," proclaiming "that the COVID-19 outbreak in the United States constitutes a national emergency, beginning March 1, 2020." (*Id.* at Ex. 5.)

By letter dated March 24, 2020, Guarantor stated to Landlord that "[a]s you know," Guarantor and its subsidiaries and affiliates "made the decision" to close all of their retail stores nationwide—including the Store—effective March 17, 2020 (the "Closure Letter"). (Czaja Aff., Ex. D.) Guarantor's Closure Letter continued as follows:

> Macy's election to cease operations is a result of the impact the COVID-19 pandemic is having on Macy's ability to operate, including: (i) closures of adjacent closed malls, (ii) mandates from quasi-governmental authorities such as the Centers for Disease Control ("CDC") and various state and local governments, and (iii) preservation and protection of the health and safety of Macy's employees, customers and the general public.

The Closure Letter also stated:

> This letter is to provide you notice that, pursuant to force majeure and/or Macy's legal and equitable remedies, Macy's has exercised its right to cease operations or otherwise reduce its operations. Macy's will continue to monitor the impact that the pandemic has on its ability to operate and make a good faith effort to reopen its stores once this pandemic has ended.

(*Id.*) The Closure Letter did not state that Tenant was irrevocably and unconditionally vacating the premises; nor has Tenant complied with the terms and conditions of the Lease, or even sought to comply with them, in order to vacate. (Czaja Aff. ¶ 13.)[1]

Neither New York State's Executive Orders nor the President's Proclamation declaring a national emergency relieved or excused Tenant's payment obligations, including the obligation to pay rent. New York State's Executive Orders No. 202.6 on March 18, 2020 required a 50% reduction of workforce in non-essential businesses no later than March 20, 2020, No. 202.7 on March 19, 2020 required a 75% reduction of workforce in non-essential businesses effective March 21, 2020, and No. 202.8 on March 20, 2020 required a 100% reduction of workforce in non-essential businesses effective March 22, 2020. (Yuzek Aff., Exs. 6, 7, and 8.) Executive Order No. 202.8 also ordered "[t]here shall be no enforcement of either an eviction of any tenant residential or commercial, or a foreclosure of any residential or commercial property for a period of ninety days." (*Id*. at Ex. 8.) Tenant's ***payment*** obligations are governed exclusively by the terms and conditions of the Lease.

New York City implemented a "phased" reopening and began "Phase 2" of the reopening plan for the State of New York on June 22, 2020, which included in-store retail businesses. (Yuzek Aff., Ex. 2, Counterclaim at ¶¶ 25-26, NYSCEF Doc. 3, and Ex. 3 at ¶¶ 25-26, NYSCEF Doc. 6.)

Tenant Fails To Pay Rent In Accordance With The Lease

In breach of Tenant's obligations under the Lease, Tenant failed to pay Landlord the Monthly Fixed Rent and Additional Rent from April 2020 through, and including, October 2020.

[1] The Closure Letter is clear that Guarantor was corresponding with Landlord on behalf of Tenant, with authority. As the Closure Letter states, Tenant is Guarantor's "subsidiary" and/or "affiliate." (Czaja Aff., Ex. D.) In the Closure Letter, Guarantor's concern is with Tenant's temporary cessation of operations, given Tenant's obligation to continuously operate its Store as required by Article 26(B)(i), which Landlord is *not* claiming constitutes a breach of the Lease, whereas Tenant's failure to meet its *monetary* obligations is the subject of this action.

(Czaja Aff. ¶ 15 and Ex. E.) The total amount due through October 20, 2020 is $3,883,198.70. (*Id.* at ¶ 16.)

Despite demand from Landlord, Tenant has failed to pay any of the amounts owed to Landlord under the Lease since March 2020. (Czaja Aff. ¶¶ 15-16.) Consequently, in accordance with the Lease, Landlord demanded payment from Guarantor. (*Id.* ¶ 17 and Ex. F.) Guarantor has similarly failed to pay Landlord in accordance with the Guarantees. (*Id.* at ¶ 18.)

ARGUMENT

I. PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT ON ITS FIRST CAUSE OF ACTION AGAINST TENANT FOR BREACH OF THE LEASE

In the Complaint's first cause of action, Landlord seeks money damages against Tenant as a result of its defaults in the payment of Monthly Fixed Rent and Additional Rent due under the Lease. Landlord is entitled to summary judgment on this cause of action.

Tenant's failure to pay rent is a clear breach of the Lease. Article 2 of the Lease provides that Tenant shall pay Monthly Fixed Rent and Additional Rent "without notice, credit, set off, deduction, counterclaim or reduction (except as may be specifically set forth herein)" (Czaja Aff., Ex. A, Article 2). Nothing in the applicable Articles of the Lease, referred to below, excuses Tenant from this obligation.

Article 21(A) of the Lease provides that Tenant's obligation to pay Monthly Fixed Rent or Additional Rent is not affected, impaired or excused by specified force majeure events which include, among other things: (1) governmental pre-emption in connection with a national emergency, (2) any rule, order or regulation of any governmental agency, (3) any closure of the Premises by Landlord or by others reasonably intended to assure the health or safety of any person in response to a national, state or municipal emergency (whether or not officially proclaimed by any governmental authority), or (4) any other cause beyond Landlord's control. (Czaja Aff., Ex.

A, Article 21(A).) Article 21(A) further provides that Tenant shall not claim force majeure events specified in the Lease, or other events beyond Tenant's control, as a defense to any demand of Landlord, or action initiated by it, resulting from Tenant's failure to comply with any of its monetary obligations. (*Id.*)

Thus, the Lease is clear that although Landlord's obligations and certain of Tenant's ***non-monetary*** obligations (such as continuous operation of its Store on the Premises under Article 26(B)(i) of the Lease) may be excused because of these force majuere events, Tenant is unequivically *not* excused from its obligations to pay rent and satisfy its other ***monetary*** obligations. (Czaja Aff., Ex. A., Articles 21 and 26.) Tenant, therefore, is liable to Landlord for damages under the terms of the Lease. Tenant cannot now avoid the bargain it struck.

It is, of course, bedrock law that "'[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.'" *Vermont Teddy Bear Co., Inc. v. 538 Madison Realty Co.,* 1 N.Y.3d 470, 475 (2004) (citation omitted). Just the opposite, "[w]here language has been chosen containing no inherent ambiguity or uncertainty, courts are properly hesitant, under the guise of judicial construction, to imply additional requirements to relieve a party from asserted disadvantage flowing from the terms actually used." *Collard v. Inc. Vill. of Flower Hill*, 52 N.Y.2d 594, 604 (1981). Here, the terms of the Lease are unambiguous. Notwithstanding any governmental preemption or executive orders issued in connection with the Covid-19 pandemic, a national health emergency, or closure of the Store in connection therewith, Tenant remains obligated to pay rent to Landlord in accordance with the agreed-upon terms of the Lease.

The recent decision in *BKNY1, Inc. v. 132 Capulet Holdings, LLC*, No. 508647/16, 2020 WL 5745631 (N.Y. Sup Ct. Kings Cty. Sept. 23, 2020), is in accord. There, on a motion to vacate

a Yellowstone injunction because of tenant's failure to pay rent in April and May of 2020, during which time it closed its restaurant in compliance with Executive Order 202.3, the Court explained that the mandatory closure did not relieve the tenant of its obligation to pay rent. The Court's analysis fits here like a glove:

> The mandatory closure of [Tenant's Store] during those months by Executive Order No. 202.3 as cited by [Tenant], did not relieve it of its contractual obligation to pay rent. [Tenant] has failed to cite - and the Court's own review has not uncovered - any provision of the lease excusing it from timely and fully paying its rent during (and notwithstanding) the state-mandated closure of its business.

Id. at *1.

The Court pointed to the fact that the lease specifically provided that tenant's "obligation to pay rent '***shall in no wise be affected, impaired or excused*** because Owner is unable to fulfill any of its obligations under this lease . . .by reason of . . . government preemption or restrictions.'" *Id*. at *2. (Emphasis added.) Similarly, Article 21 of the Lease states that if Landlord "does not fulfill any obligation under this lease" because of (1) governmental pre-emption in connection with a national emergency, (2) any rule, order or regulation of any governmental agency, (3) any closure of the Premises by Landlord or by others reasonably intended to assure the health or safety of any person in response to a national, state or municipal emergency (whether or not officially proclaimed by any governmental authority), or (4) any other cause beyond Landlord's control, then "Tenant's obligation to pay rent hereunder **shall in no wise be affected, impaired or excused**." (Czaja Aff., Ex. A, Article 21.) (Emphasis added.) The Court underscored that the doctrines of frustration of purpose and impossibility of performance (the very defenses asserted by Defendents here and discussed more fully below) are inapplicable in these circumstances. The Court explained that a temporary closure during a nine-year lease term (much like the 10-year and seven-month lease term here), even in light of a governmental order, was not sufficient to frustrate

the purpose of the lease, and the language of the lease requiring payment of rent directly undercuts the applicability of the impossibility of performance doctrine. *BKNY1, Inc.,* 2020 WL 5745631, at *2. Like the tenant in *BKNY1, Inc.*, Tenant here was—and continues to be—required to pay rent to Landlord and satisfy other monetary obligations in accordance with the terms of the Lease. Tenant has failed to comply with these obligations.

Accordingly, summary judgment should be granted in favor of Landlord on the first cause of action for breach of the Lease.

II. PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT ON ITS SECOND CAUSE OF ACTION AGAINST GUARANTOR FOR BREACH OF THE GUARANTEES

The second cause of action of the Complaint seeks to recover from Guarantor the amounts due from Tenant under the terms of the Lease. Landlord is entitled to summary judgment on this cause of action as well. It is well-settled that: "[o]n a motion for summary judgment to enforce an unconditional guaranty, the creditor must prove the existence of the guaranty, the underlying debt and the guarantor's failure to perform under the guaranty." *Davimos v. Halle*, 35 A.D.3d 270, 272 (1st Dep't 2006). *See also City of New York v. Clarose Cinema Corp.,* 256 A.D.2d 69, 71 (1st Dep't 1998).

In *Plaza 52, LLC v. Cohen*, 2009 N.Y. Slip Op. 31849(U) (Sup. Ct. N.Y. Cty. 2009), landlord established its *prima facie* entitlement to summary judgment against the guarantors of the tenant's obligations under the lease where the landlord "presented a copy of the guaranty and the affidavit of its managing agent … that sets forth a calculation of the amount of unpaid rent and other charges that [tenant] is liable for, and states that neither [tenant] nor defendants has ever made any payments towards these amounts." Since the defendant guarantors did not contest that neither the tenant nor they ever reimbursed the landlord for tenant's debts, "it is clear that

[landlord] has established all of the elements of its breach of guaranty claims against defendants" *Id* at *4-5. *See also Broadway 36th Realty, LLC v. London*, 29 Misc. 3d 1238(A) (Sup. Ct. N.Y. Cty. 2010) (granting summary judgment to landlord on claim under unconditional guaranty of tenant's obligations under the lease to pay all rent, additional rent and other charges).

Here, Guarantor executed the Guarantee in which Guarantor "unconditionally and absolutely" guaranteed payment of rent to Landlord. Section 3.1(a) of the Guarantee provides that Guarantor "irrevocably, absolutely and unconditionally guarantees to the Landlord the full and timely payment when due of all fixed annual rent, additional rent and other payments due to the Landlord pursuant to the Lease . . . which shall accrue prior to the date Tenant vacates the Demised Premises." (Czaja Aff., Ex B, Section 3.1(a).) Section 3.1(a) of the Guarantee explains that "Tenant shall be deemed to have vacated the Demised Premises on the date on which both (i) the Tenant has ceased conducting business in the Demised Premises and (ii) Tenant has notified Landlord in writing that Tenant has irrevocably and unconditionally vacated the Demised Premises." (*Id.*) It is an undisputed fact that Tenant has not notified Landlord, in writing as required (or otherwise), that it has irrevocably and unconditionally vacated the demised premises. (Czaja Aff. ¶ 13.)

Tenant owes Landlord Monthly Fixed Rent and Additional Rent for the period from April 2020 through and including October 2020 in the amount of $3,883,198.70. (Czaja Aff. ¶¶ 15-16 and Ex. E.) Neither Tenant nor Guarantor has paid any portion of this outstanding debt. (*Id.* at ¶¶ 15-18.)

Section 3.1(a) of the Guarantee contains what is commonly referred to as a "good guy" clause which allows a tenant to be released from the liability of completing the agreed-upon rental period if the tenant vacates the leased premises. (Czaja Aff., Ex. B, Section 3.1(a).) But where all

the conditions of a good guy clause are not satisfied, the limitation of liability set forth therein will not apply, and a guarantor is liable for all the damages owed by the tenant for the full term of the lease. *See 300 Park Ave., Inc. v. Café 49, Inc.*, 89 A.D.3d 634, 634 (1st Dep't 2011) ("[i]t is undisputed that the last condition [of the good guy guaranty] was never satisfied and, thus, the motion court properly found [guarantor] liable for damages until the end of the 'Term' … as set forth by the lease"); *Fairchild Warehouse Assocs., LLC v. Water Chef, Inc.*, No. 6013812012, 2014 WL 12639275, at *2 (Sup. Ct. Nassau Cty. Apr. 16, 2014) ("[s]ince the defendants have failed to satisfy the relevant conditions of the Good Guy clause, the limitation of liability set forth in the Good Guy clause is unavailable"); *Joseph P. Day Realty Corp. v. Srinivasan*, 2012 N.Y. Slip Op. 31794(U), at *5 (Sup. Ct. N.Y. Cty. 2012) (because the conditions in the good guy clause were not satisfied, "defendant's liability under the guaranty is continuing").

In *Joseph P. Day Realty Corp.*, the good guy guaranty at issue required "the tenant to deliver an actual surrender instrument confirming that the 'premises are vacant, broom clean, free of occupants, free of Tenant and any other party claiming rights of occupancy." *Id.* In holding that the guarantor's liability under the guaranty did not terminate upon leaving the premises and that the landlord was entitled to summary judgment against the guarantor, the Court held:

> Since it is undisputed that plaintiff was never provided with such an instrument, a "surrender" within the meaning of the guaranty did not occur, and defendant's liability under the guaranty is continuing…. Here, as in *300 Park Avenue Inc. v. Cafe 49, Inc.*, the terms of the guaranty are unambiguous and it is undisputed that defendant guarantor failed to satisfy the conditions as required by the guaranty necessary to release him from liability.

Id. at 5.

Here, as set forth above, Section 3.1(a) of the Guarantee provides that Guarantor's liability continues until Tenant vacates the premises and defines the "vacate" date as "the date on which *both* (i) the Tenant has ceased conducting business in the Demised Premises and (ii) *Tenant has*

notified Landlord in writing that Tenant has irrevocably and unconditionally vacated the Demised Premises." (Czaja Aff., Ex B, Section 3.1(a).) (Emphasis added.) While Defendants assert in their answer and counterclaims that Tenant "vacated" the premises, this assertion is undisputably false. The Closure Letter sent by Guarantor to Landlord stated only that Tenant would cease operations or reduce its operations, and that the Guarantor would monitor the impact the pandemic has on Tenant's ability to operate and make a good-faith effort to reopen. (Czaja Aff., Ex D.) This statement is antithetical to the requirement of the Guarantee that Tenant, to vacate, was required to notify Landlord, in writing, that it has "irrevocably and unconditionally vacated" the leased premises. (Czaja Aff., Ex B, Section 3.1(a).) Because the conditions set forth in the Guarantee were not satisfied, Guarantor remains liable under the Guarantee for all of Tenant's monetary obligations under the Lease for the remainder of the Lease term.[2]

Accordingly, summary judgment should be granted in favor of Landlord on the second cause of action for breach of the Guarantee.

III. DEFENDANTS' AFFIRMATIVE DEFENSES DO NOT PROVIDE ANY BASIS FOR IGNORING THE PLAIN TERMS OF THE LEASE AND GUARANTEES

It is well-settled that sophisticated business parties who enter into commercial leases are bound by the terms of the agreements they make. *See Accurate Copy Serv. of Am., Inc. v. Fisk Bldg. Assocs. LLC,* 72 A.D.3d 456, 457 (1st Dep't 2010) ("[T]he public policy in New York is to respect negotiated commercial leases," and "the unambiguous terms of a lease will not be disregarded 'for the purpose of alleviating a hard or oppressive bargain'") (quoting *George Backer*

[2] Landlord appropriately invokes the Guarantee, as set forth in Section 5.1 therein, not just the Limited Guarantee, since Tenant has not met the conditions for vacating the premises. The Limited Guarantee under which Landlord would, alternatively, be entitled to judgment, relates to Tenant's monetary obligations beyond any vacate date but is limited to the amount of $6,562,500. (Czaja Aff., Ex C, Section 5.13.)

Mgmt. Corp. v. Acme Quilting Co., 46 N.Y.2d 211, 217 (1978)); *Meyers Parking Sys., Inc. v. 475 Park Ave. So. Co.*, 588 N.Y.S.2d 32, 33 (1st Dep't 1992) (holding that where lease "clearly and unambiguously specified" the terms and "the lease had been negotiated at arms' length and abided by for over a period of 20 years," the trial court correctly concluded that "the parties intended that which they wrote") (quotations and citation omitted). *See also Maxton Builders, Inc. v. Lo Galbo,* 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."). Each of Tenant's defenses fails as a matter of undisputed fact, meaning the unambiguous terms of the Lease, and applicable law.[3]

A. The Doctrine Of Impossibility Of Performance Does Not Provide A Defense To The Claims In This Action

"Generally, once a party to a contract has made a promise, that party must perform or respond in damages for its failure, even when unforeseen circumstances make performance burdensome." *Kel Kim Corp. v. Central Mkts, Inc.*, 70 N.Y.2d 900, 902 (1987). The defense of impossibility of performance, a common-law exception to this general rule, is "applied narrowly . . . . Impossibility excuses a party's performance *only* when the destruction of the subject matter of

[3] Defendant Bloomingdale's, LLC as Tenant under the Lease executed by its Executive Vice President and General Counsel (Czaja Aff., Ex. A), and defendant Macy's, Inc. as Guarantor of the Lease under Guarantees executed by its Senior Vice President (*Id*. at Exs. B and C), are quintessential sophisticated business parties. They either well knew, or certainly should have known, when they, respectively, agreed to and guaranteed the unambiguous terms and conditions of the Lease, particularly Article 21(A), that: Tenant was agreeing to pay, and Guarantor was guaranteeing the payment of, *all* monetary obligations of Tenant, including substantial late fees and liquidated damages (*see* Czaja Aff., Ex. A, Article 42), intended and understood to ensure compliance with such monetary obligations, regardless of a specified array of force majeure events, including, but not limited to, national health emergencies and executive orders resulting in a Building closure.

the contract or the means of performance makes performance *objectively impossible.*" *Id.* (emphasis added). "Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract." *Id.*

Objective impossibility, required for this defense, is an extremely narrow category, and "impossibility occasioned by financial hardship" is expressly excluded from the doctrine. *Urban Archaeology Ltd. v. 207 E. 57th Street LLC*, 68 A.D.3d 562, 562 (1st Dep't 2009) (citing *407 E. 61st Garage v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 281-82 (1968) ("[W]here impossibility or difficulty in 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.") "Moreover, economic downturn," even when occasioned by such unprecedented events and at the massive scale of the 2008 global financial crisis, as in *Urban Archaeology*, 68 A.D.3d at 562, "could have been foreseen or guarded against in the lease," making the doctrine of impossibility inapplicable.

Recent authority confirms that, under New York law, "financial difficulties arising out of the COVID-19 pandemic and the PAUSE Executive Order that adversely affected [a party's] ability to make the payments called for under" a contract do not excuse performance. *Lantino v. Clay LLC*, No. 1:18-cv-12247 (SDA), 2020 WL 2239957, at *3 (S.D.N.Y. May 8, 2020); *see also Metpath Inc. v. Birmingham Fire Ins. Co. of Pa.*, 86 A.D.2d 407, 408-10 (1st Dep't 1982) (unforeseeable Federal executive order that ended airline traffic controller strike within three days did not render performance of contract for insurance against strike lasting longer than seven days impossible because contract specifically allocated the risk of a shorter strike to the insured).

Here, not only *could* the parties have foreseen and guarded against a national health-related or other emergency and related governmental orders, but they *did* so. Articles 21 and 26 of the Lease, among other provisions, provide that, in such events, Tenant could be relieved from non-

monetary obligations but would remain obligated to pay rent and satisfy other monetary obligations. (Czaja Aff., Ex. A, Articles 21 and 26.) Article 14 of the Lease also provides for Tenant to comply "*at its sole cost and expense*" with all future "laws, rules, orders, ordinances, regulations, statutes, requirements, codes and executive orders applicable to the use, alteration, maintenance and operation of the demised premises." (*Id.* at Article 14) (Emphasis added.) Article 46, too, provides that whenever "Tenant is required to comply with laws, orders and regulations of any governmental authority having or asserting jurisdiction over the demised premises," Tenant is not entitled "to claim actual or constructive eviction, partial or total, or to receive any abatement or diminution of rent" because of such compliance. (*Id.* at Article 46.)

In *BKNY1, Inc.* discussed above, the Court held that "closure of [tenant's] restaurant business during those months [of April and May 2020] by Executive Order No. 202.3 . . . did not relieve it of its contractual obligation to pay rent." 2020 WL 5745631, at *1. The Court pointed to the absence of any provision of the lease excusing tenant "from timely and fully paying its rent during (and notwithstanding) the state-mandated closure of its business." *Id.* The Court explained the inapplicability of the impossibility of performance doctrine as follows:

> Nothing in the lease at issue permits termination or suspension of plaintiff's obligation to pay rent in the event of the issuance of a governmental order restricting the use of the leased premises (*see Casteel USA v V.C. Vitanza Sons, Inc.*, 170 AD2d 568, 569 (2d Dept 1991]). To the contrary, the lease specifically provides that plaintiff's obligation to pay rent "shall in no wise be affected, impaired or excused because Owner is unable to fulfill any of its obligations under this lease . . .by reason of . . . government preemption or restrictions" (Lease [NYSCEF #24], ¶ 26), which is the case here.

Id. at *2.

So too here. Article 21(A) of the Lease explicitly addresses governmental pre-emption in connection with a national emergency, the closure of the Building or the Premises by Landlord or others reasonably intended to assure the health or safety of the Building, the Premises, or any person

in response to a national, state or municipal emergency, any rule, order or regulation of any governmental agency, and any other event beyond Landlord's control. (Czaja Aff., Ex. A, Article 21(A).) Regarding any and all such events, which the Parties obviously foresaw by virtue of their inclusion in the Lease, Article 21(A) also provides that "Tenant's obligation to pay rent hereunder shall in no way be affected, impaired or excused," and "Tenant shall under no circumstances fail or refuse to pay any installments of fixed annual rent or any additional rent . . . as a result thereof." (*Id.*) Such language is strikingly similar to the lease language in *BKNY1, Inc.* The defense of impossibility of performance is inapplicable here.

B. The Doctrine Of Frustration Of Purpose Does Not Provide A Defense To The Claims In This Action

The common-law contractual defense of frustration of purpose "is a narrow one which does not apply 'unless the frustration is substantial'. In order to invoke this defense, the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense." *Crown IT Servs., Inc. v. Koval-Olsen*, 11 A.D.3d 263, 265 (1st Dep't 2004) (citing *Rockland Dev. Assocs. v. Richlou Auto Body, Inc.,* 173 A.D.2d 690 (2d Dep't 1991) and Restatement (Second) of Contracts Section 265 (1981).) In the context of a commercial lease, "it is not enough that the transaction has become less profitable for the affected party or even that he will sustain a loss." *Rockland Dev.*, 173 A.D.2d at 691.

Instead, frustration of purpose generally requires that the leased premises be rendered entirely unsuitable for the intended commercial purposes for a significant period—often permanently. *See, e.g., Jack Kelly Partners LLC v. Zegelstein*, 140 A.D.3d 79, 85 (1st Dep't 2016) (frustration of purpose defense permitted where leased premises could not legally be used as office space during any part of the lease term due to a certificate of occupancy allowing only residential use); *Elkar Realty Corp. v. Kamada*, 6 A.D.2d 155, 157 (1st Dep't 1958) (purpose of commercial

lease frustrated when it became clear that it was impossible to adequately renovate floor of premises, such that contemplated business could not legally open at any time).

By contrast, where, as here, the loss of the use of the space is temporary, and the parties to the lease have explicitly allocated the risk of loss to the tenant, the doctrine is inapplicable. Tenant has admitted that the disruption to its use of the Premises was temporary, and that it has now resumed commercial use of the Store. (Yuzek Aff., Ex. 2, Counterclaim at ¶ 26, NYSCEF Doc. 3.) In the fifth year of Defendant's 10-year, seven-month Lease term, during only two months, April and May of 2020, was Tenant's Store closed and not operational for the full month. Tenant was open and operational during parts of March and June 2020, and thereafter. (Czaja Aff. ¶ 14.) This temporary closure of Tenant's Store did not frustrate the overall purpose of the lease. *BKNY1, Inc.*, 2020 WL 5745631, at *2 ("closure of [tenant's] business for two months (April and May 2020) in the penultimate year of its initial [nine-year] term could not have frustrated its overall purpose.")

The First Department's recent decision in *Center for Specialty Care, Inc. v. CSC Acquisition I, LLC*, 185 A.D.3d 34 (1st Dep't 2020), is instructive. There, several defendants contracted with a plaintiff medical business owner, which also owned the building in which the business operated, to purchase the business. *Id.* at 36. As part of the contemplated transaction, defendants were required to apply for a Certificate of Need ("CON") with the New York Department of Health, since such a certificate was necessary to operate the medical business in question, by September 1, 2015. *Id.* at 35-37. Regardless of whether the CON was obtained, defendants were required to begin making payments under the lease as of October 1, 2015. *Id.* at 37. Defendants did not obtain a CON by October 1, 2015 and did not begin making rent payments as agreed. *Id.* at 39. Plaintiff sued for breach of the lease and guarantee, and in response defendants argued that the lack of the CON frustrated the purpose of the lease, because the premises could not

be used as a medical practice without it. *Id.* at 39-40. The First Department rejected this argument. Noting that "the parties accounted for the fact that the CON would not be available on October 1" in the related administrative services agreement, the Court held that "because the parties acknowledged, and planned for" such a contingency, "this case cannot be compared to cases . . . where the tenant was completely deprived of the benefit of its bargain" and the doctrine of frustration of purpose did not provide a defense. *Id.* at 43.

The same reasoning applies here, for the same reasons pertaining to the impossibility of performance defense. The frustration of purpose defense is also inapplicable here.

IV. PLAINTIFF IS ENTITLED TO A DECLARATORY JUDGMENT

In order for a court to entertain a request for a declaratory judgment, there must be an actual and justiciable controversy between the parties. *See Matter of Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 713 (1980); CPLR 3001. The proper remedy, where the party seeking a declaratory judgment is not entitled to the relief it has requested, is not to dismiss the cause of action seeking declaratory relief but, instead, to enter a judgment declaring the rights of the parties *in favor of the opposing party*. *See, e.g., Rockland Light & Power Co. v. City of New York*, 289 N.Y. 45, 51 (1942) ("The court should, in proper case, retain jurisdiction of the action and should exercise its power to declare the rights and legal relations of the parties whatever they may be") (emphasis in original); *see also Plaza Mgmt. Co. v. City Rent Agency*, 31 A.D.2d 347, 350 (1st Dep't 1969), *aff'd*, 25 N.Y.2d 630 (1969) (same); *Staver Co. v. Skrobisch*, 144 A.D.2d 449, 450 (2d Dep't 1988).

Here, Defendants assert that payment of rent should be excused under either the frustration of purpose or impossibility of performance doctrines. But, as discussed above, both defenses fail. Accordingly, Landlord is entitled to a declaratory judgment that (1) the purpose of the Lease has not been frustrated, (2) performance of the Lease has not been rendered impossible, (3) Defendants

are not entitled to any abatement or suspension of their monetary obligations under the Lease and the Guarantees, and (4) Defendants are obligated to pay all outstanding Rent and Additional Rent in full and to continue paying all monetary obligations going forward, as required by the Lease and Guarantees.

V. PLAINTIFF IS ENTITLED TO ATTORNEYS' FEES

Landlord is also entitled to an award of its reasonable attorneys' fees and expenses in connection with enforcing Landlord's rights under the Lease and Guarantees.

Article 6(D) of the Lease entitles Landlord to recover from Tenant the attorneys' fees and expenses incurred in enforcing and defending Landlord's rights under the Lease regardless of whether Landlord is the prevailing party. (Czaja Aff., Ex. A, Article 6(D).) Section 5.2 of the Guarantee entitles Landlord to recover from Guarantor the attorneys' fees and expenses incurred by Landlord in enforcing Landlord's rights under the Lease and Guarantee. (*Id.* at Ex. B, Article 5.2.)

Consequently, both Tenant and Guarantor are liable for Landlord's reasonable attorneys' fees and expenses incurred in enforcing, and defending, Landlord's rights under both the Lease and the Guarantee. Summary judgment in Landlord's favor is warranted, and the amount of attorneys' fees and expenses Landlord is entitled to recover should be the subject of a hearing.

CONCLUSION

Based on the foregoing and the accompanying submissions of Landlord, Plaintiff Broadway/72nd Associates II, LLC respectfully requests the Court to grant Plaintiff's motion for summary judgment in all respects.

Dated: New York, New York
October 20, 2020

Respectfully submitted,

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ATTORNEY CERTIFICATION PURSUANT TO COMMERCIAL DIVISION RULE 17

I, Jennifer B. Zourigui, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this Memorandum of Law complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)) because it contains 6302 words, excluding the parts of the Memorandum exempted by Rule 17. In preparing this certification, I have relied on the word count of the word processing system used to prepare this Memorandum of Law.

Dated: October 20, 2020
New York, New York

By: _____
Jennifer B. Zourigui