

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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223 AVENUE B, LLC,

Plaintiff,

-against-

SUBWAY REAL ESTATE, LLC D/B/A SUBWAY,
GEETA FASTFOOD ENTERPRISE INC,
and ABHIMANUE MANCHANDA,

Defendants.

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**PLAINTIFF’S VERIFIED
REPLY TO DEFENDANT
SUBWAY REAL ESTATE, LLC
D/B/A SUBWAY’S VERIFIED
ANSWER, COUNTERCLAIMS
AND CROSSCLAIMS**

Index No.: 613065/2020

Plaintiff, 223 Avenue B, LLC (“Plaintiff”), by its attorneys, Jaspan Schlesinger LLP, as and for this Reply to the Counterclaims (“Reply”) set forth by defendant Subway Real Estate, LLC d/b/a Subway (“Defendant”) in its Verified Answer, Counterclaims and Crossclaims, dated January 27, 2021 (the “Answer”), respectfully alleges as follows:

REPLY TO AFFIRMATIVE DEFENSES

1. Denies the allegations contained in paragraph “78” of the Answer except admits that Plaintiff and Defendant entered into a 10-year lease agreement made as of April 1, 2011 for a portion of the building located at, and known as, 223 Avenue B, New York, New York 10009 (the “Building”) including certain retail space and basement consisting of approximately 900 square feet (the “Premises”), and refers this Court to the document referred to in this paragraph for the contents thereof and denies any allegations inconsistent therewith.

2. Denies the allegations contained in paragraph “79” of the Answer and avers that the Premises would be used for the operation of a SUBWAY® sandwich shop for on and off premises consumption or for any other lawful purpose, and refers this Court to the document referred to in this paragraph for the contents thereof and denies any allegations inconsistent therewith.

3. Denies the allegations contained in paragraph “80” of the Answer and avers that the Premises was to be used for a SUBWAY® sandwich shop for on and off premises consumption or for any other lawful purpose, and refers this Court to the documents referred to in this paragraph for the true content and meaning thereof and denies any allegations inconsistent therewith.

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs “81” through “82” of the Answer.

5. The allegations contained in paragraphs “83” through “84” of the Answer are not factual allegations but assertions, interpretations or conclusions of law, to which no response is required. To the extent that a response is deemed necessary, Plaintiff denies the allegations contained in these paragraphs and refers this Court to the document referred to in this paragraph for the true content and meaning thereof and denies any allegations inconsistent therewith.

6. Admits the allegations contained in paragraph “85” of the Answer.

7. Admits the allegations contained in paragraph “86” of the Answer and avers that Executive Order 202 was issued by the Governor of the State of New York, Andrew M. Cuomo (the “Governor”) on March 7, 2020.

8. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph “87” of the Answer except admits that the Governor issued a series of Executive Orders and respectfully refers this Court to the Executive Orders referred to in this paragraph for the true content and meaning thereof and denies any allegations inconsistent therewith.

9. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph “88” of the Answer except admits that Executive Order 202.6

was issued by the Governor on March 18, 2020, and respectfully refers this Court to the Executive Order referred to in this paragraph for the true content and meaning thereof and denies any allegations inconsistent therewith.

10. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph “89” of the Answer except admits that Executive Order 202.8 was issued by the Governor on March 20, 2020, and respectfully refers this Court to the Executive Order referred to in this paragraph for the true content and meaning thereof and denies any allegations inconsistent therewith.

11. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph “90” of the Answer.

12. The allegations contained in paragraph “91” of the Answer are not factual allegations but assertions, interpretations or conclusions of law, to which no response is required. To the extent that a response is deemed necessary, Plaintiff denies the allegations contained in this paragraph, avers that restaurant operations for take-out and delivery were not suspended under the Governor's Executive Order 202.3 issued on March 16, 2020, and respectively refers the Court to the subject lease and relevant Executive Orders for the true content and meaning thereof and denies any allegations inconsistent therewith.

13. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph “92” of the Answer.

14. The allegations contained in paragraph “93” of the Answer are not factual allegations but assertions, interpretations or conclusions of law, to which no response is required. To the extent that a response is deemed necessary, Plaintiff denies the allegations contained in paragraph “93” of the Answer and avers that restaurant operations for take-out and delivery were

not suspended under the Governor's Executive Order 202.3 issued on March 16, 2020, and respectively refers the Court to the subject lease and relevant Executive Orders for the true content and meaning thereof and denies any allegations inconsistent therewith.

15. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "94" of the Answer but avers that restaurant operations for take-out and delivery were not suspended under the Governor's Executive Order 202.3 issued on March 16, 2020 and Defendant and its subtenant/franchisee/licensee remained in possession of the Premises.

16. The allegations contained in paragraph "95" of the Answer are not factual allegations but assertions, interpretations or conclusions of law, to which no response is required. To the extent that a response is deemed necessary, Plaintiff denies the allegations contained in paragraph "95" of the Answer and respectively refers the Court to the subject lease and relevant Executive Orders for the true content and meaning thereof and denies any allegations inconsistent therewith.

17. The allegations contained in paragraphs "96" and of the Answer are not factual allegations but assertions, interpretations or conclusions of law, to which no response is required. To the extent that a response is deemed necessary, Plaintiff denies the allegations contained in paragraph "96" of the Answer and respectively refers the Court to the subject lease and relevant Executive Orders for the true content and meaning thereof and denies any allegations inconsistent therewith.

18. The allegations contained in paragraph "97" of the Answer are not factual allegations but assertions, interpretations or conclusions of law, to which no response is required.

To the extent that a response is deemed necessary, Plaintiff denies the allegations contained in paragraph “97” of the Answer.

19. Plaintiff denies the allegations contained in paragraph “98” of the Answer and avers that a SUBWAY® sandwich shop operated at the Premises for approximately 8 years and arrearages on the subject lease began before March 2020 and issuance of the Governor's Executive Orders as evidenced by Plaintiff's tenant ledger annexed to the Plaintiff's Amended Verified Complaint as Exhibit “B”.

20. Admits the allegations contained in paragraph “99” of the Answer.

21. The allegations contained in paragraphs “100” through “129” of the Answer (the “Affirmative Defense Section”) are not factual allegations but assertions, interpretations or conclusions of law, to which no response is required. To the extent that a response is deemed necessary, Plaintiff denies the allegations contained these paragraphs of the Affirmative Defense Section.

REPLYING TO THE FIRST COUNTERCLAIM
(Rescission for Frustration of Purpose)

22. Plaintiff repeats and realleges the responses asserted in this Reply to the allegations in the preceding paragraphs of the Answer, in response to paragraph “130” of the Answer.

23. The allegations contained in paragraph “131” of the Answer are not factual allegations but assertions, interpretations or conclusions of law, to which no response is required. To the extent that a response is deemed necessary, Plaintiff denies the allegations contained in paragraph “131” of the Answer and avers that Defendant was in default under the subject lease before the date that the Governor declared a State disaster emergency for the entire State of New York on March 7, 2020 by Executive Order 202, and respectfully refers the Court to the subject

lease and relevant Executive Orders for the true content and meaning thereof and denies any allegations inconsistent therewith.

24. The allegations contained in paragraph “132” of the Answer are not factual allegations but assertions, interpretations or conclusions of law, to which no response is required. To the extent that a response is deemed necessary, Plaintiff denies the allegations contained in paragraph “132” of the Answer and avers that Defendant was in default under the subject lease well before the date that the Governor declared a State disaster emergency for the entire State of New York on March 7, 2020 by Executive Order 202, and respectfully refers the Court to the subject lease and relevant Executive Orders for the true content and meaning thereof and denies any allegations inconsistent therewith.

25. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph “133” of the Answer.

26. The allegations contained in paragraph “134” of the Answer are not factual allegations but assertions, interpretations or conclusions of law, to which no response is required. To the extent that a response is deemed necessary, Plaintiff denies the allegations contained in paragraph “134” of the Answer.

27. The allegations contained in paragraph “135” of the Answer are not factual allegations but assertions, interpretations or conclusions of law, to which no response is required. To the extent that a response is deemed necessary, Plaintiff denies the allegations contained in paragraph “135” of the Answer except admits that Plaintiff seeks to enforce the subject lease.

28. The allegations contained in paragraph “136” of the Answer are not factual allegations but assertions, interpretations or conclusions of law, to which no response is required. To the extent that a response is deemed necessary, Plaintiff denies the allegations contained in

paragraph “136” of the Answer and respectfully refers the Court to the subject lease for the true content and meaning thereof and denies any allegations inconsistent therewith.

29. The allegations contained in paragraph “137” of the Answer are not factual allegations but assertions, interpretations or conclusions of law, to which no response is required. To the extent that a response is deemed necessary, Plaintiff denies the allegations contained in this paragraph and avers that arrearages on the subject lease began before March 2020 and issuance of the Governor's Executive Orders as evidenced by Plaintiff's tenant ledger annexed to the Plaintiff's Amended Verified Complaint as Exhibit “B”, and respectively refers the Court to the subject lease for the true content and meaning thereof and denies any allegations inconsistent therewith.

30. The allegations contained in paragraph “138” of the Answer are not factual allegations but assertions, interpretations or conclusions of law, to which no response is required. To the extent that a response is deemed necessary, Plaintiff denies the allegations contained in paragraph “138” of the Answer.

31. The allegations contained in paragraph “139” of the Answer are not factual allegations but assertions, interpretations or conclusions of law, to which no response is required. To the extent that a response is deemed necessary, Plaintiff denies the allegations contained in paragraph “139” of the Answer.

32. The allegations contained in paragraph “140” of the Answer are not factual allegations but assertions, interpretations or conclusions of law, to which no response is required. To the extent that a response is deemed necessary, Plaintiff denies the allegations contained in paragraph “140” of the Answer.

33. The allegations contained in paragraph “141” of the Answer are not factual allegations but assertions, interpretations or conclusions of law, to which no response is required. To the extent that a response is deemed necessary, Plaintiff denies the allegations contained in paragraph “141” of the Answer.

34. The allegations contained in paragraph “142” of the Answer are not factual allegations but assertions, interpretations or conclusions of law, to which no response is required. To the extent that a response is deemed necessary, Plaintiff denies the allegations contained in paragraph “142” of the Answer.

REPLYING TO THE SECOND COUNTERCLAIM
(In the Alternative - Rescission Based on Impossibility of Performance)

35. Plaintiff repeats and realleges the responses asserted in this Reply to the allegations in the preceding paragraphs of the Answer, in response to paragraph “143” of the Answer.

36. Admits the allegations contained in paragraph “144” of the Answer and respectfully refers this Court to the subject lease referred to in this paragraph for the true content and meaning thereof and denies any allegations inconsistent therewith.

37. The allegations contained in paragraph “145” of the Answer are not factual allegations but assertions, interpretations or conclusions of law, to which no response is required. To the extent that a response is deemed necessary, Plaintiff denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph “145” of the Answer.

38. The allegations contained in paragraph “146” of the Answer are not factual allegations but assertions, interpretations or conclusions of law, to which no response is required. To the extent that a response is deemed necessary, Plaintiff denies the allegations contained in

paragraph “146” of the Answer and avers that restaurant operations for take-out and delivery were not suspended under the Governor's Executive Order 202.3 issued on March 16, 2020, and respectively refers the Court to the subject lease and relevant Executive Orders for the true content and meaning thereof and denies any allegations inconsistent therewith.

39. The allegations contained in paragraph “147” of the Answer are not factual allegations but assertions, interpretations or conclusions of law, to which no response is required. To the extent that a response is deemed necessary, Plaintiff denies the allegations contained in paragraph “147” of the Answer and avers that restaurant operations for take-out and delivery were not suspended under the Governor's Executive Order 202.3 issued on March 16, 2020, and respectively refers the Court to the subject lease and relevant Executive Orders for the true content and meaning thereof and denies any allegations inconsistent therewith.

40. The allegations contained in paragraph “148” of the Answer are not factual allegations but assertions, interpretations or conclusions of law, to which no response is required. To the extent that a response is deemed necessary, Plaintiff denies the allegations contained in paragraph “148” of the Answer.

REPLYING TO THE THIRD COUNTERCLAIM
(In the Alternative - Reformation of Lease)

41. Plaintiff repeats and realleges the responses asserted in this Reply to the allegations in the preceding paragraphs of the Answer, in response to paragraph “149” of the Answer.

42. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph “150” of the Answer.

43. The allegations contained in paragraph “151” of the Answer are not factual allegations but assertions, interpretations or conclusions of law, to which no response is required.

To the extent that a response is deemed necessary, Plaintiff denies the allegations contained in paragraph “151” of the Answer and avers that Defendant was in default under the subject lease well before the date that the Governor declared a State disaster emergency for the entire State of New York on March 7, 2020 by Executive Order 202, that restaurant operations for take-out and delivery were not suspended under the Governor's Executive Order 202.3 issued on March 16, 2020, and respectively refers the Court to the subject lease and relevant Executive Orders for the true content and meaning thereof and denies any allegations inconsistent therewith.

44. The allegations contained in paragraph “152” of the Answer are not factual allegations but assertions, interpretations or conclusions of law, to which no response is required. To the extent that a response is deemed necessary, Plaintiff denies the allegations contained in paragraph “152” of the Answer and avers that Defendant was in default under the subject lease well before the date that the Governor declared a State disaster emergency for the entire State of New York on March 7, 2020 by Executive Order 202, that restaurant operations for take-out and delivery were not suspended under the Governor's Executive Order 202.3 issued on March 16, 2020, and respectively refers the Court to the subject lease and relevant Executive Orders for the true content and meaning thereof and denies any allegations inconsistent therewith.

45. Denies the allegations contained in paragraph “153” of the Answer and respectively refers the Court to the subject lease for the true content and meaning thereof and denies any allegations inconsistent therewith.

46. The allegations contained in paragraph “154” of the Answer are not factual allegations but assertions, interpretations or conclusions of law, to which no response is required. To the extent that a response is deemed necessary, Plaintiff denies the allegations contained in

paragraph “154” of the Answer and respectively refers the Court to the subject lease for the true content and meaning thereof and denies any allegations inconsistent therewith.

47. The allegations contained in paragraph “155” of the Answer are not factual allegations but assertions, interpretations or conclusions of law, to which no response is required. To the extent that a response is deemed necessary, Plaintiff denies the allegations contained in paragraph “155” of the Answer and avers that restaurant operations for take-out and delivery were not suspended under the Governor's Executive Order 202.3 issued on March 16, 2020, and respectively refers the Court to the subject lease and relevant Executive Orders for the true content and meaning thereof and denies any allegations inconsistent therewith.

REPLYING TO THE FOURTH COUNTERCLAIM
(Declaratory Judgment that a Casualty Occurred)

48. Plaintiff repeats and realleges the responses asserted in this Reply to the allegations in the preceding paragraphs of the Answer, in response to paragraph “156” of the Answer.

49. Admits the allegations contained in paragraph “157” of the Answer but respectfully refers the Court to the subject lease for the true content and meaning thereof and denies any allegations inconsistent therewith.

50. The allegations contained in paragraph “158” of the Answer are not factual allegations but assertions, interpretations or conclusions of law, to which no response is required. To the extent that a response is deemed necessary, Plaintiff denies the allegations contained in paragraph “158” of the Answer and avers that the subject lease provides for the abatement of rent “until the date when the premises shall have been repaired and restored by Owner....” and respectively refers the Court to the subject lease for the true content and meaning thereof and denies any allegations inconsistent therewith.

51. The allegations contained in paragraph “159” of the Answer are not factual allegations but assertions, interpretations or conclusions of law, to which no response is required. To the extent that a response is deemed necessary, Plaintiff denies the allegations contained in paragraph “159” of the Answer.

AFFIRMATIVE DEFENSES

As and for a First Affirmative Defense

52. The counterclaims fail to state a cause of action upon which relief may be granted.

As and for a Second Affirmative Defense

53. Defendant's counterclaims are barred, in whole or in part, by its own breaches of contract, breaches of trust, inequitable conduct and misrepresentations.

As and for a Third Affirmative Defense

54. Defendant's counterclaims are barred, in whole or in part, by the doctrines of waiver, laches and/or estoppel.

As and for a Fourth Affirmative Defense

55. Defendant's counterclaims are barred, in whole or in part, by its failure to mitigate damages, if any.

As and for a Fifth Affirmative Defense

56. Defendant's damages, if any, were not caused by Plaintiff.

As and for a Sixth Affirmative Defense

57. Defendant's counterclaims are barred, in whole or in part, by the doctrine of unjust enrichment.

As and for a Seventh Affirmative Defense

58. Defendant's counterclaims are barred by the doctrine of unclean hands.

As and for an Eighth Affirmative Defense

59. Defendant breached the terms of the subject lease which is a complete defense and bar to the counterclaims asserted and the relief sought by Defendant herein.

As and for a Ninth Affirmative Defense

60. Estoppel is a complete defense and bar to the counterclaims asserted and the relief sought by Defendant herein.


REPLYING TO THE CROSSCLAIMS

61. The allegations contained in paragraphs "160" through "170" of the Answer are directed to defendants, Geeta Fastfood Enterprise Inc and Abhimanue Manchanda, to which no response is required by Plaintiff.

WHEREFORE, it is respectfully requested that the counterclaims of Defendant contained in the Answer be dismissed in their entirety, with prejudice, and that Plaintiff be awarded the relief demanded in its Amended Verified Complaint, together with the costs and disbursements of this action and such other, further and different relief which, as to this Court, may seem necessary, just and proper.

Dated: Garden City, New York
February 12, 2021

JASPAN SCHLESINGER LLP

By: 


STEVEN R. SCHLESINGER
SOPHIA A. PERNA-PLANK
Attorneys for Plaintiff
300 Garden City Plaza, 5th Floor
Garden City, New York 11530
(516) 746-8000

VERIFICATION

STATE OF NEW YORK)
) ss:
COUNTY OF NASSAU)

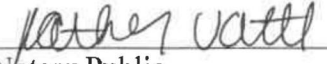
JAMES V. GUARINO, on behalf of **223 AVENUE B, LLC**, being duly sworn, deposes and says:

I am a member of 223 AVENUE B, LLC, the Plaintiff in this action. I have read the annexed **VERIFIED REPLY TO DEFENDANT SUBWAY REAL ESTATE, LLC D/B/A SUBWAY'S VERIFIED ANSWER, COUNTERCLAIMS AND CROSSCLAIMS**, and the same is true as to my own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters I believe them to be true. The basis of my knowledge is personal knowledge and in my capacity as a member of 223 Avenue B, LLC.



JAMES V. GUARINO

Sworn to before me on this
12th day of February, 2021.



Notary Public

