SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

ALEXANDRIA GAYLE WILLIAMS and JIMMY JON WILLIAMS AS GUARANTOR

Index No. 713984/2020

Plaintiffs,

-against-

4545 EAST COAST LLC

Defendant

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

This memorandum of law (the "Memorandum") is respectfully submitted in support of Defendant's motion brought pursuant to CPLR R 3212 seeking an order dismissing Plaintiffs' August 20, 2020 complaint in its entirety and awarding Defendant summary judgment on the six (6) counterclaims set forth in its October 9, 2020 verified answer.[1]

As set forth in the Loffredo affirmation and Dass Affidavit, the following facts are undisputed: (i) Tenant entered into a one (1) year free market Lease with Landlord for the Apartment scheduled to expire March 31, 2021; (ii) Guarantor entered into a separate agreement guaranteeing Tenant's performance of all obligations under the Lease including but not limited to the payment of rent, additional rent and reasonable attorney's fees incurred by Landlord in having to enforce the terms of the Lease; (iii) Tenant has not legally surrendered possession of the Apartment and remains in legal possession thereof

[1] Defined terms, unless stated otherwise, shall have the same meaning and effect as set forth in the January 12, 2021 affirmation of Scott F. Loffredo ("Loffredo Affirmation").

pursuant to the terms of the Lease; and (iv) while Tenant made partial rental payments in June 2020 and July 2020, she has otherwise failed to satisfy her rental obligations to Landlord and currently remains indebted to Landlord in the sum of $29,721.84 representing base rent and additional rent incurred through January 31, 2021 under the terms of the Lease.

Rather than honor her leasehold obligations, Tenant moved to California and engaged counsel to commence this action seeking an order from this Court absolving herself and Guarantor of all obligations and responsibilities under the Lease on the grounds of: (i) frustration of purpose, (ii) impossibility, and (iii) equitable reformation.

Tenant argues that because of the impact the COVID-19 pandemic has had on the City of New York, she decided she no longer wants to reside in the Apartment and therefore this Court should issue an order absolving her of any obligations under the terms of her Lease because she relocated to the State of California, another COVID-19 ravaged State.

Tenant's argument has no basis in law because the doctrines of frustration of purpose and impossibility simply do not apply.

At no time was Tenant's ability to use the Apartment for the exact reason she rented it for disturbed, prevented, hindered or otherwise effected in anyway. In fact, government imposed self-quarantine measures, stay-at-home orders and curfews, likely only served to cause Tenant to have to stay inside of her Apartment for greater periods of time then she originally contemplated.

As discussed herein, over the last several months, similar arguments have been brought before the Courts by commercial tenants arguing they should not be responsible

for rental payments under their leases where government orders forced their businesses to close and these arguments have been uniformly rejected as a matter of law.

Furthermore, as a matter of public policy, should Tenant be granted the relief she seeks in her complaint by way of obtaining a Court order rescinding her Lease, this Court will effectively be holding that *all* residential leases in the City of New York are subject to that same relief. Tenant's factual argument is no different than millions of New Yorker's who were all unexpectedly forced to deal with the consequences of an unforeseen global pandemic. The key difference being that in Tenant's case, she had the means to pick-up and move to *California* (another state particularly ravaged by the COVID-19 pandemic) while hiring counsel to bring legal action against her Landlord seeking rescission of her Lease—a luxury many other New Yorker's did not have in March 2020 and do not have today.

As set forth in the Dass affidavit, Tenant currently has legal possession of the Apartment and has maintained such since March 2, 2020.

Tenant currently owes Landlord $29,721.84 in base rent and additional rent in addition to reasonable legal fees, currently $5,162.89, which Landlord is entitled pursuant to the terms of the Lease to recover as a consequence of having had to defend against this action and prosecute its own counterclaims.

I.

THE COMMON LAW DOCTRINE'S OF "FRUSTRATION OF PURPOSE" AND "IMPOSSIBILITY" DO NOT APPLY TO THE CURRENT SITUATION WHERE TENANT SEEKS RESCISION OF HER RESIDENTIAL LEASE

In New York, the "frustration" and "impossibility" defenses are narrower than under the old common law. *See Noble Ams. Corp. v. CIT Grp./Equip. Fin., Inc.*, 2009 WL 9087853 (Sup. Ct. N.Y. Co. Dec. 4, 2009) (see further *infra*). An oft-quoted explanation of the other elements of these two doctrines appears in *U.S. v. Gen. Douglas MacArthur Senior Village, Inc.*, 508 F.2d 377, 381 (2d Cir. 1974):

> In general impossibility may be equated with an inability to perform as promised due to intervening events, such as … destruction of the subject matter of the contract. The doctrine comes into play where (1) the contract does not expressly allocate the risk of the event's occurrence to either party, and (2) to discharge the contractual duties (and, hence, obligation to pay damages for breach) of the party rendered incapable of performing would comport with the customary risk allocation. Essentially, then, discharge by reason of impossibility — as well as the concomitant remedy (to the discharge) of rescission — enforces what can reasonably be inferred to be the intent of the parties at the time of contract.
>
> Frustration of purpose, on the other hand, focuses on events which materially affect the consideration received by one party for his performance. Both parties can perform but, as a result of unforeseeable events, performance by party X would no longer give party Y what induced him to make the bargain in the first place. Thus frustrated, Y may rescind the contract. [Citations omitted.]

(a) Frustration of Purpose

The doctrine of frustration of purpose applies when a change in circumstances makes one party's performance virtually worthless to the other, thereby frustrating the purpose in making the contract. *PPF Safeguard, LLC v. BCR Safeguard Holding, LLC*, 85 A.D.3d 506 (App. Div. 1st Dept. 2011).

The elements of frustration of purpose require consideration of: 1) whether the frustrated purpose is the basis of the contract; 2) whether the frustrating event was foreseeable; and 3) whether the frustration of purpose is substantial. *Rockland Development Assocs. v. Richlou Auto Body*, Inc., 173 A.D.2d 690 (2d Dept. 1991); *Crown IT Services, Inc. v. Koval-Olsen*, 11 A.D.3d 263 (1st Dept. 2004). Frustration of purpose is "limited to instances where a virtually cataclysmic, wholly unforeseeable event renders the contract valueless to one party." *U.S. v. Gen. Douglas MacArthur Senior Village, Inc.*, 508 F.2d 377 (2d Cir. 1974). *It is not enough that the transaction has become less profitable for the affected party or even that the affected party will sustain loss. Rockland Development, supra.*

In *Crown, supra*, the court said that the doctrine is a narrow one and that "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." *PPF Safeguard, supra.*

In *Jack Kelly Partners LLC v. Zegelstein*, 140 A.D.3d 79 (App. 1st Dept. 2016), an owner and a tenant entered into a commercial lease agreement to use the rental space for general offices of an executive recruiting firm and so as not to violate the certificate of occupancy. However, the certificate of occupancy was for exclusive

residential use. When the landlord refused to amend the certificate of occupancy, the court, finding frustration of purpose, allowed the tenant to terminate the lease.

In *Mr. Ham, Inc. v. Perlbinder Holdings, LLC*, 116 A.D.3d 577 (1st Dept. 2014), the lease provided that the premises were to be used for the preparation and retail sale of various food items and that the tenant would do the build out. The found that the owner's unanticipated renovation of the premises, preventing the build out, deprived plaintiff of its consideration and frustrated the purpose of the contract, allowing rescission.

In *Benderson Dev. Co. v. Commenco Corp.*, 44 A.D.2d 889 (4th Dept. 1974), a tenant leased premises to run a restaurant and could not do so until a sewer was constructed years later. The court allowed the tenant to rescind the contract based on frustration of purpose.

For a party to avail itself of the frustration of purpose defense, there must be complete destruction of the basis of the underlying contract; partial frustration such as a diminution in business, where a tenant could continue to use the premises for an intended purpose, is insufficient to establish the defense as a matter of law. *See Robitzek Inv. Co. v Colonial Beacon Oil Co.*, 265 AD 749, 753 (App. Div. 1st Dep't 1943) ("Here there is not complete frustration. Defendant could have continued to operate the gasoline station at the demised premises within the terms of the lease though the volume of its business might have suffered substantial diminution...") (internal citations omitted).

As a result of the COVID-19 pandemic, countless *commercial* tenants have asked this Court to invoke the doctrines of "frustration of purpose" and "impossibility" as defenses to their nonpayment of rent during the time period within which their businesses were required to be closed by either State or Local executive orders, rules or regulations. As Tenant's counsel is well aware, the imposition of the doctrines has been widely

rejected even in this context where it is undisputed that the underlying commercial activity which the commercial tenant rented the space for was explicitly and undisputedly prohibited by Executive Order.

For example, in *Cab Bedford LLC v Equinox Bedford Ave, Inc.,* 2020 NY Slip Op 34296(U)**,** December 22, 2020**,** Supreme Court, New York County (Hon. Arlene P. Bluth, J.S.C.)[2], the Supreme Court rejected commercial tenant's efforts to invoke the doctrine holding:

> The undisputed fact is that the Tenant has not made rent payments since March 2020.That violates the terms of the lease. The question is whether the ongoing pandemic raises an issue of fact as to whether the lease's purpose was frustrated. This Court concludes that it was not. The temporary shutdown of gyms certainly devastated defendants' business. But the executive orders cited by defendants did not suspend a commercial tenant's obligation to pay rent. Instead, other steps have been taken, such as the moratorium on commercial evictions. But the Court declines to impose a rule that could indirectly impose a freeze on rent for commercial tenants; that is the province of the legislative and the executive branches…

In New York State, the Legislature has passed various laws responsive to the COVID-19 pandemic—none of which permitted for the rescission of residential lease agreements or forgiveness of rent. For example, the New York State Safe Harbor Act signed into law June 30, 2020 permitted residential tenants to avoid eviction if they could demonstrate a financial impact caused by COVID-19 leaving the landlord with the option of pursuing only a monetary judgment against that tenant in the event tenant could prove such impact.

[2] *see also 35 E. 75th St. Corp. v. Christian Louboutin L.L.C.,* 2020 NY Slip Op 34063(U) (Sup. Ct.); *Victoria's Secret Stores, LLC v. Herald Square Owner LLC,* 2021 NY Slip Op 50010(U) (Sup. Ct.)

More recently, on or about December 27, 2020, the State Legislature enacted the Emergency Eviction and Foreclosure Prevention Act of 2020 which temporarily stayed the filing of any summary eviction proceeding against a tenant who served their landlord with a "declaration of hardship" averring to have been financially impacted by the COVID-19 pandemic.

Neither law forgave a residential tenant's obligation to pay rent. In fact, both laws leave open the avenue for a landlord to commence an action in Civil or Supreme Court for a monetary judgment against their respective tenant.

Tenant cannot cite to any statutory or decisional authority which serves as a legal basis to "rescind" the parties' Lease based upon "frustration of purpose" or "impossibility".

As highlighted above, the purpose for which Tenant rented the Apartment was not frustrated. She was able to use the Apartment the same way on January 1, 2020, May 1,2020, October 1,2020 and December 25, 2020. As stated above, due to State imposed curfews and "stay at home orders", Tenant was obligated to use her Apartment for the reason it was rented even more then she originally contemplated.

Based on the foregoing, the portion of the Complaint seeking an order rescinding her Lease based on "frustration of purpose" must be dismissed as a matter of law.

(b) Impossibility

The doctrine of impossibility is only available where performance of a contract is rendered objectively impossible. The Court of Appeals of the State of New York made this standard clear in *Kel Kim Corp. v. Cent. Mkts., Inc.*, 70 N.Y.2d 900 (1987), where it stated:

> 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; until the late nineteenth century even impossibility of performance ordinarily did not provide a defense. While such defenses have been recognized in the common law, they have been applied narrowly, due in part to judicial recognition that the purpose of contract law is to allocate the risks that might affect performance and that performance should be excused only in extreme circumstances. Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract. (Emphasis added and internal citations omitted).

The elements of impossibility of performance require a showing that: 1) the event rendering the performance impossible was unforeseeable; 2) that said event destroyed the subject matter of the contract or the means of performance; and 3) it was the event that made performance objectively impossible. *Kolodin v. Valenti,* 115 A.D.3d 197, 200 (App.Div. 1st Dept. 2014); *Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d 900 (1987).

The key to an impossibility of performance defense is that a party should be excused from the performance required of it on a contract when it is objectively impossible to do the act the contract requires of the performer. *The Reed Foundation, Inc. v. Franklyn D. Roosevelt Four Freedoms Park, LLC,* 108 A.D.3d 1.

Extreme difficulty of performance does not satisfy that condition, such as the nonpayment of money when one has no income. Even in an economy where no one is lending money, the cases conclusively presume that someone who needs money can always come up with it. *407 East 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275 (1968). However, the doctrine has no place when the other party has not actually required the performance. *Walnut Place LLC v. Countrywide Home Loans, Inc.,* 96 A.D.3d 684 (App. 1st Dept. 2012).

In the context of the COVID-19 pandemic, in *Cab Bedford, supra,* the Supreme Court, New York County rejected the defense of "impossibility" in the commercial context stating as follows:

> The Court finds that this doctrine has no applicability here and does not raise an issue of fact. Defendants ran an "upscale gym" for many years prior to the Covid-19 pandemic and, after some painful months, are now permitted to operate (although at a limited capacity). The subject matter of the lease was not destroyed. At best, it was temporarily hindered. That there are more hurdles to running the business is not a basis to invoke the impossibility doctrine.

It cannot be disputed that it is not, and never has been "impossible" for Tenant to occupy and reside in her Apartment as she originally contemplated. It is dangerously disingenuous and borderline frivolous to even suggest otherwise.

Based on the foregoing, the portion of the complaint seeking an order rescinding her Lease based on "impossibility" must be dismissed as a matter of law.

(c) Equitable Reformation

Plaintiffs third and fourth causes of action ask this Court to "equitably reform" the Lease by adding in brand new clauses not found within the four (4) corners of the document which effectively serves to terminate the Lease.

In Plaintiffs' third cause of action, they ask the Court to read into the Lease an *implied force majeure clause* which upon being read into the lease will serve as a basis to rescind the Lease. In short, Tenant is asking the Court to simply makeup a Lease term which once applied would forgive her and her Guarantor from liability. To award Tenant such relief would change the face of contract law across all spectrums of law as we know it as it would effectively permit a party to ask the Court to write a favorable term into its contract and enforce the admittedly non-existent clause against its opponent thus undercutting the entire point of contracting in the first place. Plainitffs' third cause of action has no basis in law and fails to state a cause of action. Where a force majeure clause exists, New York courts interpret such provisions narrowly, and the party seeking to excuse its performance has the burden of establishing that the force majeure provision is applicable to the specific event that prevented performance under the contract. *See*, e.g. *Rochester Gas & Elec. Corp. v. Delta Star Inc.,* No. 06-CV-6155-CJS-MWP, 2009 WL 368508, at *7 (W.D.N.Y. Feb. 13, 2009); *Team Marketing USA Corp. v. Power Pact LLC*, 41 A.D.3d 939, 942 (3d Dep't 2007) (quoting Williston on Contracts §§ 77:31 (4th ed.); *Kel Kim Corp. v. Cent. Markets Inc.*, 70 N.Y.2d 900, 902-903 (1987).

In its fourth cause of action, Tenant asks the Court to reform the Lease to provide a clause: (i) staying Defendant from enforcing the terms of the Lease, or (ii) staying Defendant from enforcing any collection efforts against Tenant or Guarantor. Once again, there is no legal basis for such a cause of action.

"Before a party to a lease can be granted reformation, they must establish his right to such relief by clear, positive and convincing evidence. Reformation may not be granted upon a probability nor even upon a mere preponderance of evidence, but only upon a certainty of error. In the absence of fraud, the mistake shown 'must be one made by both parties to the agreement so that the intentions of neither are expressed in it.'" *Amend v. Hurley*, 293 N.Y. 587, 59 N.E.2d 416 (1944).[3]

In *Amend v. Hurley* (supra), the Court of Appeals denied reformation, upholding as a question of fact the determination of the trial court that there had been no oral agreement between the parties and that no credence could be given the defendant's claim that the final agreement did not express the true intention of the parties. The result would have been otherwise, however, had the quantum and quality of the proof satisfied the court as to the existence of these facts.

Where there is no mistake about the agreement and the mistake alleged is in the reduction of that agreement to writing, such mistake of the scrivener or of either party, no matter how it occurred, may be corrected. In such case equity will conform the written instrument to the parol agreement which it was intended to embody. (*Hart v. Blabey*, 287 N. Y. 257, 39 N.E.2d 230; *Born v. Schrenkeisen*, 110 N. Y. 55, 17 N.E. 339; *Pitcher v. Hennessey*, 48 N. Y. 415.).

The equitable doctrine of reformation is utilized "to restate the intended terms of an agreement when the writing that memorializes that agreement is at variance with the intent of both parties" (*George Backer Management Corp. v. Acme Quilting Co.*, 46 NY2d 211, 219 [1978]).

[3] *Ward v. Hewitt*, 196 Misc. 624, 92 N.Y.S.2d 584 (Sup. Ct. 1949)

The right to reformation must be proved by clear and convincing evidence and must be set forth in the pleadings with particularity (*Surlak v. Surlak,* 95 AD2d 371, 380 [App. 2d Dep't 1983]; *see also German Flats v. Aetna Casualty & Sur. Co*., 174 AD2d 1003 [App. Div. 4th Dep't 1991]). To be entitled to relief, "[a] claim for reformation, generally, must be based on an allegation of mutual mistake or fraudulently induced, unilateral mistake" (*id.; see also Cheperuk v. Liberty Mut. Fire Ins. Co.,* 263 AD2d 748, 749 [App. 3d Dept 1999]; *Nicholas J. Masterpol, Inc. v. Travelers Ins. Cos*., 273 AD2d 817, 818 [App. 4th Dep't 2000]).

The court may reform the contract so as to make it conform to the agreement the parties actually made and intended (Surlak, 95 AD2d at 380; Lacks v. Lacks, 12 NY2d 268, 273 [1963] [noting that the contract can be reformed "to include material orally agreed upon, but because of mutual or unilateral mistake plus fraud, not inserted in the writing"]).

However, if there was no meeting of the minds due to fraud, misrepresentation, or mistake, the appropriate remedy is rescission (Surlak, 95 AD2d at 380.

Here, there is no legal or factual basis whatsoever to support a cause of action for "equitable reformation". Tenant has not even alleged that: ((i) the language of the Lease states terms differently than what the parties' had agreed upon, or (ii) the parties ever intended for "force majeure" "early termination" or "stay of enforcement" to be written into the Lease.

Tenant's third and fourth causes of action to "reform" the Lease to effectually rescind it does not exist as a matter of law and is merely a 'mash-up" of two separate and distinct legal principles (rescission and reformation)--neither of which apply in this instance.

Based on the foregoing, Plainitffs' third and fourth causes of action seeking an order reforming the Lease to effectually nullify it--must be dismissed.

II.

DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW ON ITS COUNTERCLAIMS

Defendant's October 9, 2021 verified answer seeks entry of a monetary judgment for all rent accrued under the Lease through the date of judgment, and attorney's fees against both Tenant and Guarantor. Defendant now seekssummary judgment on each of the six (6) causes of action. There are no triable issues of material fact which would warrant the denial of Defendant's motion.

To be entitled to the remedy of summary judgment, the moving party "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 from the case" (*Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York,* 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bona fide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [App. Div.1st Dep't 2002], *aff'd* 99 NY2d 647, 760 NYS2d 96 [2003]).

As set forth in the Loffredo affirmation and Dass Affidavit, the following facts are undisputed:

- Tenant entered into a one (1) year free market Lease with Landlord for the Apartment scheduled to expire March 31, 2021 (Ex. A to Tenant's Complaint);and

- Guarantor entered into a separate agreement guaranteeing Tenant's performance of all obligations under the Lease including but not limited to the payment of rent, additional rent and reasonable attorney's fees incurred by Landlord in having to enforce the terms of the Lease (*See* Ex. D); and

- Tenant has not legally surrendered possession of the Apartment and remains in legal possession thereof pursuant to the terms of the Lease; (*See* Dass Affidavit); and

- While Tenant made partial rental payments in June 2020 and July 2020, she has otherwise failed to satisfy her rental obligations to Landlord and currently remains indebted to Landlord in the sum of $**29,721.84** representing base rent and additional rent incurred through January 31, 2021 under the terms of the Lease. (*See* Dass Affidavit and Ex. E).

Defendant will be entitled to an additional sum of base rent and additional rent on February 1, 2021 and March 1, 2021. As such, Defendant's second counterclaim seeks continuing damages through the date judgment is entered by this Court.

Finally, Defendant seeks reasonable attorney's fees to which it is entitled under section 18.1.5of the Lease in a sum to be determined by the Court.

As set forth in the Loffredo Affirmation, through the drafting of this motion for summary judgment, Defendant has incurred $5,162.89 in attorney's fees which is anticipated to increase through the date judgment is entered or the costs of reviewing and responding to any opposition papers and appearing at future Court dates on this motion.

CONCLUSION

WHEREFORE, Defendant respectfully submits that based upon controlling case law, the supporting Dass affidavit and the credible evidence annexed hereto, that the instant motion be granted in its entirety.

Respectfully submitted,

Dated: New York, New York
January 12, 2021

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