

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

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ADAM SANDERS and RANDI SANDERS,

Index No. 654992/20

Plaintiff,

-against-

EDISON BALLROOM LLC,

Defendant.
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**DEFENDANT’S REPLY MEMORANDUM OF LAW IN
OPPOSITION TO PLAINTIFF’S MOTION FOR SUMMARY
JUDGMENT AND IN SUPPORT OF DEFENDANT’S CROSS-
MOTION FOR SUMMARY JUDGMENT**

Defendant Edison Ballroom LLC, by its attorney Nathan M. Ferst, respectfully submits this Reply Memorandum of Law in opposition to Plaintiff’s motion for summary judgment and in support of Defendant’s cross-motion for an Order granting Defendant summary judgment on Defendant’s counterclaim and dismissing Plaintiff’s Complaint.

ARGUMENT

POINT I

**THE PROPER REMEDY IN THE CASE AT BAR IS SUSPENSION AND NOT
CANCELLATION OF THE CONTRACT**

Under the circumstances which have arisen, it is submitted that this Court has the power to suspend both sides’ contractual obligations during the period of emergency.

In *Wise & Co., Inc. v. Wecoline Products, Inc.*, 286 NY 365 (1941) the New York Court of Appeals, after a jury trial and an appeal to the Appellate Division, had before it the question of whether the parties to a contract had agreed that where, if a party was unable to perform in the stipulated time owing to unforeseen circumstances beyond that party’s control, the time for

performance was extended for a period equal to the period of such delay. The action dealt with the sale of coconut oil by Plaintiff, a Philippine Islands corporation, to Defendant, a New York purchaser. The vessel on which seller had arranged to ship the oil was delayed by a grounding and resulting in necessary repairs, such that timely shipping of the coconut oil could not be timely made. The New York Court of Appeals reviewed the writings between the parties and the facts underlying the controversy and concluded that, under the facts at bar, the parties had agreed that *force majeure* would and did serve to extend the time of performance for a period equal to the period of such delay.

In *Duane Reade v. Stoneybrook Realty, LLC*, 63 A.D.3d 433 (1st Dep't., 2009), the Appellate Division, First Department, in reviewing a judicial restraint not readily ascertainable when the parties executed the lease in question, which restraint impeded the ability of a landlord to give possession of premises to a tenant, pointed out that the force majeure clause agreed to by the parties provided that certain acts beyond the control of the landlord "shall be added to the time for performance of such act."

The same question of whether the parties to a contract had agreed that where, if a party was unable to perform in the stipulated time owing to unforeseen circumstances beyond that party's control, the time for performance was extended for a period equal to the period of such delay, arose in *Beardslee v. Inflection Energy*, 25 NY3d 150 (2015) and *Urban Archeology Ltd. V. 207 East 57th Street LLC*, 34 Misc. 3d (Supreme Court, New York County, 2009).

Beardslee v. Inflection Energy, supra, dealt with oil and gas leases in light of the then New York governor's mandating a formal public environmental review of the impact of high-volume hydraulic fracturing and horizontal drilling. *Urban Archeology Ltd. V. 207 East 57th Street LLC, supra*, dealt with a commercial lease where the tenant, invoking an economic

downturn, claimed inability to perform under the terms of the lease and sought modifications thereto. In both of those cases, the Court decided that, under the facts at bar, the time for performance would not be extended.

In reviewing *force majeure*, the question may be fairly asked: what is contemplated when referring to events beyond the contemplation of the parties? Surely a hurricane, a strike, and like events causing short-lived impossibility of performance are contemplated when referring to events beyond the contemplation of the parties. *See, Black's Law Dictionary, e.g.* However, the question may be also fairly asked: what is so far beyond what is contemplated when referring to events beyond the contemplation of the parties as to place the parties to a contract in territory so far beyond what is contemplated as not susceptible to contemplation as to require emergency intervention by the Court? It is respectfully submitted that, when agreeing to the *force majeure* clause in the contract at bar, while the parties did contemplate as not susceptible to contemplation "strike, governmental authority, terrorism, war . . ." (Page 12 of the contract between the parties, Exhibit A to the October 5, 2020 Affidavit of William Kaelblein, General Manager of Defendant), the parties – and the entire world - did not envision as possible a shut-down of the scope which the world has been undergoing.

In light of the foregoing, the Court may refer to *Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Avenue Associates*, 93 NY2d 508 (1999) in which the New York Court of Appeals discusses the purpose of "Yellowstone" injunctions, first adjudicated in *First Natl. Stores v. Yellowstone Shopping Ctr.*, 21 NY2d 630 (1968) which purpose, of course, is to stop the cure period under a lease from running pending an adjudication of the parties' rights and obligations concerning an alleged default. It is respectfully submitted that here, where events so far beyond the parties' contemplation as to what was beyond contemplation at the time of the

making of their contract have transpired as to give rise to this Court's "stopping the clock" by suspending the time of performance of the subject contract instead of deeming same terminated.

POINT II

PLAINTIFF IS NOT ENTITLED TO ATTORNEYS' FEES

The indemnity clause (Page 14 of the contract between the parties, Exhibit A to the January 26, 2021 Affidavit of William Kaelblein, General Manager of Defendant) contemplates the payment of the other side's legal fees only in the event of the negligence of Defendant, which is not alleged here. *Castor Petroleum Ltd. v. Petroterminal de Panama, S.A.* (2012 NY Slip Op 33533, Index No. 600243/08, Supreme Court, New York County, 2012).

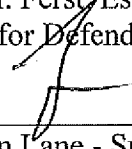
CONCLUSION

For the foregoing reasons, Plaintiffs' motion should be denied and Defendant's cross-motion should be granted.

Dated: New York, New York
January 26, 2021

Respectfully submitted,

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