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

ADAM SANDERS and RANDI SANDERS	:	Index No. 654992/20
Plaintiffs,	:	Hon. Margaret Chan
-against-	:	*Motion No. 001*
EDISON BALLROOM LLC,	:	
Defendant.	:	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

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Plaintiffs, Adam Sanders and Randi Sanders (collectively, "Plaintiffs"), respectfully submit this memorandum of law (a) in further support of their motion for an Order: (i) pursuant to CPLR 3212, awarding plaintiffs summary judgment on their first and only cause of action and entering a money judgment in the amount of $10,048.73 plus attorneys' fees, costs and expenses, and pre-judgment interest, and (ii) pursuant to CPLR 3211(b) and/or CPLR 3212, dismissing the counterclaim (the "Counterclaim") asserted by defendant Edison Ballroom LLC ("Defendant") in its Answer; and (b) in opposition to Defendant's cross-motion for summary judgment on its Counterclaim.

PRELIMINARY STATEMENT

The facts are undisputed. Defendant does not deny that the parties' clear and unambiguous agreement states that, in the event of a force majeure event -- here, the pandemic and the Governor's Executive Orders:

> Neither party shall be responsible for failure to perform this contract if circumstances beyond its reasonable control, including, but not limited to … governmental authority …, make it illegal or

> impossible for the affected party to hold the event. For the Avoidance of Doubt, in the event of any such acts of God, **[Defendant] shall refund all payments made by [Plaintiffs] to [Defendant] and [Plaintiffs] shall have no further obligation to [Defendant]**.

Rather than create any issue of material fact, Defendant absurdly claims that it can negate the above clause because this Court has the power to rewrite the plain and unambiguous terms of the parties' agreement. As established below, Plaintiffs' motion for summary judgment should be granted and the borderline frivolous cross-motion should be denied.

FACTUAL BACKGROUND

Plaintiffs respectfully refer the Court to the moving affidavit of Adam Sanders ("Sanders Aff.") and the exhibits thereto. *See* NYSCEF Doc. No. 9.

ARGUMENT

POINT I

PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT

Defendant has failed to raise a single material fact in dispute that would preclude an award of summary judgment in Plaintiffs' favor. In fact, Defendant does not dispute any of the essential elements to Plaintiffs' breach of contract claim. On this basis, Plaintiffs are entitled to judgment as a matter of law on their breach of contract claim. *See, e.g., AFGA Photo USA Corp. v. Chromazone, Inc.*, 82 AD3d 402, 403 (1st Dept 2011) (Plaintiff established prima facie entitlement to judgment as matter of law on breach of contract claim where defendant's opposition failed to raise triable issue of fact); *Levitt v. Brooks*, 102 AD3d 547 (1st Dept 2013) (same).

For the first, time, Defendant claims that Plaintiffs do not have standing or capacity to sue because they are not in privity with Defendant. Having failed to raise these defenses earlier,

they were waived as a matter of law. *Security Pacific Nat. Bank v. Evans*, 31 AD3d 278 (1st Dept 2006). Moreover, Defendant does not dispute that (a) Plaintiffs signed the Agreement, (b) Plaintiffs made all deposits (NYSCEF Doc. No. 14), and (c) Plaintiffs signed the Postponement Agreement (NYSCEF Doc. No. 15). Accordingly, Plaintiffs are entitled to judgment as a matter of law.

POINT II

DEFENDANT'S COUNTERCLAIM SHOULD BE DISMISSED

As the Court of Appeals stated in *W.W.W. Assocs., Inc. v Giancontieri*, 77 NY2d 157, 162 (1990), which also involved real property:

> "A familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing. That rule imparts 'stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses…infirmity of memory…[and] the fear that the jury will improperly evaluate the extrinsic evidence." (emphasis added; ellipses in original; internal citations omitted).

Thereafter, the Court of Appeals, in *Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 (2004), stated:

> "courts 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'" (internal citations omitted) (emphasis added).

Moreover, "the parties' intention is to be ascertained from the language employed and, absent ambiguity, interpretation is a matter of law to be determined solely by the court" (citations

omitted); *New York Overnight Partners, L.P. v Gordon*, 217 AD2d 20, 24-25 (1st Dept 1995), *affd* 88 NY2d 716 (1996).

Defendant's Counterclaim seeks a declaration that the Agreement should be "suspended until the passing of the present emergency and its limitations and that, upon such passing, the contracted event shall be held." *See* NYSCEF Doc. No. 5 at ¶ 20. There is no basis for this Court to rewrite the plain and unambiguous language of the Agreement. Rather, the Agreement should be enforced as it was drafted and signed. *See, e.g., American Exp. Bank Ltd. v. Uniroyal, Inc.*, 164 AD2d 275, 277 (1st Dept 1990) ("Rather than rewrite an unambiguous agreement, a court should enforce the plain meaning of that agreement.").

Defendant cites to various cases that either support Plaintiffs' argument or are distinguishable from the facts in this action. For example, in *Reade v. Stoneybrook Realty, LLC*, 63 AD3d 433, 434 (1st Dept 2009), unlike here, "[t]he force majeure clause agreed to by the parties provided that certain acts beyond the control of landlord 'shall be added to the time for performance of such act.'"

Defendant agreed to the plain and unambiguous terms of the Agreement. Indeed, it touts that the Agreement is "customized" and "contain[s] numerous pages containing lengthy lists of specifications …." Kaelblein Aff. at ¶ 2, NYSCEF Doc. No. 19. It cannot now seek to have those terms redrafted to suit its needs. *See, e.g., Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d 900, 902 (1987) ("[O]nce 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.").

For the reasons set forth above, Defendant's cross-motion for summary judgment should be denied and its counterclaim should be dismissed in its entirety.

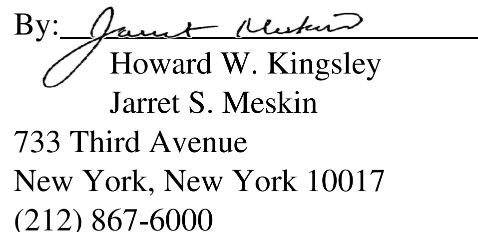
CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that this Court enter an Order granting Plaintiff's motion for summary judgment and deny Defendant's cross-motion for summary judgment in its entirety.

Dated: New York, New York
February 1, 2021

Respectfully submitted,

ROSENBERG & ESTIS, P.C.
Attorneys for Plaintiff

By: 

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