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

EAST 16TH STREET OWNER LLC,	:	
	:	Index No. 653839/2020
Plaintiff,	:	(Bluth, J.)
	:	
- against -	:	Motion Seq. No. 1
	:	
UNION 16 PARKING LLC and TMO PARENT LLC,	:	
	:	
Defendants.	:	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF LANDLORD'S MOTION FOR AN ORDER DIRECTING DEFENDANTS TO PAY RENT *PENDENTE LITE*

COZEN O'CONNOR
Attorneys for Plaintiff
45 Broadway, 16th Floor
New York, New York 10006

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Plaintiff EAST 16TH STREET OWNER LLC ("**Landlord**") respectfully submits this reply memorandum of law in further support of Landlord's motion for an order directing Defendant UNION 16 PARKING LLC ("**Tenant**") and defendant TMO Parking LLC ("**Guarantor**") (jointly, "**Defendants"**) to pay directly to Landlord rent and additional rent of $127,316.67 each month, commencing on November 2020 and continuing during the pendency of this action.

PRELIMINARY STATEMENT

Defendants' opposition to Landlord's motion is noteworthy for what it glaringly omits. Defendants are resoundingly silent as to their express contractual obligation to pay the rent sought in this motion – without deduction or setoff whatsoever. They fail to make any mention of their affirmative defenses or address how any of them would preclude the issuance of an order requiring Defendants to pay rent *pendente lite*. Defendants also ignore the fact that the Lease does not contain a *force majeure* provision. Their silence is a tacit admission that Defendants have no viable basis, as a matter of law, for their refusal to pay rent. Like the proverbial ostrich, Defendants hope to continue their free ride – to continue to operate the parking garage, pay no rent and have Landlord cover all of the Parking Garage's expenses This is simply inequitable.

Because they have no viable contractual arguments, Defendants instead attempt an appeal to the Court's emotions and compare the impacts of the pandemic on their business – a parking garage which occupies seven stories on 16th street, has remained open throughout the pandemic and which, at present, charges individuals hundreds of dollars per month for an 18 by 9 foot space – with the suffering incurred by the restaurants and small businesses that were required to close or operate at a fraction of their full capacity as a result of government orders stemming from the Covid-19 Pandemic. The truth is that Defendants are cynically seeking to benefit from the pandemic, collecting revenue for themselves since April while refusing to pay Landlord its contractually required rent.

This is evident from Defendants' assertion that the Tenant was somehow could not pay rent as a result of Covid-19 starting April 1, 2020 – barely more than a week after the Covid-19 restrictions in New York City took effect. Moreover, while Defendants complain of the general drop in garage usage and the impact on "Union 16's business" and "Union 16's revenue," they provide no evidence specific to the Parking Garage (much less any actual monetary figures), and ***nothing at all as to Guarantor*** whose liability under the Good Guy Guaranty is "direct and primary."

The legal arguments proffered by Defendants do not provide any better opposition to this motion. Defendants characterize Landlord's request that Defendants simply pay the rent due under the Lease each month during this litigation as a demand for a "constructive eviction." That is not the case. As Defendants concede, this action does not seek to evict the Tenant. Defendants would have this Court afford commercial tenants carte blanche to violate their lease agreements, but leave landlords with no recourse, simply because landlord may not "enforce an eviction," as prohibited by Executive Order. Such a proposition is simply nonsensical, as is the notion that asking Defendants to pay rent *pendente lite* constitutes an eviction.

Defendants' brief in opposition has demonstrated that they have no legal defense to the relief sought in this motion, and no apprehensions about capitalizing on Covid-19 to avoid the contractual obligation to pay rent, while remaining fully operational and open for business. Such tactics should not be condoned, and Defendants should be held to the terms of the Lease and Guaranty, and to settled law. It is respectfully submitted that the Court should grant the instant motion in its entirety.

ARGUMENT

DEFENDANTS SHOULD BE REQUIRED TO PAY RENT *PENDENTE LITE* DIRECTLY TO LANDLORD

In their opposition, Defendants address neither the absence of a *force majeure* provision in the Lease, nor their obligation to pay rent "without notice, demand, abatement, counterclaim, deduction, or set-off." Likewise, Defendants do not contest that the Good Guy Guaranty specifically states that "Guarantor's liability under this Guaranty is direct and primary, and not secondary, and shall be joint and several with that of Tenant." (Exhibit "C" to Jenkins Affidavit, Section 2)

Instead, Defendants throw a variety of assertions against the wall, none of which have any merit, and none of which refute the simple equity that Defendants should be required to pay rent while this action proceeds.

A. Defendants Have Failed to Offer Any Basis for The Denial of This Motion

i. Tenant's Assertions of Financial Hardship Are Insufficient to Prevent This Court From Directing Tenant and/or Guarantor to Pay Rent *Pendente Lite*

Through their opposition, Defendants do not argue that they are not obligated to pay the rent due under the express terms of Lease, nor do they offer any reliance on the affirmative defenses cited in their Answer. Indeed, Guarantor has presented absolutely no defense to this motion. As noted above, there is no assertion that ***Guarantor's*** revenue has been impacted, that ***Guarantor's*** business has been diminished or that ***Guarantor*** cannot (and/or is not obligated to) pay Tenant's rent for the Parking Garage.

Instead, Defendants claim that Tenant's revenue has been impacted by Covid-19 related governmental closures and, because of this, this Court should deny the relief sought. (Stiefel Affidavit paras. 7 – 8). Financial difficulties, however, do not excuse a commercial tenant's obligation to pay rent. *See, e.g., 1140 Broadway LLC v. Bold Food, LLC*, 2020 NY Slip Op

34017(U) (Sup. Ct. N.Y. Co. Dec. 3, 2020) (Bluth, J.) (Granting plaintiff landlord summary judgment for arrears accruing during the Covid-19 pandemic, noting "The landlord never agreed to make paying rent contingent on tenant being able to afford it");[1] *Capital One Equip. v. Deus,* 2018 NY Slip Op 31819(U), ¶ 4 (Sup. Ct. N.Y. Co. 2018). In any case, Defendants' assertion that Tenant does not have the funds to pay the rent due under the Lease rings hollow. A review of Icon Parking's own website reveals that Icon Parking – and its subsidiaries, like Tenant – continue to charge significant fees for hourly and monthly rentals. In fact, Tenant is currently advertising a discounted rent of $559 per month for a parking spot, and Icon Parking advertises spots for hundreds more mere blocks from the Parking Garage.[2] It strains credulity to believe that Defendants are unable to pay their rent and the salaries of the few employees who work at the Parking Garage if they still believe such prices to be appropriate (and attainable) currently. Not surprisingly, Defendants did not offer any evidence to support the vague, conclusory assertions of a drop in revenue, nor any analytics discussing what is spent on the salaries of the employees at the Parking Garage and their personal protective equipment.[3]

In support of Defendants' assertion that Tenant should not be required to pay rent, Tenant further contends that "Union 16 stopped paying Rent beginning in April 2020, after the Governor's shutdown, because the impact of the pandemic rendered it unable to afford to do so." (Stiefel Affidavit, para. 11) The Executive Order which required so many businesses (but not Tenant's)

---

[1] A copy of *1140 Broadway* is annexed hereto.

[2] https://iconparkingsystems.com/search/40.7358633/-73.9910835/2020-12-11T08:30:00/2/Union%20Square%20Manhattan,%20New%20York,%20NY,%20USA/monthly/web (pdf print-outs are annexed hereto for the Court's easy reference)

[3] Particularly with Defendants' reliance on Executive Order 202.28, and its prohibition against the commencement of proceedings for eviction based on nonpayment of rent against commercial entities which face financial hardship due to the COVID-19 pandemic, it would be expected that Defendants would use this opportunity to demonstrate such financial hardship. They have not.

to close or reduce their work forces did not go into effect until March 23, 2020. The rent for April 2020 was due a week later, on or before April 1, 2020. It is difficult not to view Defendants' claims with a skeptical eye when Tenant thus asserts that, despite having operated in Union Square for years, that just one (1) week after the Executive Order went into effect, Tenant was barren of funds to pay its rent and operating expenses. It seems much more likely that Defendants saw an opportunity to cease paying rent and took advantage of it. Indeed, even more disturbing about Tenant's credibility in claiming financial hardship due to the pandemic is the fact (which Defendants do not address in their opposition) that Tenant was already withholding tax payments owed to Landlord long before Covid-19 struck New York City. (See Exhibit "B" to Jenkins Affidavit). *See, e.g., CP Assocs. LLC v. Concourse Plaza Family Dental LLC*, Index No. 654307/2020, 2020 WL 6867924 (Sup. Ct. N.Y. Cty. Nov. 20, 2020) ("The Court is well aware of the hardships that the pandemic has inflicted on small businesses across New York City. The fact is that the defendants stopped paying rent in October 2019, almost six months before the pandemic gripped the city. For this dentist, who never had to stop seeing patients at all, to use the pandemic as an excuse rings hollow and is an affront to the actual suffering of the many restaurants and businesses which were no longer able to pay their rent because of the pandemic.").

Such opportunism fits Defendants' *modus operandi* – as evidenced by the multiple other suits commenced against Icon Parking entities recently and the immediate increase of prices on its customers when the minimum wage was raised in New York City three years ago, the impropriety of which resulted in Icon Parking being fined and refunding approximately 22,000 customers fees wrongfully collected.[4] It is respectfully submitted that the Court should not be taken in by Tenant's unsupported claims.

[4] An article describing Icon Parking's fraud and the related settlement is annexed hereto.

In any event, even were Defendants taken at their word and excused from providing any proof of their current finances, claims of financial hardship alone – particularly when unaccompanied by any actual dollar figures or proof of loss – are insufficient to warrant the denial of the relief sought.[5]

ii. That Landlord Seeks Rent Under an Existing Lease Does Not Preclude The Issuance of the Relief Sought

In the first segment of its opposition, captioned "Plaintiff Has Failed To Establish Any Right to Use and Occupancy *Pendente Lite* Relief," Defendants' primary argument is that such relief is "***generally*** reserved for holdover tenancies," is "***normally*** reserved for holdover proceedings" and is "***principally*** reserved for holdover proceeding" with the implication that such relief can only be granted where the Lease has been terminated or where injunctive relief (such as a *Yellowstone* injunction) is sought. (Defendants' Memorandum of Law, pp. 2, 8). As this Court is very aware, ***this is simply not the law***, and this Court is well within its jurisdiction to direct Defendants to pay rent *pendente lite* to Landlord while the Lease remains in effect.[6]

The First Department has recognized that "use and occupancy" can be directed *pendente lite* on an existing lease. For example, in *Andejo Corp. v. S. St. Seaport Ltd. P'ship*, 35 A.D.3d 174 (1st Dep't 2006), the Court affirmed the lower Court's issuance of an order directing the payment of use and occupancy pursuant to an "existing lease" for a current tenant at the Lease rent and distinguished this from the use and occupancy to be paid by holdover tenants, which required

[5] It is also not a basis for impossibility or frustration of purpose, two of the affirmative defenses raised by Defendants.

[6] Defendants' focus on actions where *Yellowstone* relief has been granted actually refutes this point – by its very nature, a *Yellowstone* prevents the termination of a lease. Thus, whether phrased as rent or as use and occupancy, it is clear that any direction of monthly payments *pendente lite* may stem from an existing, viable lease, and is not solely borne of a holdover scenario.

a hearing to determine the amount of such use and occupancy. Plainly, this is a recognition that the relief sought herein is available to Landlord, whether it is framed as rent or as use and occupancy. *See also La Fabrique Owners Corp. v. La Fabrique LLC*, 16 Misc. 3d 130(A), 841 N.Y.S.2d 826 (App. Term 1st Dep't 2007) (Affirming lower Court's order directing tenant to pay rent *pendente lite* in proceeding for nonpayment of rent under an existing lease); *Esposito v. Larig*, 174 A.D.3d 574 (2d Dep't 2019) (Reversing lower Court order which, *inter alia*, denied landlord's motion for ***rent*** *pendente lite*); *40 Broad Assoc. No. 3 LLC v. 40 Broad Commer. LLC,* 2018 NYLJ LEXIS 3992, *2 (Civ. Ct. N.Y. Co. 2018). Clearly, awards of rent and/or use and occupancy *pendente lite* are not "generally," "principally" or "normally" limited to instances involving holdovers or *Yellowstone* injunctions, and Defendants' lengthy assertion of same is irrelevant.[7]

iii. Landlord Does Not Seek an Ejectment in This Action, Nor Through This Motion

Evidently hoping to echo the positive result for the Icon Parking entities in *Park Towers South,* discussed *supra,* Defendants mimic the language in the *Park Tower South* defendants' opposition, and contend that Landlord's motion actually seeks the "constructive eviction" of Tenant from the Parking Garage. Before addressing the incorrectness of this claim vis-à-vis Landlord, it is worth noting that a "constructive eviction" is when ***wrongful*** acts by the landlord "substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises." *Barash v. Pa. Terminal Real Estate Corp*., 26 N.Y.2d 77, 83 (1970). *See also Pac. Coast Silks, LLC v. 247 Realty, LLC*, 76 A.D.3d 167, 172 (1st Dep't 2010). Clearly, there has been

[7] Indeed, even when based on an express statute, the reward of rent or use and occupancy *pendente lite* is not limited to holdover cases. *See, e.g.,* RPAPL 745 (Directing the payment of "rent or use and occupancy accrued from the date the petition and notice of petition [were] served upon the respondent"); RPL 220 ("The landlord may recover a reasonable compensation for the use and occupation of real property, by any person, under an agreement, not made by deed; and a parol lease or other agreement may be used as evidence of the amount to which he is entitled.").

no "wrongful act" by Landlord in simply asking Tenant to pay its rent and there can therefore be no "constructive eviction."[8] *See, e.g., Melendez v. City of N.Y.*, No. 20-CV-5301 (RA), 2020 U.S. Dist. LEXIS 222774, at *27 (S.D.N.Y. Nov. 25, 2020) (Considering anti-harassment laws on commercial and residential tenants arising from COVID-19, and noting "these provisions plainly permit the collection of rent from commercial tenants, and the Court interprets them, by extension, to allow landlords to make routine rent demands from their tenants."). Ironically, in light of Defendants' reliance on a purported prospective constructive eviction to avoid paying rent *pendente lite*, the Court of Appeals in the seminal case on constructive eviction, noted "It has been said to be inequitable for the tenant to claim substantial interference with the beneficial enjoyment of his property and remain in possession without payment of rent." *Barash v. Pa. Terminal Real Estate Corp*., 26 N.Y.2d 77, 83 (1970).

Simply, this motion is not an end-run to achieve the eviction (constructive or otherwise) of Tenant, nor an effort to "circumvent New York State's moratorium on commercial evictions." (Defendants' Memorandum of Law, p. 2) Landlord simply wants Defendants to live up to the terms of the Lease and the Guaranty.

iv. Landlord's Request for the Instant Relief is Appropriate and Warranted

Contrary to Defendants' contention, Landlord is not seeking "payment of all future, not-yet-due rent under the subject lease, which has not been terminated, regardless of the circumstances and notwithstanding that Plaintiff has remedies available at law." (Defendants' Memorandum of Law, pp. 1-2) In fact, virtually nothing about this sentence is accurate.

[8] Defendants' concern about Tenant being ejected or evicted if they do not pay use and occupancy if ordered by this Court seems to send a message that, even if ordered to do so, Defendants will not heed this Court's order and therefore be subject to ejectment. We will not comment on such an implication at this time.

First, through this motion, Landlord does not seek all future rent due under the Lease. Landlord just seeks rent, ***as it becomes due***, while this case is being litigated. Second, Landlord has not demanded such rent be paid "regardless of the circumstances." To the contrary, Landlord expressly noted that such payments would be "without prejudice." And, of course, should a circumstance arise which would entitle Tenant to withhold rent, Defendants have the ability to request an adjustment or suspension of any rent due. Third, Landlord does not have a remedy available at law, short of allowing Tenant to occupy the Parking Garage rent-free and continue to turn a profit, all while Landlord is left holding the bills for the taxes, upkeep, etc. of the Parking Garage.[9] Which brings us back to the very reason the instant motion is appropriate, and the relief sought is warranted -- "[i]t is manifestly unfair that [a tenant] should be permitted to remain in possession of the subject premises without paying for their use." *MMB Associates v. Dayan,* 169 A.D.2d 422, 422 (1st Dep't 1991). *See also 401 Hotel, L.P. v. MTI/The Image Grp., Inc*., 271 A.D.2d 228, 230 (1st Dep't 2000) ("It would have been unjust to permit MTI to remain in possession of, and derive substantial benefits from, the premises for such an extended passage of time without paying.").

Defendants' reliance on Justice Nock's decision denying the landlord's order to show cause in *Park Towers South Company, LLC v. Columbus Circle Parking, LLC et al,* Supreme Court, N.Y. Co. Index No. 653757/2020 -- which, obviously, is not binding on this Court – is misplaced.

[9] The cases offered by Defendants for the proposition that Landlord has an adequate remedy at law universally consider requests for preliminary injunctions, and not for the payment of rent or use and occupancy *pendente lite*, which it is well recognized that Courts have broad discretion to award. *See, e.g., Harris v. Patients Med., P.C.,* 169 A.D.3d 433 (1st Dep't 2019) (Affirming denial of preliminary injunction relating to an employment contract dispute); *Eastview Mall, LLC v. Grace Holmes, Inc*., 182 A.D.3d 1057, 1058 (4th Dep't 2020) (Reversing issuance of preliminary injunction which, inter alia, prevented defendant from ceasing operations, noting "plaintiff did not establish that it would sustain irreparable injury without a preliminary injunction.").

In *Park Towers South*, the landlord did not merely seek rent *pendente lite* after issue had been joined, as is the case here. Rather, the landlord tried to fast-track the entire process, seeking an order: (i) directing tenant to pay all outstanding rent; (ii) directing tenant to pay monthly use and occupancy; (iii) entering judgment in the full amount sought in the complaint; (iv) ordering defendants not to commit waste; (v) directing tenant to provide pre-litigation discovery; (vi) ordering defendants to account for the fees received from parking customers since April 2020; (vii) declaring defendants to be in default of their lease; and (viii) awarding plaintiff-landlord the costs and fees incurred in the litigation.[10] ***All before defendants had even answered the complaint***! It can therefore come as no surprise that Justice Nock denied the motion as, *inter alia*, seeking the ultimate relief sought in the complaint.

Here, unlike in *Park Towers South*, Defendants answered the Complaint prior to the service of the order to show cause. The absence in the opposition of even a single sentence based on any of the defenses set forth in the Answer speaks volumes – simply, Defendants have no legal defense to Landlord's request that they pay rent *pendente lite.*

Further, as noted above, Landlord does not seek "all future rent due," as the Court found to be at issue in *Park Towers South.* Rather, Landlord just seeks rent which becomes due during the course of this litigation – rent which is vital to pay the taxes and ongoing operating expenses of the seven-story Parking Garage (which has Tenant as its sole occupant). As to Justice Nock's determination that the plaintiff's motion was not, in actuality, an interlocutory request for use and occupancy *pendente lite*, but rather a request for the ultimate relief sought in the breach of contract claim, we respectfully disagree. Indeed, the First Department considered, and rejected, that very

[10] For the Court's easy reference, a copy of the order to show cause, without exhibits or supporting papers, is annexed hereto.

argument in *MMB Associates v. Dayan,* 169 A.D.2d 422 (1st Dep't 1991), reversing the lower Court and rejecting the determination that "Because the underlying action seeks use and occupancy pursuant to Real Property Law § 220, to grant a preliminary order for the same relief prior to an answer would be inappropriate given the factual dispute." *Id.* at 422. As noted above, that *MMB Associates* addressed use and occupancy rather than rent is a distinction without a difference on this issue – Tenant is no more entitled to withhold rent simply because Landlord has not terminated the Lease.

This Court's decision in *CP Assocs. LLC v. Concourse Plaza Family Dental LLC*, Index No. 654307/2020, 2020 WL 6867924 (Sup. Ct. N.Y. Cty. Nov. 20, 2020) – cited by Defendants – is much more on-point with this matter. In particular, both the tenant in *CP Assocs.* and Tenant here were deemed essential businesses, and therefore have not been subjected to closure mandates. Indeed, the relief sought herein is even (arguably) more warranted inasmuch as Tenant, unlike *CP Assocs.,* did not close at all during the pandemic. And, like the tenant in *CP Assocs.*, Defendants' default pre-dated Covid-19 and the related Executive Order, with real estate taxes outstanding as of January 2020. *See also 1140 Broadway LLC v. Bold Food, LLC*, 2020 NY Slip Op 34017(U) (Sup. Ct. N.Y. Co. Dec. 3, 2020).

Accordingly, like the tenant in *CP Assocs*. (and the tenants in *Andejo Corp.* and *MMB Associates,* to name a few), it is respectfully submitted that the instant motion should be granted, and Defendants directed to pay rent *pendente lite*.

B. The Amount of *Pendente Lite* Rent Sought, Consisting of Rent and Additional Rent at the Lease Rate, is Appropriate

Lastly, Defendants argue that Landlord has not demonstrated that the *pendente lite* rent sought is "market value." As Defendants spend great length discussing, there is an existing lease and, in that lease, the rent is clearly set forth. It is this sum which Defendants should be obligated

to pay (as this Court ordered in *CP Assocs.*) and there is no need for a determination as to what the "market value" of the Parking Garage is. *See Andejo Corp. v. S. St. Seaport Ltd. P'ship*, *supra* at 174 (Affirming award of use and occupancy, under existing lease: "The award of interim use and occupancy, without a hearing, in the amount of the base rents contained in existing leases was a proper exercise of discretion."). *See also Marbru Assocs. v. White*, 114 A.D.3d 554, 555 (1st Dep't 2014) ("The amount sought, $1,595.53 per month, is the amount of monthly rent under the last lease effective between the parties, and, as such, is fair.").

Notably, despite complaining about the notion of Defendants being required to pay the rent due under the (existing) Lease, Defendants offer nothing of any evidentiary value as to what the fair market value of the Parking Garage is. In any event, on the off chance that Defendants eventually demonstrate that the rent they are directed to pay *pendente lite* exceeds what they should be required to pay, adjustments can be made at the conclusion of this case. *See*, *e.g., E. 4th St. Garage, Inc. v. Estate of Berkowitz*, 265 A.D.2d 249 (1st Dep't 1999) (Affirming order granting request for payment of use and occupancy *pendente lite*, and noting "if plaintiff's claims of error are there found to possess merit, it may be provided with a refund or rent credit.").

Defendants rely on the First Department's decision in *Mushlam, Inc. v. Nazor*, 104 A.D.3d 483 (1st Dep't 2013) to support the notion that Landlord has not established the "reasonable value" which Defendants should be required to pay for the use of the Premises. While in that case the Court found that the amount charged in the prior rent to be of little probative value, ***it actually increased the use and occupancy ordered to be paid over what the lease had called for***. Ultimately, the Court concluded, "the award of use and occupancy is only *pendente lite*, and the remedy for any over or underpayment is a speedy trial." *Id.* at 483. Similarly, in *43rd St. Deli, Inc. v. Paramount Leasehold, L.P.*, 107 A.D.3d 501 (1st Dep't 2013), also cited by Defendants, the

Court expressly identified that plaintiff as a "holdover tenant," and, in light of the holdover status, held "it would be premature to find that the rent under the lease is the correct *pendente lite* payment. To the extent that plaintiff is ultimately successful at trial, it may be provided with a refund or rent credit." *Id.* at 501-02. Indeed, the *43rd St. Deli* Court highlighted the significance of the plaintiff's status as a holdover tenant (as opposed to a tenant with an existing lease being required to pay the rent thereunder), contrasting the case before it with that at issue in *N.Y. Physicians LLP v. Ironwood Realty Corp*., 103 A.D.3d 410 (1st Dep't 2013), wherein the First Department considered a lease which was still in effect (by virtue of a *Yellowstone* injunction), and held "the motion court appropriately ordered plaintiff to pay the base rent that was in effect during the previous lease term plus escalation and real estate taxes." *Id.* at 411.

* * *

In sum, Defendants have not presented any viable reason why they should not be required to pay rent *pendente lite*, nor that such rent should be at any rate other that set forth in the Lease - $127,316.67 per month.

CONCLUSION

Based on the foregoing, Tenant and Guarantor should be directed to pay to Landlord rent *pendente lite* each month beginning November 2020 pursuant to the terms of the Lease, together with such other and further relief as the Court deems just and proper.

Respectfully submitted,

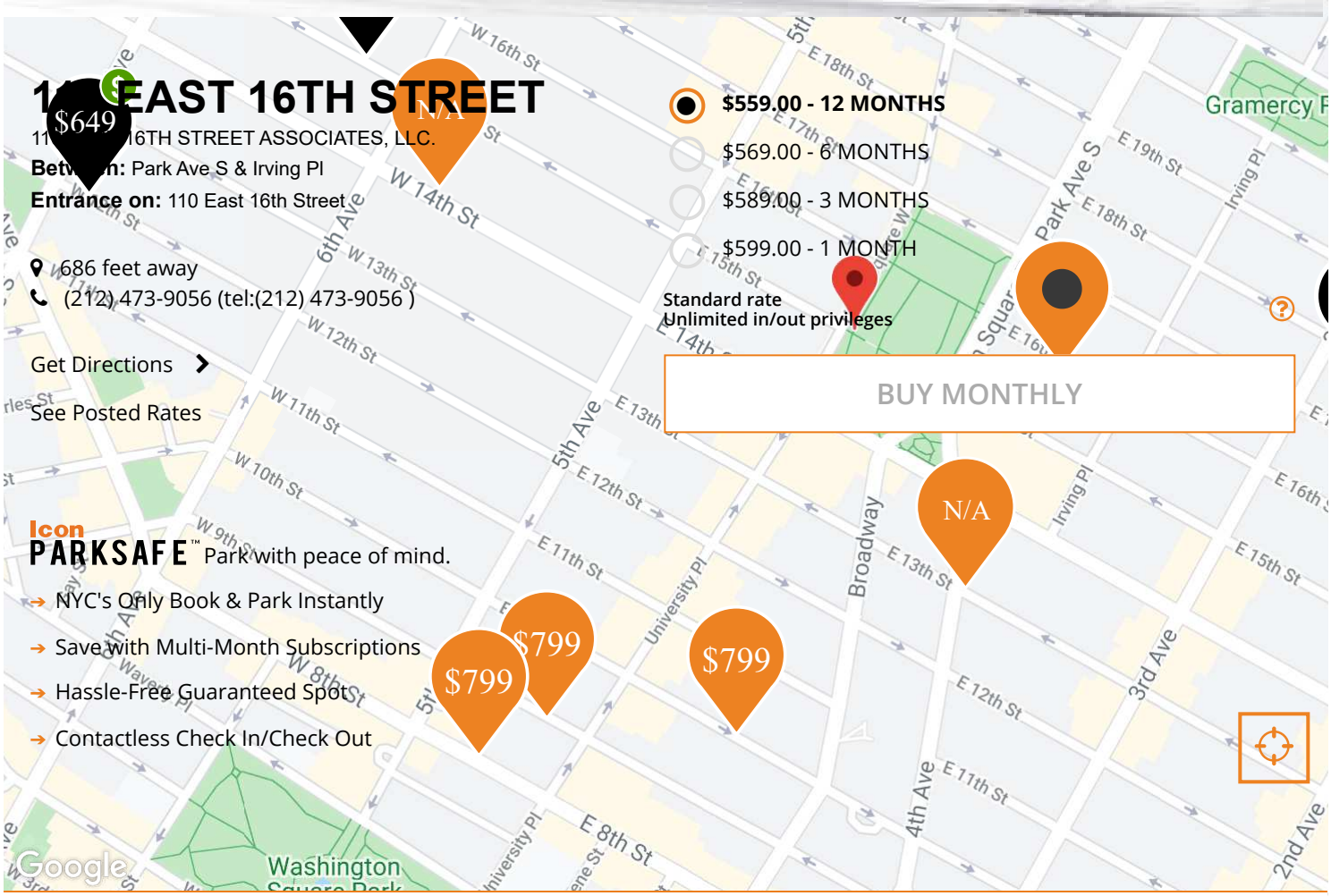
Dated: New York, New York
December 15, 2020

COZEN O'CONNOR
Attorneys for Plaintiff

By: _____

Menachem J. Kastner, Esq.
Amanda L. Nelson, Esq.
Emily A. Shoor, Esq.
45 Broadway, 16th Floor
New York, NY 10006
(212) 453-3811

ICON PARKSAFE: (/iconparksafe) Contactless Payments, Hospital-Grade Disinfection, Gloves, Masks, & Social Distancing.



BUY MONTHLY

HON. LOUIS L. NOCK
J.S.C.

38

At I.A.S. Part 38 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse located at 60 Centre Street, New York, New York, on the 21st of OCTOBER, 2020.

Present: Hon. _____
Justice

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

----------X

PARK TOWERS SOUTH COMPANY, LLC

Plaintiff,

-against-

COLUMBUS CIRCLE PARKING, LLC
TMO PARENT, LLC

Defendants.

----------X

653757/2020

INDEX NO.: ~~253757-2020~~

ORDER TO SHOW CAUSE

~~SIRS:~~

Upon the Affidavit of Brett Obletz, sworn to on October 19, 2020, the affirmation of Robert Dashow, Esq. dated October 19,2020 with exhibits and upon the pleadings and other proceedings previously had herein let the Defendants Columbus Circle Parking, LLC ("Columbus") and TMO Parent, LLC ("TMO"), or their counsel show cause at the Supreme Court of the State of New York County of New York IAS Part 38 ~~Room 60 Centre Street New York, NY~~ on ~~October~~ November 12, 2020 at 10:00 a.m. o'clock, why an order should not be made and entered:

via telecon ference to be arranged by the court

1) Ordering Columbus to immediately pay all outstanding rent for the period of April 1, 2020 through October 31, 2020;
2) Ordering Columbus to pay $62,716.67 ongoing per month for use and occupancy;
3) Directing Columbus and TMO to provide prelitigation discovery to determined which Icon Parking entity will be held liable for Columbus and TMO's breach of Lease and Guaranty;
4) Ordering the Defendants to account for the disposition of monies received from parking customers April 1, 2020 to present and continuing during the litigation
5) Finding that Columbus and TMO are in default and entering judgment in the full amount of the complaint plus interest, costs and fees;

6) Ordering that the Defendants not commit further waste at the premises.

7) The costs and fees of this litigation.

8) Such other and further relief as this Court deems just and proper

It is ordered that pending the hearing of this motion:

1) Columbus Circle Parking LLC must deposit monies earned from parking fees with the Court ~~from the date of this Court's order until determination hereof;~~

2) Columbus Circle Parking, LLC must pay all rent coming due ~~from the date of this Order to Show Cause until determination hereof;~~

3) Defendants must account for the disposition of monies received from parking customers April 1, 2020 to present ~~and continuing during the litigation~~

~~4) Defendants shall not commit further waste at the premises.~~

JSC JSC JSC JSC

Sufficient cause being alleged therefore, it is hereby ORDERED that Service of the order to show cause with all papers upon which it is based shall be made by delivery to the ~~Demised~~ Defendants' premises at 330 West 58th Street New York, NY and to 211 East 38th Street New York, NY and proof of service shall be submitted via ecf. on or before the return date of the motion.

Answering papers if any are to be served no later than ~~seven (7) days before the return date of this motion.~~ on or before October ~~29~~ 27, 2020,

~~Oral Argument Directed~~

~~JSC~~

Enter:
JSC

November 9, 2020.

https://www.wsj.com/articles/new-york-parking-chain-to-refund-customers-1-2-million-1498682542

NEW YORK

New York Parking Chain To Refund Customers $1.2 Million

As part of a settlement with the city over improper fees, the company that owns Icon and Quik garages also will pay a $100,000 fine

Quik Park on West 46th Street in Manhattan. Citizens Icon Holdings operates more than 300 Icon Parking and Quik Park facilities, mostly in New York City, according to its website.

PHOTO: ALEXANDER COHN/THE WALL STREET JOURNAL

By *Corinne Ramey*

June 28, 2017 4:42 pm ET

New York City's Department of Consumer Affairs said Wednesday it had settled with a parking-garage chain that charged its monthly customers what it called a $30 "NYC Living Wage Assessment" fee.

The settlement requires Citizens Icon Holdings LLC, the parent company, to refund some 22,000 customers a total of $1.2 million and pay a $100,000 fine. The chain operates more than 300 Icon Parking and Quik Park facilities, mostly in New York City, according to its website.

The Department of Consumer Affairs said that beginning in January, when the state's minimum-wage law went into effect, the garage began charging its monthly customers a

$30 monthly fee which it called an NYC Living Wage Assessment.

"A business that misleads customers about what its fees are for is violating our City's Consumer Protection Law," Department of Consumer Affairs Commissioner Lorelei Salas said in a written statement.

The garage chain didn't respond to a request for comment. Under the terms of the settlement, the company didn't admit wrongdoing. Its website says it delivers "affordable parking and prompt and courteous service."

This year, the New York state minimum wage for businesses with at least 11 employees increased to $11 from $9 an hour. The Consumer Protection Law prohibits misleading statements, city officials said. The phrase "NYC Living Wage Assessment" was misleading because the higher wages were apparently due to the increase in the state minimum wage, not because of a city wage, officials said.

City Council Member Helen Rosenthal, a Democrat who represents Manhattan's Upper West Side, said constituents told her about the fee.

"For a company to misleadingly use a minimum-wage increase to disguise an ordinary price hike was a deeply cynical violation of the public trust," she said in a statement.

Write to Corinne Ramey at Corinne.Ramey@wsj.com

1140 Broadway LLC v Bold Food, LLC
2020 NY Slip Op 34017(U)
December 3, 2020
Supreme Court, New York County
Docket Number: 652674/2020
Judge: Arlene P. Bluth
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH **PART** IAS MOTION 14

Justice

----------X

1140 BROADWAY LLC,

Plaintiff,

- V -

BOLD FOOD, LLC, KBFK RESTAURANT CORP.

Defendants.

----------X

INDEX NO. 652674/2020

MOTION DATE 11/24/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

were read on this motion to/for JUDGMENT - SUMMARY.

The motion by plaintiff for summary judgment is granted as to liability only.

Background

In this commercial landlord-tenant case, plaintiff (the landlord) moves for summary judgment. It claims that defendant Bold Food (the tenant) leased a portion of the twelfth floor at plaintiff's building in Manhattan as office space. Defendant KBFK entered into a good guy guarantee in connection with the lease, which expired in February 2022. Plaintiff contends that the tenant stopped paying rent in February 2020 and eventually vacated the space on June 30, 2020, five months later.

In opposition, defendants cite the ongoing pandemic as the reason the tenant stopped paying rent. They argue that performing under the contract was objectively impossible and therefore any default was excusable. Defendants also rely on the frustration of purpose doctrine to excuse the tenant's failure to pay rent. Defendant Bold Food observes that its primary services

involve managing and consulting for a group of restaurants and the shutdown of restaurants renders its business model unprofitable. Defendants argue in the alternative that there must be an inquest to determine the precise amount plaintiff is due.

In reply, plaintiff argues that the impossibility and frustration of purpose defenses are inapplicable and fail as a matter of law. Plaintiff also insists that the guarantor must be held liable and that its damages are not disputed.

Discussion

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 bonafide 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 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

As an initial matter, the Court grants plaintiff's motion as to liability and rejects defendants' reliance on the doctrines of impossibility and frustration of purpose. The Court empathizes with the many business that have been adversely affected by the ongoing pandemic; here, both the landlord and the tenant have undoubtedly faced significant hardship.

The doctrine of frustration of purpose requires that "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 Services, Inc. v Koval-Olsen*, 11 AD3d 263, 265, 782 NYS2d 708 [1st Dept 2004]). "[T]his doctrine is a narrow one which does not apply unless the frustration is substantial"(*id.*). Here, the lease was for office space in a building and the tenant's business was devastated by a pandemic. That does not fit into the narrow doctrine of frustration of purpose. Simply put, defendants could no longer afford the rent because restaurants no longer needed the management help that the tenant provides.

This is not a case where the office space leased was destroyed or where a tenant rented a unique space for a specific purpose that can no longer serve that function (such as a factory that was condemned after the lease was signed or a agreeing to rent costumes for a specific play to be performed at a specific theater on specific dates but the theater burned down before the first rental date). To be clear, the Court takes no position on what circumstances might permit the implication of a frustration of purpose doctrine under a generic office lease. The Court merely concludes that it does not apply here, where the tenant rented office space, the tenant's industry experienced a precipitous downfall and the tenant to no longer be able pay the rent.

Similarly, the Court finds that the impossibility doctrine does not compel the Court to deny the motion. "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" (*Kel Kim Corp. v Cent. Markets, Inc.*, 70 NY2d 900, 902, 524 NYS2d 384 [1987]).

It is critical to point out that the tenant merely provided restaurants with consulting services. It was not shut down by any public health directives. In other words, the tenant was one step removed from the governor's public health orders relating to restaurants because their business assists restaurants.[1] It appears that restaurants no longer needed assistance with human resources, payroll or accounting, not because of anything plaintiff did (or failed to do). Sometimes that happens in business—an industry changes overnight.

And although restaurants were required to scale back certain operations (such as indoor dining) because of the pandemic, they were not fully shut down. Many food establishments decided to shut down because of the financial consequences from both the pandemic and the public health orders, but that does not mean there was a "destruction of the subject matter" contemplated in the contract at issue here, which was for office space on the twelfth floor of an office building. The Court is unable to find that the doctrine of impossibility has any application here.

[1] To be clear, the Court takes no position on whether a restaurant could successfully rely on the doctrines of impossibility or frustration of purpose. That issue is not before the Court in this motion.

Summary

The undisputed fact is that the lease was for office space in a building and the tenant stopped making payments. Nothing in the lease provides a remedy for a situation like this. The landlord never agreed to make paying the rent contingent on the tenant being able to afford it. The Court declines to step in and unilaterally modify the parties' contract and tell the landlord that it should not be able to enforce the agreement it signed with a tenant.

And the parties included a safeguard: this landlord agreed to a good guy guaranty, thus lessening the guarantor's risk if the tenant went out of business so long as certain obligations were satisfied. The guarantor is only responsible for rent for the time the tenant is actually in possession and had the power to return the premises to the landlord. Here, the tenant waited five months to return the premises to the landlord – yet the tenant and guarantor ask this Court to absolve them of their obligations. The Court declines to ignore a clear contractual provision designed to address the situation at issue here—where the tenant stops paying the rent and retains possession of the premises.

However, the Court finds that a hearing is required to assess the amount of damages plaintiff is due. Defendants argued that the security deposit has not been deducted from the damages requested although plaintiff explains in reply that any amount it is awarded should be deducted by the amount of the security deposit. This is an indication of the lack of proof as to plaintiff's actual damages. Plaintiff did not provide a ledger or any documentation demonstrating how it calculated the amount it seeks. While plaintiff attached the affidavit of its agent (NYSCEF Doc. No. 8), that does not show how it totaled the rent, additional rent, reasonable attorneys' fees, any damages or interest. In fact, Mr. DiFiore asks, in the alternative, that the Court refer this matter to a special referee to fix the amount of damages.

To the extent that defendants argue that the ongoing pandemic should constitute a "casualty" that could entitle defendants to an abatement, that claim is denied. That portion of the lease refers to physical damage, not the failure of defendants' business to retain its clients.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment is granted as to liability only and there shall be a trial to determine the amount of damages due to plaintiff, and plaintiff is directed to file a note of issue on or before December 15, 2020.

12/3/2020
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

652674/2020 1140 BROADWAY LLC vs. BOLD FOOD, LLC
Motion No. 001

Page 6 of 6