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

GRAPHNET, INC.,

Plaintiff,

-against-

30 BROAD STREET VENTURE LLC,

Defendant.
.

Index No.: 151622/2021

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S CROSS-MOTION TO DISMISS THE COMPLAINT AND IN FURTHER OPPOSITION TO PLAINTIFF'S APPLICATION, BROUGHT BY ORDER TO SHOW CAUSE, FOR A YELLOWSTONE INJUNCTION

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Defendant 30 Broad Street Venture LLC ("Defendant" or "Landlord") submits this memorandum of law (a) in support of its cross-motion, pursuant to CPLR 3211(a)(1) and/or 3211(a)(7), to dismiss each of the five causes of action asserted by plaintiff Graphnet, Inc. ("Plaintiff" or "Tenant") in its Complaint; and (b) in opposition to Plaintiff's motion, brought by Order to Show Cause, seeking a Yellowstone preliminary injunction.

STATEMENT OF FACTS

Tenant is a technology service company, providing cloud-based electronic messaging solutions to its clients in, inter alia, the financial, insurance, healthcare, media and telecommunications industries. It is a sophisticated Tenant, represented by counsel.[1]

Tenant initially occupied a 'swing space' on the 43rd floor (the "43rd Floor Space") in the building located at 30 Broad Street, New York, New York (the "Building"), pursuant to a License Agreement made as of October 1, 2018 (the "Original License") and as subsequently amended by a First Amendment of Lease dated as October 7, 2019 (the "First Amendment") (collectively, the Original License and the First Amendment of License shall be referred to hereinafter as the "License").[2] The stipulated expiration date of the License was October 31, 2020.

In late 2018, at the time that the parties executed the License, it was with the expectation that the parties would thereafter enter into a long-term lease for other space in the Building.[3] Accordingly, the parties specifically agreed that in the event that Landlord and Tenant entered into a lease for a permanent space in the Building, the term of the License would expire within five

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1 The Court is respectfully referred to the accompanying affidavit of William Brodsky, sworn to on March 11, 2021 (the "Brodsky Aff.") at ¶¶ 6, 15.

2 See Brodsky Aff., Exh. 2

3 See Brodsky Aff., ¶ 6

business days of the commencement date of said lease, and Tenant would be required to vacate and surrender the 43rd Floor Space to Landlord in accordance with the terms set forth in the License.

In January 2020, Tenant agreed to take a permanent space in the Building, and the parties entered into an Agreement of Lease made as of January 15, 2020 (the "Lease")[4] for a certain portion of the 26th floor (the "26th Floor Space") in the Building. Landlord agreed -- with Tenant participating in the design process -- to perform certain improvements to the 26th Floor Space ("Landlord's Work");[5] and the parties also agreed that once Landlord had substantially completed Landlord's Work, Tenant would relocate from the 43rd Floor Space to the 26th Floor Space and would start paying rent -- after a free-rent period of three months.[6]

Tenant itself confirmed this agreement, in an email from Guy Conte, Tenant's CFO and Executive Vice President, dated May 26, 2020, to Landlord, where Mr. Conte stated "[t]he effective date of occupation, for the 26th floor facility, will commence upon completion of the construction".[7]

By letter dated October 26, 2020 ("Landlord's Substantial Completion Notice," Brodsky Aff., Exh. 8), Landlord notified Tenant that, as of October 26, 2020, Landlord's Work as required by the Lease was Substantially Completed (as defined therein), and, therefore, the 26th Floor Space was suitable and available for Tenant's relocation.

4 See Brodsky Aff., Exh. 4
5 See Brodsky Aff. at ¶ 19.
6 See Brodsky Aff. at ¶ 29
7 See Brodsky Aff. at ¶¶ 4, 23

Nevertheless, Tenant ignored Landlord's Substantial Completion Notice, and, while also ignoring multiple requests by Landlord to do so, refused to execute Landlord's Certificate accepting possession of and acknowledging that the 26th Floor Space was ready for Tenant's occupancy.[8] Tenant also failed and refused to move into the 26th Floor Space. Instead, Tenant chose to continue to occupy the 43rd Floor Space, without paying any license fees therefor,[9] and also failed to vacate and surrender possession of the same to Landlord on October 31, 2020 as required by the License. Tenant never relocated to the 26th Floor Space and continued to hold-over in the 43rd Floor Space -- until Tenant vacated the Building on January 22, 2021.

In accordance with the Lease, Landlord served Tenant with a notice to cure dated February 4, 2021 (the "Notice to Cure") (Brodsky Aff., Exh. 18), informing Tenant that it was in default under the Lease, in that (i) Tenant had failed to pay rent and additional rent due for the month of February 2021, and (ii) the 26th Floor Space had become vacant, deserted or abandoned; and further advised Tenant that, in the event Tenant failed to cure said defaults on or before February 18, 2021, Landlord then intended to serve the appropriate notice to terminate the Lease.

[8] Tenant was kept informed as Landlord's Work progressed, and its representative visited the 26th Floor Space to inspect said progress on more than one occasion. See Brodsky Aff. at ¶ 19.

[9] As set forth in the accompanying Brodsky Aff., Plaintiff stopped paying license fees and/or use and occupancy due to Defendant pursuant to the License beginning as of August 1, 2020 and continuing through and including the date that Plaintiff vacated the Building -- i.e., January 22, 2021, for a total amount due to Defendant pursuant to the License of $192,175.50. Plaintiff has also failed to pay Defendant rent due under the Lease for the months of February and March 2021 in the total amount of $34,941.00. See Brodsky Aff. at ¶¶ 42, 49.

In lieu of curing its defaults in accordance with the Notice to Cure, Tenant commenced the instant action alleging five causes of action against Landlord, and moving, by Order to Show Cause, for a Yellowstone preliminary injunction.

In essence, Tenant now is seeking to walk-away from its obligations under the Lease. But it is now clear, particularly given Mr. Conte's May 26th e-mail to Landlord, that Tenant's current litigation position is an after-the-fact pretext. It is plain that Tenant just wants to escape from its Lease because it no longer desires an office location in New York City -- or, if Tenant cannot succeed in escaping from its Lease, then, in the alternative, that Tenant wants to re-negotiate the Lease that it entered into with Landlord prior to the Covid-19 pandemic. But such motives do not, of course, constitute a proper basis for a 'Yellowstone' stay. Without divulging the substance of any settlement communications: we strongly suspect that Tenant's default, and this lawsuit, are just attempts to gain 'leverage,' as a basis for Tenant's attempt to renegotiate the terms of the lease. But the 'Yellowstone doctrine' was not intended to grant tenants such negotiating 'leverage;' and Tenant's attempt here to thus abuse the doctrine should be rejected.

Accordingly, as shown here: (a) Tenant's excuses are without merit, and (b) in any event, do not warrant a Yellowstone injunction.

PROCEDURAL HISTORY

Plaintiff commenced this action by e-filing a summons and complaint (the "Summons and Complaint") with the New York County Clerk's Office on February 19, 2021 under Index No.: 151622/2021. (NYSCEF Doc No.: 1.) Simultaneously with the e-filing of the Summons and Complaint, Plaintiff also e-filed an application for a temporary restraining order and ultimately a Yellowstone preliminary injunction. (NYSCEF Docs No.: 2-9).

On February 22, 2021, Defendant e-filed its preliminary opposition to Plaintiff's application for a temporary restraining order and the Yellowstone preliminary injunction (the "Claman Opp. Affirm.") (NYSCEF Docs. No.: 11-14). In its preliminary opposition, Defendant not only pointed out the dispositive defects of Plaintiff's position, but also suggested that Plaintiff be given an opportunity to supplement its filing to meet Defendant's preliminary objections. Defendant repeated this offer at oral argument on February 23, 2021. Tenant, however, declined the opportunity to supplement.[10]

Defendant now, in addition to opposing Plaintiff's application for a Yellowstone injunction, cross-moves for dismissal of each of the five causes of action alleged by Plaintiff in the Complaint pursuant to CPLR 3211(a)(1) and/or 3211(a)(7), in the face of the Lease and the undisputable facts.

In short, as noted in the Claman Opp. Affirm.: (a) since the claims are without merit, the Yellowstone stay should be denied;[11] and (b) in any event, Tenant has failed to show that it is 'ready, willing, and able,' to cure the noticed default -- an essential element of a Yellowstone injunction.

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[10] Accordingly, Plaintiff should not be permitted to introduce new arguments in its reply papers. See, Dannasch v. Bifulco, 184 A.D.2d 415, 417 (1st Dep't 1992) ("The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion").

[11] See, e.g., Excel Graphics Technologies, Inc. v. CFG/AGSCB 75 Ninth Avenue, LLC, 1 A.D.3d 65, 71 (1st Dep't 2003).

ARGUMENT

I. TENANT'S FIRST AND SECOND CAUSES OF ACTION ARE PREMISED UPON ITS MISCONCEPTION OF THE TERM 'COMMENCEMENT DATE' IN THE LEASE. THUS, IN LIGHT OF THE APPLICABLE CASE-LAW AND THE PLAIN LANGUAGE OF THE LEASE, THESE CLAIMS SHOULD BE DISMISSED

In support of its First and Second Causes of Action, Plaintiff simply denies the existence of any defaults under the Lease, and contends that it "has duly performed all of the terms of the Lease on its part to be performed." (Complaint ¶¶ 21, 25). Relying upon these baseless assertions, Plaintiff seeks (i) a declaratory judgment that Plaintiff is not in violation of the Lease, nor is Plaintiff required to cure in accordance with the Notice to Cure; and (ii) a permanent injunction enjoining the termination of the Lease pursuant to the Notice to Cure. Contrary to Plaintiff's assertions, however, it is clear from the applicable case-law and the plain language of the Lease that Plaintiff is in default of the Lease.

Simply put, Tenant's allegations are based upon its misconception of the definition of 'Commencement Date' in the Lease.

As a predicate, it is important to note that the defined term 'Commencement Date' does not refer to the date when the Lease became effective -- for the Lease became effective upon execution. Thus, Lease ¶ 1(B) states that the Lease becomes effective "hereby," i.e., upon execution, see also the first sentence of Lease ¶ 23(A), see also Landlord's initial letter to Tenant dated November 12, 2020,[12] making these points.

[12] See Brodsky Aff., Exh. 12.

Rather, "Commencement Date" is a key term insofar as Tenant's obligation to start paying rent commences three (3) months later -- i.e., after a three (3) month free rent period. See Lease ¶ 1(C)(ii).

Turning then to the Lease's definition of "Commencement Date," Lease ¶ 1(A)(v) provides:

> "Commencement Date" shall mean the later of (a) the date on which Landlord's Work (as defined below and in Exhibit "B" hereto) in the Premises is Substantially Completed (as defined in Exhibit "B" hereto), (b) the date on which Landlord's Work in the Premises would have been Substantially Completed but for the occurrence of any Tenant Delay Days (as defined in Exhibit "B" hereto), or (c) the date on which Tenant occupies any portion of the Premises and begins conducting business therein.

Tenant now simply misconstrues -- for its own benefit -- the definition of Commencement Date in Lease ¶ 1(A)(v) as granting Tenant some kind of unilateral 'option' in its favor, whereby Tenant's unilateral decision to not take occupancy of the 26th Floor Space somehow indefinitely postpones its rent obligations under the Lease. Hence, under Tenant's misplaced understanding of Commencement Date, Tenant's obligation to pay rent has not commenced -- and indeed might never commence -- and, therefore, according to Tenant, it is not in default of its obligations under the Lease.

Contrary, however, to Tenant's misconstruction of the term 'Commencement Date,' and as previously explained to Tenant, the governing rule applicable here has been summarized as follows (Claman Opp. Affirm. ¶¶9-10):

> Where a contract calls for performance of an act within a specified time after completion of another act, but the contract is silent as to the time of the completion of such other act, a reasonable time is

> implied for its completion and the beginning of the period for performance of the act which is to follow it.
>
> 22 NY Jur.2d Contracts § 272 at fn. 10, citing to Acreage Estates Co. v. Shelley, 275 A.D. 842 (2d Dep't 1949).

As applicable here, this means that:

> When a [lease] calls for [payment of rent] within a specified period [i.e., 3 months] after [tenant begins conducting business in the space], but the [lease] is silent as to [to the date by which tenant is obligated to begin conducting its business in the space], a reasonable time is implied for [tenant to begin conducting its business in the space], and [the commencement of tenant's obligation to pay rent, following any free-rent period].
>
> Accord, e.g., Murphy v. Keel, 71 Misc.2d 844 (Sup. Ct. Oneida Co. 1972), aff'd, on the opinion below, 40 A.D.2d 749 (4th Dep't 1972).
>
> [And see further discussion in Claman Opp. Affirm. ¶¶ 8-10]

Furthermore, it is well established that 'reasonable time of performance' can and should be determined as a matter of law, where there are no disputes as to the relevant facts. See, e.g., GSL Enterprises, Inc. v. Bella Carla Fashions, Inc., 1996 WL 34573256 (Sup. Ct. N.Y. Co.) (Saxe, J.) [applying the rule that a tenant, in order to assert constructive eviction, must abandon the premises without unreasonable delay; citing Leider v. 80 William Street Co, 22 A.D.2d 952 (2nd Dep't 1964) (holding that where the relevant facts are not in dispute, 'reasonable time' should be determined as a matter of law); and thereupon granting summary judgment to landlord, on basis that tenant had failed to vacate within a reasonable time); see also, e.g., Tedeschi v. Northland Builders, LLC, 74 A.D.3d 1613 (3rd Dep't 2010) (plaintiff-seller gave defendant purchase-money financing, with first payment due upon receipt of government approvals for defendant's development; defendant abandoned its application, and argued that payment was accordingly never due, i.e., that the note was "open-ended." The court held, however, that defendant was subject to an implied obligation to obtain permits within a reasonable time; and in view of

defendant's abandonment of the process, the notes were now due); and see generally, Glen Banks, New York Contract Law § 16.2 (noting that "When the attendant facts are undisputed, the court may decide as a matter of law what constitutes a reasonable time in which to perform").

This case is just like Tedeschi in that here too Tenant has abandoned the 26th Floor Space, and cannot dispute that it had a reasonable opportunity to move-in to that space on October 26, 2020.

Again, in particular: Tenant was already in the 43rd Floor Space, and the intent was that it would relocate to the 26th Floor Space once the 26th Floor Space was built-out for Tenant;[13] and Tenant has not alleged any reason why Tenant could not have promptly relocated to the 26th Floor Space upon substantial completion of the build-out. To the contrary, Guy Conte acknowledged in his May 26th e-mail that he understood that "[t]he effective date of occupation, for the 26th floor facility, will commence upon completion of the construction."[14]

Accordingly, Tenant's First and Second Causes of Action should be dismissed.

II. TENANT'S THIRD, FOURTH AND FIFTH CAUSES OF ACTION ARE LEGALLY INSUFFICIENT AND SHOULD BE DISMISSED

a. The Lease Does Not Excuse Tenant From Performing Its Obligations Thereunder

Tenant alleges that it has no obligation to pay (or should be excused from paying) rent pursuant to the terms of the Lease (Complaint ¶¶ 34, 38). On the face of the Lease, however, this allegation is patently without basis.

[13] See Brodsky Aff. at ¶14.
[14] See Brodsky Aff. at ¶¶19, 22.

The Lease contains two force majeure clauses: but each provides that Tenant's obligation to pay rent is not in any event excused. Thus, Lease ¶ 26 ("Inability to Perform") provides, in pertinent part, that:

> [T]his Lease and the obligation of Tenant to pay Rent and Additional Rent hereunder and perform all of the other covenants and agreements hereunder on the part of Tenant to be performed shall in nowise be affected, impaired or excused because Landlord is unable to fulfill any of its obligations under this Lease expressly or impliedly to be performed by Landlord or because Landlord is unable to make, or is delayed in making any repairs, additions, alterations, improvements or decorations or is unable to supply or is delayed in supplying any equipment or fixtures if Landlord is prevented or delayed from so doing by reason of strikes or labor troubles or by accident or by any cause whatsoever reasonably beyond Landlord's control, including but not limited to, laws, governmental preemption in connection with a National Emergency or by reason of any rule, order or regulation of any federal, state, county or municipal authority or any department or subdivision thereof or any government agency or by reason of the conditions of supply and demand which have been or are affected by war or other emergency.[15]

See also Lease ¶ 42(B), which -- contrary to Tenant's allegations in the Complaint ¶¶ 33-38 -- does not excuse "Tenant's obligations under this Lease that can be performed by the payment of money (e.g., payment of rent and maintenance of insurance) . . .."

A provision stating that the tenant's rent obligations are not excused, even by force majeure events, should be enforced. Thus, as stated in Westchester Co. Industrial Development Agency v. Morris Industrial Builders, 278 A.D.2d 232, 233 (2d Dep't 2000):

> Contrary to the defendant's contention, section 28 of the lease, excusing the tenant's failure to comply with the terms of the lease based on "unavoidable delays," and extending its time to comply, is clearly inapplicable to the rent provisions contained in sections 1

[15] All emphasis in material quoted herein is added, unless otherwise noted.

> and 2 of the lease. Indeed, section 28 excludes by its very terms the tenant's continuing obligation to pay "fixed annual rental and additional rental" as such payments are due.

[See also the motion court's decision, 1999 WL 35022565 (Sup. Ct. Westchester Co.) (in § A of the Court's analysis), for additional details.]

See likewise, LIDC I, LLC v. Sunrise Mall, LLC, 46 Misc.3d 885, 890-891 (Sup. Ct. Nassau Co. 2014):

> Initially, the Court finds that the Town's actions were sufficient to invoke the force majeure clause as a result of governmental action – is not disputed by the defendant on this motion – at least until the issuance of a final determination of the Article 78 proceeding in the contractor's favor. However, [the Court] also finds that rent is excepted under the leases' *force majeure* clause, and non-payment of rent is the stated default. It thus had to be paid from the Commencement Dates as provided in the leases and their amendments.

Nor should the Court imply any force majeure clause beyond what is contained in the Lease. See, e.g., General Electric v. Metals Resources Group Ltd., 293 A.D.2d 417 (1st Dep't 2002) (holding that if an integrated contract does not include a force majeure clause, none will be "implied.").[16] Accord, UBS Real Estate v. Gramercy Park Land LLC, 2009 WL 10729957 (Sup. Ct. N.Y. Co.) (Lowe, J.).

Tenant has also failed to demonstrate that is has any claim under Lease ¶ 42(B) for additional time to move from the 43rd Floor Space to the 26th Floor Space. First, Tenant has not

[16] As in General Electric, here too the Lease is an "integrated" agreement. See Lease ¶ 24 (E).

alleged how the Covid-19 pandemic somehow actually delayed Tenant in moving from the 43rd Floor Space to the 26th Floor Space.

Second, and in any event, it is well known that, in June 2020, New York City ("NYC") entered into 'Phase 2' of 're-opening,' which permitted offices in NYC to reopen -- albeit subject to social distancing and other precautions. (And New York State, likewise, issued reopening guidance to answer key questions regarding social distancing, cleaning and disinfecting in the workplace.) Tenant has not even attempted to allege that anything in the Phase 2 re-opening provisions somehow delayed its relocation from the 43rd Floor Space to the 26th Floor Space.

Thirdly, and at bottom, Tenant cannot claim 'delay' in moving from the 43rd Floor Space to the 26th Floor Space, since it plainly was abandoning and repudiating any obligation to move. (There is no writing from Tenant's counsel, for example, saying, in words or substance, -- 'we need extra time to move.' To the contrary, Tenant's counsel claimed falsely that Tenant had already vacated the 43rd Floor Space as of August 31, 2020! See Brodsky Aff. Exh. 17.

Consequently, Tenant's Third Cause of Action is without any merit and should be dismissed.

b. The Doctrines Of Frustration of Purpose And Impossibility Of Performance Are Inapplicable

As previously noted in Landlord's preliminary opposition, the Courts have consistently rejected the application of both doctrines -- frustration of purpose and impossibility of performance -- in the present context. In the recent decisions, the Courts have specifically stated that the reduction of an office tenant's customer base as a result of the pandemic is not a basis to apply either the 'frustration of purpose' or the 'impossibility' doctrine. See e.g., 1140 Broadway LLC v.

Bold Food, LLC, 2020 WL 7137817 (Sup. Ct. N.Y. Co.) (Bluth, J) (rejecting the assertions of 'frustration,' and 'impossibility'); see also, East 16th Street Owner LLC v. Union 16 Parking LLC, 2021 WL 143471 (Sup. Ct. NY Co.) (Bluth, J) ("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"; accordingly, the Court held that although tenant had suffered a substantial downturn in its business as a result of the pandemic, it was not a basis to find that the frustration of purpose doctrine should apply).

Moreover, Tenant assumed the risk that it would have to pay its rent, even in a force majeure context; see supra, and see also Lease ¶ 1(C)(i), where the parties stipulated and agreed that Tenant was to pay the rent due to Landlord pursuant to the Lease "without any set-off, offset, abatement or deduction whatsoever." See, Victoria's Secret Stores, LLC v. Herald Square Owner LLC, 2021 WL 69146 (Sup. Ct. NY Co.) (Borrok, J.) (dismissing the tenant's complaint, explaining that a lease can allocate the risk of adverse events; and clauses analogous to those here showed that the tenant there had assumed the risk of having to pay rent even in adverse circumstances).

Accordingly, Plaintiff's Fourth and Fifth Causes of Action are patently meritless and should be dismissed.

III. TENANT'S APPLICATION FOR A YELLOWSTONE PRELIMINARY INJUNCTION SHOULD BE DENIED

Tenant has failed to establish one of the essential 'Yellowstone' criteria, in that Tenant's conclusory statement that Tenant is "ready, willing, and able" to cure its default -- made without evidence -- is insufficient.

As noted in the Claman Opp. Affirm., the conclusory statement in the moving affidavit of Guy Conte, ¶ 22 -- which merely repeats the 'magic phrase' (i.e., 'ready, willing and able'), without, however, any showing of, e.g., financial wherewithal -- is insufficient. That conclusory allegation is particularly insufficient since Tenant is seeking now to "terminate[]," and so to walk away from, the Lease. A tenant is not entitled to a Yellowstone stay when it is not actually attempting to use the space at issue. See, York Parking LLC v. York Avenue Commons LLC, 2020 WL 6736320 (Sup. Ct. N.Y. Co., Borrok, J.); see also., Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assoc., 93 N.Y.2d 508, 514 (1999).

Finally, and in the event that -- notwithstanding the foregoing -- this Court were to grant Plaintiff's application for a Yellowstone injunction, such relief should be conditioned upon (i) Plaintiff depositing, with the Court, a bond (or undertaking) for all the arrears, i.e., the total amount of $227,116.50;[17] and (ii) paying ongoing use and occupancy at the Lease rate for the 26th Floor Space, starting March 1, 2021 and continuing during the pendency of this action. See e.g. Rame LLC v. Metropolitan Realty Management, Inc., 2020 WL 6290556 ((Sup. Ct. NY Co.) (Jaffe, J) (granting tenant's application for Yellowstone injunction on the condition that tenant both (i) post an undertaking on account of the arrears, and (ii) pay in full the ongoing use and occupancy to landlord on a monthly basis); see also, The Gap Inc v. 44-45 Broadway Leasing Co., LLC, 2021 WL 561152 (1st Dep't 2021) (upholding conditions of (i) arrears and (ii) ongoing use and occupancy).

[17] See Brodsky Aff. at ¶¶ 42, 49

CONCLUSION

For the foregoing reasons: (i) Defendant's cross-motion should be granted, and each of Plaintiff's five causes of actions should be dismissed pursuant to CPLR 3211(a)(1) and/or (a)(7); and (ii) additionally, and/or in any event, Plaintiff's application for a Yellowstone preliminary injunction should be denied.

Dated: New York, New York
March 11, 2021

Respectfully Submitted,

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