INDEX NO. 655166/2020
RECEIVED NYSCEF: 10/09/2020

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

HUGO BOSS RETAIL, LLC, Plaintiff, -against- A/R RETAIL, LLC, Defendant.	Index No.: Plaintiff designates New York County as the place of trial The basis of venue is residence in New York County. **SUMMONS**

To the above-named defendant:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance on Plaintiff's attorney(s) within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York), and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: New York, New York
October 9, 2020

DAVIDOFF HUTCHER & CITRON LLP

By: */s/ William H. Mack*
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TO:

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c/o Related Urban Management Company
60 Columbus Circle, 19th Floor
New York, New York, 10023

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

HUGO BOSS RETAIL, LLC,

Plaintiff,

-against-

A/R RETAIL, LLC

Defendant.

Index No.:

COMPLAINT

Plaintiff, Hugo Boss Retail, LLC ("Plaintiff" or "Tenant"), by and though its attorneys, Davidoff Hutcher & Citron LLP, brings the following Complaint against Defendant A/R Retail, LLC ("Defendant" or "Landlord"). The allegations of the Complaint are based on the knowledge of Plaintiff, and on information and belief, including the investigation of counsel and review of publicly available information.

NATURE OF THE ACTION

1. This action primarily seeks rescission of a commercial property lease, and a declaration that the lease is unenforceable as a result of the COVID-19 Pandemic and the related government-mandated shutdowns (including Governor Cuomo's "New York State on PAUSE" Executive Order). In the alternative, Plaintiff is entitled to an abatement of rent for the period during which it was prohibited from using the leased premises, and a proportional rent reduction to reflect the scant operating capacity that has been permitted in recent weeks. In sum, the total standstill of business, commerce, and everyday life in New York City has completely and unforeseeably frustrated the purposes of the lease, and has rendered performance impossible.

2. Plaintiff operates its HUGO BOSS[1] retail store at the shopping center known as The Shops at Columbus Circle (the "Shopping Center") on the west side of Manhattan. In exchange for the ability to operate at this retail location, Plaintiff pays Defendant, *inter alia*, gross rent of approximately $692,026.07[2] per month or $8,304,312.84 per annum ("Rent"). The Hugo Boss retail location at the Shopping Center consists of approximately 14,776 square feet of within the Shopping Center (the "Premises").

3. From a business and branding perspective, that hefty Rent sum was justified by the nature and caché of this prime Manhattan neighborhood. Columbus Circle is a heavily trafficked public square in Manhattan, located at the intersection of Eighth Avenue, Broadway, Central Park South, and Central Park West.

4. The indoor Shopping Center is situated at the southwest corner of Central Park, and sits within the iconic Time Warner Center ("Time Warner Center"), world headquarters of the Time Warner Corporation. The Time Warner Center consists of two massive 53-story skyscrapers, and is home to noted cultural institutions such as Jazz at Lincoln Center, internationally known businesses such as the New York City studio headquarters of CNN, and upscale tourist destinations such as the Mandarin Oriental, New York hotel and world-renowned restaurants. The Shopping Center is, thus, typically trafficked by shoppers, passers-by, tourists, local residents, and diners heading to one of the Shopping Center's numerous famed eateries.

5. As an international retail hub, Columbus Circle is easily reached from all corners of New York City. It sits atop the MTA's 59th Street Station, and is serviced by numerous public

[1] HUGO BOSS is a non-essential business that designs, manufactures, distributes, and sells men's and women's suiting, apparel, accessories, and footwear.

[2] Gross Monthly Rent breaks down as follows: $441,666.67 in Monthly Minimum Rent; $120,589.00 in Monthly CAM Charges; $121,303.46 in Monthly Real Estate Taxes; $7,851.69 in Monthly Marketing Fees; $615.25 in Monthly Sprinkler Recovery Fees.

transportation arteries, including the 1, A, B, C, and D subway lines, as well as the M5, M7, M10, M20, and M104 bus routes.

6. The hustle-bustle of Columbus Circle – and the foot-traffic accompanying such a prime Manhattan residential, tourist, cultural, retail, and business neighborhood – were substantial factors in Tenant's decision to enter the lease. Without this, Tenant never would have entered the lease.

7. But in March 2020, all of New York went dark. The COVID-19 pandemic, unprecedented in scope and destruction, spawned a massive and severe government response that completely shuttered the Shopping Center (and, thus, Hugo Boss' retail Premises) beginning in mid-March, and in fact prohibited or dramatically hindered most retail operations in New York City continuing to the present day and beyond. This shutdown has, thus, utterly and irreversibly frustrated the purpose of the parties' lease agreement, and indeed rendered both parties' performance impossible. While the parties may have contemplated certain gradual ups and downs of tourism, the economy, seasonal habits, and the like, the COVID-19 shutdown actually *prohibited* operation of any retail store at the Shopping Center, including the Premises. The COVID-19 hazard and related shutdown is unlike anything ever before experienced in America in terms of severity and duration, and could not have been foreseen.

8. Because the Premises are located in an indoor mall, the Hugo Boss retail store remained *completely shuttered* by operation of law until September 9, 2020. Throughout that closure period, Tenant clung to hope that the shutdown would be brief, and that the Premises would once again be usable as a retail store. Unfortunately, as time went on, it became clear that the Premises were untenantable.

9. The reopening of the Shopping Center brought onerous government restrictions on key factors such as store capacity, and prohibitive "social distancing" guidelines are now required. For example, all retail establishments, including the Premises, are required by law to reduce *both* workforce *and* customer presence to *no more than 50%* of the maximum occupancy as stated in the certificate of occupancy. That effectively reduces the Premises' usable space by half. Moreover, staff must maintain at least six feet of distance from customers, which proves onerous and unduly burdensome, particularly in the context of fitting for clothing items.

10. In fact, after months of forced closure, the present restrictions on retail are so burdensome that it makes no sense for the store to operate in these conditions. Although the store has now technically been open for approximately one month, the COVID-19 hazard has continued to render the Premises unusable and unfit for retail purposes. There is simply no "switch to flip," that will return the parties to their pre-COVID posture and suddenly cause eager shoppers to appear in the corridors of the Columbus Circle mall.

11. To the contrary, it is indisputable that New York City's business and retail landscape has been shattered, and is forever altered. Nobody can predict if or when Columbus Circle's millions of annual visitors will return, or when government-mandated social distancing and capacity guidelines will ease, and permit the store to reasonably open at pre-COVID capacity. New York remains a veritable ghost-town, compared to its once reputation as the city-that-never-sleeps.

12. In fact, with COVID-19 infection rates in New York City once again edging upward, it is more likely than not that Manhattan is embarking upon a "second wave." Indeed, new COVID-19 lockdown orders are already in place throughout nearly a dozen New York city neighborhoods.

13. COVID-19 remains virulent, having recently ravaged the upper echelons of the United States executive and legislative branches, as well as the American military. Schools that have opened in New York City are reverting to their remote-learning protocols each week, with positive COVID-19 cases reported. Offices remain closed throughout New York City.

14. Thus, even amidst the extensive and mandatory guidelines intended to offer at least some measure of protection to consumers, the experience of shopping for consumer products in a retail store has been altered forever. All that is known with certainty is that it will be years before retail has even a chance of returning to New York City in its pre-COVID form, which was the foundation for the material assumptions and fundamental bases upon which the parties relied in entering their agreements.

15. In other words, the purpose of spending a monthly Rent of nearly $700,000 to operate a retail store is completely frustrated when, as here, that store cannot open. That purpose is also frustrated when the subject store can open at only a marginal capacity, or when customers are too fearful of profound illness and potential death to venture out to shop in an indoor mall for clothing or other personal items.

16. Despite Plaintiffs' numerous attempts (as early as May 2020) to come to some accommodation, Landlord persists in its position that full Rent is owed for space that is and has been entirely unusable for its intended purpose.

17. Thus, as explained below, this Court should, *inter alia*, declare that the lease is rescinded as a result of the COVID-19 Pandemic and/or the Executive Orders which prohibited Plaintiff from operating its business at the Premises.

PARTIES

18. Hugo Boss Retail, LLC is a Limited Liability Company, organized under the laws of the State of Delaware, authorized to conduct business in the State of New York, and currently maintains its principal place of business at 55 Water Street, 48th Floor, New York, New York 10041.

19. A/R Retail, LLC is a Limited Liability Company, organized under the laws of the State of Delaware, authorized to conduct business in the State of New York, and currently maintains its principal place of business at c/o Related Urban Management Company, 60 Columbus Circle, 19th Floor, New York, New York, 10023.

20. A/R Retail, LLC is the owner of the shopping center commonly known as The Shops at Columbus Circle.

21. Defendant A/R Retail, LLC is a subsidiary of The Related Companies, a privately-owned real estate firm in New York City, with offices and major developments in urban centers throughout the world.

JURISDICTION AND VENUE

22. The Court has jurisdiction over Defendant pursuant to CPLR 301 and 302(a) since Defendant owns real property within the State of New York.

23. Venue is proper in New York County pursuant to CPLR 503(a) in that Plaintiff and Defendant reside in the County of New York and this litigation concerns real property located in the County of New York.

COMMERICAL LEASE

24. On or about December 15, 2012, Hugo Boss Retail, Inc. entered into a written commercial lease with A/R Retail, LLC, for a retail store located at the Shops at Columbus Circle. (together will amendments and modifications, the "Lease").

25. Plaintiff and Defendant entered the Lease with the basic expectation that Plaintiff could operate the Premises as a first-class retail location.

26. Pursuant to the terms of the Lease, Plaintiff had demised the Premises, a portion of the Shopping Center, to operate a first-class retail location for "Hugo Boss."

27. The Lease commenced on or about December 15, 2012 and (but for the rescission of the Lease in or about March 2020) was set to expire on December 31, 2025.

28. In exchange for the ability to operate at the Premises, Plaintiff first paid Defendant Annual Base Rent in the amount of $2,802,994.60 annum ($233,582.88 per month), which by the end of the term of the Lease was slated to scale to $5,900,000 per annum ($491,666.67 per month). As of the date of the Lease's rescission in or about March 2020, the Annual Base Rent stood at $5,300,000 per annum ($441,666.67 per month). As noted above, together with CAM charges, real estate taxes, and other fees, the monthly out-of-pocket Rent for the Premises presently stands at $692,026.07 ($8,304,312.84 per annum).

29. Accordingly, the Rent for the months of March, April, May, June, July, August, September, and October 2020 was $$692,026.07 per month.

30. In addition to Annual Base Rent, the Lease provides that Plaintiff pay, *inter alia*, "Tenant's Tax Share." Tenant has discovered that, over the course of its tenancy, it has been substantially overcharged for its Tenant's Tax Share due to Landlord's unreasonable allocation of tax burden, particularly among the three anchor tenants and the restaurants in the Shopping Center.

31. More specifically, Landlord has artificially, and in violation of the Lease, depressed the tax burden of the three anchor stores in the Shopping Center (Whole Foods, H&M, and Equinox), as well as the restaurants in the Shopping Center. It has done so in a series of self-dealing maneuvers, some of which were not at arm's-length. Indeed, Equinox is owned by Landlord's parent company, and so Landlord and its affiliates stood to benefit substantially by demanding that other tenants, including Plaintiff, pay more than their fair share of the Shopping Center's tax burden. It is estimated that Landlord's self-dealing has resulted in Plaintiff's overpayment of real estate taxes in excess of $2,600,000.

32. Plaintiff has faithfully performed all of its obligations under the Lease including the payment of rent until April 1, 2020.

33. Because of the COVID-19 Pandemic and Governor Cuomo's "New York State on PAUSE" Executive Order (and related Executive Orders), Defendant announced that it would completely close the Shopping Center as of 5:00 PM on March 17, 2020, thus restricting 100% of Plaintiff's access to the Premises. Plaintiff also complied with its legal obligations, and shuttered the Hugo Boss store at the Premises indefinitely. Any retail activity at the location would violate the State's orders, and could potentially subject Plaintiff (and Defendant) to criminal violations and penalties.

34. As a result of its total inability to operate its retail store at the Shopping Center – by government order and by virtue of the Shopping Center's closure – Plaintiff ceased paying Rent, its performance under the Lease having been excused by, *inter alia*, the doctrines of frustration of purpose and impossibility of performance as well as the express terms of the Lease.

35. Nevertheless, as noted, Plaintiff engaged in numerous good-faith discussions with Landlord aimed at resolving the instant dispute. Proposed solutions ranged from, *inter alia*, Rent modification, relocation, and/or a Lease buyout.

36. Unfortunately, and despite the fact that Tenant was wholly unable to use the Premises for its only intended purpose, Landlord rebuked Plaintiff's efforts to find an amicable resolution. Landlord's stated reason for its unwillingness to consummate any of the proposed transactions was the fact that it could find a suitable tenant willing to enter this untenantable space. Instead, Landlord insisted that full Rent was owed even though the Shopping Center was entirely locked down.

37. On July 28, 2020, Defendant purported to provide Plaintiff with a notice of default, via email, claiming that Plaintiff did not pay the Rent that it alleged was owed, and demanded Plaintiff to cure.

38. On July 31, 2020, Plaintiff responded to Defendant's e-mailed default notice, noting numerous deficiencies in same, and asserting abatement rights.

39. On August, 6, 2020, Defendant responded to Plaintiff, purporting to reiterate its claim of default, and purporting to reject Plaintiff's claims for any relief whatsoever.

40. The Lease expires on December 31, 2025.

41. However, owing to the frustration of purpose and/or impossibility of performance caused by the COVID-19 Pandemic, and the related government shutdown orders, Plaintiff has elected, *inter alia*, to rescind the Lease as asserted herein.

<u>FRUSTRATION OF PURPOSE AND IMPOSSIBILITY OF PERFORMANCE</u>

42. Plaintiff and Defendant entered the Lease with the principal and basic expectation that Plaintiff could operate the Premises as a first-class retail location for its Hugo Boss brand.

43. The operation of the Premises as a first-class retail location was equally important to both Plaintiff and Defendant.

44. In fact, a "Basic Term[]" of the Lease (Section 1.1(g)) was stated as follows:

> Tenant ***shall operate the Premises as a first-class, high-quality store*** for the display and sale, at retail of designer Hugo Boss labeled men's and women's ready to wear apparel and related accessories, fragrances (but in no event shall Tenant devote more than ten percent (10%) of the sales area of the Premises to the display of such fragrances) and other Hugo Boss labeled merchandise offered for sale at a majority of Tenant's other flagship retail locations operated under the Hugo Boss trade name (but in no event shall Tenant devote more than ten percent (10%) of the sales area of the Premises to the display of such merchandise), and offices, dressing rooms and storage (for inventory and fixtures used exclusively at the Premises) in connection therewith. The Premises may not be used for any other use or purpose whatsoever.

45. Thus, the express terms of the Lease make clear that both parties recognized that the Lease's principal purpose was the operation of a first-class retail location.

46. Without Plaintiff's ability to operate as a first-class retail location at the Premises, neither party would have entered the Lease.

47. Unfortunately, as a result of the governmental restrictions resulting from the COVID-19 Pandemic, Plaintiff was, for nearly six months, expressly precluded by law from operating its retail store in any capacity at the Premises, and thus the very purpose of the Lease has been completely frustrated insofar as, *inter alia*, Plaintiff has been deprived of its use of the Premises for the full term that Plaintiff was promised under the Lease. Indeed, it was a fundamental and material expectation that Plaintiff would have access to the Premises for the full term of the Lease (not just some portion thereof).

48. COVID-19 has paralyzed the entire world, having killed more than 200,000 Americans and infected millions more. The disease has spread exponentially, shutting down retail stores, schools, jobs, professional sports seasons, and even The White House.

49. The New York City Metropolitan Area has been among the hardest hit region in America.

50. On March 7, 2020, Governor Andrew M. Cuomo issued Executive Order No. 202. The order, issued in response to the rapidly escalating COVID-19 public health emergency, stated that "a disaster [was] impending in New York State, for which the affected local governments [would be] unable to respond adequately" and therefore the declaration of "a State disaster emergency for the entire State of New York" was necessary (Executive Order [A. Cuomo] No. 202).

51. At that time in early March, the number of confirmed COVID-19 cases in New York State was less than 100 (Jesse McKinley and Edgar Sandoval, Coronavirus in NY: Cuomo Declares State of Emergency, NY Times, Mar. 7, 2020, https://nyti.ms/2XkHaZW); a month later, that number exceeded 138,000 (NY Virus Deaths Hit New High, but Hospitalizations Slow, NY Times, Apr. 7, 2020, https://nyti.ms/3aOzvXz).

52. In the ensuing days and weeks, the Governor, in a series of executive orders, aimed to "flatten the curve" and slow the spread of COVID-19 by limiting large gatherings of people (*see, e.g.*, Executive Order 202.1 [ordering the 30-day postponement or cancelation of "[a]ny large gathering or event for which attendance is anticipated to be in excess of five hundred people"]; Executive Order 202.3 [modifying the large gathering order in Executive Order 202.1 to gatherings where "more than fifty persons are expected in attendance"]; Executive Order 202.10 [cancelling or postponing all "(n)on-essential gatherings of individuals of any size for any reason"]).

53. On March 16, 2020, as the crisis worsened, New York City Mayor Bill de Blasio issued Emergency Executive Order No. 100, imposing restrictions on various types of retail locations. As such at the close of business on March 17, 2020, Plaintiff suspended all retail operations at the Premises to comply with applicable governmental orders and guidelines, and to protect the health and safety of its employees, customers, and the surrounding community.

54. On March 18, 2020, Governor Cuomo issued Executive Order 202.6, requiring non-essential businesses to reduce their in-person work force by 50%. Plaintiff's store at the Shopping Center is deemed "non-essential." By this time, business and commerce in New York City was already at a virtual standstill.

55. These efforts culminated in the issuance of Executive Order 202.8, on March 20, 2020, which ordered all nonessential businesses and nonprofit organizations to ***"reduce [their] in-person workforce at any work locations by 100% no later than March 22[, 2020] at 8 p.m."*** (Executive Order 202.8) (emphasis added).

56. Pursuant to these extraordinary and unforeseeable executive acts and decrees, Plaintiff was *required* to close all of its operations at the Shopping Center (despite having paid full rent for the month of March 2020). And even if Plaintiff desired to continue operating in contravention of law, Defendant fully closed the Shopping Center as of 5pm on March 17, 2020. It did not reopen, nor did Plaintiff have any access to the Premises, until September 9, 2020.

57. The COVID-19 Pandemic and Executive Order 202.8 have completely frustrated the very purpose of the Lease, and made it impossible for the parties to perform.

58. The Premises were permitted to reopen only recently, as of September 9, 2020. And despite Tenant's recent hope to reopen in some "normal" capacity, the reopening has demonstrated that the Premises remain, in fact, untenantable.

59. Indeed, the reopening was permitted only at scant capacity, and with strict social distancing and other safety restrictions in place to guard against the COVID-19 hazard. The store might as well have remained closed, as consumers in New York City are nowhere close to willing to put their own health and safety at risk to shop for clothing products in an indoor mall.

60. Because of the COVID-19 Pandemic and related governmental orders, Plaintiff cannot operate its retail store at the Premises consistent with the parties' fundamental understanding, purpose, and expectation at the time the lease was entered. Moreover, New York City remains largely shut down, and so the "foot traffic" that was a fundamental basis for the terms of the Lease has evaporated.

61. Plaintiff's inability to operate its store has completely frustrated the purpose of the Lease.

62. The COVID-19 Pandemic and related government shutdown orders – altering every aspect of business and life in New York City – were neither foreseen nor foreseeable by any party to the Lease.

63. Nevertheless, it is clear that from the Lease that both parties understood that the operation of a retail business at the Premises – amid the hustle-bustle of Columbus Circle – was ***the primary purpose*** of the Lease, and the inability to operate as a retail business in that setting would entitle Plaintiff to an abatement of rent and a rescission of the Lease.

64. Accordingly, as a result of the COVID-19 Pandemic and Executive Orders, the Lease is rescinded by the legal doctrines of frustration of purpose and impossibility of performance.

FIRST CAUSE OF ACTION
(Rescission For Frustration of Purpose)

65. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

66. An actual controversy of a justiciable nature exists between Plaintiff and Defendant concerning the rights and obligations of the parties under the Lease.

67. Specifically, Defendant seeks to enforce the Lease despite the fact that the Lease is rescinded under the doctrine of frustration of purpose.

68. Under New York law, frustration of purpose applies where an unforeseen event has occurred which, in the context of the entire transaction, destroys the underlying reasons for performing such contract, thus operating to discharge a party's duties of performance.

69. As a result of COVID-19 and/or Governor Cuomo's Executive Orders, Plaintiff was prohibited from operating its business at the Premises and were prohibited from undertaking all other Permitted Uses set forth in the Lease.

70. Plaintiff's inability to operate its business because of a pandemic and/or the related government orders was completely outside of Plaintiff's control and was neither foreseeable nor foreseeable at the time the Lease was entered into. Onerous restrictions remain in the "phased" reopening, permitting operation of the store only at marginal capacity for the foreseeable future. It will, thus, be years before consumer retail behavior and/or Columbus Circle business district activity levels recover to pre-COVID-19 levels. This, too, was unforeseeable.

71. Plaintiff has a legally protectable interest in this controversy.

72. Specifically, Plaintiff has a pecuniary interest in a declaration that it has no obligation to continue to pay rent to Defendant commencing on March 17, 2020 (the first date that operations at the Premises were shuttered).

73. Therefore, Plaintiff seeks a declaratory judgment of its rights under the doctrine of frustration of purpose.

74. Specifically, Plaintiff seeks a declaration from this Court that the Lease is rescinded as a result of the COVID-19 Pandemic and/or the Executive Orders, which prohibited Plaintiff from operating its business at the Premises.

75. Plaintiff further seeks a declaration that Defendant wrongfully purported to declare a default under the Lease.

76. This controversy is ripe for adjudication and a judicial declaration is necessary to end the present controversy.

SECOND CAUSE OF ACTION
(In the Alternative – Rescission Based on Impossibility of Performance)

77. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

78. The Lease requires Defendant to tender the Premises for use as a retail store.

79. The Lease requires Plaintiff to use the Premises as a retail store.

80. The law of impossibility of performance provides that performance of a contract will be excused if such performance is rendered impossible by intervening governmental activities.

81. COVID-19 and/or the Executive Orders have rendered performance by both Plaintiff and Defendant impossible. Indeed, since mid-March, and continuing for months, governmental regulations have outlawed and/or otherwise restricted the operation of a retail store at the Premises. In fact, the Landlord closed the Shopping Center itself as of 5pm on March 17, 2020, and continuing to September 9, 2020. Thus, performance under the Lease has been rendered impossible.

82. The impossibility occasioned by COVID-19 and/or the Executive Orders was unforeseen at the time the Lease was entered into and cannot be attributed to Plaintiff or Defendant.

83. This controversy is ripe for adjudication and a judicial declaration is necessary to end the present controversy.

THIRD CAUSE OF ACTION
(In the Alternative – Declaratory Judgment Relating To Section 15.1(d) of the Lease)

84. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

85. An actual controversy of a justiciable nature exists between Plaintiff and Defendant concerning the rights and obligations of the parties under the Lease.

86. Specifically, the parties disagree on whether Section 15.1(d) of the Lease entitles Plaintiff to a rent abatement or reduction. That section provides:

> [i]f the Premises are completely or partially destroyed or so damaged by fire or ***other hazard*** that the Premises ***cannot be reasonably used by Tenant*** or ***can only be partially used*** *by Tenant* and this Lease is not terminated as provided in this Article XV, then rent shall be ***abated*** (in the case of substantial damages) or ***reduced proportionately*** (in the case of partial damage) during any period in which, solely by reason of such damage or destruction there is substantial interference with the operation of the business of Tenant in the Premises.

87. COVID-19 constitutes a hazard.

88. As a result of the COVID-19 hazard and the related Executive Orders, the Premises either cannot be reasonably used by Tenant or can be only partially used by Tenant.

89. Therefore, Plaintiff seeks a declaratory judgment that the Defendant wrongfully purported to declare a default under the Lease on August 6, 2020, as Section 15.1(d) of the Lease entitles Plaintiff to an abatement and/or reduction of rent as the result of the COVID-19 hazard, which has rendered the Premises wholly and/or partially unusable.

90. This controversy is ripe for adjudication and a judicial declaration is necessary to end the present controversy.

FOURTH CAUSE OF ACTION
(In the Alternative – Declaratory Judgment Relating to Section 15.2 of the Lease)

91. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

92. An actual controversy of a justiciable nature exists between Plaintiff and Defendant concerning the rights and obligations of the parties under the Lease.

93. Specifically, the parties disagree on whether Section 15.2 of the Original Lease entitles Plaintiff to terminate the Lease. That section provides:

> [i]f (a) the Premises are (i) ***rendered wholly or substantially untenantable***, or damaged as a result of any casualty which is not covered by the insurance required hereunder to be maintained by Landlord . . . Landlord and ***Tenant may elect to terminate*** this Lease by giving the other written notice of such election within ninety (90) days after the occurrence of such casualty event. If such notice is given, the rights and obligations of the parties shall cease as of the date of such notice…."

94. As a result of COVID-19 and/or the Executive Orders, the Premises have been rendered wholly or substantially untenantable.

95. Therefore, Plaintiff seeks a declaratory judgment that Lease is terminated by virtue of the untenantability of the Premises.

96. This controversy is ripe for adjudication and a judicial declaration is necessary to end the present controversy.

FIFTH CAUSE OF ACTION
(In the Alternative – Reformation of Lease)

97. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

98. Plaintiff's ability to operate a retail store at the Premises was the parties' mutual purpose in entering the Lease, as both parties understood at the time of contracting, and but for its right to operate such a retail store, Plaintiff would not have entered the Lease.

99. When Plaintiff was forced to cease all retail operations at the Premises, the purpose of the Lease was frustrated and impossible to effectuate due to no fault of Plaintiff. Plaintiff's obligations under the Lease became impossible and impracticable to perform, and Plaintiff was deprived of the consideration it received in exchange for entering the Lease.

100. Plaintiffs' inability to operate its business because of a pandemic and/or the related government shutdown order was completely outside of Plaintiff's control and was neither foreseen nor foreseeable at the time the Lease was entered.

101. The Parties would not have entered the Lease had they known that Plaintiff would have been unable to operate a retail store at the Premises, and Plaintiff's ability to use the Premises as a retail store was the sole consideration Plaintiff received under the Lease.

102. It was the Parties' intent that Plaintiff would not pay rent or other consideration for the Premises if such use was rendered impossible or impracticable. Had the Parties been able to anticipate the events of the COVID-19 crisis at the time of contracting, the Parties would have provided language expressly stating their true intent.

103. An actual controversy exists between the Parties concerning their respective rights under the Lease, and Plaintiff has no adequate remedy at law.

104. In the alternative to Plaintiff's claims relating to the rescission of the Lease, Plaintiff is entitled to judicial reformation of the Lease to reflect the Parties' true intent that Plaintiff would have no obligation to pay rent once it was deprived of the use of the Premises and

that the Lease would terminate automatically when Plaintiff was deprived of its use of the Premises as originally contemplated by the Lease.

SIXTH CAUSE OF ACTION
(Breach of Contract)

105. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

106. Prior to the Lease's termination and/or rescission, the Lease constituted a binding enforceable contract.

107. Defendant breached the Lease contract by, among other things, charging and collecting from Tenant amounts far in excess of its reasonable share of real estate taxes; demanding that Plaintiff pay rent and/or other expenses that were not owed under the Lease; demanding, collecting and subsequently failing to reimburse Plaintiff for excess charges paid in advance under the Lease before the COVID-19 crisis (such as March 2020 rent for periods in which the Premises were required to be shuttered); and later failing to reimburse Plaintiff for the prorated amount of the rent, charges and other expenses attributable to the period that Plaintiff has been deprived of its use of the Premises.

108. Plaintiff performed all of its obligations under the Lease except those that were waived, excused or rendered impossible and/or impractical.

109. Plaintiff is entitled to a judgment against Defendant in an amount to be proven at trial.

SEVENTH CAUSE OF ACTION
(In the Alternative – Money Had and Received)

110. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

111. Plaintiff's ability to operate a retail store at the Premises was the parties' mutual purpose in entering the Lease, as both parties understood at the time of contract.

112. But for its right to operate a retail store, Plaintiff would not have entered the Lease.

113. When Plaintiff was forced to cease all retail operations at the Premises, the purpose of the Lease was frustrated and impossible to effectuate due to no fault of Plaintiff. At that point, Plaintiff's obligations under the Lease became impossible and impracticable to perform, and Plaintiff was deprived of the consideration it received in exchange for entering the Lease.

114. This sudden mandatory cessation of retail operations at the Premises was unforeseeable and not contemplated by the parties at the time the Lease was entered.

115. The parties would not have entered the Lease had they known that Plaintiff would have been unable to operate a retail store at the Premises, and Plaintiff's ability to use the Premises as a retail store constituted the primary consideration it received under the Lease.

116. Plaintiff has previously paid rent and other consideration to Defendant, in an amount to be proved at trial, for the period of time that Plaintiff was prohibited from operating a retail store at the Premises.

117. Defendant benefitted from these payments to Plaintiff's detriment.

118. Under principles of good conscience, Defendant should not be allowed to retain the rent and other consideration paid for the period of time that Plaintiff was unable to operate a retail store at the Premises as originally contemplated by the Lease.

119. Plaintiff is entitled to a judgment in its favor equal to the amount that Plaintiff has previously overpaid as rent and as other consideration to Defendant, in an amount to be proven at trial, for the period of time that Plaintiff was barred from operating a retail store at the Premises as originally contemplated by the Lease.

EIGHTH CAUSE OF ACTION
(In the Alternative – Unjust Enrichment)

120. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

121. Plaintiff's ability to operate a retail store at the Premises was the parties' mutual purpose in entering the Lease, as both parties understood at the time of contract.

122. But for its right to operate a retail store, Plaintiff would not have entered the Lease.

123. When Plaintiff was forced to cease all retail operations at the Premises, the purpose of the Lease was frustrated and impossible to effectuate due to no fault of Plaintiff. At that point, Plaintiff's obligations under the Lease became impossible and impracticable to perform, and Plaintiff was deprived of the consideration it received in exchange for entering the Lease.

124. This sudden mandatory cessation of retail operations at the Premises was unforeseeable and not contemplated by the parties at the time the Lease was entered.

125. The parties would not have entered the Lease had they known that Plaintiff would have been unable to operate a retail store at the Premises, and Plaintiff's ability to use the Premises as a retail store was the sole consideration it received under the Lease.

126. Plaintiff has previously paid rent and other consideration to Defendant, in an amount to be proved at trial, for the period of time that Plaintiff was unable to operate a retail store at the Premises.

127. Defendant has been unjustly enriched from these payments to Plaintiff's detriment.

128. Under principles of good conscience, Defendant should not be allowed to retain the rent and other consideration paid for the period of time that Plaintiff was unable to operate a retail store at the Premises as originally contemplated by the Lease.

INDEX NO. 655166/2020
RECEIVED NYSCEF: 10/09/2020

129. Plaintiff is entitled to restitution in an amount equal to the amount that Plaintiff has previously overpaid as rent and as other consideration to Defendant, in an amount to be proven at trial, for the period of time that Plaintiff was barred from operating a retail store at the Premises as originally contemplated by the Lease.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that the Court enter judgment in its favor and against Defendant for the following relief:

A. On the first cause of action, a judgment declaring that the Lease is rescinded and of no further force and effect, pursuant to the doctrine of frustration of purpose;

B. Alternatively, on the second cause of action, a judgment declaring that the Lease is rescinded and of no further force and effect, pursuant to the doctrine of impossibility of performance.

C. Alternatively, on the third cause of action, a judgment declaring that Section 15.1(d) of the Lease entitles Plaintiff to an abatement and/or reduction of rent as the result of the COVID-19 hazard, which has rendered the Premises wholly and/or partially unusable.

D. Alternatively, on the fourth cause of action, a judgment declaring that the Lease is terminated by virtue of the untenantability of the Premises, and the Landlord's purported declaration of default under the Lease on August 6, 2020.

E. Alternatively, on the fifth cause of action, a judgment reforming the Lease to reflect the Parties' true intent that Plaintiffs have no obligation to pay rent once Plaintiff was deprived of the use of the Premises and that the Lease would terminate automatically when Plaintiff was deprived of its use of the Premises as originally contemplated by the Lease;

F. On the sixth cause of action, an award of money damages for Defendant's breaches of the Lease;

G. Alternatively, on the seventh cause of action, an award of money damages to reimburse Plaintiff for the rents and other expenses paid for the period of time that Plaintiff was deprived of its use of the Premises as originally contemplated in the Lease;

H. Alternatively, on the eighth cause of action, an award of money damages to reimburse Plaintiff for the rents and other expenses paid for the period of time that Plaintiff was deprived of its use of the Premises as originally contemplated in the Lease;

I. An award of attorneys' fees and costs incurred by Plaintiff in the prosecution of this lawsuit;

J. Prejudgment interest on all amounts due; and

K. Such other and further relief as this Court deems just, proper, and equitable.

Dated: October 9, 2020
New York, New York

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