SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

---X
VALENTINO U.S.A., INC.,

Plaintiff-Appellant,

-against-

693 FIFTH OWNER LLC,

Defendant-Respondent.
---X

Appellate Division Case No. 2021-01099

Sup. Ct. New York Co. Index No. 652605/2020

AFFIRMATION IN OPPOSITION TO MOTION
FOR STAY PENDING APPEAL AND INTERIM RELIEF

CASEY SLAMANI, affirms under penalty of perjury under the laws of the State of New York, which may include a fine or imprisonment, that I am physically located outside of the geographic boundaries of the United States (I am in France), that the following is true, and that this document will be used in court:

1. I am a citizen and resident of the Republic of France and am fluent in the English language.

2. I am in-house legal counsel for Fimalac SA, the parent company of defendant-respondent 693 Fifth Owner LLC ("693 Fifth") and am fully familiar with the facts set forth herein.

3. I submit this affirmation in opposition to the motion of plaintiff-appellant Valentino U.S.A. Inc. ("Valentino") for a stay, pursuant to CPLR 5518 and 5519(c), pending its appeal from the order of the Supreme Court, New York

County entered January 27, 2021 (Borrok, J.) dismissing its complaint.

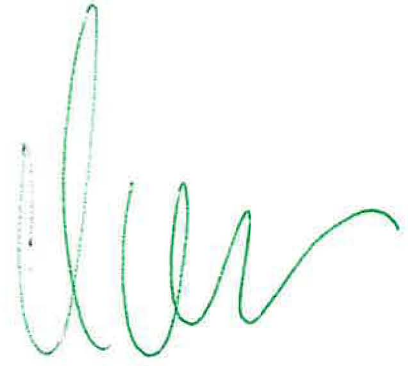
4. The reasons for denial of the motion are contained in the accompanying memorandum to law in opposition to which I respectfully refer the Court.

5. In 2013, Valentino, an internationally renowned purveyor of luxury goods and services, signed a lease (the "Lease") with Thor 693 LLC ("Thor"), for retail space at 693 Fifth Avenue, New York, New York (the "Building") located in Manhattan's "Plaza District" between East 54th and East 55th Streets. The Lease was and is secured by a written guaranty from Valentino's parent company, Valentino Fashion Group S.p.A. 693 Fifth later purchased the Building from Thor, thereby becoming Valentino's landlord.

6. The Lease now requires Valentino to pay annual base rent of $18,975,000.00, a sum that increases over time to $22,476,145.00 per annum. To date, Tenant is in arrears under the Lease in the sum of $8,365,206.77 on account of unpaid rent and additional rent from September 2020 through April 2021 (a copy of 693 Fifth's rent arrearage report for Valentino is annexed hereto and made part hereof as **Exhibit A**).

7. For the foregoing reasons, and those contained in the accompanying legal memorandum, to which I respectfully refer the Court, I respectfully request that the Court deny Valentino's motion.

Dated: Paris, France
April 11, 2021



CASEY SLAMANI

EXHIBIT A

Aging Detail

DB Caption: USA LIVE 7s Property: 1360-ny Status: Current, Past, Future Age As Of: 04/30/2021 Post To: 04/2021

Property	Custome	Lease	Status	Tran#	Charge Code	Date	Month	Current Owed	0-30 Owed	31-60 Owed	61-90 Owed	Over 90 Owed	Pre-payments	Total Owed
693 Fifth Owner LLC (1360-ny)														
Valentino U.S.A. Inc. (vale1360)														
1360-ny		Valentino U.S.A. Inc.	Past	C-2341154	rent	9/1/2020	09/2020	1,449,168.38	0.00	0.00	0.00	1,449,168.38	0.00	1,449,168.38
1360-ny		Valentino U.S.A. Inc.	Past	C-2341156	otac	9/1/2020	09/2020	5,667.00	0.00	0.00	0.00	5,667.00	0.00	5,667.00
1360-ny		Valentino U.S.A. Inc.	Past	C-2361553	rent	10/1/2020	10/2020	1,581,250.00	0.00	0.00	0.00	1,581,250.00	0.00	1,581,250.00
1360-ny		Valentino U.S.A. Inc.	Past	C-2361554	realtax	10/1/2020	10/2020	136,445.32	0.00	0.00	0.00	136,445.32	0.00	136,445.32
1360-ny		Valentino U.S.A. Inc.	Past	C-2361555	otac	10/1/2020	10/2020	5,667.00	0.00	0.00	0.00	5,667.00	0.00	5,667.00
1360-ny		Valentino U.S.A. Inc.	Past	C-2371195	wateport	10/1/2020	10/2020	2,044.08	0.00	0.00	0.00	2,044.08	0.00	2,044.08
1360-ny		Valentino U.S.A. Inc.	Past	C-2435459	water	12/1/2020	12/2020	2,079.22	0.00	0.00	0.00	2,079.22	0.00	2,079.22
1360-ny		Valentino U.S.A. Inc.	Past	C-2442285	rent	1/1/2021	01/2021	1,581,250.00	0.00	0.00	0.00	1,581,250.00	0.00	1,581,250.00
1360-ny		Valentino U.S.A. Inc.	Past	C-2442286	otac	1/1/2021	01/2021	5,667.00	0.00	0.00	0.00	5,667.00	0.00	5,667.00
1360-ny		Valentino U.S.A. Inc.	Past	C-2479650	realtax	1/1/2021	01/2021	139,899.33	0.00	0.00	0.00	139,899.33	0.00	139,899.33
1360-ny		Valentino U.S.A. Inc.	Past	C-2467056	water	2/1/2021	02/2021	2,436.78	0.00	0.00	2,436.78	0.00	0.00	2,436.78
1360-ny		Valentino U.S.A. Inc.	Past	C-2467057	otac	2/1/2021	02/2021	5,667.00	0.00	0.00	5,667.00	0.00	0.00	5,667.00
1360-ny		Valentino U.S.A. Inc.	Past	C-2467058	rent	2/1/2021	02/2021	1,581,250.00	0.00	0.00	1,581,250.00	0.00	0.00	1,581,250.00
1360-ny		Valentino U.S.A. Inc.	Past	C-2479651	realtax	2/1/2021	02/2021	139,899.33	0.00	0.00	139,899.33	0.00	0.00	139,899.33
1360-ny		Valentino U.S.A. Inc.	Past	C-2491881	otac	3/1/2021	03/2021	5,667.00	0.00	5,667.00	0.00	0.00	0.00	5,667.00
1360-ny		Valentino U.S.A. Inc.	Past	C-2491882	realtax	3/1/2021	03/2021	139,899.33	0.00	139,899.33	0.00	0.00	0.00	139,899.33
1360-ny		Valentino U.S.A. Inc.	Past	C-2491883	rent	3/1/2021	03/2021	1,581,250.00	0.00	1,581,250.00	0.00	0.00	0.00	1,581,250.00
		Valentino U.S.A. Inc.						**8,365,206.77**	**0.00**	**1,726,816.33**	**1,729,253.11**	**4,909,137.33**	**0.00**	**8,365,206.77**

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

---X	
VALENTINO U.S.A., INC.,	Appellate Division Case No. 2021-01099
Plaintiff-Appellant,	
-against-	Sup. Ct. New York Co. Index No. 652605/2020
693 FIFTH OWNER LLC,	
Defendant-Respondent.	
---X	

AFFIRMATION IN OPPOSITION TO MOTION
FOR STAY PENDING APPEAL AND INTERIM RELIEF

ANDREW C. PISTOR, an attorney duly admitted to practice before the Courts of this state hereby affirms, under the penalties of perjury, that:

1. I am associated with Cyruli Shanks Hart & Zizmor LLP, the attorneys for the defendant-respondent 693 Fifth Owner LLC, (the "693 Fifth"), and am fully familiar with the facts set forth herein.

2. I submit this affirmation in opposition to the motion of plaintiff-appellant Valentino U.S.A. Inc. ("Valentino") for a stay, pursuant to CPLR 5518 and 5519(c), pending its appeal from the order of the Supreme Court, New York County entered January 27, 2021 (Borrok, J.) dismissing its complaint.

3. The reasons for denial of the motion are contained in the accompanying memorandum to law in opposition to which I respectfully refer the Court.

4. A copy of 693 Fifth's complaint dated February 19, 2021 (Index No.: 651158/2021 – NYCEF Doc. # 2) is annexed hereto and made part hereof as **Exhibit A**.

5. A copy of Casey Slamani's affirmation dated July 27, 2020 (Index No.: 652605/2020 – NYCEF Doc. # 4) submitted in support of 693 Fifth's motion to dismiss is annexed hereto and made a part hereof as **Exhibit B**.

6. A copy of 693 Fifth's memorandum of law in support of its motion to dismiss dated July 27, 2020 (Index No.: 652605/2020 – NYCEF Doc. # 12) is annexed hereto and made a part hereof as **Exhibit C**.

7. A copy of 693 Fifth's reply memorandum of law in further support of its motion to dismiss dated September 14, 2020 (Index No.: 652605/2020 – NYCEF Doc. # 31) is annexed hereto and made a part hereof as **Exhibit D**.

8. Copies of recent decisions holding for landlord's are collectively annexed hereto and made a part hereof as **Exhibit E**.

9. A copy of an article dated February 10, 2021, from therealdeal.com concerning Valentino opening a boutique at 135 Spring Street, in Soho is annexed hereto and made a part hereof as **Exhibit F**.

10. For the foregoing reasons, and those contained in the accompanying legal memorandum, to which I respectfully refer the Court, I respectfully request that the Court deny Valentino's motion.

Dated: New York, New York
April 12, 2021

Andrew C. Pistor

ANDREW C. PISTOR

EXHIBIT A

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

--X Index No.: _______/2020

693 FIFTH OWNER LLC,

Plaintiff,

-against-

COMPLAINT

VALENTINO U.S.A., INC. and VALENTINO FASHION GROUP, S.p.A.,

Defendants.

--X

Plaintiff, 693 Fifth Owner LLC ("Plaintiff"), by its attorneys, Cyruli Shanks & Zizmor LLP, complaining of defendants, Valentino U.S.A., Inc. ("Tenant") and Valentino Fashion Group, S.p.A. ("Guarantor") (collectively, "Defendants") alleges as follows:

1. At all times hereinafter mentioned, Plaintiff was and remains a foreign limited liability company organized and existing under the laws of the State of Delaware and authorized to conduct business in New York.

2. At all times hereinafter mentioned, upon information and belief, Tenant was and remains a foreign corporation organized and existing under the laws of the State of Delaware and authorized to conduct business in New York.

3. At all times hereinafter mentioned, upon information and belief, Guarantor was and remains a foreign corporation organized and existing under the laws of Italy.

4. At all times hereinafter mentioned, upon information and belief, Tenant was and remains a wholly owned subsidiary of Guarantor.

5. On or about May 3, 2013, Plaintiff's predecessor-in-interest, Thor 693 LLC, as landlord, and Tenant, as tenant, entered into a written lease agreement (the "Lease") for the rentable portion of the lower level, ground floor, second floor and third floor (the "Premises") of

the building located at 693 Fifth Avenue, New York, New York 10022 (the "Building") for a term commencing on August 1, 2013 and expiring on July 31, 2029 (the "Term") under the terms, covenants, and conditions contained therein.

6. Guarantor executed a guaranty, dated as of May 6, 2013, in favor of Plaintiff's predecessor-in-interest, Thor 693 LLC, as landlord under the Lease (the "Guaranty") in which, inter alia, Guarantor unconditionally guaranteed to landlord the full prompt payment of fixed rent, additional rent, and all other charges and amounts payable by Tenant under the Lease (hereinafter, and in the Lease, collectively defined as "Rent"), and the full and complete performance of all obligations of the Tenant under the Lease.

7. On or about April 15, 2016, Thor 693 LLC transferred to Plaintiff all of its right, title, and interest in and to the Building.

8. On or about June 10, 2016, by assignment of leases ("Assignment of Leases"), Thor 693 LLC assigned to Plaintiff, inter alia, all of its right, title, and interest in and to the Lease.

TENANT FILES ACTION SEEKING
TO AVOID ITS LEASE OBLIGATIONS

9. On June 1, 2020, Tenant served upon Plaintiff a notice of Tenant's intent to vacate the Premises by December 31, 2020 (the "Vacate Notice"), approximately eight and one-half (8 ½) years before the end of the Lease.

10. The express terms of the Lease did not grant Tenant any right to terminate the Lease as contemplated in the Vacate Notice.

11. Thereafter, on or about June 21, 2020, Tenant filed a complaint (a copy of which is annexed hereto and made a part hereof as **Exhibit A**) (hereinafter "Tenant's Complaint") against Plaintiff in Supreme Court, New York County, Index No.: 652605/2020 (hereinafter

"Tenant's Suit") seeking, among other things, to void the remaining eight and one-half (8 ½) years of its obligations under the Lease, and thereby freeing Guarantor of its corresponding obligations under the Guaranty.

12. Tenant's Vacate Notice and Tenant's Suit were an opportunistic attempt to capitalize upon and pervert the international COVID-19 pandemic in order to mitigate market difficulties the House of Valentino had been suffering since well before the COVID-19 pandemic.

13. On July 27, 2020, Plaintiff moved to dismiss the Tenant's Complaint (the "Motion to Dismiss").

14. Tenant ceased operations in the Premises in or about December 2020.

15. Tenant vacated and abandoned the Premises on or about December 31, 2020.

16. By decision and order dated January 27, 2021 (Borrok, J.) (the "Decision") this Court granted Plaintiff's motion and dismissed Tenant's Complaint in its entirety. A copy of the Decision is annexed hereto and made a part hereof as **Exhibit B**.

17. In the Decision, this Court found that, inter alia, "(n)o wrongful act of the landlord is alleged to have caused the necessity" of Tenant's decision to vacate the Premises (see Ex. B, pg. 2).

GUARANTOR'S BUSINESS SLOWS IN 2018
AS CUSTOMERS MIGRATE TO ONLINE RETAILERS

18. Upon information and belief, in fiscal year 2018, business began to slow for Guarantor.

19. In April 2019, discussing Guarantor's fiscal year 2018, its Chief Executive Officer, Stefano Sassi[1], was quoted by *uk.reuters.com* stating that business had not grown "at the

[1] Mr. Sassi executed the Guaranty on behalf of Guarantor.

pace we were used to" (see *Reuters.com* article, dated April 17, 2019, annexed hereto and made a part hereof as **Exhibit C**).

20. Upon information and belief, concurrent with Guarantor's declining growth, throughout 2018 and 2019 retailers worldwide increasingly shifted their focus to online sales in response to ongoing consumer migration to online retail outlets.

21. Notwithstanding the foregoing, the Fifth Avenue shopping district has and remains among the most desirable and expensive retail locations in Manhattan and the world.

22. In Tenant's own words, Tenant operates a retail store at the Premises "for customers to view and sample Valentino's merchandise in a luxurious setting, in addition to experiencing high-quality service – and amenities" (see Ex. A, ¶ 6) complete with champagne, and an in-house café (see Ex. A, ¶ 5-11), having chosen the Premises because the Building was in a "heavily trafficked area" and that it also "served a focal point of high-end New York City fashion buyers" (see Ex. A, ¶ 10).

23. According to Defendants, the introduction of online shopping has compromised Valentino's ability to offer in-person opportunities for customers to view its "merchandise in a luxurious setting, in addition to experiencing high-quality service – and amenities" (see Ex. A ¶6).

24. In fact, it is in response to these declining business prospects that Defendants have opportunistically attempted to capitalize upon and pervert the international COVID-19 pandemic in order to evade their lawful obligations under the Lease and Guaranty, respectively.

25. Upon information and belief, historically and to date retailers have maintained flagship locations among the world-renowned in luxury shops on Fifth Avenue, regardless of sales at those locations, due to the prestige and exposure afforded retailers.

26. Tenant's Suit and subsequent media blitz in 2020 speak only of its Manhattan-based patrons, never acknowledging the robust and broadly national and international pedestrian traffic for which luxury shops on Fifth Avenue are well-known.

THE COVID-19 PANDEMIC

27. In 2020, in reaction to the COVID-19 pandemic, New York State Governor Andrew Cuomo issued a series of Executive Orders, entitled "Temporary Suspension and Modification of Laws Relating to the Disaster Emergency" (hereinafter, "Temporary Orders").

28. On March 20, 2020, Governor Cuomo issued Temporary Order 202.8, which resulted in the temporary closing of non-essential retail establishments, including the Premises.

29. Over the course of 2020, the State of New York gradually scaled back the Temporary Orders, in the process, allowing retailers to reopen subject to prescribed safety precautions.

30. In Tenant's Complaint, Tenant claimed that the "financial disruptions" to the lives of New Yorkers will render them unable to partake of Tenant's in-person experiences (complete with personalized fittings, champagne, and an in-house cafés) and that, consequently, Defendants should be relieved of all obligations under the Lease and Guaranty, respectively (see Ex. A, ¶ 5-21).

31. Notably, at no time did Tenant accuse Plaintiff of preventing Tenant's access to or use of the Premises. (see Ex. B).

32. In fact, Plaintiff never prevented Tenant's access to or use of the Premises.

33. At the same time that Tenant and Guarantor disparaged the Fifth Avenue shopping district and Manhattan, and bemoaned the effects of the COVID-19 pandemic on its business:

(i) Tenant continued to maintain a retail outlet at 821 Madison Avenue (at 68th St.), New York, New York 10065, a mere avenue and fourteen (14) streets from the Premises; and

(ii) Tenant simultaneously expanded its presence in other parts of the country, among them, by 690 square feet to its 2,505 square foot boutique in Highland Park Village, a prestigious shopping center in Dallas, Texas (see *theRealDeal.com* article dated June 24, 2020, copy annexed hereto and made a part hereof as **Exhibit D**); and

(iii) upon information and belief, Tenant was negotiating for a new retail location at 135 Spring Street, New York, New York 10012, which ultimately resulted in a new lease for Tenant at that location sometime in 2020 or early 2021.

PLAINTIFF SERVES THE RPAPL § 235-e(d) RENT NOTICE TO TENANT AND GUARANTOR

34. On or about July 10, 2020, Plaintiff sent Tenant a notice pursuant to RPAPL § 235-e(d) ("Default Notice") (a copy of which is annexed hereto and made a part hereof as **Exhibit E**), stating, in part:

> (i)f you fail to pay the sum set forth above in full within ten (10) days of the date of this notice, the Landlord may commence appropriate legal proceedings against you to recover all sums due under the Lease, including, without limitation the $3,180,241.78 referenced above. In that event, in addition to all sums due pursuant to the Lease, Landlord will seek to collect all attorney's fees, costs and disbursements incurred by Landlord in connection therewith, together with interest and late charges.

35. The Default Notice was also delivered to the Guarantor in satisfaction of the requirements of Sections 3, 10(a), and 15 of the Guaranty.

TENANT'S RENT DEFAULT

36. Tenant failed to pay Rent from September 2020 through February 2021, in the aggregate sum of $6,638,390.44.

TENANT ABANDONS THE PREMISES

37. Tenant vacated and abandoned the Premises on or about December 31, 2020.

38. Tenant turned over the Premises to Plaintiff with its valuable components having been destroyed.

39. Specifically, Tenant and/or those claiming by under or through Tenant, caused or permitted substantial damage to occur in the Premises (the "Property Damage") including, but not limited to:

(a) defacing the Venetian Terrazzo marble panels with Carrara chippings throughout the Premises with paint or a similar substance and leaving sizable holes in the Venetian Terrazzo marble panels with Carrara chippings throughout the Premises;

(b) defacing the Venetian Terrazzo marble panels with Carrara chippings in the elevator at the Premises with paint or a similar substance; and

(c) defacing the Venetian Terrazzo marble panels with Carrara chippings of the interior staircase at the Premises with paint or a similar substance and leaving sizable holes in the Venetian Terrazzo marble panels with Carrara chippings.

40. Section 21.5 of the Lease requires that at the expiration or earlier termination of the Lease, Tenant deliver the Premises "broom clean, free of debris and Tenant's property, in good order, condition and state of repair."

41. Section 6.1 of the Lease requires that all fixtures, equipment, alterations,

improvements and installations attached to, or built into, the Premises as of the Commencement Date or during the Term shall be and remain a part of the Premises and be deemed the property of Plaintiff.

42. Section 8.1(a) of the Lease states that Tenant shall take good care of the Premises and pay the cost of any injury, damage, or breakage done by Tenant or by its employees, licensees, or invitees.

43. Section 6.1 of the Lease further requires that Tenant shall repair or shall reimburse Plaintiff upon demand for the cost of repairing any damage to the Premises or the Building occasioned by the removal of Tenant's movable trade fixtures.

44. Plaintiff will be required to spend no less than $12,861,757.50 to repair and restore the Premises as a result of the Property Damage.

AS AND FOR A FIRST CAUSE OF ACTION

45. Plaintiff repeats reiterates and re-alleges each and every allegation contained in paragraphs 1 thru 44, above, as if fully set forth at length herein.

46. Tenant has defaulted in its monetary obligations under the Lease.

47. Tenant has failed to pay Rent from September 2020 through February 2021, in the aggregate sum of $6,638,390.44.

48. By reason of the foregoing, Tenant is liable to Plaintiff in the sum of $6,638,390.44, representing Rent from September 2020 through February 2021.

AS AND FOR A SECOND CAUSE OF ACTION

49. Plaintiff repeats, reiterates and re-alleges each and every allegation contained in paragraphs 1 thru 48, above, as if fully set forth at length herein.

50. By way of the Guaranty, Guarantor unconditionally guaranteed to Plaintiff the full

and prompt payment of Rent, and the full and complete performance of all obligations of Tenant under the Lease.

51. Section 1(a) of the Guaranty further states:

> Guarantor hereby covenants and agrees with Landlord that if default shall at any time be made by Tenant or its successors or assigns in the payment of any Rent or other charges…in each case after notice to Tenant and the expiration of any applicable cure period, Guarantor, in each and every instance, shall and will forthwith pay such Rent and other charges to Landlord and any arrears thereof…

52. By reason of the foregoing, Guarantor is liable to Plaintiff in the sum of $6,638,390.44, representing Rent due under the Lease from September 2020 through February 2021.

AS AND FOR A THIRD CAUSE OF ACTION

53. Plaintiff repeats, reiterates and re-alleges each and every allegation contained in paragraphs 1 thru 52, above, as if fully set forth at length herein.

54. On June 1, 2020, Tenant served the Vacate Notice which stated that Tenant intended to vacate the Premises by December 31, 2020 (the "Vacate Date").

55. The Lease is set to expire on July 31, 2029, under the terms, conditions and covenants contained therein ("Expiration Date").

56. The Vacate Notice was unequivocal in its expression that Tenant was unilaterally terminating the Lease on or about December 31, 2020, approximately eight and one-half (8 ½) years prior to the Expiration Date.

57. The Lease provided Tenant with no right to terminate the Lease as contemplated in the Vacate Notice.

58. The Tenant vacated and abandoned the Premises on or about the Vacate Date.

59. Tenant has repudiated its duties under the Lease prior to the time designated for performance and before it has received all of the consideration due it thereunder.

60. Tenant has breached its obligation to pay Rent due under the Lease from September 2020 through the Expiration Date.

61. Tenant's termination of the Lease was a unilateral, unauthorized, early termination of the Lease.

62. Pursuant to Section 19.2 of the Lease:

> In the event of a termination of this Lease, Tenant shall pay to Landlord as damages…sums equal to the aggregate of all Rent which would have been payable by Tenant had this Lease not terminated, payable upon the due dates therefor specified herein until the date hereinbefore set forth for the expiration of the Term.

63. In accordance with Section 19.2 of the Lease in computing the net amount of Rent to be collected through the Expiration Date, Tenant is duly indebted to Plaintiff in the aggregate sum of no less than $184,077,065.40.

64. By reason of the foregoing, Tenant is liable to Plaintiff for all Rent due under the Lease through the Expiration Date, in the aggregate sum of no less than $184,077,065.40.

AS AND FOR A FOURTH CAUSE OF ACTION

65. Plaintiff repeats, reiterates and re-alleges each and every allegation contained in paragraphs 1 thru 64, above, as if fully set forth at length herein.

66. The Default Notice dated July 10, 2020, was delivered to Guarantor pursuant to Sections 3, 10(a), and 15 of the Guaranty.

67. Section 10 of the Guaranty states:

> Guarantor acknowledges and agrees that it shall be deemed in default under this Guaranty if at any time during the duration of this Guaranty …(a) (i)f, after notice to Guarantor of a default under the Lease, Guarantor shall fail to perform or cause the performance

> of Tenant's obligations under the Lease…and such default shall continue for ten (10) days after Landlord notifies Guarantor thereof.

68. Guarantor failed to perform or cause the performance of Tenant's obligations under the Lease within the ten (10) days after Guarantor was notified of the default stated in the Default Notice.

69. Pursuant to Section 10 of the Guaranty, Guarantor is in default under the Guaranty.

70. Due to Guarantor's default under the Guaranty, Guarantor is not entitled to the benefit of Section 1(b) of the Guaranty which limits Guarantor's liability.

71. Due to Guarantor's default under the Guaranty, Guarantor is liable for the full measure of Tenant's outstanding obligations to pay Rent due under the Lease from September 2020 through the Expiration Date.

72. By reason of the foregoing, Guarantor is liable to Plaintiff for all Rent due under the Lease from September 2020 through the Expiration Date in the aggregate sum not less than $184,077,065.40.

AS AND FOR A FIFTH CAUSE OF ACTION

73. Plaintiff repeats, reiterates and re-alleges each and every allegation contained in paragraphs 1 thru 72, above, as if fully set forth at length herein.

74. Section 1(b) of the Guaranty states:

> …if after the Commencement Date Tenant (i) provides Landlord with written notice that Tenant intends to vacate the Premises and Tenant, (ii) delivers possession of the Premises to Landlord in the condition required by the Lease…then Guarantor's liability under this Paragraph 1 shall be limited to the amount of Rent that is due and payable by the Tenant pursuant to the Lease for the period commencing on the Rent Commencement Date through the date

> that is the third (3rd) anniversary of the Vacate Date. (emphasis added).

75. The Property Damage caused and/or which was left unrepaired by Tenant is in violation of Sections 6.1, 8.1(a), and 21.5 of the Lease.

76. There was no Conforming Surrender in that as a result of the Property Damage, Tenant did not deliver possession of the Premises to Landlord in the condition required by the Lease.

77. Guarantor is not entitled to the benefit of Section 1(b) of the Guaranty which limits Guarantor's liability.

78. Guarantor is therefore liable for the full measure of Tenant's outstanding obligations to pay Rent due under the Lease from September 2020 through the Expiration Date.

79. By reason of the foregoing, Guarantor is liable to Plaintiff for all Rent due under the Lease from September 2020 through the Expiration Date in the aggregate sum not less than $184,077,065.40.

AS AND FOR A SIXTH CAUSE OF ACTION

80. Plaintiff repeats, reiterates and re-alleges each and every allegation contained in paragraphs 1 thru 79, above, as if fully set forth at length herein.

81. Pursuant to Section 1(b) of the Guaranty, if at any time after the Lease's commencement date, Tenant: (i) provides Plaintiff with written notice that Tenant intends to vacate the Premises and Tenant, (ii) delivers possession of the Premises to Plaintiff in the condition required by the Lease, and (iii) executes and delivers to Plaintiff a surrender declaration form (collectively, a "Conforming Surrender"), then Guarantor's liability shall be limited to the amount of Rent that are due and payable by Tenant pursuant to the Lease through the date that is the third (3rd) anniversary of the Conforming Surrender date.

82. At the time Tenant surrendered possession of the Premises to Plaintiff by way of Tenant's vacatur and abandonment on or about December 31, 2020, Tenant was in default in its payment of Rent under the Lease from September 2020 through December 2020 in the sum of $6,638,390.44.

83. Pursuant to the Guaranty, the Guarantor is liable to Plaintiff through the actual date of the Conforming Surrender in the sum of $3,182,321.00, representing Rent from September 2020 through December 2020.

84. Pursuant to the Guaranty, as the Tenant vacated and abandoned on or about December 31, 2020, the Guarantor is liable to Plaintiff through the date that is the third (3rd) anniversary of the actual date of the Conforming Surrender in the sum of $58,404,509.44, representing Rent from January 2021 through December 2023.

85. By reason of the foregoing, Guarantor in the aggregate sum of not less than $61,586,830.44.

AS AND FOR A SEVENTH CAUSE OF ACTION

86. Plaintiff repeats, reiterates and re-alleges each and every allegation contained in paragraphs 1 thru 85, above, as if fully set forth at length herein.

87. The Property Damage is a violation of Sections 6.1, 8.1(a), and 21.5 of the Lease.

88. Pursuant to Section 6.1 of the Lease, the Tenant shall reimburse Plaintiff for the cost of repairing the Property Damage and/or restoring the Premises.

89. Plaintiff will be required to expend and forgo rents in the aggregate sum of not less than $15,374,257.50 in order to restore the Premises and remedy the extensive Property Damage.

90. By reason of the foregoing, Tenant is liable to Plaintiff for all expenses in

restoring the Premises and repair the Property Damage in an amount to be determined at trial but not less than $15,374,257.50.

AS AND FOR AN EIGHTH CAUSE OF ACTION

91. Plaintiff repeats, reiterates and re-alleges each and every allegation contained in paragraphs 1 thru 90, above, as if fully set forth at length herein.

92. Pursuant to Section 2.2 of the Lease, all charges, sums, and amounts payable by Tenant pursuant to any provision of the Lease, shall be deemed additional rent and referred to, collectively with fixed rent, as “Rent.”

93. Pursuant to Section 1a of the Guaranty, the Guarantor unconditionally guaranteed to Plaintiff, the full “prompt payment of Rent (as defined in the Lease) and all other charges payable by Tenant.”

94. By reason of the foregoing, Guarantor is liable to Plaintiff for all expenses in restoring the Premises and repairing the Property Damage in an amount to be determined at trial but in not less than $15,374,257.50.

AS AND FOR A NINTH CAUSE OF ACTION
(Against Tenant Seeking Attorneys’ Fees in the Within Action)

95. Plaintiff repeats, reiterates and re-alleges each and every allegation contained in paragraphs 1 thru 94, above, as if fully set forth at length herein.

96. Pursuant to Section 21.7 of the Lease:

> If Landlord or Tenant shall bring any action or proceeding for any relief against the other, arising out of or in connection with this Lease, the losing party shall reimburse the successful party for all reasonable attorneys' fees and disbursements incurred by the successful party in such suit.

97. In accordance with Section 21.7 of the Lease, Plaintiff is entitled to recover from Tenant as damages all reasonable attorneys’ fees and disbursements incurred by Plaintiff should

Plaintiff prevail in this action.

98. By reason of the foregoing, if Plaintiff is the successful party in this action, Tenant is liable to Plaintiff for all costs, expenses, interest and attorneys' fees incurred in relation to this action in an amount to be determined at trial.

AS AND FOR A TENTH CAUSE OF ACTION
(Against Guarantor Seeking Attorneys' Fees in the Within Action)

99. Plaintiff repeats, reiterates and re-alleges each and every allegation contained in paragraphs 1 thru 98, above, as if fully set forth at length herein.

100. Pursuant to Section 1 of the Guaranty, Plaintiff is entitled to recover from Guarantor as damages all reasonable attorneys' fees and disbursements incurred by Plaintiff relating to a default and/or enforcement of the Guaranty.

101. By reason of the foregoing, Guarantor is liable to Plaintiff for all costs, expenses, interest and attorneys' fees incurred in relation to this action in an amount to be determined at trial.

AS AND FOR AN ELEVENTH CAUSE OF ACTION
(Against Guarantor Seeking Attorneys' Fees in the Tenant's Suit)

102. Plaintiff repeats, reiterates and re-alleges each and every allegation contained in paragraphs 1 thru 101, above, as if fully set forth at length herein.

103. This Court dismissed Tenant's Complaint in the Tenant's Suit in its entirety. (see Ex. B).

104. As previously stated, Section 21.7 of the Lease states:

> If Landlord or Tenant shall bring any action or proceeding for any relief against the other, arising out of or in connection with this Lease, the losing party shall reimburse the successful party for all reasonable attorneys' fees and disbursements incurred by the successful party in such suit. (emphasis added)

105. Plaintiff was the successful party in Tenant's Suit.

106. Pursuant to Section 1a of the Guaranty, Guarantor unconditionally guaranteed to Plaintiff, the full "prompt payment of Rent (as defined in the Lease) and all other charges payable by Tenant."

107. Plaintiff is therefore entitled to recover from Guarantor as damages all reasonable attorneys' fees and disbursements incurred by Plaintiff in Tenant's Suit.

108. By reason of the foregoing, Guarantor is liable to Plaintiff for all costs, expenses, interest and attorneys' fees incurred by Plaintiff in Tenant's Suit in an amount to be determined at trial.

AS AND FOR A TWELFTH CAUSE OF ACTION

109. Plaintiff repeats, reiterates and re-alleges each and every allegation contained in paragraphs 1 thru 108, above, as if fully set forth at length herein.

110. In accordance with Section 19.2 of the Lease in computing the net amount of Rent to be collected through the Expiration Date, Tenant is duly indebted to Plaintiff in the aggregate sum of no less than $184,077,065.40.

111. Plaintiff will be required to expend and forego rent in the aggregate sum of not less than $15,374,257.50 in order to restore the Premises and repair the Property Damage.

112. Pursuant to Section 26.1(a) of the Lease, if Tenant fails to pay any Rent, Tenant shall pay interest at an annual rate of no less than 9.25% until the date the Rent is paid.

113. In accordance with Section 26.1(a) of the Lease, Tenant is duly indebted to Plaintiff in the sum of not less than $7,650,545.43.

114. By reason of the foregoing, Tenant is liable to Plaintiff in the aggregate sum of not less than $207,101,868.33.

AS AND FOR A THIRTEENTH CAUSE OF ACTION

115. Plaintiff repeats, reiterates and re-alleges each and every allegation contained in paragraphs 1 thru 114, above, as if fully set forth at length herein.

116. In accordance with Section 19.2 of the Lease in computing the net amount of Rent to be collected through the Expiration Date, Tenant is duly indebted to Plaintiff in the aggregate sum of no less than $184,077,065.40.

117. Plaintiff will be required to spend no less than $15,374,257.50 to restore the Premises and repair the Property Damage.

118. Pursuant to Section 26.1(a) of the Lease, if Tenant fails to pay any Rent, Tenant shall pay interest at an annual rate of no less than 9.25% until the date the Rent is paid.

119. In accordance with Section 26.1(a) of the Lease, Tenant is duly indebted to Plaintiff in the sum of not less than $7,650,545.43.

120. Pursuant to Section 1a of the Guaranty, Guarantor unconditionally guaranteed to Plaintiff, the full "prompt payment of Rent (as defined in the Lease) and all other charges payable by Tenant."

121. By reason of the foregoing, Guarantor is liable to Plaintiff in the aggregate sum of not less than $207,101,868.33.

WHEREFORE, Plaintiff demands judgment as follows:

a) on the first cause of action, against Tenant, in the sum of $6,638,390.44, plus interest thereon from February 1, 2021; and

b) on the second cause of action, against Guarantor, in the sum of $6,638,390.44, plus interest thereon from February 1, 2021; and

c) on the third cause of action, against Tenant, in the aggregate sum of not less than $184,077,065.40; and

d) on the fourth cause of action, against Guarantor, in the aggregate sum of not less than $184,077,065.40; and

e) on the fifth cause of action, against Guarantor, in the aggregate sum of not less than $184,077,065.40; and

f) on the sixth cause of action, against Guarantor, in the sum of $61,586,830.44 plus interest thereon from February 1, 2021; and

g) on the seventh cause of action, against Tenant in an amount to be determined at trial, but not less than $15,374,257.50; and

h) on the eighth cause of action, against Guarantor, in an amount to be determined at trial, but not less than $15,374,257.50; and

i) On the ninth cause of action, against Tenant, in an amount to be determined at trial; and

j) On the tenth cause of action, against Guarantor, in an amount to be determined at trial; and

k) On the eleventh cause of action, against Guarantor, in an amount to be determined at trial; and

l) On the twelfth cause of action, against Tenant, in the aggregate sum of not less than $207,101,868.33; and

m) On the thirteenth cause of action, against Guarantor, in the aggregate sum of not less than $207,101,868.33; and

n) statutory costs, interest, and disbursements; and

o) such other and further relief as to this court may seem just and proper.

Dated: New York, New York
February 19, 2021

CYRULI SHANKS & ZIZMOR LLP
Attorneys for Plaintiff

By: ______________________
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Of counsel: James E. Schwartz
Andrew C. Pistor

EXHIBIT B

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

---X

VALENTINO U.S.A., INC.,

Plaintiff,

-against-

693 FIFTH OWNER LLC,

Defendant.

---X

Index No.: 652605/2020

AFFIRMATION

CASEY SLAMANI, affirms under penalty of perjury under the laws of the State of New York, which may include a fine or imprisonment, that I am physically located outside of the geographic boundaries of the United States (I am in France), that the following is true, and that this document will be used in court:

1. I am a citizen and resident of the Republic of France and am fluent in the English language.

2. I am in-house legal counsel for Fimalac SA, the parent company of defendant 693 Fifth Owner LLC ("693 Fifth") and am fully familiar with the facts set forth herein.

3. I submit this affirmation in support of 693 Fifth's motion to dismiss the complaint of plaintiff Valentino U.S.A., Inc. ("Valentino") pursuant to New York Civil Practice Law and Rules 3211(a)(1), 3211(a)(7) and 3211(c).

4. The reasons for dismissal are largely contained in the accompanying memorandum to law to which I respectfully refer the Court.

5. The motion rests on certain documents and facts. This affirmation serves as the vehicle by which 693 Fifth places those items before the Court.

6. In 2013, Valentino, an internationally renowned purveyor of luxury goods and services, signed a lease (the "Lease") with Thor 693 LLC ("Thor"), for retail space at 693 Fifth

Avenue, New York, New York (the "Building") located in Manhattan's "Plaza District" between East 54th and East 55th Streets (a copy of the Lease is annexed hereto and made part hereof as Exhibit A). The Lease was and is secured by a written guaranty from Valentino's parent company, Valentino Fashion Group S.p.A. ("VSG") (the "Guaranty") (a copy of which is annexed hereto and made part hereof as Exhibit B). 693 Fifth later purchased the Building from Thor, thereby becoming Valentino's landlord.

7. The Lease now requires Valentino to pay annual base rent of $18,975,000.00, a sum that increases over time to $22,476,145.00 per annum.

8. Valentino claims that it can no longer earn the level of profit from its salon that it contemplated subjectively at Lease inception in 2013, due to the Covid-19 pandemic and New York Governor Cuomo's emergency executive orders (the "EOs") that temporarily shuttered retail establishments.

9. By way of the complaint (the "Complaint") this action, Valentino seeks to escape from the Lease almost nine years prematurely (a copy of the Complaint is annexed hereto as Exhibit C).

10. In fact, Valentino is trying to cease paying rent on account of the pandemic and EOs. Section 21.11 of the Lease expressly recites that cataclysmic events or governmental closure orders do not excuse Valentino from paying rent. Section 9.1 of the Lease requires Valentino to obey governmental orders. See Memo. of Law.

11. Also, Valentino alleges that as of the date of the Complaint – June 21, 2020 – it was current in its rent payments. Complaint ¶4. That allegation was and – and remains – patently false. In mid-June, 2020, Valentino paid one month's rent; however, to date, Valentino is in arrears under the Lease in the sum of $3,180,241.78 on account of unpaid rent for June and July,

2020 (a copy of 693 Fifth's rent arrearage report for Valentino is annexed hereto and made part hereof as Exhibit D).

12. Beginning in March 2020, Valentino closed its store and reached out to 693 Fifth to request rent relief. Discussions then followed at the highest levels of our respective companies about our respective concerns and included Gianfranco Ditadi, Valentino's CEO and Thomas Piquemal, Fimilac's Deputy Chief Executive Officer. Our intent, as landlord, was to attempt to provide some temporary relief to our tenant, Valentino, to assist it through these challenging times.

13. As a result of our ongoing discussions, 693 Fifth offered to defer two months of Valentino's rent, to be repaid by December 31, 2020.

14. Two weeks later, Gianfranco Ditadi, CEO of Valentino, responded: Valentino wanted an additional month of rent deferral, the entirety to be repaid over the eight years of the remaining Lease term.

15. Given our constructive dialog and the relative proximity of our respective positions, it seemed we were likely to conclude in short measure with Valentino receiving rent relief acceptable to each side.

16. Regrettably, it is now apparent that Valentino thought otherwise, but played its cards close to the vest.

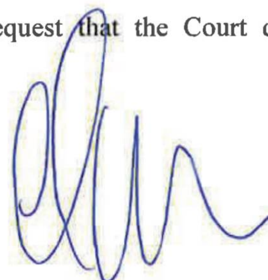
17. On June 19, 2020, Valentino gave 693 Fifth written notice that Valentino intended to vacate the Premises by December 31, 2020 (a copy of the notice is annexed hereto and made part hereof as Exhibit E).

18. Counsel has informed me that the legal theories upon which Valentino seeks to escape liability under the Lease are meritless. The legal basis for our position is for that

contained, as I noted above, in the accompanying legal memorandum, to which I respectfully refer the Court.

19. For the foregoing reasons, I respectfully request that the Court dismiss the complaint with prejudice.

Dated: Paris, France
July 27, 2020



CASEY SLAMANI

EXHIBIT C

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

---X Index No.: 652605/2020

VALENTINO U.S.A., INC.,

Plaintiff,

-against-

693 FIFTH OWNER LLC,

Defendant.

---X

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT

CYRULI SHANKS HART & ZIZMOR LLP
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PRELIMINARY STATEMENT

Defendant 693 Fifth Owner LLC ("693 Fifth") respectfully submits this memorandum of law in support of its motion to dismiss the complaint of plaintiff Valentino U.S.A., Inc. ("Valentino") pursuant to CPLR 3211(a)(1), 3211(a)(7) and 3211(c). The complaint in this action rests on theories of frustration of the venture and impossibility of performance, with constructive and actual eviction added for good measure. Each of these claims is deficient legally (CPLR 3211 (a)(1) & (7)), if not factually (CPLR 3211(c)) as well. Thus, the Court should grant the motion to dismiss.

In brief, Valentino, an internationally renowned purveyor of luxury goods and services, is a tenant under a long-term commercial lease with 693 Fifth (the "Lease") for retail space at 693 Fifth Avenue, New York, New York (the "Building") located in the "Plaza District" between East 54th and East 55th Streets. By way of this action, Valentino seeks to escape from the Lease almost nine years prematurely. The Lease now requires Valentino to pay annual base rent of $18,975,000.00, a sum that increases over time to $22,476,145.00 per annum. Valentino claims that it can no longer earn the level of profit from its salon that it contemplated subjectively at Lease inception in 2013, due to the Covid-19 pandemic and Governor Cuomo's emergency executive orders that temporarily shuttered retail establishments.[1]

Both as a matter of fact and law, Valentino contracted away whatever right it might otherwise have had to cease paying rent on account of the pandemic and EOs. Section 21.11 of the Lease expressly recites that cataclysmic events or governmental closure orders do not excuse Valentino from paying rent. Section 9.1 of the Lease requires Valentino to obey governmental orders. See pp. 10-12, below.

[1] We respectfully request that given that Valentino rented retail space in the Plaza District on Fifth Avenue at a rental rate that is currently nearly $19,000,000 per annum, the Court take judicial notice that Valentino is indeed a "sophisticated party" within the meaning of the case law concerning contract interpretation and enforcement. See pp. 6-7, below.

Not insignificant is the fact that, in or about April 27, 2020, Valentino apparently sought and obtained from the United States Treasury a so-called "PPP loan" of $2,000,000-5,000,000 (according to the Treasury website), sufficient to fund between one and three months' rent at the current Lease rental rate. This alone surely undermines Valentino's claims of frustration and impossibility.

In sum, even though the Lease constitutes a freely negotiated commercial contract between sophisticated parties, each represented by counsel, Valentino wants this Court to set it free based upon Valentino's claim that the business operation permitted by the Lease is no longer sufficiently profitable. As the Court of Appeals noted in 407 E. 61st Garage, Inc. v. Savoy Corp., 23 N.Y.2d 275 (1968), its landmark case on frustration and impossibility, financial loss does not frustration or impossibility make: "[T]he applicable rules do not permit a party to abrogate a contract, unilaterally, merely upon a showing that it would be financially disadvantageous to perform it; were the rules otherwise, they would place in jeopardy all commercial contracts." Id. at 282.

To allow Valentino to jettison its Lease liability would, to paraphrase the Court of Appeals, jeopardize all commercial leases in New York City, if not the whole of New York State. Further, it would have the unintended but likely consequence of depriving landlords of the rental streams necessary to pay real estate taxes and maintain their properties, the real-time results of which would include erosion of the City's tax base, and, quite possibly, compromise the safety of the City's populace.

OVERVIEW OF THE COMPLAINT'S LEGAL INSUFFICIENCIES

At the outset, regardless of the legal doctrine Valentino attempts to invoke, the Lease itself requires Valentino to pay its rent in the face of cataclysms, such as a pandemic. Lease Section 22.11. See p. 10, below.

Second, frustration is legally deficient because the possibility of a pandemic and governmental orders requiring closure were foreseeable and could have been guarded against, and indeed were (as set forth at length below). 407 E. 61St Garage. See pp.9-13, below.

Third, it is not impossible for Valentino to pay its rent even if its revenues have fallen. See pp.14-16, below.

Fourth, it is well-settled that a claim for constructive eviction requires the tenant to allege that it has voluntarily vacated its rented premises. Barash v. Pennsylvania Term. Real Estate Corp., 26 N.Y.2d 77 (1970). For a claim for actual eviction, the tenant must allege that the landlord physically ousted it from occupancy. Id. Valentino's complaint makes no such allegations – nowhere does it allege that Valentino has voluntarily vacated or been ousted from its premises. See pp. 17-18, below.

THE COMPLAINT'S ALLEGATIONS

Valentino's complaint (the "Complaint", a copy of which is annexed to the accompanying affirmation of Casey Slamani, in-house counsel of 693 Fifth's parent company, Fimilac SA, as Exhibit C), filed on June 21, 2020, alleges eight causes of action (discussed at length below). All rest on a common core of factual allegations.

The Complaint begins with the recitation that Valentino "is the American branch of 'Valentino' – an internationally renowned luxury fashion company with retail boutiques located around the world." (Complaint, p.1) By the Lease, dated May 3, 2013, Valentino rented the lower level, ground floor, second floor and third floor (the "Premises") for the period beginning on August 1, 2013 and ending on July 31,

2029 (a copy of the Lease is annexed to the Slamani Aff. as Exhibit A).[2] Complaint ¶3.[3] The Lease requires Valentino to "'use and occupy the Premises solely and exclusively for the display and retail sale of women's wear, menswear, accessories, shoes, fragrances and handbags and/or…other luxury items….'" Complaint ¶5; Lease §5.01. It requires Valentino to continuously operate as a Valentino store, but for one day only. Complaint ¶9; Lease §5.04 Valentino did so: "[C]onsistent with the prestige and reputation of the immediate Fifth Avenue neighborhood, Valentino provided its clientele with a world-renowned array of products including clothing, shoes and bags, and also offered expert fittings and tailoring at the Premises." Complaint ¶7.

Valentino alleges that as of the date of the Complaint – June 21, 2020 – it was current in its rent payments. Complaint ¶4. That allegation was and – and remains – patently false. As detailed in the Slamani Aff., Valentino ceased paying rent in February 2020. In mid-June, 2020, it paid one month's rent, but has so far not paid for July (a copy of the rent arrearage report is annexed to the Slamani Aff. as Exhibit D). Thus, by virtue of the Lease and the Guaranty, respectively, Valentino and VFG, the guarantor, now owe 693 Fifth $3,180,241.78 on account of unpaid rent for June and July, 2020.

At the end of January 2020, the federal government had declared a state of emergency on account of Covid-19. Complaint ¶14. As a result, Governor Cuomo issued Executive Orders ("EOs") that resulted in the closure of non-essential retail stores, Valentino's included. Complaint ¶15. Valentino closed on March 17, 2020. Complaint ¶17. As of June 21, 2020 the restrictiveness of the EOs had eased, but Valentino alleges that it nevertheless "is unable to offer in-boutique retail sales, or associated services

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[2] The Lease was made in 2013 between Valentino, as tenant, and Thor 693 LLC, 693 Fifth's predecessor-in-title. Valentino was represented by counsel. See Lease Article 20 (requiring service of notices on Valentino's counsel, Pavia & Harcourt LLP). (693 Fifth later bought the Building, thereby becoming Valentino's landlord.)

[3] The Complaint (¶77) properly alleges that Valentino Fashion Group S.p.A. ("VSG") signed a written guaranty of the Lease (the "Guaranty") (copy annexed to the Slamani Aff. as Exhibit B).

such as fittings, as originally contemplated by the parties, and as the company operated before the Covid-19 pandemic, services which are vital to its business and central to the Lease's purpose." Complaint ¶18.

We note, though, that as of July 22, 2020 Valentino was open for business at the Premises, presumably subject to social distancing and other requirements necessary to thwart the spread of the virus (photographs, taken on July 22 of the exterior of the Valentino premises and of a notice posted on the inside of the Valentino salon, are annexed to the accompanying affidavit of Natacha Azevedo as Exhibit A).

Beyond merely alleging a present inability to operate "as the company operated before" the pandemic, Valentino indulges in the purely self-serving speculation that it will not be able to operate properly in the future: "[E]ven in a post-pandemic New York City (should such a day arrive), the social and economic landscapes have been radically altered in a way that has drastically, if not irreparably, hindered Valentino's ability to conduct high-end retail business at the premises." Complaint ¶19. In this regard, we reiterate that on or about April 27, 2020, Valentino apparently sought and obtained a "PPP loan" which, alone, sufficiently undermines Valentino's frustration and impossibility claims.

On June 19, 2020, Valentino gave 693 Fifth written notice that Valentino intended to vacate the Premises by December 31, 2020 (a copy of the notice is annexed to the Slamani Aff. as Exhibit E). Complaint ¶26. For a business that claims it can no longer operate at the Premises as it intended, six (6) months' notice is a considerable lead time, which ends, not coincidentally, just after the conclusion of the holiday sales season, which is, for many retailers, sustaining in and of itself.

FACTS OUTSIDE THE COMPLAINT

Items outside the complaint are not generally considered on a motion to dismiss; however, we believe that the following is germane and necessary to any considered determination of this motion.

Beginning in March 2020, as the impact of Covid-19 became apparent, Valentino reached out to 693 Fifth to request rent relief. See Slamani Aff., ¶ 12. Discussions then followed at the highest levels of their respective companies, and included Gianfranco Ditadi, Valentino's CEO and Thomas Piquemal, Fimilac's Deputy Chief Executive Officer. See Slamani Aff., ¶ 12. As a result of the ongoing discussions, 693 Fifth, acting through Mr. Piquemal, offered to defer two months of rent, to be paid by December 31, 2020. Two weeks later, Gianfranco Ditadi, CEO of Valentino, responded: Valentino wanted an additional month of rent deferral, the entirety to be repaid over the eight years of the remaining Lease term. Thereafter, Valentino fell silent. Particularly given the relative proximity of their respective positions, 693 Fifth believed that the parties had been engaged in good faith, constructive negotiations, likely to conclude in short measure with Valentino receiving rent relief acceptable to each side. See Slamani Aff., ¶ 15. Apparently, Valentino thought otherwise, but played its cards close to the vest. See Slamani Aff., ¶ 16. It was not until six weeks later that Valentino next surfaced, by way of its notice to 693 Fifth of its intent to vacate the Premises by December 31, 2020. See Slamani Aff.

THE RELEVANT LEASE PROVISIONS

In this matter, the Lease controls – particularly because it is unambiguous and the parties are sophisticated. An apt summary of the law is found in 501 Fifth Ave. Co. v. Roberts, Index No. 652111/2019, 4-5 (Sup. Ct., N.Y. Cty. 2019):

> Because the lease is unambiguous on its face, and neither party claims otherwise, the court enforces the lease's plain meaning without the need for extrinsic evidence to discern the parties' intent. 159 MP Corp. v. Redbridge Bedford, LLC, 33 N.Y.3d 353, 358-59 (2019); 2138747 Ontario, Inc. v. Samsung C&T Corp., 31 N.Y.3d 372, 381 (2018); Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P., 13 N.Y.3d 390, 403-404 (2009); Ashwood Capital, Inc. v. OTG Mgt., Inc., 99 A.D.3d 1, 8 (1st Dep't 2012). The fact that sophisticated businesspersons negotiated the lease at arm's length further compels enforcement of the written agreement according to its terms. 159 MP Corp. v. Redbridge Bedford, LLC, 33 N.Y.3d at 359; Riverside S. Planning Corp. v. CRP/Extell

Riverside, L.P., 13 N.Y.3d at 403; Vermont Teddy Bear Co. v. 538 Madison Realty Co., 1 N.Y.3d 470, 475 (2004). See 2138747 Ontario, Inc. v. Samsung C&T Corp., 31 N.Y.3d at 381; Ashwood Capital, Inc. v. OTG Mgt., Inc., 99 A.D.3d at 7.

The Lease contains numerous provisions that bear on, and, indeed, conclusively determine, the dispute:

First, Section 2.3: Valentino promises to pay its rent "without any abatement, set-off or deduction whatsoever…."

Second, Section 22.11: In the event of a governmental closure order or cataclysm, Valentino must continue to pay its rent.[4]

Third, Section 9.1: Valentino is required to comply with present and future governmental orders, whether foreseen or unforeseen.[5]

Fourth, Section 4.1: Valentino is not entitled to any set-off in rent liability based upon condition of Premises.

Fifth, Sections 4.1(b) and 21.2: 693 Fifth makes no warranties and in entering into Lease, Valentino relies on nothing outside Lease.

[4] "In the event that either party shall be...prevented from the performance of any act required hereunder by reason of strikes, labor troubles, inability to procure labor or materials, failure of power, restrictive governmental laws or regulations, riots, insurrection, war, acts of terrorism, acts of God, floods, hurricanes, windstorms, fire or other casualty, condemnation or other reason of a similar or dissimilar nature beyond the reasonable control of the party...doing acts required under...this Lease, then the performance of such act shall be excused for the period of the Unavoidable Delay....[N]othing contained in this Section shall operate to excuse Tenant from the prompt payment of Rent or any other payments or charges required by the terms of this Lease....Delays or failures to perform resulting from lack of funds shall not be deemed Unavoidable Delays."

[5] "Tenant, at its sole cost and expense, shall comply with all laws, codes, orders, rules, statutes, ordinances, requirements and regulations of all federal, state, local and municipal governments, agencies and authorities…(collectively, 'Laws')(whether any Laws are in effect on, or enacted or made effective after, the date hereof, whether contemplated or foreseen on the date hereof or not) which shall impose any…duty upon Landlord or Tenant with respect to the Premises or the use or occupancy thereof…."

Sixth, Section 22.1: a covenant of quiet enjoyment is conditioned upon Valentino's abiding by all of its Lease obligations.[6]

OVERVIEW OF THE EIGHT CAUSES OF ACTION

The eight causes of action of the Complaint each rest, as noted above, on Valentino's purported inability to occupy the Premises as originally contemplated in the Lease. Valentino seeks: first, a declaration that the purpose of the Lease has been frustrated, thereby entitling Valentino to terminate without consequence; second, a declaration that because of frustration of the purpose of the Lease, Valentino's rent obligations are suspended until it can once again fully occupy the Premises; third, a claim for rescission based upon impossibility of performance of Valentino's Lease obligations; fourth, a claim for a rent abatement based upon impossibility of performance of Valentino's Lease obligations; fifth, rescission based upon failure of consideration – namely, that because Valentino purportedly can no longer operate in the Premises, it should be freed from its Lease obligations; sixth, for a claim for actual or constructive eviction based upon a claim that 693 Fifth has failed to take precautions against the effects of Covid; seventh, for a declaration that VFG's guaranty is void; and, finally, eighth, an injunction preventing 693 Fifth from terminating the Lease before December 31, 2020 so as to permit Valentino to wind down its operations in the Premises.

Implicit, if not explicit, in each of the causes of action is the misguided notion that under the Lease, 693 Fifth, as landlord, is required to control circumstances well beyond the Premises and/or the Building, in failure of which, Valentino maintains that it should receive judicial asylum from the arm's-length agreement that it negotiated and into which it entered (the Lease).

[6] "Tenant, upon keeping, observing and performing all of the covenants and agreements of this Lease on its part to be kept, observed and performed, shall lawfully and quietly hold, occupy and enjoy the Premises during the term of this Lease…."

STANDARD OF REVIEW

Each of the claims is legally deficient, but for different reasons: some are barred by the express, controlling provisions of the Lease itself and some because the law does not recognize them as legally cognizable.

Three CPLR provisions serve as the vehicle for this motion: CPLR 3211(a)(1)(the bar of documentary evidence); CPLR 3211(a)(7)(failure to state a cause of action); and, CPLR 3211(c)(consideration of facts on a dismissal motion). Under 3211(a)(1), the document relied upon – typically, the very contract from which the plaintiff's cause of action purports to spring – must conclusively establish a defense to the asserted action as a matter of law. Goldman v. Metropolitan Life Ins. Co., 5 N.Y.3d 561, 571 (2005). Under 3211(a)(7), a court tests the pleading to determine whether the cause of action states a legally cognizable claim. Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977). Finally, under CPLR 3211(c), a court may consider evidentiary material on a motion to dismiss so long as it notifies the parties that it is going to do so.[7]

ARGUMENT

I. Valentino May Not Invoke Frustration of Purpose Both Because The Pandemic Was Foreseeable And Because The Lease Itself Allocates to Valentino The Risk of Its Inability to Operate in The Premises.

Valentino's first and second causes of action are based on the doctrine of so-called frustration of purpose. The first cause of action seeks to rescind the Lease and the second to suspend Valentino's rent obligation until the Covid-19 pandemic ends and the EOs are lifted.

[7] Part of the argument on certain causes of action rests on sworn statements by 693 Fifth that Valentino has not paid rent. At another point, based on a notice posted on the inside of the Valentino exterior entry door fronting on Fifth Avenue, we assert that Valentino is open for business. These are evidentiary items. See CPLR 3211(c).

A. The Frustration Doctrine Defined.

The frustration doctrine, which is narrowly applied, Crown It Servs. v. Koval-Olsen, 11 A.D.3d 263 (1st Dep't 2004), is defined thus: "Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary." Gander Mountain Co. v. Islip U-Slip LLC, 923 F.Supp.2d 351, 359 (N.D.N.Y.2013), aff'd, 561 Fed. Appx. 48 (2d Cir. 2014)(applying New York law)(citation omitted)(emphasis supplied). Here, the express language of the Lease not only indicates – but expressly states – the contrary.

B. Even in The Absence of Foreseeability, The Lease Allocates to Valentino The Risk of Closure.

Even if, arguendo, the Covid-19 pandemic and EOs requiring closure of retail stores were not foreseeable (and the Lease indicates to the contrary), the Lease expressly allocates the risk of closure in those circumstances to Valentino. It must in all events continue to pay its rent.

First, Section 21.11, "Unavoidable Delays," recites that in the face of cataclysmic events – "failure of power, restrictive governmental laws or regulations, riots, insurrection, war, acts of terrorism, acts of God, floods, hurricanes, windstorms, fire or other casualty, condemnation or other reason of a similar or dissimilar nature." (emphasis supplied) – Valentino must continue to pay its rent: "[N]othing contained in this Section shall operate to excuse Tenant from the prompt payment of Rent or any other payments or charges required by the terms of this Lease." (emphasis supplied) Moreover, Valentino expressly agreed that its own lack of funds – such as would be the case because of the salon's poor financial performance – would be no excuse: "Delays or failures to perform resulting from lack of funds shall not be deemed Unavoidable Delays."

Section 21.11 lists supervening, cataclysmic events that might thwart Valentino's performance of its obligations under the Lease. Notably, the clause goes beyond the events named, reciting as it does that it covers other events "of a similar or dissimilar nature." A pandemic and EOs that prevent Valentino from operating are supervening events that, in theory, prevent Valentino from operating. Section 21.11 addresses these events' impact on Valentino's operations in the Premises, and expressly recites that no such supervening event excuses Valentino from paying rent. See LIDC I v. Sunrise Mall, LLC, 46 Misc.3d 885, 891 (Sup. Ct., Nassau Cty. 2014)("[R]ent is excepted under the leases' force majeure clause, and non-payment of rent is the stated default. It [rent] thus had to be paid…."). Thus, by virtue of Section 21.11, Valentino contractually ceded whatever right it might have had to argue that the frustration doctrine allows it to walk away from its rental obligation under the Lease.

Second, Section 9.1 places the onus on Valentino to comply, at its own cost and expense, with governmental orders affecting its occupancy of the Premises:

> Tenant, at its sole cost and expense, shall comply with all…orders…of all…state…governments (collectively, 'Laws')(whether any Laws are in effect on, or enacted or made effective after, the date hereof, whether contemplated or foreseen on the date hereof or not) which shall impose any…duty upon Landlord or Tenant with respect to the Premises or the use or occupancy thereof….

Thus, in and to the extent that, arguendo, the EOs are preventing Valentino from conducting business in the Premises, that inability was and remains a risk that Valentino accepted for itself under the Lease.

New York courts enforce contractual allocations of risk. In Urban Archaeology Ltd. v. 207 E. 57th St. LLC, 68 A.D.2d 562 (1st Dep't 2009), the tenant sued, claiming that because of the Great Recession of 2008, it need not proceed with a lease that it had signed just before that recession took hold. The purpose of the lease, it argued, had been frustrated. Relying on the provisions of the very lease that the tenant had signed, the court granted the landlord's CPLR 3211(a)(1) motion to dismiss:

> The force majeure clause of the parties' lease agreement contemplates either party's inability to perform its obligations under the lease due to "any cause whatsoever" beyond the party's control—other than financial hardship. This clause conclusively establishes a defense to plaintiff's claim that it is excused from performing under the lease by reason of the effect that the downturn in the economy has had on it.

Id. at 562. See also International Paper Co. v. Rockefeller, 161 A.D. 180, 185 (3d Dep't 1914)("The defendant is not excused from delivering the live spruce suitable for pulp wood which survived the fire by the mere fact that its location upon the tract is such that it would be very expensive for him to deliver it.").

The Lease itself conclusively disposes of Valentino's frustration claim. Thus, the Court should dismiss Valentino's first two causes of action pursuant to CPLR 3211(a)(1).

C. The Pandemic and The EOs Were Reasonably Foreseeable.

Not only does the Lease, by its terms, preclude a frustration claim, but the events giving rise to Valentino's frustration claims were reasonably foreseeable, and thus, if Valentino had negotiated differently, the Lease could have guarded against them. For this separate reason, the frustration claims warrant dismissal pursuant to CPLR 3211(a)(1).

First, the pandemic was foreseeable. We respectfully request that the Court take judicial notice of pandemics occurring in the years leading up to the 2013 Lease signing: the SARS pandemic of 2002 and the H1N1 pandemic of 2009 and the wide publicity they received. As for the need to close because of EOs, the Lease itself deals with that issue by requiring Valentino generally to obey governmental orders. See Lease Section 9.1.

The application of these principles is illustrated in Sage Realty Corp. v. Jugobanka D.D. New York Agcy., 1998 U.S. Dist. LEXIS 15756* at 14-15 (S.D.N.Y. 1998)(applying New York law). There, a Yugoslavian bank was a tenant under a long-term lease in a Manhattan office building. Shortly after

signing its lease, the President issued an Executive Order that prevented the bank from accessing assets in the United States, an order that the Treasury Department then implemented by directing the bank to close. The bank then stopped paying rent. In response to the landlord's suit to recover rent, the bank argued that the purpose of the lease had been frustrated and warranted rescission.

In granting summary judgment to the landlord, the court first noted that the closure order was foreseeable because the potential for it, for stated political reasons, was reported in the press in the months leading up to the lease's signing. In addition, the lease contained a provision that closely paralleled Sections 9.1 and 22.11 of the Lease: "[T]he obligation of Tenant to pay rent hereunder…shall in no way be affected, impaired or excused because Landlord is unable to fulfill any of its obligations under this Lease…by reason of any…order or regulation of any…government agency." 1998 U.S.Dist. LEXIS 15756 at *13-14. The Court enforced the provision as written: "Section 33.01 requires the tenant to continue to pay rent where a government action prevents the landlord from performing any of its duties under the lease." Id. at *14-15. See also Urban Archeology ("[A]n economic downturn could have been foreseen or guarded against in the lease.").

The issue is not whether the specific event causing a contracting party to invoke frustration was foreseeable. The relevant foreseeability issue is whether a tenant – particularly a sophisticated one, like Valentino – could reasonably have negotiated its lease to guard against the general risk that supervening events, unrelated to its own conduct, might force closure. The trial court in Urban Archaeology noted as much: "The contract here was entered into by sophisticated commercial parties who could have anticipated the possibility that future events might result in financial disadvantage on the part of either party, even if the precise cause or extent of such financial disadvantage was not foreseen at the time the contract was executed." 34 Misc.3d 1222(A), 2009 N.Y. Misc. LEXIS 6670 at ***12 (citation omitted)(emphasis supplied). Accord General Elec. Co. v. Metals Res. Group Ltd., 293 A.D.2d 417 (1st

Dep't 2002); In re M&M Transp. Co., 13 B.R. 861, 871 (Bankr. 1981)(applying New York law)("A person who makes an absolute promise is not to be excused from performance when an event destroys the value of the stipulated consideration and when a reasonable inference may be drawn that an express condition would have been inserted had the parties so intended.").

Here, by way of Sections 9.1 and 22.11 the parties did anticipate the consequences of a supervening cataclysmic or other event that might impact upon the Valentino retail store. Together, those sections require Valentino to obey governmental orders and state that no such supervening event will excuse Valentino from paying its rent. Those sections control. Had Valentino been concerned about allocating risk and stemming rent liability should a governmental order require closure during a pandemic, it was incumbent on Valentino to have raised the issue at the bargaining table and obtained a provision addressing its lease obligations in those circumstances. The Lease itself demonstrates that Valentino freely entered into it in the absence of such protection. See Maxton Bldrs., Inc. v. LoGalbo, 68 N.Y.2d 373, 382 (1986) ("[R]eal estate contracts are probably the best examples of arm's length transactions. Except in cases where there is a real risk of overreaching, there should be no need for the courts to relieve the parties of the consequences of their contract. If the parties are dissatisfied…the time to say so is at the bargaining table."). Here, the Lease expressly allocates to Valentino the risk that it must pay rent despite a governmental order requiring closure. The Court should not relieve Valentino of the consequences of this negotiated, arm's-length bargain struck by sophisticated parties, each represented by counsel (the Lease).

For all of these reasons, the Court should dismiss the frustration causes of action.

II. The Impossibility of Performance Claims Are Legally Deficient.

The third and fourth causes of action are based on so-called impossibility of performance. By the third cause, Valentino seeks to rescind the Lease on account of impossibility of performance, and by the fourth,

Valentino seeks to abate its rental obligation until the end of the pandemic/lifting of the EOs. Common to both claims are allegations that Valentino's performance has become impossible because Valentino alleges that is no longer able to use and fully occupy the Premises. Complaint ¶¶ 47 & 55.

As demonstrated below, as a matter of fact and law, Valentino contracted away its right to raise impossibility of performance on account of a pandemic or governmental order, but even had it not done so, as a matter of law, the impossibility doctrine does not apply.

A. The Impossibility Doctrine Defined.

Impossibility of performance is "an inability to perform as promised due to intervening events, such as an act of state or destruction of the subject matter of the contract." United States v. General Douglas MacArthur Senior Village, Inc., 508 F.2d 377, 380 (2d Cir. 1974)(applying New York law). The inability to perform must be objective: "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." Kel Kim Corp. v. Central Mkts., Inc., 70 N.Y.2d 900, 902 (1987). Accord Ogdensburg Urban Renewal Agcy. v. Moroney, 42 A.D.2d 639 (3d Dep't 1973). Finally, "where impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused." 407 E. 61st Garage, 23 N.Y.2d at 281.

B. The Impossibility Doctrine Does Not Apply.

Neither the pandemic nor the EOs renders Valentino's performance of the Lease impossible. The Lease places on Valentino one principal duty: payment of the rent. Lease Article 2.[8] See Sage Realty, 1998 U.S.Dist LEXIS 15766 at *16 ("Jugobanka's primary obligation under the under the lease, to pay

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[8] Valentino also had a duty to continuously operate, for one day, as a luxury boutique. Section 5.04. It discharged that duty in 2013, on the day it opened for business.

rent, was not impaired by the Executive Order."). Nothing about the pandemic or the EOs precludes Valentino from carrying out that duty – indeed, Valentino paid its rent for June 2020 – meaning that fulfillment of that duty is not objectively impossible, irrespective of whether Valentino is conducting business. Nothing objectively prevents it from paying rent on a premises where it is not conducting business. See Raner v. Goldberg, 244 N.Y. 438, 440 (1927)("There is obviously no impossibility or illegality in paying the rent, and the landlord by making the lease has conveyed to the tenant the estate for which rent was promised." (citation omitted)). Accordingly, Valentino's potential financial hardship does not amount to impossibility. 407 E. 61st Garage.

C. The Lease Bars The Impossibility Claims.

Above, we demonstrated that the Lease itself bars Valentino's frustration claims. See pp.10-12, above. For the same reasons, the Lease also bars the impossibility claims. In brief, Section 21.11 says that casualty and governmental order do not excuse the payment of rent. Section 9.1 requires Valentino to comply with governmental orders. The Lease thus assigns to Valentino the risk of inability to operate. See, e.g., General Douglas MacArthur Senior Village, 508 F.2d at 381 ("The [impossibility] doctrine comes into play where…the contract does not expressly allocate the risk of the event's occurrence to either party…."). In short, not only does the Lease not excuse Valentino from performing its rental obligation, but the Lease affirmatively and expressly states the direct opposite.[9]

For all of these reasons, the Court should dismiss Valentino's impossibility claims pursuant to CPLR 3211(a)(1).

[9] We adopt also the foreseeability argument that we made above in relation to frustration. See pp. 12-14, above.

III. Valentino's Fifth Cause of Action – for Failure of Consideration – Fails Because The Frustration and Impossibility Claims Fail.

The fifth cause of action seeks rescission because of failure of consideration. As pleaded, the claim states merely that because of Covid-19 and the EOs, Valentino has been deprived of the beneficial use and occupancy of the store. However, this is merely a repackaging of Valentino's claims of frustration of the venture and impossibility of performance. We have demonstrated, above, that each of those claims is legally deficient. See Culver & Thessen, Inc., v. Starr Realty Co. (NE) LLC, 307 A.D.2d 910, 911 (2d Dep't 2003)(dismissing plaintiff-tenant's claim "Since the possibility that the plaintiff would be unable to obtain a permit was anticipated by the parties at the time the agreement was executed, and the risk of failure to terminate on the basis was intentionally placed on the tenant."(emphasis supplied)).

IV. The Sixth Cause of Action – for Actual and Constructive Eviction – Is Legally Deficient Because It Fails to Plead That Valentino Has Relinquished Possession of The Premises.

The sixth cause of action purports to plead an actual and constructive eviction. Complaint ¶¶69-75. The critical element for these claims, which must rest on a breach of a lease's covenant of quiet enjoyment – here, Lease Article 22 – is the tenant's abandonment of all or a portion of the subject premises. In the case of an actual eviction, the abandonment is brought about by the landlord's physical ouster of the tenant. In the case of a constructive eviction, the abandonment is brought about by the landlord's creation of a condition that forces the tenant to leave – such as lack of heat or the presence of vermin. See, e.g., Barash; Dave Herstein Co. v. Columbia Pictures Corp., 4 N.Y.2d 117 (1958).

To be clear, Valentino makes no allegation of abandonment. Nowhere in the Complaint does Valentino allege in words or substance that it has abandoned the Premises. Indeed, the eighth cause of action flatly refutes abandonment and ouster: by that claim, Valentino asks the Court to enjoin 693 Fifth from terminating the Lease before December 31, 2020 so as to permit Valentino to wind up its operations

(again, not coincidentally, after the conclusion of the holiday season). For this reason alone, the claim is legally insufficient and warrants dismissal pursuant to CPLR 3211(a)(7).

In addition, however, the covenant of quiet enjoyment of the Lease is expressly conditioned upon Valentino observing all of its obligations under the Lease. ("Tenant, upon keeping, observing and performing all of the covenants and agreements of this Lease on its part to be kept, observed and performed, shall lawfully and quietly hold, occupy and enjoy the Premises…."). The Court of Appeals has held that such a conditioning of the quiet enjoyment covenant is permissible. Dave Herstein. However, as previously noted, Valentino has not paid base rent for June and July 2020 and is thus in default of its material obligations under the Lease. Accordingly, Valentino may not make a claim for breach of the quiet enjoyment covenant. For this additional reason, the sixth cause of action warrants dismissal.

V. Valentino's Effort to Void VFG's Guaranty Is Meritless.

The seventh cause of action seeks to void the Guaranty. On two distinct bases – each sufficient on its own to warrant dismissal – this cause fails.

First, on the procedure, VFG, the guarantor, is not a party to this action. Valentino, an entity separate from VFG, lacks standing to seek to invoke the possible rights of VFG and, thus, attempt to free VFG from the Guaranty.

Second, on the substance, the Guaranty turns on the validity of the obligations that Valentino undertook under the Lease. As demonstrated above, Valentino has no legally viable basis to attack the validity of the Lease. The absence of any merit to Valentino's challenge to the Lease leaves neither Valentino nor VFG (even were VFG a party) with any basis to challenge the Guaranty.

For these reasons, the Court should dismiss the seventh cause of action.

VI. There Is No Basis to Enjoin 693 Fifth from Terminating The Lease.

Finally, the eighth cause of action seeks to prevent 693 Fifth from terminating the Lease. The effort to prevent 693 Fifth from terminating is premature – at best.

The claim for an injunction seeks "Yellowstone"-like relief. See First Nat'l Stores, Inc. v. Yellowstone Shopping Ctr., Inc., 21 N.Y.2d 630 (1968). However, a Yellowstone injunction is available only where the landlord serves on the tenant a notice that imperils the lease. Here, 693 Fifth has served no such notice upon Valentino. Indeed, to date, 693 Fifth has never even threatened to terminate the Lease. Accordingly, the request for an injunction is speculative at best, and would be prematurely chilling to the ability of 693 Fifth to invoke its rights under the Lease, including the very right to serve a notice to cure. If 693 Fifth serves such a notice, then and only then, would Valentino legitimately have a basis upon which to seek Yellowstone relief. Valentino's premature effort to chill the rights of 693 Fifth is both speculative and legally baseless.

The eighth cause of action thus warrants dismissal.

CONCLUSION

For the foregoing reasons, the Court should dismiss the complaint with prejudice, together with such other, further and different relief as the Court deems just or proper.[10]

Dated: New York, New York
July 27, 2020

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[10] Section 21.7 of the Lease recites, as relevant here, that if Valentino sues 693 Fifth on a matter arising out of or relating to the Lease, the losing party will pay the prevailing party's reasonable legal fees. Should the relief sought in the within motion be granted, we will make separate application to the Court for our legal fees.

EXHIBIT D

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

VALENTINO U.S.A., INC.,

Plaintiff,

- against-

693 FIFTH OWNER LLC,

Defendant.

Index No. 652605/2020
(NYSCEF Case)

(Motion Seq. 001)

Hon. Andrew Borrok

**PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS COMPLAINT**

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PRELIMINARY STATEMENT

Plaintiff VALENTINO U.S.A., INC. ("Valentino" or "Plaintiff"),[1] respectfully submits this memorandum of law in opposition to Defendant 693 FIFTH OWNER LLC ("Landlord" or "Defendant")'s motion (Motion Seq. 001), which seeks an order pursuant to CPLR §§ 3211(a)(1), 3211(a)(7) and 3211(c), dismissing Plaintiff's Complaint, dated June 19, 2020 (the "Complaint").

For the reasons detailed below, and in the accompanying Ferrara Affirmation and Bergamo Affidavit, the Court should deny Defendant's motion, in all respects. Specifically, denial is appropriate, as a matter of law, because the causes of action in Plaintiff's Complaint are, unequivocally and sufficiently pleaded and assert viable and legally cognizable claims.

As the Court is aware, the COVID-19 pandemic has drastically impacted New York State, tragically resulting in over 33,000 fatalities and 475,000 positive cases, to date. To combat this crisis, unprecedented governmental restrictions have prohibited and/or severely restricted local businesses, schools, and places where people can eat, shop and assemble. Such historically unparalleled changes have fundamentally altered the economic landscape in a manner that Valentino (or no other tenant) could have possibly foreseen or imagined. Indeed, Valentino's fundamental assumption – that it could use the Premises to operate a high-end fashion retail boutique along a prestigious section of Fifth Avenue, has been completely frustrated. In that regard, Valentino's boutique suffered an unprecedented shutdown, and ongoing governmental restrictions render it impossible to provide its signature in-store experience. See Bergamo Aff., ¶13.

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[1] Unless otherwise defined herein, all capitalized terms and/or exhibits referenced herein shall have the meaning as ascribed in the accompanying affirmation of Lucas A. Ferrara, dated September 14, 2020 (the "Ferrara Affirmation") and/or the affidavit of Laurent Bergamo, sworn to on September 14, 2020 (the "Bergamo Affidavit").

Valentino has more than adequately pleaded that these catastrophic developments have impacted its business and, *inter alia*, must now been deemed to have rendered the Lease void and/or terminated, and/or entitle Valentino to an abatement of any rent claimed to be due.

In response, Defendant lacks any meaningful rebuttal – particularly at this pre-Answer stage, when Valentino's allegations must be accepted as true and afforded every possible favorable inference. Rather, Defendant offers the misguided argument (which Valentino vehemently disputes) that two provisions of the Lease somehow bar Valentino's contract, quasi-contract and equitable rights. As outlined below, Defendant's argument fails for several reasons, including the simple fact that neither Valentino nor Defendant ever anticipated, or protected against, a global pandemic, nor is that possibility mentioned in the Lease. Plainly and simply, there is nothing in the Lease which prohibits Valentino's claims; nor would such an amorphous waiver be consistent with public policy.

At this juncture, the only relevant inquiry is whether, looking at the pleadings and deeming those facts to be true, Valentino asserts a cause of action. A plain reading of every one of Valentino's eight (8) causes of action amply shows that it asserts legally viable and cognizable claims.

While Defendant attempts to argue the equities (*i.e.* alleging that Plaintiff hasn't paid rent while receiving P.P.P. loans), those arguments are premature, irrelevant and factually incorrect – further illustrating that dismissal is unwarranted, particularly when material issues of fact remain in dispute. See Bergamo Aff., ¶ 21.

STATEMENT OF FACTS

The Court is respectfully referred to the Ferrara Affirmation and the Bergamo Affidavit for a recital of the salient facts.

ARGUMENT

I.

DEFENDANT FAILS TO MEET THE HIGH STANDARD FOR PRE-ANSWER DISMISSAL

It is well settled, black letter law that the "scope of a court's inquiry on a motion to dismiss under CPLR § 3211 is narrowly circumscribed." *P.T. Bank Cent. Asia, N.Y. Branch v. ABNAMRO Bank N.V.*, 301 A.D.2d 373, 375 (1st Dep't 2003). Indeed, as this Court summarized in *Allergan Fin., LLC v. Pfizer Inc.*, 67 Misc.3d 1206(A) (Sup. Ct. N.Y. 2020), in denying a motion to dismiss:

> On a motion to dismiss pursuant to CPLR § 3211, the court must afford the pleading a liberal construction and accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference and determine only if the facts as alleged fit into any cognizable legal theory (*Leon v Martinez,* 84 NY2d 83 [1994]). . . . . **Finally, under CPLR § 3211(a)(7), the court must only assess whether the plaintiff has a cause of action and not whether the plaintiff has stated one.** (Emphasis supplied.)

After accepting the Complaint's allegations as true, and affording Valentino "every possible favorable inference," Defendant's conclusory claim that Valentino lacks any cause of action falls woefully short.

To the contrary, a plain reading of the Complaint demonstrates Plaintiff adequately asserted each of its eight (8) causes of action.[2]

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[2] Seven (7) causes of action seek a declaratory judgment, while the eighth (8th) cause of action seeks an injunction, pursuant to, *inter alia*, *First National Stores, Inc. v. Yellowstone Shopping Center, Inc.,* 21 N.Y.2d 630 (1968).

A. <u>Plaintiff pleads each element of every declaratory cause of action.</u>

i. Plaintiff states a cause of action for "frustration of purpose."

(a) The pleadings are sufficiently structured.

Valentino's first and second causes of action seek a declaration that the Lease and Valentino's obligations thereunder have been terminated and/or the rent abated because the Lease's principal purpose has been frustrated.

To plead a frustration of purpose claim, a party must allege that: (1) an event substantially frustrates a party's principal purpose in entering into a contract; (2) the nonoccurrence of the event was a basic assumption of the contract; and (3) the event was not the fault of the party asserting the defense. See generally Hon. Michael M. Baylson et al., 8 Bus. & Com. Litig. Fed. Cts. § 89:36 (4th ed. 2019).

Commercial tenants have prevailed on frustration of purpose claims when they have pleaded those elements. See *Jack Kelly Partners LLC v. Zegelstein*, 140 A.D.3d 79 (1st Dep't 2016) (lease declared void where tenant was unable to utilize premises for office); *Elkar Realty Corp. v. Mitsuye T. Kamada*, 6 A.D.2d 155 (1st Dep't 1958) (tenant justified in "disavowing" lease where alterations required for tenant's restaurant were thwarted), *cf. Ctr. for Specialty Care, Inc. v. CSC Acquisition I, LLC*, 185 A.D.3d 34 (1st Dep't 2020) (medical facility tenant could not prevail on a "frustration" claim when its contract expressly guarded against a delay in obtaining a specific certificate).

Here, Plaintiff avers each element of a frustration claim.[3] Specifically, Valentino alleges that: (1) the COVID-19 pandemic has undermined and frustrated Valentino's principal purpose in entering into, and continuing with, the Lease – the ability to conduct retail business (See

[3] Plaintiff's second frustration of purpose claims requests alternate relief, and is therefore pleaded separately.

Complaint, ¶29); (2) Valentino and its landlord never assumed that a global pandemic would occur during the Lease term, and did not address or provide for that risk in the Lease (See Complaint, ¶¶6, 10, 29 and 39); and (3) Valentino was not at fault for the pandemic (See Complaint, ¶30).

As the foregoing allegations must be accepted as true, and Plaintiff afforded every possible favorable inference, there can be no dispute that the pleadings are sufficient to survive attack.

On that basis alone, Defendant's motion must be denied.

(b) The Lease does <u>not</u> vitiate Plaintiff's frustration of purpose claim.

While the pleadings, on their face, unequivocally assert a viable cause of action for frustration of purpose, Defendant next attempts to secure a dismissal by misinterpreting and misapplying certain Lease clauses.

In that regard, Defendant cites to two provisions – Lease Sections 9.1 and 21.11. But neither provision addresses a pandemic, nor bars **<u>any</u>** of Valentino's claims.

Specifically, Section 9.1 requires Valentino to comply with rules and regulations concerning the Premises. Examples include: Americans with Disabilities Act and Landmarks Preservation Commission requirements, and local laws addressing sprinklers and façades. Absent is language concerning pandemics or any provision barring or waiving Plaintiff's claims.

Similarly, Section 21.11 provides that "Unavoidable Delays" shall not excuse payment of rent, but does **<u>not</u>** indicate that Valentino preemptively waived any and all contractual, quasi-contractual and/or equitable claims, including the doctrine of frustration of purpose. Additionally, that provision's applicability is limited by its express terms, which provide as follows:

> Section 21.11. Unavoidable Delays and Postponement of Performance. In the event that either party hereto shall be delayed or hindered in or prevented from the performance of any act required hereunder by reasons of strikes, labor troubles, inability to procure labor or materials, failure of power, restrictive governmental laws or regulations, riots, insurrection, war, acts of terrorism, acts of God,

> floods, hurricanes, windstorms, fire or other casualty, condemnation or other reason of a similar or dissimilar nature beyond the reasonable control of the party delayed in performing work or doing acts required under the terms of this Lease (each an "Unavoidable Delay"), then performance of such act shall be excused for the period of the Unavoidable Delay and the period for the performance of any such act shall be extended for a period equivalent to the period of such Unavoidable Delay. Notwithstanding the foregoing, after the Commencement Date, which date shall be subject to an Unavoidable Delay occasioned by the above causes, **nothing contained in this Section** shall operate to excuse Tenant from the prompt payment of Rent or any other payments or charges required by the terms of this Lease (**except as otherwise specifically provided for pursuant to the terms of this Lease**), or shall operate to extend the Term. Delays or failures to perform resulting from lack of funds shall not be deemed Unavoidable Delays. (Emphasis added.)

Simply stated, Section 21.11 of the Lease (a) does **not** expressly refer to pandemics, (b) does **not** contain any language which would act as a waiver of Plaintiff's frustration of purpose claims,[4] and (c) does **not** concern the voiding/termination of the lease (but merely the payment of rent). And, while Plaintiff may not be able to rely on this provision to excuse payment of rent for "Unavoidable Delays" (which, again, does not include the pandemic), the section does **not** bar Plaintiff from relying on other provisions of the Lease, or applicable provisions of governing law (such as the frustration of purpose doctrine), as a basis for termination or as a defense to the payment of rent.

Defendant's impermissible extrapolation of those provisions into a broad "waiver" provision not only violates public policy, but belies the Lease's plain language. Thus, the assertion of a frustration of purpose claim is not prohibited and has been properly and sufficiently alleged.

[4] A waiver must be clear and unequivocal, and no such language is present in the Lease. See *Granite Broadway Dev. LLC v. 1711 LLC*, 44 A.D.3d 594 (1st Dep't 2007).

(c) The Pandemic and the Governor's Executive Orders were not foreseeable.

Defendant alleges that the parties somehow foresaw the COVID-19 public-health crisis, despite the Lease's utter silence concerning pandemics.[5] That specious assertion raises another material issue of fact, and on that basis alone, dismissal is unwarranted.

Putting that aside, Defendant asks the Court to take judicial notice of two prior incidents occurring in 2009 (H1N1) and 2002 (SARS), respectively, (4 years and 11 years before the Lease). Comparing those isolated instances (which had far less impact and death in the United States [in fact, upon information and belief, SARS caused **no** deaths in the United States], resulted in **no** government-ordered closures, **no** social-distancing guidelines, **no** limits or restrictions on retail, **no** economic downturn, **no** limits or restrictions on tourism, etc.) to the COVID-19 pandemic is absurd. Although prior viruses may have occurred, the COVID-19 pandemic's impact, and related Executive Orders, were anything but "foreseeable." To hold otherwise would eviscerate the concept of "foreseeability" and the frustration of purpose doctrine entirely, as any event, no matter how improbable, would theoretically be "foreseeable" with sufficient perfect hindsight.

Significantly, Defendant's cases do not warrant a different result, because in each instance the "foreseeable" event is distinguishable.

In *407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 282 (1968), the Court of Appeals rejected a frustration defense on a summary judgment motion (not a motion to dismiss), because the defendant's unilateral hotel closure as a business decision was not a result of "unanticipated circumstances[]" – and the defendant never made the vital argument that closure was "unforeseen." A business decision to close, based solely on profitability, and not intervening

[5] Defendant's Memorandum of Law, p.13 (NYSCEF Doc. No. 12).

circumstances, cannot constitute an "unforeseeable" event. *407 E. 61st Garage, Inc.* is therefore completely distinguishable.

Likewise, in *Sage Realty Corp. v. Jugobanka, D.D.*, 95 Civ.0323 RJW, 1998 WL 702272, at *2-3 (S.D.N.Y. Oct. 8, 1998), the landlord's first summary judgment motion was denied as premature. Only after discovery was completed, was landlord's second summary judgment motion granted (**not** a motion to dismiss), because defendant's counsel admitted in a deposition that he closely monitored pending financial sanctions that prevented defendant from paying rent. The Court found that careful monitoring of impending sanctions before signing the lease rendered those sanctions "foreseeable." Here, the parties had no idea that there would be a devastating global pandemic which would occur seven (7) years after signing the Lease.

Urban Archaeology Ltd. v. 207 E. 57th St. LLC, 68 A.D.3d 562 (1st Dep't 2009) is similarly inapplicable, because that tenant's claim concerned a *force majeure* provision following an economic downturn. The claim failed, because a downturn in the economy, by itself, was "foreseeable." Here, Valentino is not exercising a contractual *force majeure* right. Instead, Valentino asserts frustration, based on a "virtually cataclysmic, wholly unforeseeable event [that] renders the contract valueless to one party." *United States v. Gen. Douglas MacArthur Senior Vil., Inc.*, 508 F.2d 377, 381 (2d Cir. 1974).

Furthermore, the COVID-19 pandemic is a more complex and distinguishable multifaceted public-health crisis than any economic downturn. Among other things, unprecedented public-health challenges, extremely restrictive governmental orders and regulations, and a substantially worsened economic decline, differentiate the present circumstances from anything that has ever

previously arisen. The pandemic has irretrievably altered and impacted Plaintiff's business operations because of an unprecedented global-health crisis.[6]

Lastly, Defendant cites *Maxton Builders, Inc. v. Lo Galbo*, 68 NY2d 373, 382 (1986) to argue that Valentino should have carved-out a "pandemic" protection. *Maxton* concerned a real-estate sales-contract dispute, not a lease, was decided on summary judgment, and is therefore irrelevant. Defendant cavalierly and conveniently misapplies the doctrine of frustration, and its cited precedent actually supports Valentino's claim that the parties never assumed or anticipated a global pandemic of devastating proportions would occur, and that Valentino would face restrictive pandemic-related governmental shutdowns.

Valentino has therefore adequately pleaded a frustration of purpose claim. Lease sections 9.1 and 21.11 do not bar that claim, and the COVID-19 pandemic must constitute the type of "unforeseeable" event for which the doctrine excuses contractual performance. In any event, if such waiver could arguably be found to exist, such waivers (in the midst of an unprecedented global health crisis) must be deemed unenforceable and violative of public policy.

ii. Plaintiff states a cause of action for "impossibility of performance."

Valentino's third and fourth cause of action seek a declaration that its obligations under the Lease have been rendered impossible, and the Lease and Valentino's obligations thereunder have therefore been rescinded.

To plead a cause of action for impossibility, a party must allege that its performance: (1) has been rendered impossible, by (2) an unforeseeable event outside of that party's control that could not have been guarded against. See *Kel Kim Corp. v. Cent. Markets, Inc.*, 70 N.Y.2d 900

[6] Upon information and belief, earlier pandemics cited by Defendant's counsel did not cause as significant or widespread closure of business as here. See https://www.bloomberg.com/opinion/articles/2020-03-10/how-coronavirus-compares-with-2009-s-h1n1-in-spread-and-reaction, accessed on September 8, 2020.

(1987).

Here, Valentino alleges precisely that. See Exhibit F, Complaint, ¶47. Furthermore, Complaint ¶¶ 17, 23 and 25 further reinforce that the unprecedented governmental orders and restrictive regulations imposed due to the COVID-19 pandemic have rendered Valentino's performance impossible.

Accordingly, as these facts must be accepted as true on this pre-Answer motion, dismissal is entirely inappropriate. And, while Defendant reiterates its claim that Sections 9.1 and 21.11 of the Lease bar an impossibility claim, for the reasons set forth above in Section I(A)(i)(b), that contention is without merit. There is absolutely nothing within those sections (or any other portion of the Lease) that bars Plaintiff's claim or would otherwise act as a legally enforceable waiver.

Notably, Defendant's own case law guides <u>against</u> dismissal. In fact, not a single case cited by Defendant in support of this claim concerns an "unanticipated" event, or a pre-answer motion to dismiss.[7] To the contrary, the Court of Appeals in *Raner v. Goldberg*, 244 N.Y. 438, 441-42 (1927) found that when parties leased a dancehall, with the understanding that such operation required a license, the inability to obtain that license wasn't an "unforeseeable" event.

Likewise, in *Kel Kim Corp.*, a tenant was unable to renew an insurance policy that it was obligated to maintain during the lease (and in fact maintained for a period of years). *Kel Kim Corp.* is distinguishable, because the consequences of a failure to renew an insurance policy is a readily "foreseeable" risk. In *Ogdensburg Urban Renewal Agcy. v. Moroney*, 42 A.D.2d 639 (3d Dep't 1973), a buyer without a financing contingency clause was unable to complete a purchase because it was unable to secure federal funding. That inability to obtain a loan, particularly when a buyer neglects to bargain for a loan contingency provision, was found to be a "foreseeable" risk.

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[7] See Footnote 5.

Once again, Defendant's cases are entirely distinguishable, and the COVID-19 health crisis and related governmental shutdowns and regulations materially different. An unprecedented global pandemic simply cannot be compared to a "foreseeable" leasing or contract issue -- such as obtaining a permit, maintaining insurance, or getting a loan.

Furthermore, the COVID-19 pandemic has irretrievably altered the Lease's foundation in at least two fundamental respects: first, governmental shutdowns and/or regulations have prevented, and continue to prevent, Valentino from opening and/or operating as originally anticipated (Complaint, ¶18), and second, Fifth Avenue has been decimated as a "focal point of high-end New York City fashion buyers" (Complaint, ¶10).

In this case, at this early stage of the litigation, there is no indication that the COVID-19 pandemic was anything but an "unanticipated" event. In fact, the Court of Appeals has already noted the unimaginable horrific circumstances the pandemic has caused New Yorkers, citing in a recent decision the "unique" and "unprecedented" challenges created by the COVID–19 pandemic. See *Seawright v. Bd. of Elections in City of New York*, 2020 N.Y. Slip Op. 02993 (Ct. of Appeals May 21, 2020). If "unprecedented" and "unique," as the Court of Appeals has characterized only months ago, how could COVID-related developments have been "anticipated," as a matter of law, back in 2013 (when this Lease was originally executed)?

Valentino has therefore adequately asserted an impossibility claim.

iii. Plaintiff states a cause of action for "rescission."

Valentino's fifth cause of action seeks to rescind the Lease based on a failure of consideration.

The Court of Appeals has long recognized rescission as an available equitable remedy when there is a failure of consideration between contracting parties. See *Callanan v. Powers*, 199

N.Y. 268 (1910). Such a failure "depends on what the parties had in contemplation at the time of the lease." *Elk Realty Co. v. Yardney Elec. Corp.*, 153 N.Y.S2d 730, 731 (App. Term, 1st Dep't 1956). See also *Say-Phil Realty Corp. v. De Lignemare*, 131 Misc.827, 828-29 (N.Y. Mun. Ct. 1928) (holding that, "t]he doctrine of failure of consideration is predicated upon the happening of events which materially change the rights of parties, which events were not within the contemplation of the parties, at the time of the execution of the contract."). Indeed, when parties contemplated a use that is later found to be barred by governmental regulation, the courts have rescinded such leases. See *Mariani v. Gold*, 13 N.Y.S2d 365 (Sup. Ct. N.Y. County 1939) (rescinding lease for premises leased as a health resort, where such use was not approved under the zoning ordinance).

Here, Plaintiff has met its burden of alleging a rescission cause of action by alleging, in part, that:

> 62. The Lease permits, and requires, Plaintiff to use the Premises and operate its high-end fashion retail business in a particular manner.
>
> 63. As consideration for the Lease, Defendant is required to provide the Premises for the use specified and as contemplated by the parties' Lease.
>
> 64. The COVID-19 pandemic, related EOs and other governmental restrictions, have completely deprived Plaintiff, *inter alia*, of the beneficial use and occupancy of the Premises.

See Complaint, ¶¶62-64.

Furthermore, Valentino alleges that the parties contemplated that the tenant would be able to operate as a boutique retail store along a heavily-trafficked, high-end fashion, retail corridor (Complaint, ¶10), and that this expectation was fundamental consideration for the "substantial rent" Valentino agreed to pay.

In opposition, Defendant fails to offer any documentary evidence to rebut the Plaintiff's "failure of consideration" contention. Rather, Defendant merely cites to a single Second Department case, *Culver & Theisen, Inc. v. Starr Realty Co.*, 307 AD2d 910 (2d Dep't 2003). But there, plaintiff-tenant was unable to obtain a permit from the New York City Department of Buildings to install an advertising display in Queens, and subsequently sought to rescind its lease on multiple grounds.

Culver is plainly distinguishable from the present circumstances, based on that court's holding that the ability to obtain a permit was expressly anticipated and factored into the parties lease, prior to its execution, and that tenant received valuable consideration for that risk:

> [T]he possibility that the plaintiff would be unable to obtain a permit was anticipated by the parties at the time the agreement was executed, and the risk of failure to terminate on that basis was intentionally placed on the plaintiff (*cf. Verschell v Pike,* 85 AD2d 690, 691 [1981]). In consideration of the possibility that the plaintiff would be unable to obtain the permit, the defendant granted the plaintiff a free look period and the right to cancel the lease during that time period (see Jobco-Mitchel Field v Lazarus, 156 AD2d 426, 428 [1989]).

Culver & Theisen, Inc. v. Starr Realty Co., 307 A.D.2d 910, 911 (2d Dep't 2003).

Here, no such consideration was given or offered. In fact, Defendant offers not one scintilla of evidence that Valentino (a) anticipated a global pandemic would decimate its unique, retail boutique business at the time the Lease was signed, or (b) received any form of valuable consideration, such as a cancellation option, or reduced rent, due to that risk.

Accordingly, based on the pleading's facial sufficiency, Defendant's pre-Answer motion to dismiss must be denied.

iv. Plaintiff states a cause of action for "constructive eviction."

To plead a "constructive eviction" claim, Valentino need simply allege that: (a) the tenant's use of the subject premises has been disrupted by its landlord and/or a condition that the landlord is required to remediate, (b) the disruption is substantial and (c) the disruption has resulted in at least a partial abandonment of the premises. See *NYC Goetz Realty Corp. v. Martha Graham Ctr. of Contemporary Dance*, 39 A.D.3d 356 (1st Dep't 2007); see also *Holy Properties Ltd., L.P. v. Kenneth Cole Productions, Inc.*, 208 A.D.2d 394, 395 (1st Dep't 1994), *aff'd*, 87 N.Y.2d 130 (1995).

Here, the Complaint recites each of the forgoing elements. Specifically, Complaint paragraphs 70-71 proffers as follows:

> 70. Defendant has failed to properly maintain the Building and Premises pursuant to the Lease and/or take reasonable and/or necessary precautions and/or measures in light of the COVID-19 pandemic, to ensure that Plaintiff could safely occupy the Premises and/or operate, as originally contemplated by the Lease.
>
> 71. As a result of the foregoing, Defendant has breached the Lease's covenant of quiet enjoyment and/or has actually or constructively evicted Plaintiff from all and/or part of the Premises.

See Exhibit F, Complaint, ¶¶ 70-71.

Thus, there can be no reasonable dispute that Plaintiff has alleged a cause of action for constructive eviction, consistent with controlling case law.

Rather, Defendant harps on the fact that Valentino has failed to completely abandon the Premises. However, the case law has long held that a commercial tenant is entitled to a "reasonable" time to abandon its leased premises, following eviction substantial disruption resulting in at least a partial abandonment of the premises, and that the question of reasonableness is an issue of fact. See *Joseph P. Day Realty Corp. v. Franciscan Sisters for Poor Health Sys., Inc.*, 256 A.D.2d 134, 135 (1st Dep't 1998) (denying motion to dismiss over factual dispute

concerning "reasonableness" of tenant's delay in abandoning); *S.E. Nichols, Inc. v. New Plan Realty Tr.*, 160 A.D.2d 251, 252 (1st Dep't 1990) (holding that, "the abandonment of a department store in an orderly manner may be a lengthy process and that a delay of even several months might be reasonable under certain circumstances (*see, Leider v. 80 Williams St. Co., Inc.,* 22 A.D.2d 952, 255 N.Y.S.2d 999)."); *Zurel U.S.A., Inc. v. Magnum Realty Corp.*, 279 A.D.2d 520, 521 (2d Dep't 2001) (holding that, "[a] delay of three or four months for a commercial tenant to move in an orderly fashion may be considered reasonably prompt[.]"); *135 E. 57th St., LLC v. Calypso Capital Mgt., LP*, 2018 WL 4381741 (Sup. Ct., N.Y. County 2018) (delay of almost nine months not unreasonable).

Here, Plaintiff provided notice during the course of the pandemic, by letter dated July 1, 2020, that Valentino intends to abandon the Premises by December 31, 2020. See Bergamo Aff., ¶17; see also Exhibit F, Complaint, ¶26. From the plain allegations of the Complaint, Plaintiff has therefore set forth a constructive eviction cause of action, and its dismissal, at this early stage of the litigation, is entirely unwarranted.

Moreover, to the extent Defendant raises factual issues concerning the "reasonableness" of Plaintiff's stated intention to abandon the Premises, such factual issues merely highlight the inappropriate and premature nature of pre-Answer dismissal.

v. Plaintiff states a cause of action to void the Guaranty.

Plaintiff also properly asserts a cause of action for a declaratory judgment that the Guaranty is void.

As a matter of law, a guaranty may be voided by the expiration and/or termination of the lease obligations being guaranteed. See, e.g. *In re 504 Assoc. LLC*, 47 Misc.3d 1204(A) (Sup. Ct. Kings County 2015), *judgment entered sub nom. 504 Assoc. LLC v. Nason* (Sup. Ct. Kings County

2015) (holding that, "[t]here can be little question that the expiration of that lease on November 30, 2005 ended Mr. Rogin's guaranty obligation."); *300 E. 96th St. LLC. v. Saka*, 49 Misc.3d 144(A) (App. Term, 1st Dep't 2015).

A guaranty may also be voided by a "substantial" and/or "impermissible" change in the guarantor's obligations under the original agreement. See *Lo-Ho LLC v. Batista*, 62 A.D.3d 558, 560 (1st Dep't 2009); *cf. Fehr Bros., Inc. v. Scheinman*, 121 A.D.2d 13 (1st Dep't 1986) (guarantor that created increased risk remained bound by guaranty). A determination of whether the guaranty has been so modified is a material question of fact to be determined at trial. See *404 Park Partners, L.P. v. Lerner*, 75 A.D.3d 481 (1st Dep't 2010); *Harlorn LLC v. Cheng*, 59 Misc.3d 1221(A) (Sup. Ct. N.Y. County 2018) (denying motion to dismiss).

Here, Valentino adequately pleads that the Guaranty should be declared void for <u>both</u> reasons cited above -- although each would be an independent basis for the declaratory judgment cause of action. In that regard, the Complaint provides, as follows:

> 78. The parties never contemplated that a world-wide COVID-19 pandemic and related EOs would utterly frustrate and/or render impracticable, infeasible, unworkable, and/or impossible Valentino's performance under the Lease.
>
> 79. Had Valentino S.p.A. known of or contemplated such a catastrophic event, it would not have guaranteed Valentino's obligations.
>
> 80. An actual case and justiciable controversy exist since Defendant, as noted in its counsel's June 19, 2020 letter, disputes that Valentino S.p.A.'s Guaranty obligations have been excused or otherwise rendered null and void or otherwise unenforceable.

See Exhibit F, Complaint, ¶¶ 78-80.

Furthermore, Defendant is fully aware that the Guaranty clearly indicates that Plaintiff is a "wholly-owned subsidiary" of the Guarantor. Exhibit B, Guaranty, Paragraph 14. Accordingly, Valentino has standing to seek a declaratory judgment regarding potential liabilities of its parent -

- liabilities that will directly financially impact Valentino, and are intrinsically tied to the Lease. See *In re Kollel Mateh Efraim, LLC*, 406 B.R. 24 (Bankr. S.D.N.Y. 2009). Notably, Defendant fails to cite a single case in support of its conclusory statement that Valentino somehow "lacks standing."[8] Defendant's motion to dismiss this cause of action must therefore be denied.

Having expressly and sufficiently asserted allegations in support of each of Plaintiff's seven (7) declaratory judgment causes of action, Defendant's pre-Answer motion to dismiss must be denied, as a matter of law. Indeed, the very cases cited by Defendant highlight that material issues of fact remain concerning, *inter alia*: (a) the foreseeability of the COVID-19 pandemic; (b) the parties' underlying assumptions concerning the Lease's purpose and retail conditions along Fifth Avenue; (c) what the parties' contemplated at the time the Lease was executed; (d) the reasonableness of Plaintiff's stated intent to abandon the Premises at the end of the year; and (e) whether Guarantor contemplated guaranteeing the Lease in the event of an unprecedented global pandemic. Respectfully, these are issues that are not suitable for resolution at this early stage of the litigation, particularly prior the joinder of issue.

For the foregoing reasons, it is respectfully requested that Defendant's faulty and premature motion be denied, in its entirety.

B. <u>Plaintiff pleads each element of its injunction cause of action</u>.

Finally, the Complaint sets forth Valentino's cause of action for injunctive relief, as follows:

> 86. Because, upon information and belief, Defendant is threatening to terminate Plaintiff's valuable commercial interest in the Premises, Plaintiff would be irreparably harmed absent the grant of an injunction.

[8] Should the Court determine that Guarantor is a necessary party with respect to Plaintiff's seventh cause of action, for a declaratory judgment that the Guaranty is void, Plaintiff shall seek to amend the Complaint to add Guarantor as co-plaintiff.

> 87. Plaintiff lacks an adequate remedy at law.
>
> 88. By reason of the foregoing, Plaintiff is entitled to an order and judgment temporarily, preliminarily, and permanently enjoining Defendant from (a) terminating Plaintiff's tenancy and/or interest in the Premises prior to December 31, 2020 or such other term as the court may otherwise deem applicable, in order to permit Plaintiff to wind down its operations and deliver possession of the Premises to Defendant as required by the Lease, or for such other use as the court may deem appropriate under the circumstances, and/or (b) otherwise removing Plaintiff from possession of the Premises.

See Exhibit F, Complaint, ¶¶ 86-88.

Such an injunction is necessary, based upon Defendant's baseless claim that Valentino is in default in the payment of rent. See, Slamani Affirmation, ¶11. Notably, Defendant does not need to serve a termination notice for Valentino to raise a claim – the mere threat of eviction establishes a viable cause of action. See *Post v. 120 E. End Ave. Corp.*, 62 N.Y.2d 19, 475 N.Y.S.2d 821 (1984). Defendant should not be permitted to seek to evict Valentino, until the present claims are adjudicated.

II.

DEFENDANT FAILS TO PROVIDE ANY EVIDENCE CONCLUSIVELY ESTABLISHING A DEFENSE

Defendant also seeks dismissal of the Complaint pursuant to CPLR §§ 3211(a)(1) and (c).

While CPLR § 3211(a)(1) provides, in relevant part, that a party may move to dismiss a complaint on the basis that "a defense is founded upon documentary evidence[,]" and CPLR § 3211(c) further provides, in relevant part, that: "either party may submit any evidence that could properly be considered on a motion for summary judgment," Defendant has not properly satisfied either of those requisites

The essence of Defendant's argument (which Plaintiff vigorously and vehemently disputes) appears to be that certain sections of the Lease somehow provide a complete defense to

each of Plaintiff's claims for declaratory and injunctive relief. As has been previously noted, Defendant's argument fails for two reasons: first, Defendant's self-serving interpretation of the Lease does not preclude any of Plaintiff's claims, and second, the purported material "evidence" cited by Defendant concerning Plaintiff's alleged nonpayment of rent and/or receipt of PPP loans is wholly inaccurate – thus emphasizing, yet again, why pre-Answer dismissal motions are typically discouraged – particularly when the parties have not engaged in any discovery.

A. Defendant's Self-Serving Interpretation of the Lease Fails.

As set forth above, the Lease does not expressly preclude or vitiate **any** of Valentino's claims. In fact, nothing in Sections 9.1 and/or 21.11 indicates, in any manner, that Valentino "anticipate[d] the consequences of a supervening cataclysmic or other event that might impact upon the Valentino retail store." See Defendant's Memorandum of Law, p.14.[9]

To that point, nothing in Article 9.1 speaks to whether the COVID-19 pandemic was "foreseeable" or "unforeseeable," the parties' intentions and basic assumptions entering into the Lease, or whether it is reasonable to abandon the Premises by the end of the year given the current state of affairs.

Article 21.11 similarly fails to address these, and other material factual, issues. This provision does not speak to any of Valentino's contractual rights in other sections of the Lease, or any quasi-contractual or equitable claims available in law or equity (which exist independently of the Lease).

Furthermore, the absence of any reference to a "pandemic" or "epidemic" renders both provisions ambiguous, and the trier of fact must determine whether the parties intended to impose

[9] In fact, Defendant's extreme argument suggests that Valentino's obligation to pay rent cannot be abated in any manner, by any event, under any circumstances – a position contradicted by controlling precedent for each of Valentino's claims.

an unassailable duty to continue to pay rent, without reprieve, during this "unique" and "unprecedented" COVID-19 pandemic. See *Seawright*, *infra*.

Even if the Court deems Articles 9.1 and 21.11 to be unambiguous, Defendant's motion should still be denied because the Lease fails to resolve each of the following key factual questions in Defendant's favor, required pursuant to *Goshen v. Mut. Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002):

(a) did the parties anticipate or guard against the global COVID-19 pandemic and/or resulting restrictive governmental orders and/or regulations?;

(b) was the Lease entered into based on the fundamental assumption that Fifth Avenue would remain a heavily-trafficked focal point of high-end New York City fashion retail?;

(c) has the pandemic fundamentally destroyed and/or drastically altered the basic consideration for which Valentino bargained?;

(d) has Valentino been forced to abandon its premises?;

(e) did Guarantor assume or agree to take on liability arising from an unprecedented global pandemic?; and

(f) has Defendant served a type of predicate rent demand and/or threatened to prematurely terminate the Lease and/or remove Valentino from the Premises during its wind-down?

Simply, because the Lease cannot "conclusively" resolve **<u>any</u>** one or more of those material factual inquiries in Defendant's favor, dismissal is inappropriate, and Defendant's motion must be denied.

B. Defendant's Claims Concerning Arrears and PPP Loans are Patently False and Wholly Irrelevant.

Defendant's argument relies on "evidentiary items" – an affirmation by Defendant's in-house counsel (the Slamani Affirmation), and photographs annexed to Defendant's counsel's employee's affidavit (the Azevedo Affidavit). That questionable "evidence" cannot provide grounds for the Complaint's dismissal since it is inaccurate and contradicted by the Bergamo

Affidavit.

As the First Department held, in denying a motion to dismiss, "a question of such far-reaching consequence and of such potential mischief as a precedent, should not be determined upon conflicting affidavits." *Sheils v. Sheils*, 32 A.D.2d 253, 256 (1st Dep't 1969).

Defendant's key 'facts' are summarized, in relevant part, as follows:

(a) Slamani Affirmation, ¶10: "Section 21.11 of the Lease expressly recites that cataclysmic events or governmental closure orders do not excuse Valentino from paying rent."

(b) Slamani Affirmation, ¶11 "In mid-June, 2020, Valentino paid one month's rent; however, to date, Valentino is in arrears under the Lease in the sum of $3,180,241. 78 on account of unpaid rent for June and July, 2020 (a copy of 693 Fifth's rent arrearage report for Valentino is annexed hereto and made part hereof as Exhibit D)."

(c) Slamani Affirmation, ¶13: "As a result of our ongoing discussions, 693 Fifth offered to defer two months of Valentino's rent, to be repaid by December 31, 2020."

(d) Defendant's memorandum of law claims that, "Not insignificant is the fact that, in or about April 27, 2020, Valentino apparently sought and obtained from the United States Treasury a so-called 'PPP loan' of $2,000,000-5,000,000 (according to the Treasury website), sufficient to fund between one and three months' rent at the current Lease rental rate. This alone surely undermines Valentino's claims of frustration and impossibility."

These claims are either incorrect or irrelevant, and thus fail to meet the required evidentiary standard.

First, Article 21.11 of the Lease does not contain the terms "cataclysmic events" or "governmental closure orders." See Exhibit A, Lease, Article 21.11. Those terms were apparently invented by Defendant's in-house counsel, and are a total "stretch," if not an utter fabrication.

Second, Valentino is **not** in arrears. See Bergamo Aff., ¶23. The parties agreed to a two-month rent deferral. See Bergamo Aff., ¶11. With the exception of the deferred base rent, Valentino has paid monthly rent. See Bergamo Aff., ¶24. Moreover, Valentino's ability or

inability to pay rent is irrelevant to determining whether its Complaint states a cause of action.

Third, the Azevedo Affidavit, with its accompanying photographs of a purportedly empty store front and street, is not dispositive, because it fails to contradict any of Defendant's allegations concerning its inability to use the Premises as intended, whether the parties foresaw the global COVID-19 pandemic, or whether the parties assumed Fifth Avenue would remain a heavily-trafficked luxury fashion retail destination during the Lease term.[10] Furthermore, Valentino disputes that it enjoys "full and complete" possession of the Premises and pertinent factual questions - - concerning constructive eviction, and whether Valentino's intended abandonment is reasonable - - remain unanswered.

Lastly, while wholly irrelevant, Valentino did ***not*** receive a P.P.P. Loan. See Bergamo Aff., ¶22. Since Defendant's argument is entirely baseless and manufactured, it should be ignored.

III.

PUBLIC POLICY AND EQUITY SUPPORT ADJUDICATION OF PLAINTIFF'S CLAIMS ON THEIR MERITS

As the Court of Appeals recently recognized in *Seawright v. Bd. of Elections in City of New York*, the COVID-19 pandemic has presented New Yorkers, families and businesses alike, with "unique" and "unprecedented" challenges. While existing case law supports the adjudication, and eventual grant, of Plaintiff's claims arising from, *inter alia*, the doctrine of frustration of purpose, public policy and the court's inherent equitable powers also support the application and, if necessary, extension of these precedents to this novel environment.

In many respects, the global COVID-19 pandemic has resulted in more devastation to New York City than almost any other historical event. The impacts, in terms of lost lives, declining

[10] In fact, the photographs show empty Premises, and a Fifth Avenue devoid of any retail shoppers or foot traffic.

physical and mental health of the workforce, lost jobs, shuttered businesses, closed schools, a lingering public-health threat, and a possible resurgence of the virus, have instilled a climate of fear (which will impact the City for many years to come). To move forward, it is critical for the courts to examine the parties' contractual arrangements with an open mind and heart.

Given that Valentino's tenancy was founded upon certain basic assumptions that have been decimated, if not permanently altered by the pandemic and related governmental closures and restrictions, the court should exercise its inherent powers to review and to eventually annul the parties' contractual relationship. Such an outcome is eminently reasonable when a commercial tenant can demonstrate that the foundations of its business, has been irretrievably altered. Plaintiff respectfully proposes that, given the unique circumstances presented, public policy requires this Court to find that Valentino's quasi-contractual and equitable claims apply, particularly in the midst of this current crisis.

Notably, since the New York City Council and New York State Legislature have recognized that commercial tenants are in desperate need of such relief,[11] Valentino should be permitted to exit its Lease, without further harm or delay. That determination would facilitate a more efficient re-leasing or reletting of the Premises. While Defendant may argue that applying claims such as the frustration of purpose doctrine to relieve tenants of their lease obligations would result in a mass exodus of businesses from the city, such contentions are makeweight, for if businesses cannot viably be conducted, that exodus would occur in any event. The issue is whether Defendant should profit from such adverse conditions.

[11] The Court is respectfully asked to take judicial notice of pending legislation such as Senate Bill S7053, that would impose upon commercial landlords an obligation to mitigate their damages. Such legislation follows the 2019 Housing Stability and Tenant Protection Act, and indicates a clear public policy of supporting commercial tenants in these challenging times.

CONCLUSION

For the reasons set forth herein, Plaintiff respectfully requests that the Court deny Defendant's motion (Motion Seq. 001) in all respects, and grant Plaintiff such other and further relief deemed as just and proper under the circumstances including, but not limited, to an award of fees and/or sanctions as against the Defendant for its frivolous and unsubstantial posture in this time of crisis.

Dated: New York, New York
September 14, 2020

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH WORD COUNT LIMIT

I hereby certify pursuant to Rule 17 of the Rules of Practice for the Commercial Division of the Supreme Court of the State of New York that the total number of words in the foregoing document, exclusive of the caption, table of contents, table of authorities, and signature block, is 6,944 according to the "Word Count" function of Microsoft Word, the word-processing system used to prepare the document, and thus that the document complies with the word count limit set forth in Rule 17.

Dated: New York, New York
September 14, 2020

Lucas A. Ferrara

LUCAS A. FERRARA

EXHIBIT E

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED, *Justice* — PART IAS MOTION 2EFM

INDEX NO. 154141/2020

MOTION SEQ. NO. 001

---X

BACKAL HOSPITALITY GROUP LLC, CANVAS EVENTS LLC, and ARTHUR BACKAL,

Plaintiffs,

- v -

627 WEST 42ND RETAIL LLC,

Defendant.

---X

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR.

In this action for declaratory and injunctive relief, plaintiffs Backal Hospitality Group LLC, Canvas Events LLC, and Arthur Backal, move, by order to show cause, for an order directing defendant 627 West 42nd Retail, LLC to refund the entire value of a letter of credit to plaintiffs or, in the alternative, directing defendant to post a bond in the amount of the letter of credit for the benefit of plaintiffs pending the final resolution of this matter. Defendant opposes the motion. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the application is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

On June 28, 2018, plaintiff Canvas Events, LLC ("Canvas"), a caterer, leased from defendant 627 West 42nd Retail, LLC ("627") the ground floor and lower level storage unit located at 635 West 42nd Street, New York, New York ("the premises"), which was to be used as an event

space. Concomitantly with the execution of the lease, Canvas deposited $500,000.00 in cash with 627 as a security deposit. Doc. 4 at 40-41, par. 34.1. Plaintiff Arthur Backal ("Backal"), a managing member of Canvas, also executed a Good Guy Guaranty of the Lease. Doc. 4 at 47, 54-58. The lease provided, inter alia, that "[n]o agreement to accept a surrender of all or any part of the Demised Premises shall be valid unless in writing and signed by [627]" and that "[t]he delivery of keys to an employee of [627] or of its agent shall not operate as a termination of this [l]ease or a surrender of the Demised Premises." Doc. 4 at par. 28.2(A). Additionally, paragraph 25.3 of the lease provided, inter alia, that if plaintiff defaults, 627 "shall be entitled to retain all moneys, if any, paid by [Canvas] to [627], whether as advance rent, security or otherwise, but such moneys shall be credited by [627] against any Fixed Rent or Additional Rent due from [Canvas] at the time of such termination or re-entry [by 627] or, at [627's] option, against any damages payable by [Canvas] . . ." Doc. 4 at par. 25.3. Paragraph 26.1 of the lease required Canvas to pay 627 any rent which came due after it vacated the premises due to a default. Doc. 4 at par. 26.1.

On September 10, 2018, plaintiff Backal Hospitality Group, LLC ("BHG"), on behalf of Canvas, and for the benefit of 627, established a letter of credit ("LOC") in the amount of $500,000.00 with JPMorgan Chase Bank, N.A. ("JPMorgan"). Doc. 5. In accordance with paragraph 34.1 of the lease, the letter of credit replaced the cash provided by Canvas as security for the lease. Doc. 4 at par. 34.1. Paragraph 34.1 of the lease also allowed 627 to draw upon the LOC in the event Canvas breached the lease by failing to pay 627 any amounts owed. Id. Paragraph 34.2 of the lease provided that Canvas "shall not seek to enjoin, prevent or otherwise interfere with [627's] draw against the [LOC]." Id. at par. 34.2.

On March 22, 2020, New York State Governor Andrew Cuomo issued an executive order which, inter alia, banned large gatherings at all facilities in New York State of New York due to the COVID-19 epidemic ("the March 22 order").

Because the March 22 order prevented Canvas from operating as an event space, and thus rendered it unable to pay future rent, its attorney wrote to a representative of 627 on May 27, 2020 purporting to confirm a telephone conversation counsel had with the representative earlier that day during which, counsel claimed, they purportedly agreed that Canvas would vacate the space and that the lease would be terminated. Doc. 8. The same day, counsel for plaintiffs wrote to JPMorgan to advise that the lease had been terminated and requested instructions regarding how to terminate the LOC. Doc. 6. On May 28, 2020, counsel for 627 wrote to counsel for plaintiffs to advise that 627 "in no way agreed to terminate the [l]ease" and that it reserved all of its rights pursuant to the lease and otherwise. Doc. 8.

JPMorgan responded on June 4, 2020 by advising Backal that the LOC could only be cancelled with the consent of its customers, BHG and Canvas, and the beneficiary, 627. Doc. 7.

On June 10, 2020, 627 filed paperwork with JPMorgan to draw down on the LOC in order to satisfy outstanding rental arrears due through June, 2020 in the sum of $413,161.19. Doc. 13 at par. 27. 627 received these funds from JPMorgan the following day. Id.

On June 10, 2020, plaintiffs commenced the captioned action by filing a summons with notice seeking: 1) a declaration that the lease has been terminated; and 2) an order "permanently enjoining [627] from preventing [p]laintiffs from canceling the [LOC] that secures the lease." Doc. 1.

Plaintiffs thereafter filed the instant OSC seeking an order directing 627 to refund the entire value of the LOC to plaintiffs or, in the alternative, directing 627 to post a bond in the amount of

the LOC for the benefit of plaintiffs pending the final resolution of this matter. Docs. 2-12. The OSC, signed June 23, 2020, contained a temporary restraining order ("TRO") preventing 627 from further drawing upon the LOC and enjoining 627 from using or transferring any of the funds it had already drawn down pending the hearing of the OSC. Doc. 12. In support of the motion, Kelly Robreno Koster, Esq., counsel for plaintiffs, argues that plaintiffs are entitled to injunctive relief since they are likely to succeed on the merits, they will suffer irreparable harm if the relief demanded is not granted, and because the equities weigh in their favor. Doc. 3. Koster asserts that plaintiffs are likely to succeed on the merits since their surrender of the premises, combined with 627's acceptance of the keys, establish that 627 allowed plaintiffs to terminate the lease without any penalty. Doc. 3 at par. 40. They further assert that they will be irreparably harmed if they are not granted the relief they seek since they will be unable to return the deposits their clients made in connection with parties planned at the premises. Doc. 3 at par. 55. They assert that the equities favor them for the same reason. Doc. 3 at par. 57. Additionally, Koster argues that it is impossible for plaintiffs to perform under the lease given the March 22 order prohibiting large gatherings. Doc. 3.

In an affidavit in support of the OSC, Backal represents, inter alia, that: 1) he is the principal of Canvas and BHG as well as the guarantor of the lease; 2) the majority of events plaintiffs had planned at the premises have been cancelled due to the COVID-19 pandemic and that plaintiffs cannot refund the deposits made by their clients unless they have access to the funds securing the LOC; 3) 627 agreed to terminate the lease without any penalty and that plaintiffs would not have terminated the lease unless it was without penalty; 4) 627 accepted the keys after plaintiffs advised that they were terminating the lease; and 5) plaintiffs will suffer irreparable harm if plaintiffs

cannot access the funds securing the LOC since they will not be able to refund their clients' deposits. Doc. 10.

In an affirmation in opposition, Andrew Plotkin, Esq., Executive Vice President and Associate General Counsel of Josephson, LLC ("Josephson"), the asset manager of 627, states, inter alia, as follows: 1) on April 21, 2020, 627 delivered a notice of default to Canvas after Canvas failed to pay March and April 2020 rent and additional rent in the amount of $204,983.36; 2) plaintiffs thereafter requested a lease modification as a result of the COVID-19 pandemic; 3) the parties thereafter entered into negotiations regarding a possible lease modification; 4) despite the discussions about a possible lease modification, 627 never agreed to allow Canvas to vacate the premises without any penalty since doing so could have resulted in a waiver by 627 of hundreds of thousands of dollars in rent arrears, $10 million in future rent, and the return of the $500,000 LOC; 5) pursuant to paragraph 28.2(A) of the lease, plaintiffs could not surrender the premises without the written consent of 627, which was not granted, and that paragraph specifically states that the mere acceptance of the keys by 627 did not operate as a surrender of the premises or as a termination of the lease; 6) paragraph 34.1 allows 627 to draw upon the LOC in the event plaintiffs fail to pay their rent; 7) plaintiffs never responded to 627's May 28, 2020 correspondence reserving its rights under the lease; and 8) paragraph 34.2 of the lease prevented plaintiffs from seeking to "enjoin, prevent or otherwise interfere with [627's] draw against the [LOC]." Doc. 13.

In an affidavit in opposition, Kimberly Cafaro, managing agent for Josephson, corroborates Plotkin's representations about the default notice served on Canvas, the negotiations regarding a possible lease modification, the fact that 627 never agreed to allow Canvas to terminate the lease without a penalty, and the fact that plaintiffs never objected to Plotkin's correspondence of May

28, 2020. Doc. 14. She further states that 627 received the keys to the premises from plaintiffs on June 4, 2020. Doc. 14.

Scott F. Loffredo, Esq. of Belkin Burden Goldman LLP, counsel for 627, also submits an affirmation in opposition to the OSC. Doc. 15. Loffredo argues that plaintiffs are not entitled to a preliminary injunction since they have failed to establish the likelihood of success on the merits, irreparable harm, and that the equities herein weigh in their favor. Id. Specifically, he argues that plaintiffs fail to establish their likelihood of success on the merits because they have provided no evidence that the parties agreed to an early termination of the lease or a waiver of all rent due and maintains that: 1) paragraph 34.1 of the lease required that Canvas obtain a LOC in order to secure its performance under the lease, and that 627 was permitted to draw upon the LOC in the event of a breach by Canvas; 2) paragraph 34.2 of the lease prohibited Canvas from enjoining, preventing or interfering with any drawing upon the LOC by 627; 3) paragraph 28.2(A) of the lease prohibited Canvas from surrendering the premises without written approval from 627 and stated that the mere acceptance of the keys by 627 did not operate as a termination of the lease; 4) paragraph 25.3 of the lease permitted 627 to retain any moneys paid by Canvas to 627, whether as advance rent, security or otherwise, so long as such moneys shall be credited by 627 against any rent arrears; and 5) paragraph 26.1 of the lease required Canvas to pay any rent after it vacated the premises due to a default. Thus, asserts Loffredo, plaintiffs clearly do not establish a likelihood of success on the merits.

Loffredo further asserts that plaintiffs fail to establish irreparable harm because they can be compensated by monetary damages.

Finally, Loffredo asserts that the equities do not weigh in plaintiffs' favor since they made a settlement offer to 627 on June 10, 2020 despite simultaneously arguing that 627 had agreed to plaintiffs' early termination and a waiver of its arrears.

LEGAL CONCLUSIONS:

"A preliminary injunction will only be granted when the party seeking such relief demonstrates a likelihood of ultimate success on the merits, irreparable injury if the preliminary injunction is withheld, and a balance of equities tipping in favor of the moving party." *1234 Broadway LLC v West Side SRO Law Project*, 86 AD3d 18, 23 (1st Dept 2011). Whether to grant a preliminary injunction is a matter to be determined in the broad discretion of the court. *See Madden Int'l., Ltd. v Lew Footwear Holdings Pty Ltd.,* 143 AD3d 418 (1st Dept 2016); *Cityfront Hotel Assoc. Ltd. Partnership v Starwood Hotels & Resorts Worldwide, Inc*., 142 AD3d 873 (1st Dept 2016).

Here, plaintiffs have clearly failed to establish the likelihood of their success on the merits. Although they assert that 627 agreed to terminate their lease without any penalty, this contention is unsupported by any evidence. On the contrary, as 627 asserts, counsel for 627 wrote to plaintiffs' counsel on May 28, 2020 stating that 627 "in no way agreed to terminate the [l]ease" and that it reserved all of its rights pursuant to the lease and otherwise. Doc. 8.

The lease clearly provided that "[n]o agreement to accept a surrender of all or any part of the [premises] shall be valid unless in writing and signed by [627]." Since plaintiffs have produced no such writing, their contention that they legally surrendered the premises is without merit. Additionally, plaintiffs' argument that 627 assented to Canvas' surrender of the premises by accepting the return of the keys is belied by the provision of the lease providing that "[t]he delivery

of keys to an employee of [627] or of its agent shall not operate as a termination of this [l]ease or a surrender of the [premises]." Doc. 4 at par. 28.2(A). Despite the fact that Canvas vacated the premises, it was still liable to pay its arrears, as well as other amounts due under the lease, and 627 was permitted by the lease to draw down the LOC for this purpose. Doc. 4 at pars. 25.3, 26.1, 34.1, 34.2.

Plaintiffs further contend that they are likely to succeed on the merits because the March 22 order prohibiting large gatherings of people rendered it impossible for them to perform under the lease. However, in making this argument, plaintiffs overlook paragraph 36.4 of the lease, which provides that:

> If the fixed rent or any additional rent shall be or become uncollectible by virtue of any law, governmental order or regulation, or direction of any public officer or body, Tenant shall enter into such agreement or agreements and take such other action (without additional expense to Tenant) as Landlord may request, as may be legally permissible, to permit Landlord to collect the maximum Fixed Rent and Additional Rent which may, from time to time during the continuance of such legal rent restriction be legally permissible, but not in excess of the amounts of fixed rent or additional rent payable under this Lease. Upon the termination of such legal rent restriction, (a) the Fixed Rent and Additional Rent, after such termination, shall become payable under this Lease in the amount of the Fixed Rent and Additional Rent set forth in this Lease for the period following such termination, and (b) Tenant shall pay to Landlord, if legally permissible, an amount equal to (i) the Fixed Rent and Additional Rent which would have been paid pursuant to this Lease, but for such rent restriction, less (ii) the Fixed Rent and Additional Rent paid by Tenant to Landlord during the period that such rent restriction was in effect.

Doc. 4 at par. 36.4.

Although the parties do not raise this provision in the motion papers, they evidently contemplated a scenario in which performance of the lease terms by plaintiffs might become prohibited by a governmental order, and agreed that, if such a situation arose, they would reach an

agreement regarding the collection of rent at the conclusion of the governmental restriction. Although the parties attempted in vain to negotiate a lease modification, plaintiffs nevertheless attempted to unilaterally terminate the lease in a manner violative of the terms thereof.

Given this finding, it is not necessary to address the other two requirements for obtaining a preliminary injunction. In any event, however, plaintiffs have also failed to establish irreparable harm and a balancing of the equities in their favor. Although plaintiffs claim that they will be irreparably harmed if they are not immediately able to access the funds that secure the LOC since those funds are "earmarked for refunds to [Canvas'] clients and far exceed any colorable damages [627] could claim it is owed" (Doc. 3 at par. 55), this claim is utterly conclusory insofar as plaintiffs submit no proof whatsoever of the amounts owed to their clients. Plaintiffs' claim that 627 will suffer no prejudice in the event its application is granted "because it has already surrendered the [p]remises to [627] in compliance with their agreement to terminate the [l]ease without penalty" (Doc. 3 at par. 58) is specious given the analysis above. Finally, plaintiffs' claim that any damages owed to 627 "are far less than the value of [627's] withdrawal due to [p]laintiffs' surrender of the [p]remises and [627's] duty, and failure, to mitigate" is baseless since, as noted above, no proof of any such damages has been submitted to this Court.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by plaintiffs Backal Hospitality Group LLC, Canvas Events LLC, and Arthur Backal is denied in all respects; and it is further

ORDERED that defendant 627 West 42nd Retail, LLC shall serve this order, with notice of entry, on all parties, within 20 days after the filing of this order on NYSCEF; and it is further

ORDERED that defendant's time to serve a demand for a complaint is extended until 20 days after the filing of this order with notice of entry: and it is further

ORDERED that the TRO entered by this Court on June 25, 2020 is vacated; and it is further

ORDERED, that counsel for the parties are directed to participate in a preliminary conference by telephone on November 2, 2020 at 10:30 a.m. (the parties must provide the court with a dial-in number and access code prior to the conference or must all be on the line and then patch the court in); and it is further

ORDERED that this constitutes the decision and order of the court.

8/3/2020
DATE

KATHRYN E. FREED, J.S.C.

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

At an IAS Term, Comm Part 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23rd day of September, 2020.

PRESENT:

HON. LAWRENCE KNIPEL,
Justice.

---------------------------------X

BKNY1, INC., d/b/a 132 LOUNGE,

Plaintiff,

- against -

132 CAPULET HOLDINGS, LLC,

Defendant.

---------------------------------X

DECISION AND ORDER

Index No. 508647/16

Mot. Seq. No. 16

<u>The following e-filed papers read herein:</u>	<u>NYSCEF #:</u>
Notice of Motion, Affidavits (Affirmations), and Exhibits Annexed	547-557
Opposing Affidavits (Affirmations) and Exhibits Annexed	558-562
Reply Affidavits (Affirmations)	566-567

In this action for a *Yellowstone* injunction and other relief, defendant 132 Capulet Holdings, LLC (defendant), moves for: (1) leave, pursuant to CPLR 2221 (d), to reargue its prior motion for, among other things, partial summary judgment on its affirmative defenses and counterclaims, and, upon reargument, granting that branch of its prior motion; and/or (2) an order vacating the *Yellowstone* injunction entered in favor of plaintiff BKNY1, Inc., d/b/a 132 Lounge (plaintiff), on the grounds that the latter has failed to pay rent for the months of April and May 2020; and/or (3) "[a]lternatively setting this matter down for trial on a date certain"; and/or (4) reimbursement of costs, expenses, and attorneys' fees incurred by defendant in making this motion. Plaintiff opposes the motion.

(1)

The initial branch of defendant's motion which is for leave to reargue its prior motion for partial summary judgment on its affirmative defenses and counterclaims is *denied*. The record reflects that the legal and factual issues underlying defendant's affirmative defenses and counterclaims are scheduled to be tried in or about November 2020 by a Civil Court Judge presiding over the holdover proceeding commenced by defendant against plaintiff in the Housing Part of the Kings County Civil Court (*see 132 Capulet Holdings, LLC v BKNY1, Inc., d/b/a 132 Lounge*, index No. LT-79902-19-KI) (the holdover proceeding).[1] There is a "strong preference for resolving landlord-tenant disputes in Civil Court due to its unique ability to resolve such issues" (*44-46 W. 65th Apt. Corp. v Stvan*, 3 AD3d 440, 441 [1st Dept 2004]). The interests of judicial economy, fairness, and consistency are better served by deferring to the Civil Court's upcoming hearing and determination in the holdover proceeding.

(2)

The *Yellowstone* injunction has been predicated on plaintiff's representation made on the record of the hearing that it has paid, and will continue paying, rent.[2] It is undisputed that plaintiff has failed to pay rent for the months of April and May 2020.[3] The mandatory

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[1] *See* Affidavit of Nasser Ghorchian (plaintiff's president), dated July 26, 2020 (NYSCEF #559) (Plaintiff's Affidavit), ¶¶ 1-3; Amended Petition with attachments filed in the holdover proceeding (NYSCEF #562).

[2] *See* Order, dated Aug. 5, 2016 (NYSCEF #41), incorporating Transcript of Hearing, held on Aug. 5, 2016 (NYSCEF #42), at page 89, lines 19-21 (statement of plaintiff's counsel: "Rent is being paid and we'll continue to pay rent as we always have to the owners of the building.").

[3] *See* Plaintiff's Affidavit, ¶ 16.

closure of plaintiff's restaurant business during those months by Executive Order No. 202.3 as cited by plaintiff, did not relieve it of its contractual obligation to pay rent. Plaintiff has failed to cite – and the Court's own review has not uncovered – any provision of the lease excusing it from timely and fully paying its rent during (and notwithstanding) the state-mandated closure of its business.

The common-law doctrine of frustration of purpose is inapplicable under the circumstances. "[T]o invoke the doctrine of frustration of purpose, 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" (*Warner v Kaplan*, 71 AD3d 1, 6 [1st Dept 2009] [internal quotation marks omitted], *lv denied* 14 NY3d 706 [2010]). "The doctrine applies when a change in circumstances makes one party's performance virtually worthless to the other, frustrating [its] purpose in making the contract" (*PPF Safeguard, LLC v BCR Safeguard Holding, LLC*, 85 AD3d 506, 508 [1st Dept 2011] [internal citations omitted]). Examples include a situation where the tenant was unable to use the premises as a restaurant until a public sewer was completed approximately three years after the lease had been executed (*see Center for Specialty Care v CSC Acquisition I, LLC*, 185 AD3d 34, 42 [1st Dept 2020] [citation omitted]). On the other hand, "impossibility occasioned by financial hardship does not excuse performance of a contract" (*Urban Archaeology Ltd. v 207 E. 57th St. LLC*, 68 AD3d 562, 562 [1st Dept 2009]). Inasmuch as the initial term of the lease, as amended by the March 2012 rider, is for approximately nine years (Nov. 2012 to Sept. 2021), a temporary closure of plaintiff's business for two months (April and May 2020) in the penultimate year of its initial term could not have frustrated its overall purpose.

Nor is the doctrine of impossibility of performance available to plaintiff in this case. "Generally, once a party to a contract has made a promise, that party must perform or respond in damages for its failure, even when unforeseen circumstances make performance burdensome" (*Kel Kim Corp. v Central Markets, Inc.*, 70 NY2d 900, 902 [1987]). "[A]bsent an express contingency clause in the agreement allowing a party to escape performance under certain specified circumstances, compliance is required" (*Stasyszyn v Sutton E. Assoc.*, 161 AD2d 269, 271 [1st Dept 1990]). Nothing in the lease at issue permits termination or suspension of plaintiff's obligation to pay rent in the event of the issuance of a governmental order restricting the use of the leased premises (*see Casteel USA v V.C. Vitanza Sons, Inc.*, 170 AD2d 568, 569 [2d Dept 1991]). To the contrary, the lease specifically provides that plaintiff's obligation to pay rent "shall in no wise be affected, impaired or excused because Owner is unable to fulfill any of its obligations under this lease . . . by reason of . . . government preemption or restrictions" (Lease [NYSCEF #24], ¶ 26), which is the case here.[4] Accordingly, the branch of defendant's motion for an order vacating the *Yellowstone* injunction on account of plaintiff's failure to pay rent for the months of April and May 2020 is granted to the extent set forth in the decretal paragraphs below.

The alternative branches of defendant's motion are either academic or without merit.

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[4] Notably, neither plaintiff's president nor plaintiff's counsel has demonstrated, via any competent evidence, such as plaintiff's financial documentation or an affidavit by its accountant with supporting evidence, that plaintiff was (and still is) unable to pay the April and May 2020 rent (*accord 538 Morgan Ave. Props. LLC v 538 Morgan Realty LLC*, 2020 NY Slip Op 32780[U], *10 [Sup Ct, Kings County 2020]).

Conclusion

Accordingly, it is

ORDERED that defendant's motion is *granted to the extent* that (1) plaintiff is directed to pay to defendant the April and May 2020 base rent ($10,927 per month as set forth in the Rent Rider) within 30 days after electronic service of this decision and order with notice of entry on its counsel by defendant's counsel; and (2) if plaintiff fails to pay such rent on time and in full, defendant may, if it be so advised, renew its request for the vacature of the *Yellowstone* injunction upon further order of the Court; and the remainder of its motion is denied; and it is further

ORDERED that defendant's counsel is directed to electronically serve a copy of this decision and order with notice of entry on plaintiff's counsel and to electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the decision and order of the Court.

E N T E R,

J. S. C.

Justice Lawrence Knipel

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,	INDEX NO.	652674/2020
Plaintiff,	MOTION DATE	11/24/2020
- v -	MOTION SEQ. NO.	001
BOLD FOOD, LLC, KBFK RESTAURANT CORP. Defendants.	**DECISION + ORDER ON MOTION**	

---X

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					ARLENE P. BLUTH, J.S.C.
DATE					
CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION		
	☐ GRANTED	☐ DENIED	☒ GRANTED IN PART		☐ OTHER
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT		☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

--X

THE GAP, INC. and OLD NAVY, LLC,

Plaintiffs,

- v -

44-45 BROADWAY LEASING CO. LLC,

Defendant.

--X

INDEX NO. 652549/2020

MOTION DATE 07/21/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for INJUNCTION/YELLOWSTONE.

ORDER

Upon the foregoing documents, it is

ORDERED that the plaintiffs' motion for a Yellowstone injunction is GRANTED, retroactive to June 25, 2020, and the cure periods are hereby tolled pending a determination of whether the plaintiffs are in default under the Lease dated June 24, 2015 and the Lease dated June 24, 2015, respectively, and pursuant to defendant's Notices of Default dated June 16, 2020; and it is further

ORDERED that defendant is, effective June 25, 2020, preliminarily enjoined from terminating plaintiffs' leases pending the outcome of this action and a declaration determining the rights, remedies and liabilities of the parties; and it is further

ORDERED that the Yellowstone injunction granted above is hereby conditioned upon an undertaking in the form of plaintiffs' payment of use and occupancy for the premises in the amount of $1,434,470, based upon the monthly fixed rent under the Lease dated June 24, 2015 between plaintiff The Gap, Inc. and defendant, and in the amount of $1,519,263, based upon the monthly fixed rent under the Lease dated June 24, 2015 between Old Navy, LLC and the defendant, for a total amount of use and occupancy in the sum of $2,953,733, and at the time such rent due under each Lease, except as to use and occupancy for July 2020, which is due immediately; and it is further

ORDERED that plaintiffs shall post a bond in the amount of $5,842,531 with the Clerk of New York County to secure the payment of rent arrears allegedly owed by plaintiffs to defendant for May and June 2020; and it is further

ORDERED that counsel are directed to file with IAS Part 59 (59nyef@nycourts.gov) the proposed discovery preliminary conference order no later than August 18, 2020, which order shall also propose a date for a discovery compliance conference.

DECISION

In this declaratory judgment action seeking an order adjudicating plaintiffs' rights under two certain commercial leases, plaintiffs seek a Yellowstone injunction pursuant to First National Stores v Yellowstone Shopping Center, 21 NY2d 630 (1968).

Plaintiffs have demonstrated that (1) each holds a commercial lease; (2) each received from the landlord a notice to cure; (3) each requested injunction relief before the termination of the lease; and (4) each is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises. See Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Avenue Associates, 93 NY2d 508, 514 (1999).

Specifically, with respect to the issue whether each commercial lease remains extant, defendant's argument that plaintiffs no longer hold a commercial lease because, in this action, they seek a declaration that each lease has terminated is unpersuasive. Plaintiffs' counsel is correct that as there has been no adjudication of such claim and as they have pled, in the alternative, that they are entitled to a rent abatement under each such lease, plaintiffs have demonstrated that they hold the two commercial leases at this time has been established.

Defendant next argues that plaintiffs did not request injunctive relief before termination of each leasehold under the default notice, as the Order to Show Cause (OSC) dated June 25, 2020 never took effect as plaintiffs did not comply with the directives for service of such OSC. Such OSC required that plaintiffs personally deliver the OSC, summons and complaint, and supporting papers to defendant, and defendant argues that plaintiffs' service upon the Secretary of State does not establish such service. This court disagrees. Eugene Di Lorenzo, Inc. v A.C. Dutton Lumber Co., Inc., 67 NY2d 138 (1980) is not to the contrary, as that decision examined the distinction between service upon a corporation through delivery to the Secretary of State under the Business Corporation Law § 306 and service upon an agent designated under CPLR 318, for the purposes of determining entitlement to relief from a default under CPLR 317. Thus, the issue in Eugene Di Lorenzo, supra, was a question of statutory construction, so not controlling on this court's intention with respect to the method of service under the OSC. Moreover, as argued by plaintiffs, Limited Liability Company Law § 301(b) required defendant to designate the Secretary of State as its agent for service of process, and thus delivery to that agent met the OSC's directive.

This court also concurs with plaintiffs' counsel that "nail and mail" service constitutes personal service under CPLR

308(4), and defendant raises no issue of fact with respect to the process server's statements of due diligence, having searched for but unable to find defendant's managing member or any person of suitable age and discretion at either his residence or defendant's office building. Thus, the facts at bar are distinguishable from those before the court in Norlee Wholesale Corp., Inc. v 4111 Hempstead Turnpike Corp., 138 AD2d 466, 468 (2d Dept. 1988), where the process server did not state, "with due diligence, that it was impossible to serve [the] party personally or to deliver the papers to a person of suitable age and discretion at the party's business dwelling or abode with a follow-up mailing".

Turning to the question of an appropriate undertaking, in Kuo Po Trading Co., Inc. v Tsung Tsin Assn, Inc., 273 AD2d 11, where the plaintiff tenant demonstrated that "defendant [was] adequately protected by the value of the building improvements installed by plaintiff at its own expense", the appeals court upheld the trial court's finding of no necessity for a bond to pay the alleged rent arrearl`s should defendant ultimately prevail. Here, plaintiffs offer no evidence of any such security, and therefore an undertaking is warranted.

However, as set forth in the affidavit of plaintiffs' senior director of real estate, the global pandemic has had a devastating impact on the retail industry, arising from the

governmental closing of malls in New York City, from March 22 with no date certain for reopening. Considering these extraordinary circumstances, in the exercise of discretion, the court sets use and occupancy and the undertaking for May and June 2020 rent arrears based upon the monthly fixed rent under the Lease, as of June 2020, each reduced by about ten percent (10%).

7/21/2020
DATE

DEBRA A. JAMES, J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

RPH HOTELS 51ST STREET OWNER, LLC, Plaintiff,	INDEX NO. 654938/2020
- v -	MOTION DATE 01/25/2021
HJ PARKING LLC, Defendant.	MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 16, 17, 18, 22, 23, 24

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

The motion by defendant to vacate the default judgment entered against it (as to liability only) is denied.

Background

In this commercial landlord tenant case, defendant seeks to vacate the Court's decision dated December 11, 2020 in which plaintiff was awarded a default judgment on liability (NYSCEF Doc. No. 12).

Defendant claims that its operations (a parking garage) have faced severely declining revenue and increased costs associated with the ongoing global pandemic. It points out that it is an essential business and is located in the heart of Times Square. Defendant complains that plaintiff moved too quickly for a default judgment and sought relief only 11 days after the deadline for defendant to answer the complaint. Defendant insists it has both a reasonable excuse and a meritorious defense.

Defendant asks the Court to exercise its broad equitable powers to relieve it from its obligations, for a rent abatement, postponement of rent or other relief due to Covid-19. Defendant also claims it has meritorious defenses and relies upon the doctrines of impossibility and frustration of purpose as defenses it should be entitled to raise. It argues that the Court could refuse to enforce the lease as unconscionable under New York Real Property Law § 235-c.

In opposition, plaintiff points out that defendant is a subsidiary of the largest parking garage operator in Manhattan and the parent company has over 200 parking locations in the borough. It also observes that the parent (Icon) is owned by a private equity firm with $67 billion under its management as of December 2020.

Plaintiff observes that as a landlord it no longer has the option of bringing rent eviction proceedings in Civil Court and is limited to seeking relief in this Court due to various Covid-related executive orders. Plaintiff also points out that defendant has been operating the garage since March 2020 and not paying any rent while keeping all of the revenue generated. It claims that at the beginning of the crisis, plaintiff offered that defendant could pay some percentage of its rent but defendant ignored this request.

In reply, defendant contends that it has a reasonable excuse in that a defendant's time to answer was tolled pursuant to various executive orders signed by the governor. It also insists that its burden to point to meritorious defenses is a lesser standard that one for summary judgment. In addition, defendant argues that plaintiff's request for affirmative relief in its opposition—plaintiff asked for conditions to be imposed on defendant if the Court were to vacate the judgment—is improper as plaintiff did not cross-move for such relief.

Discussion

"An application brought pursuant to CPLR 5015 to be relieved from a judgment or order entered on default requires a showing of a justifiable excuse and legal merit to the claim or defense asserted" (*Crespo v A.D.A. Mgt.*, 292 AD2d 5, 9, 739 NYS2d 49 [1st Dept 2002]).

As an initial matter, the Court finds that defendant has stated a reasonable excuse for its default based on the affidavit of Mr. Stiefel (NYSCEF Doc. No. 17), general counsel for defendant's parent company, who claims that the office where legal papers are received has been closed since the pandemic began and only a limited staff comes into the office as needed. This is a reasonable excuse for not timely answering the complaint.

However, the Court finds that the alleged meritorious defenses cited by defendant are insufficient. Defendant does not dispute the fact that it has not paid rent since March 2020 nor does it claim that it has paid anything to plaintiff (or stashed away funds toward a potential payment) during the pandemic despite continuing to operate the parking garage. The Court recognizes that the pandemic has devasted many businesses, including parking garages that may rely upon commuters or tourists. But that does not mean that defendant can simply walk away from a valid lease.

Both the impossibility and the frustration of purpose doctrines are inapplicable here. "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]).

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.*).

Neither doctrine applies because defendant did not face the substantial "frustration" or "impossibility" required to invoke these doctrines. Defendant faced decreased revenue from fewer customers and increased costs from pandemic-related regulations. But a less profitable business is not a basis to find that these equitable doctrines could absolve defendant of its obligation to pay rent (*c.f. PPF Safeguard, LLC v BCR Safeguard Holding, LLC*, 85 AD3d 506, 924 NYS2d 391 [1st Dept 2011] [finding that Hurricane Katrina was not a sufficient basis to implicate the frustration of purpose doctrine to excuse payment in New Orleans-based self-storage contract]).

Defendant's reliance on the governor's executive orders barring commercial evictions does not compel a different result. Neither the governor nor the state legislature barred landlords from seeking to recover rent owed by tenants. Expressing a hope or desire that a moratorium on commercial evictions will allow a tenant to work something out with the landlord is not a meritorious defense to the nonpayment of rent. And this Court must also recognize that plaintiff, like many landlords, continues to incur expenses such as property taxes and insurance payments in a building where one of its commercial tenants has not paid anything for nearly a year, even though it is continuing to operate.

The Court also rejects defendant's assertion that a lease for a parking garage is unconscionable under the Real Property Law. That defendant should have to pay rent to a

landlord to operate a parking garage that has continued to operate throughout this pandemic is not unconscionable in any way.

Summary

There is no doubt that there are many commercial tenants like defendant who have faced significant challenges during this pandemic. Defendant's business model relies on visitors and local workers driving to Times Square. Obviously, the number of people driving into Manhattan, and particularly that area of Manhattan, has greatly diminished due to the pandemic. And defendant certainly has greater costs to ensure a safe workplace. But these obstacles cannot support a defense that would absolve them of any responsibility to pay rent. The Court's empathy for defendant's plight is not a basis to find that there is a meritorious defense.

The Court cannot ignore the facts: defendant has not paid since March 2020 and has continued to operate the parking garage. Pointing to equitable doctrines is not sufficient to grant defendant's motion. The Court has to consider the impact of finding that these doctrines constitute a meritorious defense. If a business that was permitted to operate throughout the pandemic (as opposed to others, such as gyms, that were forced to close for months) can assert a frustration of purpose or impossibility defense, then nearly every struggling commercial tenant could seek relief from their leases. Quite simply, here, where there is a downturn in a tenant's business - with or without Covid – it does not invoke the doctrine of impossibility of performance, especially when the business is operating. Nor does it invoke frustration of purpose – defendant's purpose was to operate a garage, and it certainly is doing just that.

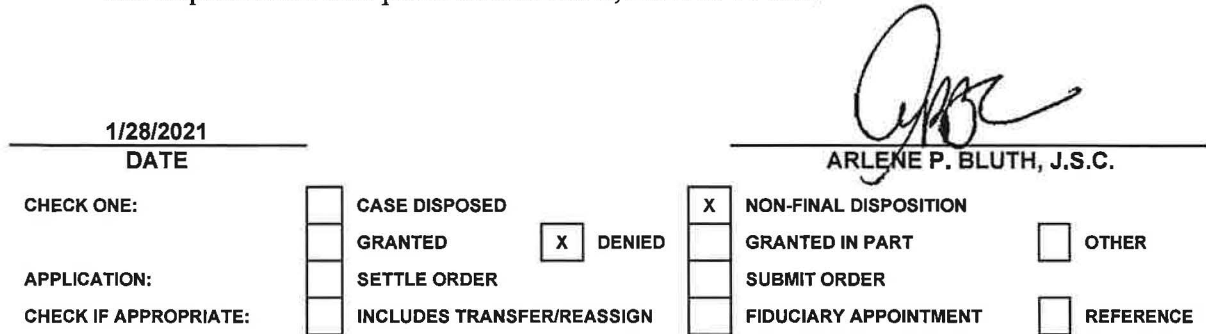
The fact is that nearly every business that relies on in-person customers has suffered greatly during the pandemic and consequently it has also affected nearly every landlord who has

nonpaying tenants. The solution is not for this Court to ignore an otherwise-valid contract to the severe detriment of one party.

Accordingly, it is hereby

ORDERED that the motion to vacate the default judgment and the note of issue for an inquest is denied and all stays are hereby vacated.

The inquest shall take place on March 23, 2021 at 10 a.m.



1/28/2021
DATE

ARLENE P. BLUTH, J.S.C.

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

User Name: Andrew Pistor

Date and Time: Thursday, April 1, 2021 11:05:00 AM EDT

Job Number: 140417544

Document (1)

1. *MEPT 757 Third Ave. LLC v Grant, 2021 N.Y. Misc. LEXIS 797*

   Client/Matter: 9999

   Search Terms: Mept 757 Third Ave. LLC v. Grant, No. 653267/2020

   Search Type: Natural Language

   Narrowed by:

Content Type	Narrowed by
Cases	-None-

No *Shepard's* Signal™
As of: April 1, 2021 3:05 PM Z

MEPT 757 Third Ave. LLC v Grant

Supreme Court of New York, New York County

March 1, 2021, Decided

653267/2020

Reporter
2021 N.Y. Misc. LEXIS 797 *; 2021 NY Slip Op 30592(U) **

[1]** MEPT 757 THIRD AVENUE LLC, Plaintiff, - v - HAYIM GRANT, Defendant. INDEX NO. 653267/2020

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

Tenant, rent, lease, frustrated, defaulted, premises

Judges: **[*1]** PRESENT: HON. ARLENE P. BLUTH, J.S.C.

Opinion by: ARLENE P. BLUTH

Opinion

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54 were read on this motion to/for JUDGMENT - SUMMARY.

The motion by plaintiff for summary judgment and to amend to conform to the evidence is granted and the cross-motion by defendant to dismiss the complaint is denied.

Background

Plaintiff owns a building located at 757 Third Avenue. It claims that non-party Corporate Suites 757 LLC (the "Tenant") entered into a fifteen-year lease that ends in June 30, 2024. Defendant Grant signed a guaranty in connection with this lease where he agreed to guarantee the obligations of the Tenant up to $500,000.

Plaintiff asserts that the Tenant failed to pay rent and it eventually commenced an action in Civil Court. That case was settled by stipulation on July 2, 2019 where the Tenant agreed in part to pay the then-existing rent arrears in the amount of $367,728.41 over an eleven-month period. Plaintiff claims that **[*2]** the Tenant defaulted by not making payments. It claims that the Tenant has incurred additional rent arrears and now owes more than the upper limit of the guarantee, so defendant is liable for $500,000.

[2]** In opposition and in support of his cross-motion to dismiss, defendant claims that the matter is not ripe for review because the Tenant's underlying debt has yet to accrue. He argues that the ongoing pandemic has limited the number of persons permitted to be in the premises (two floors in a commercial office building) and this has frustrated the purpose of the lease. Defendant maintains that the business model is to license the spaces to others and the Tenant is unable to find as many customers because of restrictions regarding workplace density. Defendant also points to an Administrative Code that prevents guarantors from being held liable where defaults were caused by Covid.

Defendant reads the guaranty to mean that he is not supposed to pay anything while the Tenant remains in the premises. He also takes issue with the affidavit submitted by plaintiff in support of the motion and insists that this affidavit does not justify the relief plaintiff demands.

In reply, plaintiff emphasizes **[*3]** that it has proven that the Tenant has defaulted and that the defendant unconditionally guaranteed the Tenant's obligations to pay rent and additional rent. Plaintiff points out that the building in question has remained open throughout the pandemic and that turnstile logs show that these floors were utilized throughout 2020.

In reply to its cross-motion, defendant insists that the affidavit from plaintiff's asset manager (submitted in reply) lacks the requisite personal knowledge about this particular Tenant. Defendant concludes that the occupancy restrictions made it impossible for the Tenant to pay the rent. The Court observes that plaintiff filed a sur-reply without first asking permission, so it will not be considered.

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 **[**3]** to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853, 476 N.E.2d 642, 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 **[*4]** 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, 404 N.E.2d 718, 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, 965 N.E.2d 240, 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, 790 N.E.2d 269, 760 NYS2d 96 [2003]*).

The Court grants plaintiff's motion. As an initial matter, the Court observes that there is no dispute that the Tenant has failed to make rent payments or that defendant signed a guaranty in connection with the lease. The events that defendant argues must happen before he can be held liable under the guarantee are, in fact, limitations on his liability (such as turning over keys to the landlord). There is no basis to find that these events must take place or that the Tenant must vacate the property *before* plaintiff can sue on the guaranty.

[4]** The branch of the motion to amend to conform to the proof is granted. There **[*5]** is no prejudice to defendant to include rent that has accrued since this case began; the subject matter of this action is about unpaid rent where the Tenant remains in the premises.

The Court also finds that the affidavits from the asset manager for plaintiff, Mr. Erdem, assert admissible facts sufficient for the Court to grant plaintiff the relief it seeks. The fact that the affidavits do not contain a certificate of conformity is not a fatal defect (*Wager Estate of Cordaro v Rao, 178 AD3d 434, 435, 113 NYS3d 63]) [1st Dept 2019]*) especially where the affidavit was notarized (albeit from an out of state notary). The Court can also overlook this mistake pursuant to *CPLR 2001*.

The central question on this motion concerns the frustration of purpose argument raised by defendant. "For a party to a contract to invoke frustration of purpose as a defense for nonperformance, 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. The doctrine applies when a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract" (*PPF Safeguard, LLC v BCR Safeguard Holding, LLC, 85 AD3d 506, 508, 924 N.Y.S.2d 391 [1st Dept 2011]* [internal quotations and citations omitted]).

Defendant's claim that restrictions on **[*6]** the number of people that can be present in the office space undoubtedly reduced the Tenant's revenue and likely reduced the Tenant's ability to meet its rental obligations given the nature of Tenant's business. The Tenant appears to make money by licensing office space, which means it makes more money by entering into more

license agreements. But a reduction in potential revenue is not the same as completely frustrating the purpose of the contract. After all, the contract was to lease an office space and the **[**5]** Tenant chose to run a particular business. It is not the landlord's concern how the Tenant tried to turn a profit from the premises.

Sometimes, outside factors reduce the profitability of businesses and in many cases those factors are outside the control of both the landlord and the tenant. But that does not mean that defendant can raise an issue of fact to simply rip up the contract. The pandemic has devastated businesses across New York City, but there is nothing in existing case law that would permit a Tenant (or a guarantor) to walk away from a contract on the ground that its business model is no longer as profitable as it used to be. Under such a theory, all manner of businesses **[*7]** could seek rescission of leases during a downturn in their particular business.

The Court also finds that the Administrative Code provision cited by defendant does not bar plaintiff's requested relief.

The subject provision provides that:

> Personal liability provisions in commercial leases.
> A provision in a commercial lease or other rental agreement involving real property located within the city, or relating to such a lease or other rental agreement, that provides for one or more natural persons who are not the tenant under such agreement to become, upon the occurrence of a default or other event, wholly or partially personally liable for payment of rent, utility expenses or taxes owed by the tenant under such agreement, or fees and charges relating to routine building maintenance owed by the tenant under such agreement, shall not be enforceable against such natural persons if the conditions of paragraph 1 and 2 are satisfied:
> 1. The tenant satisfies the conditions of subparagraph (a), (b) or (c):
>
> (a) The tenant was required to cease serving patrons food or beverage for on-premises consumption or to cease operation under executive order number 202.3 issued by the governor on March 16, 2020; **[*8]**
> (b) The tenant was a non-essential retail establishment subject to in-person limitations under guidance issued by the New York state department of economic development pursuant to executive order number 202.6 issued by the governor on March 18, 2020; or
>
> **[**6]** (c) The tenant was required to close to members of the public under executive order number 202.7 issued by the governor on March 19, 2020.
> 2. The default or other event causing such natural persons to become wholly or partially personally liable for such obligation occurred between March 7, 2020 and March 31, 2021, inclusive.
>
> (Administrative Code of City of NY § 22-1005).

In this case, plaintiff commenced a landlord tenant case in 2019. Although plaintiff contends that there was a settlement of that case, plaintiff argues that the Tenant defaulted on that settlement. In other words, there is a demonstrated history of the Tenant not paying the rent prior to the pandemic. Moreover, there is no basis to find that the above code provision applies given that the premises did not close pursuant to various executive orders.

Accordingly, it is hereby

ORDERED that the motion by plaintiff to amend the complaint pursuant to CPLR 3025(c) to conform to the proof submitted and for summary judgment is granted **[*9]** and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of $500,000 plus interest from the date of this decision along with costs and disbursement upon presentation of proper papers therefor; and it is further

ORDERED that the issue of reasonable attorneys' fees is severed and a hearing will be scheduled by the clerk of this part so the Court can determine the amount due; and it is further

ORDERED that the cross-motion by defendant is denied.

3/1/2021

DATE

/s/ Arlene P. Bluth

ARLENE P. BLUTH, J.S.C.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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THE GAP INC.,

Plaintiff,

-v- No. 20 CV 4541-LTS-KHP

PONTE GADEA NEW YORK LLC,

Defendant.

---x

MEMORANDUM OPINION AND ORDER

Plaintiff The Gap Inc. ("Gap") brings this action, asserting claims for breach of contract, declaratory judgment, rescission, reformation, money had and received, and unjust enrichment against Defendant Ponte Gadea New York LLC ("Ponte Gadea"). Ponte Gadea asserts counterclaims for declaratory judgment and breach of contract. The parties' claims arise out of a lease agreement for premises at the corner of 59th Street and Lexington Avenue in Manhattan, in which Gap has operated a retail business, and the impact of the COVID-19 pandemic, and Gap and governmental actions in response thereto. Gap contends, in essence, that its closure of the two stores operating on the premises in response to the pandemic, the governmental measures taken in response to the pandemic that restrict or condition store operations, and changes in the volume of foot traffic in the vicinity of the stores warrant Gap's release from its obligations under the lease as of March 19, 2020. Ponte Gadea, pointing to provisions of the lease and Gap's failure to vacate the premises, contends that it is entitled to continued payment of rent and to holdover rent for occupancy after Ponte Gadea gave notice of termination of the lease for non-payment. The Court has jurisdiction of this action pursuant to 28 U.S.C. § 1332.

The parties have cross-moved for summary judgment. Gap seeks summary judgment in its favor on all of its claims and judgment dismissing Ponte Gadea's counterclaims. Ponte Gadea seeks the dismissal of all of Gap's claims and judgment in its favor on the counterclaims. The Court has considered carefully all of the parties' submissions. For the following reasons, Ponte Gadea's motion is granted as to liability on its first and second counterclaims, Gap's Complaint is dismissed, and Gap's motion is denied in its entirety.

BACKGROUND

Unless otherwise indicated, the following facts are undisputed.[1] Gap operates a national retail network of stores specializing in fashion for men, women, and children. (Docket Entry No. 30 ("Pl. 56.1 St.") ¶ 1.) On February 18, 2005, Gap entered into a lease agreement with Ponte Gadea's predecessor-in-interest[2] for premises for the operation of two "first-class retail businesses," a Banana Republic store and a Gap store, at 130 East 59th Street, New York, NY 10022. (Docket Entry No. 18 ("Def. 56.1 St.") ¶ 1; Docket Entry No. 16-1 Ex. A (the "Lease") at 1 & §§ 4.1, 4.5(A).) The term of the Lease extended to January 31, 2021, unless terminated or extended by the parties. (Pl. 56.1 St. ¶ 14.)

Four provisions of the Lease—section 1.7(H), Article 16, Article 21, and Article 25—are of particular relevance to the parties' cross-motions. First, section 1.7(H) defines a "Force Majeure Event" to mean "a strike or other labor trouble, fire or other casualty,

1 Facts characterized as undisputed are identified as such in the parties' statements pursuant to S.D.N.Y. Local Civil Rule 56.1 or drawn from evidence as to which there has been no contrary, non-conclusory factual proffer. Citations to the parties' respective Local Civil Rule 56.1 Statements incorporate by reference the parties' citations to underlying evidentiary submissions.

2 The original landlord later assigned the Lease to Ponte Gadea. (Pl. 56.1 St. ¶ 12.)

governmental preemption of priorities or other controls in connection with a national or other public emergency or shortages of fuel, supplies or labor resulting therefrom, or any other cause beyond Tenant's reasonable control."

Second, Article 16, titled "Casualty," sets forth the parties' restoration obligations, termination rights, and rent obligations in the event of a "fire or other casualty." Section 16.1 provides that Gap "shall notify Landlord promptly of any fire or other casualty that occurs in the Premises." Sections 16.2 and 16.3 set forth the parties' obligations to "repair the damage to the Premises to the extent caused by fire or other casualty," which obligations are excused "to the extent that this Lease terminates by reason of such fire or other casualty as provided in this Article 16." Section 16.4 provides for a proportional abatement of Gap's rent obligations if, "as a result of a fire or other casualty, all or a portion of the Premises shall not be usable by Tenant" for a period of more than 14 days. Section 16.5 provides Ponte Gadea with a termination right if "the Building is so damaged by fire or other casualty that, in Landlord's opinion, substantial alteration, demolition, or reconstruction of the Building is required," and section 16.6 provides Gap a termination right if (1) an independent contractor's estimate to complete the premises restoration work contemplated in section 16.2 exceeds 18 months, or (2) by reason of a fire or other casualty, "Landlord has an obligation to perform a restoration as contemplated by Section 16.2," but fails to do so within the requisite timeframe. Section 16.7 provides that either party may terminate the Lease if "the Premises are substantially damaged by a fire or other casualty that occurs during the period" of one year preceding the end of the Lease. Finally, section 16.8 provides that Gap has "no right to cancel this Lease by virtue of a fire or other casualty except to the extent specifically set forth herein."

Third, Article 21 governs defaults under the Lease. It defines an "Event of Default" as occurring when (among other circumstances not relevant here) Gap fails to pay monthly rent when due pursuant to section 1.6(A) (and fails to remedy that failure within five business days of notice from Ponte Gadea). (Lease §§ 1.6(A), 21.1(A).) It also defines an "Event of Default" as occurring when:

> Tenant defaults in the observance or performance of any other covenant of this Lease on Tenant's part to be observed or performed and Tenant fails to remedy such default within thirty (30) days after Landlord gives Tenant notice thereof, except that if (i) such default cannot be remedied with reasonable diligence during such period of thirty (30) days (including by reason of the occurrence of a Force Majeure Event), (ii) Tenant takes reasonable steps during such period of thirty (30) days to commence Tenant's remedying of such default, and (iii) Tenant prosecutes diligently Tenant's remedying of such default to completion, then an Event of Default shall not occur by reason of such default[.]

(Id. § 21.1(F) (emphasis added).) Section 21.1(F)'s reference to a Force Majeure Event is the Lease's only use of that defined term. The occurrence of an Event of Default provides Ponte Gadea with a right to terminate the lease, in which event "Tenant immediately shall quit and surrender the Premises, but Tenant shall nonetheless remain liable for all of its obligations hereunder[.]" (Id. § 21.2.)

Finally, Article 25 of the Lease, which governs the end of the Lease term, imposes a holdover rental payment liability for use and occupancy after the expiration or termination date of the Lease. (Lease § 25.2.)

In December 2019 and the first quarter of 2020, a new coronavirus disease referred to as COVID-19 spread throughout the world, resulting in a global pandemic. World Health Organization, Coronavirus disease (COVID-19) pandemic, https://www.who.int/emergencies/diseases/novel-coronavirus-2019 (last visited March 8, 2021). Beginning in March 2020, the spread of COVID-19 caused significant disruptions in New York

State and New York City. (Pl. 56.1 St. ¶ 36.) On March 7, 2020, the State declared a state of emergency (id. ¶ 37) and, on March 20, 2020, the State ordered non-essential businesses (including those operated by Gap in the leased premises) to reduce their in-person workforces by 100% no later than March 22, 2020, at 8:00 p.m., in order to reduce transmission of the virus. (Def. 56.1 St. ¶ 27.)

Gap's response to the COVID-19 pandemic was also significant. On March 17, 2020, Gap "decided . . . to close all its stores in the United States, Canada, and Mexico to protect the wellbeing of its employees and customers." (Docket Entry No. 29 ("Pl. Opp.") at 12); accord Gap Inc. Blogs, Gap Inc. Announces Temporary Closure of Stores in North America, https://www.gapinc.com/en-us/articles/2020/03/gap-inc-announces-temporary-closure-of-stores-in-n (last visited March 4, 2021). In Gap's Form 8-K filing dated April 23, 2020, Gap disclosed that, in April 2020, it had "suspend[ed] rent payments under the leases" for all of its stores in North America. (Def. 56.1 St. ¶ 30.) Consistent with that decision, Gap has not paid rent pursuant to the Lease since March 2020. (Id. ¶¶ 28-32.) On June 8, 2020, Ponte Gadea served Gap with a Notice of Termination, which stated that Gap's failure to pay rent, if not cured within five business days, would constitute an Event of Default under section 21.1 of the Lease, and that Ponte Gadea would have the right to terminate the Lease and to seek recovery of unpaid rent and other relief and remedies available under the Lease. (Id. ¶¶ 51-52; see also Docket Entry No. 16-9 ("Notice of Termination").)

Also on June 8, 2020, New York City entered "phase one" of its reopening, allowing retail stores, including Gap, to offer curbside pick-up. (Def. 56.1 St. ¶ 40.) On June 12, 2020, Gap began offering curbside pickup at the Banana Republic store on the premises.

(Docket Entry No. 44 ("Def. Add'l 56.1 St.") ¶ 11.)[3] On June 22, 2020, New York City entered "phase two" of its reopening, allowing retail stores, including Gap, to permit customers to shop indoors at no more than 50% capacity, subject to mandatory masking and social distancing requirements. (Pl. 56.1 St. ¶ 40.)[4] Thereafter, Gap opened certain of its other retail locations in Manhattan to indoor shopping (Def. Add'l 56.1 St. ¶¶ 17-19, 21-22), but did not so open its stores at 59th and Lexington—though it did offer curbside pick-up at the Banana Republic store between June 12, 2020, and September 20, 2020, and at the Gap store between August 27, 2020, and September 20, 2020. (Docket Entry No. 50 ("Supp. Rondholz Decl.") ¶ 6.) Gap also continued to use the stores for online order fulfillment (id.), and to store its merchandise. (Id.; Def. 56.1 St. ¶ 37.) As of September 25, 2020, Gap's Senior Director of Real Estate, Jennifer Rondholz, attested that Gap was "currently on pace to vacate the Premises by October 15, 2020." (Supp. Rondholz Decl. ¶ 8.)

DISCUSSION

Summary judgment is to be granted in favor of a moving party if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is considered material if it "might affect the outcome of the suit under the governing law," and an issue of fact is a genuine one where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Holtz v. Rockefeller & Co. Inc., 258 F.3d 62, 69 (2d Cir. 2001) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). To defeat summary judgment, the nonmoving

3 Gap also filed this action on June 12, 2020.

4 New York City has since undergone additional phases of opening (and closing), but neither party contends that subsequent changes to the City's and State's restrictions are material for purposes of these cross-motions. (See Pl. 56.1 St. ¶ 41.)

party "must do more than simply show that there is some metaphysical doubt as to the material facts." Caldarola v. Calabrese, 298 F.3d 156, 160 (2d Cir. 2002) (citation omitted). The nonmoving party "may not rely on mere conclusory allegations nor speculation, but instead must offer some hard evidence showing that its version of the events is not wholly fanciful." Golden Pac. Bancorp v. FDIC, 375 F.3d 196, 200 (2d Cir. 2004) (citation omitted).

The same legal standards apply when analyzing cross-motions for summary judgment. Schultz v. Stoner, 308 F. Supp. 2d 289, 298 (S.D.N.Y. 2004). "[E]ach party's motion must be examined on its own merits, and in each case all reasonable inferences must be drawn against the party whose motion is under consideration." Morales v. Quintel Entm't, Inc., 249 F.3d 115, 121 (2d Cir. 2001) (citation omitted).

Here, certain claims of both parties are premised on alleged breaches of contract. Under New York law, "if a contract is straightforward and unambiguous, its interpretation presents a question of law for the court to be made without resort to extrinsic evidence." Spinelli v. Nat'l Football League, 903 F.3d 185, 200 (2d Cir. 2018) (citation omitted). If, however, "'the intent of the parties can[not] be ascertained from the face of their agreement,' the contract is ambiguous and its interpretation presents a question of fact." Id. (citation omitted).

Gap's Complaint in this action asserts six causes of action, each of which hinges on Gap establishing that the parties' Lease terminated in, or should be deemed to have been rescinded or reformed as of, March 2020, as a result of the COVID-19 pandemic and associated governmental restrictions, such that, from March 19, 2020, Gap had no rent payment liability under the Lease.[5] In Count One, Gap asserts that Ponte Gadea breached the Lease by demanding

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5 Gap identifies March 19, 2020, the date it closed its stores at the premises, as the date it claims the Lease was terminated. (Compl. ¶¶ 2, 20, 23-24, 30.)

that Gap continue to pay rent after that date, and by taking other actions consistent with the continued validity of the Lease after March 2020. (Compl. ¶¶ 29-34.) In Count Two, Gap seeks a declaratory judgment regarding the termination, rescission, or reformation of the Lease as of March 2020, and the parties' obligations thereafter. (Id. ¶¶ 35-42.) In Count Three, Gap seeks rescission of the Lease, "as a result of the frustration of purpose of the Lease, the illegality, impossibility and impracticability of the Lease, and/or the failure of consideration." (Id. ¶¶ 43-48.) In Count Four, Gap seeks reformation of the Lease, "to reflect the Parties' true intent that Tenant would have no obligation to pay rent once it was deprived of the use of the Premises," or that "the amount of rent for the Term would have otherwise been adjusted to account for the portion of the Lease's Term during which Tenant could not operate a retail store in the Premises." (Id. ¶¶ 49-56.) In Counts Five and Six, Gap asserts claims for money had and received and unjust enrichment, and seeks to recover "the rent and other consideration paid for the period of time" it was "unable to operate a retail store at the Premises" (id. ¶¶ 64, 73), i.e., after March 19, 2020. (Compl. ¶¶ 57-74; see also Pl. Opp. at 18 ("Gap paid funds to Ponte Gadea to which it was not entitled in the form of rent for the second half of March 2020[.]").)

Ponte Gadea asserts three counterclaims. Count One seeks a declaration that:

> (i) an Event of Default occurred pursuant to Section 21.1(A) of the Lease due to Gap's non-payment of Fixed Rent for April 2020 and May 2020; (2) the Lease terminated on June 15, 2020 pursuant to [Ponte Gadea's] Notice of Termination; (3) Gap became a holdover tenant effective June 15, 2020, entitling Ponte Gadea to holdover rent in accordance with Section 25.2 of the Lease; and (4) Gap must immediately and peacefully surrender the Premises.

(Docket Entry No. 9 ("Counterclaims") ¶ 194.) In Count Two, Ponte Gadea asserts that Gap breached the Lease by failing to pay rent and failing to vacate the Premises and/or pay holdover rent once Ponte Gadea terminated the Lease effective June 15, 2020. (Id. ¶¶ 195-205.) In Count

Three, Ponte Gadea asserts, in the alternative, that "in the event the Court determines that the Lease terminated due to a 'casualty,' as defined in Article 16 of the Lease," Gap has nonetheless breached the Lease by failing to vacate the premises and by failing to pay holdover rent. (Id. ¶¶ 206-14.)

Ponte Gadea seeks summary judgment on its counterclaims, as well as on Gap's affirmative claims, based on Gap's failure to pay rent in and after April 2020. (Docket Entry No. 17 ("Def. Mem.") at 9-24.) Gap's failure to pay monthly rent after March 2020 is undisputed. (Def. 56.1 St. ¶¶ 28-29, 31-32.) Gap cross-moves for summary judgment in its own favor on its Complaint and Ponte Gadea's counterclaims, however, relying on five theories as to why the parties' Lease terminated (or should be deemed rescinded or reformed) as of March 2020. Gap argues that: (1) the COVID-19 pandemic constituted a "casualty" for purposes of section 16.4 of the Lease, entitling Gap to abatement of its rent obligations; (2) the pandemic frustrated the primary purpose of the Lease; (3) the pandemic rendered performance under the Lease impossible, illegal, or impracticable; (4) as a result of the pandemic, there was a failure of consideration; and (5) the parties made a mutual mistake by failing to address the future possibility of the COVID-19 pandemic in the Lease. (Compl. ¶¶ 21-26; Pl. Opp. at 10-25.)

Ponte Gadea's counterclaims rest on the propositions that: Gap is obligated under the Lease to make timely rent payments; it is undisputed that Gap has not done so; the sole force majeure provision of the Lease only prevents certain non-monetary defaults from triggering the landlord's right to terminate the lease; Ponte Gadea gave proper notice to cure the non-payment, and proper notice of termination, effective June 15, 2020; and Gap is liable for rent payments through the termination date and for holdover payments thereafter, in light of its failure to vacate

the premises. Gap's six affirmative claims are largely in the nature of affirmative defenses to Ponte Gadea's claims of rights to payments in accordance with the Lease.

Because both parties' claims rise or fall on the resolution of Gap's five theories as to why the parties' Lease terminated (or should be deemed rescinded or reformed) as of March 2020, the Court first addresses each separately below.

Casualty

Gap's first theory as to why it bears no liability for rental payments under the Lease after March 2020 is that the COVID-19 pandemic and its resulting lockdowns constituted a "casualty" within the meaning of Article 16 of the Lease that rendered the entire premises unusable such that Gap was entitled to an abatement of its rent payment obligations under Article 16.4 of the Lease.

The text and structure of Article 16, which refers in several instances to a "fire or other casualty" causing "damage" occurring "in" or "to" the "Premises," and describes in detail the restoration obligations of the parties in the event such damage occurs, leave no doubt that "casualty" refers to singular incidents, like fire, which have a physical impact in or to the premises—and does not encompass a pandemic, occurring over a period of time, outside the property, or the government lockdowns resulting from it.[6] Indeed, the rent abatement to which Gap claims entitlement is, under the Lease, one that ends "on the date that Landlord Substantially Completes the restoration work" required in the event of a casualty. (Lease § 16.4.) Section 16.2 of the Lease requires the Landlord to "repair the damage to the Premises to

[6] Notably, section 1.7(H) defines a Force Majeure Event to include a "fire or other casualty" or a "governmental preemption of priorities or other controls in connection with a national or other public emergency," suggesting that the parties did not understand a "casualty" to encompass governmental preemption or controls such as those imposed in light of the COVID-19 pandemic.

the extent caused by fire or other casualty, with reasonable diligence." It is self-evident that Ponte Gadea is not in a position to do restoration work that could eliminate the pandemic or alter the government restrictions that constrain Gap's operations. Hence, there is no reasonable reading of the Lease's casualty provision or the rent abatement provision cited by Gap that would be triggered by the pandemic-related changes cited by Gap. This conclusion is consistent not only with the clear text of the Lease but also with persuasive recent decisions of the Supreme Court of New York, New York County, which have generally concluded that the pandemic is not a "casualty" as that term is generally used in commercial leases. 1140 Broadway LLC v. Bold Food, LLC, No. 652674/2020, 2020 WL 7137817, at *3 (N.Y. Co. Sup. Ct. Dec. 3, 2020) ("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.") (granting summary judgment in favor of landlord); Dr. Smood New York LLC v. Orchard Houston, LLC, No. 652812/2020, 2020 WL 6526996, at *2 (N.Y. Co. Sup. Ct. Nov. 2, 2020) (rejecting tenant's argument "that the pandemic constitutes a 'casualty'" as "entirely without merit," in part because "there has been no physical harm to the demised premises"). But see 188 Ave. A Take Out Food Corp. v. Lucky Jab Realty Corp., No. 653967/2020, 2020 WL 7629597, at *3 (N.Y. Co. Sup. Ct. Dec. 21, 2020) (concluding, in a Yellowstone injunction proceeding, that plaintiff-tenants had established a likelihood of success on the merits of their claim that the pandemic constituted a "casualty" within the meaning of the parties' lease).

The Court's reading of the Lease is consistent with general authority regarding the term "casualty" as well. Black's Law Dictionary defines it as a "serious or fatal accident," or a "person or thing injured, lost, or destroyed." Black's Law Dictionary (11th ed. 2019). New

York courts, while not establishing a definitive general definition of "casualty," have found the term applicable to singular events, such as fires, that cause physical damage in or to a property. See, e.g., 45 Broadway Owner LLC v. NYSA-ILA Pension Tr. Fund, 107 A.D.3d 629, 631 (1st Dep't 2013) (holding that casualty, as that term was used in a lease discussing damage caused by a "fire or other casualty," included a flood resulting from a rusted gauge on an HVAC system); Blue Water Realty, LLC v. Salon Mgmt. of Great Neck, Corp., 189 A.D.3d 496, 2020 WL 7250444, at *1 (1st Dep't Dec. 10, 2020) (holding that casualty, which the First Department had previously defined as an "accident" or an "unfortunate occurrence," did not include repeated leaks and flooding which were a "common occurrence" in the leased premises).

The Court therefore concludes that the COVID-19 pandemic and its effects did not constitute a casualty under Article 16 of the parties' Lease, and that Ponte Gadea is entitled as a matter of law to summary judgment dismissing Gap's breach of contract claim to the extent it is premised on a right to a casualty-based rent abatement by reason of the effects of the pandemic and operational constraints in connection therewith.

Frustration

Gap's second theory as to why the parties' Lease terminated in March 2020 is that the COVID-19 pandemic and resulting governmental restrictions frustrated the principal purpose of the Lease, which Gap characterizes as its operation of two first-class retail businesses on the premises.

"The doctrine of frustration of purpose discharges a party's duties to perform under a contract where a 'wholly unforeseeable event renders the contract valueless to one party.'" Axginc Corp. v. Plaza Automall, Ltd., 759 F. App'x 26, 29 (2d Cir. 2018) (quoting United States v. Gen. Douglas MacArthur Senior Vill., Inc., 508 F.2d 377, 381 (2d Cir. 1974)).

"In order to be invoked, the frustrated purpose must be so completely the basis of the contract that, as both parties understood, the transaction would have made little sense." In re Condado Plaza Acquisition LLC, 620 B.R. 820, 839-40 (Bankr. S.D.N.Y. 2020). The event which allegedly frustrates performance must be both "virtually cataclysmic" and "wholly unforeseeable." Gander Mountain Co. v. Islip U-Slip LLC, 923 F. Supp. 2d 351, 359 (N.D.N.Y. 2013) (quoting Gen. Douglas MacArthur, 508 F.2d at 381), aff'd, 561 F. App'x 48 (2d Cir. 2014). "Examples of a lease's purposes being declared frustrated have included situations where the tenant was unable to use the premises as a restaurant until a public sewer was completed, which took nearly three years after the lease was executed . . . and where a tenant who entered into a lease of premises for office space could not occupy the premises because the certificate of occupancy allowed only residential use and the landlord refused to correct it." Ctr. for Specialty Care, Inc. v. CSC Acquisition I, LLC, 185 A.D.3d 34, 42-43 (1st Dep't 2020) (citing Benderson Dev. Co. v. Commenco Corp., 44 A.D.2d 889 (4th Dep't 1974), aff'd, 37 N.Y.2d 728 (1975), and Jack Kelly Partners LLC v. Zegelstein, 140 A.D.3d 79 (1st Dep't 2016)).

"It is not enough," however, "that the transaction will be less profitable for an affected party or even that the party will sustain a loss." In re Condado Plaza Acquisition LLC, 620 B.R. at 839-40 (citation omitted). See also Latipac Corp. v. BMH Realty LLC, 93 A.D.3d 115, 123 n.4 (1st Dep't 2012) ("Manifestly, the return of nine apartments to rent-stabilized status does not render impossible plaintiff's contemplated use of the building; it simply reduces the profitability of that use to a certain extent."); Bierer v. Glaze, Inc., No. 05-CV-2459 (CPS), 2006 WL 2882569, at *7 (E.D.N.Y. Oct. 6, 2006) ("Under New York law, changes in market conditions or economic hardship do not excuse performance.").

In this case, Gap has not framed a genuine issue of material fact in connection with its frustration defense. First, to the extent Gap contends that New York State's blanket prohibition on non-essential business between March 22 and June 8, 2020, frustrated the purpose of the Lease, the possibility of just such a prohibition was referenced in the Lease itself, defeating any claim that the possibility was "wholly unforeseeable." (Lease § 1.7(H) (defining a "Force Majeure Event" to mean "a strike or other labor trouble, fire or other casualty, governmental preemption of priorities or other controls in connection with a national or other public emergency or shortages of fuel, supplies or labor resulting therefrom, or any other cause beyond Tenant's reasonable control.") (emphasis added).) See Gander Mountain, 923 F. Supp. 2d at 362 (N.D.N.Y. 2013) (commercial tenant could not invoke frustration of purpose to terminate lease based on tenant's inability to obtain insurance to protect against flood risk, where flood risk was foreseeable); Fifth Ave. of Long Island Realty Assocs. v. KMO-361 Realty Assocs., 211 A.D.2d 695, 696 (2d Dep't 1995) (affirming rejection of commercial tenant's frustration defense (based on the bankruptcy of the tenant's sublessee), where the "terms of the lease indicate[d] that it was foreseeable that the tenant might find itself in bankruptcy proceedings, or that the defendant might cease the type of retail operation contemplated by the parties, but that no protection for the defendant in the event of such occurrences was provided").

Second, to the extent Gap contends that the pandemic itself frustrated the purpose of the Lease to operate a retail business, Gap has not shown that the purpose of the Lease (according to Gap, the operation of a "first-class retail business"[7]) was "so completely"

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[7] Gap relies extensively on the "first-class" nature of its permitted use of the premises under the Lease, arguing that the contemplated "first-class" operation was to be physically and operationally identical to pre-pandemic store configuration and occupancy conditions. The Lease supports no such restrictive reading. Rather, the Lease uses the term "first-class" to distinguish between "[d]iscount, promotional and off-price retailers,"

frustrated by the COVID-19 pandemic that "the transaction [makes] little sense." Crown IT Servs., Inc. v. Koval-Olsen, 11 A.D.3d 263, 265 (1st Dep't 2004). Gap argues that, as a result of the COVID-19 pandemic, "Gap was forced to shut down retail operations at the Premises to protect its customers and employees from an unforeseeable and highly contagious virus[.]" (Pl. Opp. at 23.) Gap also states that it entered into the Lease for the purpose of operating stores located "in the heart of what, until recently, was one of the busiest high end shopping districts in Midtown Manhattan" (id. at 4), with extensive foot traffic that has diminished substantially in light of COVID-19. (See Pl. 56.1 St. ¶¶ 48-51; see also id. ¶¶ 4-9.) Gap claims that "without the ability to operate the Premises as a retail store, 'the transaction would have made little sense.'" (Pl. Opp. at 23 (citation omitted).)

Gap does not dispute, however, that it in fact operated the stores at issue here for periods of time since the onset of the pandemic, offering customers curbside pick-up, or that it opened other retail locations in Manhattan to in-person shopping, during the pandemic. (Def. Add'l 56.1 St. ¶¶ 2-5, 11, 15-19, 21-22.) Instead, Gap maintains that it has since stopped offering even curbside pick-up at the stores on the premises, and that its other stores, at which it has offered in-person shopping notwithstanding the capacity and hygiene restrictions imposed as a result of the pandemic, are "in other parts of the City, with different demographics, under different leases, with different landlord-tenant relationships[.]" (Docket Entry No. 51 ("Pl. Reply") at 3.) Gap makes no proffers regarding any relevant differences in the terms of its leases for the other premises, and it points to no covenant in the Lease in which Ponte Gadea made any

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such as "Daffy's, Center 21, Conway's, Payless Shoes," or Marshalls, and non-discount retail businesses selling quality merchandise, such as stores "similar in quality" to Sony, Apple, or T Anthony stores. (Lease § 4.1.)

guarantee regarding foot traffic or the nature or demographic characteristics of the area of the Lexington Avenue store premises.

While undeniably unfortunate, the COVID-19 pandemic has not amounted to a frustration of the Lease's purpose of Gap operating a retail business at the Premises. Instead, the evidence suggests that Gap has made a business decision to close its stores at 59th and Lexington, perhaps due to the pandemic's greater financial impact on those stores than on its other stores (see Pl. 56.1 St. ¶¶ 48-51; Pl. Opp. at 12 ("[F]oot traffic on Lexington Avenue never recovered . . . the precipitous decline in foot traffic and office workers destroyed the entire economic justification for the consideration demanded and paid for the premises and monthly rent."), while it continues to operate its retail businesses at other locations in Manhattan that are also subject to the health and safety risks of the COVID-19 pandemic.[8] The possibility that the stores at issue in this case may suffer particularly adverse financial consequences from the COVID-19 pandemic does not amount to frustration of the purpose of the Lease. 1140 Broadway LLC, 2020 WL 7137817, at *2 ("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.") (granting summary judgment on frustration defense in favor of landlord); 35 East 75th Street Corp. v. Christian Louboutin L.L.C., No. 154883/2020, 2020 WL 7315470, at *2 (N.Y. Co. Sup. Ct. Dec. 9, 2020) ("Contrary to defendant's argument, [the frustration] doctrine has no applicability here. This is not a case where the retail space defendant

8 The Court recognizes Gap's health concerns about its employees and customers. (See, e.g., Pl. 56.1 St. ¶ 52 ("Because asymptomatic people can spread the disease, there is no way to prevent carriers of COVID-19 from entering stores without requiring customers to first have a negative test result, which is simply impractical given the time from test to result.").) However, the undisputed evidence presented establishes that Gap has operated other retail locations, including in Manhattan, on an in-person basis, notwithstanding these concerns.

leased no longer exists, nor is it even prohibited from selling its products. Instead, defendant's business model of attracting street traffic is no longer profitable because there are dramatically fewer people walking around due to the pandemic.") (granting summary judgment on frustration defense in favor of landlord); Dr. Smood, 2020 WL 6526996, at *2 (rejecting tenant's argument that the purpose of its lease had been frustrated where the tenant had "been operating out of the demised premises," providing "both counter service and pickup of orders submitted online," since "at least July, 2020," while asserting it had no obligation to pay rent); Greater New York Auto. Dealers Ass'n, Inc. v. City Spec, LLC, 70 Misc. 3d 1209(A), 136 N.Y.S.3d 695, at *9 (N.Y. Civ. Ct. 2020) ("[E]ven if Respondent were forced by the Executive Order to close in-person operations at the Premises, a four-month closure out of a five-year lease did not frustrate the overall purpose of the Lease."). See also Cai Rail, Inc., v. Badger Mining Corp., No. 20-CV-4644 (JPC), 2021 WL 705880, at *9 (S.D.N.Y. Feb. 22, 2021) ("At most, Badger has shown that the contract has become unprofitable and 'more onerous,' which does not excuse performance under New York law."); In re: CEC Entertainment, Inc., No. 20-33162, 2020 WL 7356380, at *9 (Bankr. S.D. Tex. Dec. 14, 2020) (concluding that the debtor, which operated a nationwide chain of Chuck E. Cheese venues, could not rely on the COVID-19 pandemic to avoid its obligations to pay rent to six lessors in three states, in part because "the purpose of each lease is not entirely frustrated"). But see Intern. Plaza Associates L.P. v. Amorepacific US, Inc., No. 155158/2020, 2020 WL 7416600, at *2 (N.Y. Co. Sup. Ct. Dec. 14, 2020) (denying summary judgment for landlord based on a tenant's failure to pay commercial rent during COVID-19 pandemic because court found issues of fact regarding foreseeability).

The Court therefore concludes that Ponte Gadea is entitled as a matter of law to summary judgment dismissing Gap's claims to the extent they rest on the proposition that Gap's Lease obligations terminated because the purpose of the Lease was frustrated.

Impossibility

Gap's third theory as to why the parties' Lease terminated in March 2020 is that the COVID-19 pandemic and resulting governmental restrictions rendered the parties' performance of the Lease impossible or impracticable.

"[U]nder New York law, impossibility (which is treated synonymously with impracticability) is a defense to a breach of contract action 'only when . . . performance [is rendered] objectively impossible . . . by an unanticipated event that could not have been foreseen or guarded against in the contract.'" Axginc Corp. v. Plaza Automall, Ltd., 759 F. App'x 26, 29 (2d Cir. 2018) (quoting Kel Kim Corp. v. Cent. Markets, Inc., 70 N.Y.2d 900, 902 (1987)). Accord RW Holdings, LLC v. Mayer, 131 A.D.3d 1228, 1230 (2d Dep't 2015) ("a party seeking to rescind a contract [on impossibility grounds] must show that the intervening act was unforeseeable, even if the intervening act consisted of the actions of a governmental entity or the passage of new legislation"); Millgard Corp. v. E.E. Cruz/Nab/Fronier-Kemper, No. 99-CV-2952 (LBS), 2004 WL 1900359, at *4 (S.D.N.Y. Aug. 24, 2004) ("Foreseeability negates a defendant's use of impossibility as an affirmative defense."). "The [New York] Court of Appeals explained that a defense to contract performance such as impossibility should be applied narrowly and only in extreme circumstances 'due in part to judicial recognition that the purpose of contract law is to allocate risks.'" Sher v. Allstate Ins. Co., 947 F. Supp. 2d 370, 383 (S.D.N.Y. 2013) (quoting Kel Kim, 70 N.Y.2d at 902); accord Ebert v. Holiday Inn, No. 11-CV-4102 (ER), 2014 WL 349640, at *7 (S.D.N.Y. Jan. 31, 2014) ("Case law is clear that

impossibility excuses a party's performance 'under very limited and narrowly defined circumstances.'") (citation omitted), aff'd, 628 F. App'x 21 (2d Cir. 2015). "Economic hardship, even to the extent of bankruptcy or insolvency, does not excuse performance" under the doctrine of impossibility. Ebert, 628 F. App'x at 23 (collecting cases).

Gap's impossibility defense fails because the very text of the Lease demonstrates that the conditions that Gap claims render performance impossible were foreseeable. Cf. Gander Mountain, 923 F. Supp. 2d at 362 ("Impossibility and frustration of purpose refer to two distinct doctrines in contract law, but both require unforeseeability.") (citation omitted). To the extent Gap relies on the government's prohibition and limitations of physical retail business as a result of the pandemic, the inclusion and limited application of the Force Majeure Event definition of the Lease demonstrate that the parties foresaw, and apportioned the risk associated with, the possibility that government measures in the event of a public emergency could affect performance under the Lease. Furthermore, to the extent Gap relies on the COVID-19 pandemic itself as the basis of impossibility or frustration of purpose, Gap's contentions are insufficient to raise a genuine issue of material fact because the undisputed evidence shows that Gap in fact operated a retail business at the stores at issue in this case by way of curbside pick-up, and operated other retail locations on an in-person basis, during the pandemic. The fact that its continued performance may be burdensome, "even to the extent of insolvency or bankruptcy," Bank of New York v. Tri Polyta Fin. B.V., No. 01-CV-9104 (LTS) (DFE), 2003 WL 1960587, at *5 (S.D.N.Y. Apr. 25, 2003) (Swain, J.) (citation omitted), does not render Gap's performance objectively impossible under New York law. Accord 35 East 75th Street Corp., 2020 WL 7315470, at *3 ("The subject matter of the contract—the physical location of the retail store—is still intact. And defendant is permitted to sell its products. The issue is that it cannot sell enough

to pay the rent. That does not implicate the impossibility doctrine."); 1140 Broadway LLC, 2020 WL 7137817, at *2 (same); Atlantic Garage Management LLC. v. Boerum Commercial LLC, No. 512250/2020, 2020 WL 7350542, at *2 (N.Y. Co. Sup. Ct. Dec. 2, 2020) (rejecting parking garage tenant's theory that COVID-19 restrictions made it "impossible . . . to perform under the terms of the lease," in light of the general rule that "[i]mpossibility occasioned by financial hardship does not excuse performance of a contract") (citation omitted); Cai Rail, Inc., 2021 WL 705880, at *10 (rejecting impossibility defense premised on the effects of the COVID-19 pandemic, even where the parties' contract became "dramatically" unprofitable to one party).

The Court therefore concludes that Ponte Gadea is entitled as a matter of law to summary judgment dismissing Gap's claims to the extent they rest on the proposition that Gap's Lease obligations terminated due to impossibility of performance.

Failure of Consideration

Gap's fourth theory is that the COVID-19 pandemic led to a "failure of consideration" under New York law.

"Failure of consideration exists wherever one who has promised to give some performance fails without his or her fault to receive in some material respect the agreed quid pro quo for that performance. Failure of consideration gives the disappointed party the right to rescind the contract." Indep. Energy Corp. v. Trigen Energy Corp., 944 F. Supp. 1184, 1199 (S.D.N.Y. 1996) (quoting Fugelsang v. Fugelsang, 131 A.D.2d 810 (2d Dep't 1987)). Rescission based on a failure of consideration is "not permitted for a slight, casual, or technical breach, but, as a general rule, only for such as are material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract." Callanan v. Powers, 199 N.Y. 268, 284 (1910). For example, a tenant's eviction "suspends the

obligation of payment either in whole or in part, because it involves a failure of the consideration for which rent is paid." Fifth Ave. Bldg. Co. v. Kernochan, 221 N.Y. 370, 372 (1917) (Cardozo, J.).

Gap's failure of consideration defense is unavailing because Gap has continued to receive the consideration promised under the Lease—retail premises for its operations—from the defendant landlord during the course of the COVID-19 pandemic. Gap does not dispute that it has continued to use the stores to house its merchandise; that, for a period during the pandemic, it offered curbside pick-up at the stores; that it has been legally authorized to offer both curbside pick-up and in-person shopping at the stores, at least since June 2020; and that it remained in possession of the stores. (Def. 56.1 St. ¶¶ 40-41; Def. Add'l 56.1 St. ¶¶ 2-12, 26.) As of the parties' most recent submission, Gap had not been evicted from the premises, and had not abandoned the premises. (Def. Add'l 56.1 St. ¶ 26.) Even if the COVID-19 pandemic resulted—through no fault of the parties—in a partial failure of consideration, that partial failure would not be a basis for rescission. CAB Bedford LLC v. Equinox Bedford Ave, Inc., No. 652535/2020, 2020 WL 7629593, at *3 (N.Y. Sup. Ct. Dec. 22, 2020) (rejecting tenant gym operator's failure of consideration argument based on the COVID-19 pandemic and its resulting temporary shutdown of gyms in New York City); Niagara Frontier Transp. Auth. v. Patterson-Stevens, Inc., 237 A.D.2d 965, 966 (4th Dep't 1997) (holding that "only a partial failure of consideration" was not a basis to avoid the consequences of a contract). Furthermore, Gap has not proffered any facts demonstrating that rescission of the Lease, under which the parties and Ponte Gadea's predecessor have performed since 2005, would even be possible.

Ponte Gadea is entitled as a matter of law to summary judgment dismissing Gap's claims to the extent they are premised on failure of consideration.

Mutual Mistake

Gap's fifth theory is that the Lease should be reformed because the parties made a mutual mistake in drafting the Lease when they failed to foresee and address the possibility of a pandemic such as COVID-19. Gap proffers conclusory declarations claiming that it would never have entered into a lease under which it would have remained obligated to pay rent in the current pandemic-affected circumstances. It has made no proffer whatsoever as to whether its original counterparty intended to shoulder the entire risk of a pandemic-related downturn in the retail business, nor any evidence corroborating its alleged expectations as to allocation of risk.

"In the proper circumstances, mutual mistake or fraud may furnish the basis for reforming a written agreement." Chimart Assocs. v. Paul, 66 N.Y.2d 570, 573 (1986). In order to establish entitlement to reformation based on mutual mistake, a party must show that "the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement." Id. "Reformation is not granted for the purpose of alleviating a hard or oppressive bargain, but rather to restate the intended terms of an agreement when the writing that memorializes that agreement is at variance with the intent of both parties." George Backer Mgmt. Corp. v. Acme Quilting Co., 46 N.Y.2d 211, 219 (1978). "The mutual mistake must exist at the time the contract is entered into and must be substantial." Weissman v. Bondy & Schloss, 230 A.D.2d 465, 468 (1st Dep't 1997). A party's "prediction or judgment as to events to occur in the future, even if erroneous, is not a 'mistake' as that word is defined here." Hartford Fire Ins. Co. v. Federated Dep't Stores, Inc., 723 F. Supp. 976, 994 (S.D.N.Y. 1989) (quoting Restatement (Second) of Contracts § 151 cmt. (a), and collecting cases).

"Procedurally, there is a 'heavy presumption that a deliberately prepared and executed written instrument manifest[s] the true intention of the parties[.]'" Chimart Assocs, 66

N.Y.2d at 574 (citation omitted). See also id. at 571 ("Where a written agreement between sophisticated, counseled businessmen is unambiguous on its face, one party cannot defeat summary judgment by a conclusory assertion that, owing to mutual mistake or fraud, the writing did not express his own understanding of the oral agreement reached during negotiations.").

In this case, Gap alleges that, "[h]ad the Parties been able to foresee the events of the COVID-19 crisis at the time of contracting, the Parties would have provided language stating their true intent" that Gap "would not pay rent or other consideration for the Premises if [its intended] use was rendered impossible or impracticable." (Compl. ¶ 54.) In its summary judgment papers, Gap explains that the parties made a "mutual mistake" because the term "first-class retail business" was not "properly defined" to exclude the operation of a retail business during a pandemic, and because the "Lease omitted the intended protection of the Lease's purpose." (Pl. Reply at 7; see also Pl. Opp. at 20 ("Gap's evidence proves the entire purpose of the lease was for Gap to operate a 'first-class retail business.' [ ]. Gap and [Ponte Gadea's predecessor-in-interest] had a shared definition of that term which in no way included the Plexiglas barriers and face masks the current crisis and laws require.").) As support for this theory, Gap submits the affidavits of two former employees of Gap (one of whom negotiated the Lease, and the other of whom signed the Lease), each of whom attests that, had the parties foreseen the limitations imposed by the COVID-19 pandemic on Gap's operation of a "first-class retail business," they would either not have entered into the Lease or would have entered into the Lease on unspecified different terms.[9]

[9] See Docket Entry No. 35 ¶ 15 ("It was never the intent of the parties to require Gap to operate or pay rent under such circumstances. . . . If anything, the parties intended that if Gap could not operate a first-class retail stores similar to its other stores as they existed in 2005 . . . the Lease would terminate."); id. ¶ 16 ("Had anyone foreseen that the Premises would be required to be closed for an unspecified period of time, and that when they

Gap's claim that, had it anticipated the limitations imposed by the COVID-19 pandemic in advance, it would not have entered the Lease (at least on the same terms), is not sufficient to support a "mutual mistake" affirmative defense under New York law. Gap has failed to proffer any facts supporting an inference that the alleged mistake "exist[ed] at the time" the Lease was entered into. See Weissman, 230 A.D.2d at 468. Gap's declarants attest that the parties did not anticipate the COVID-19 pandemic when they entered into the Lease. However, mistaken assumptions about the future do not amount to mutual mistakes warranting rescission of a contract. de la Gueronniere v. Simon, No. 97-CV-4813 (DC), 1998 WL 226199, at *3 (S.D.N.Y. May 4, 1998) ("As to the happening of this future event, the parties' mistaken assumptions do not, as a matter of law, rise to the level of a mutual mistake.") (emphasis in original), aff'd, 166 F.3d 1199 (2d Cir. 1998); Raphael v. Booth Mem'l Hosp., 67 A.D.2d 702, 703 (2d Dep't 1979) ("Equity will not relieve a party of its obligations under a contract merely because subsequently, with the benefit of hindsight, it appears to have been a bad bargain[.]"). Moreover, Gap's affiants' unilateral beliefs about how the possibility of a pandemic in 2020 might have affected the parties' negotiation of the Lease in 2005 does not overcome the "heavy presumption" that the plain language of the Lease captures the complete intention of the parties.

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reopened they would be required to be operated according to the rules, restrictions and limitations that substantially impair the ability to operate the store as expected, the Lease would not have made any sense, the Lease would not have been entered into, or would not have been entered into on the same terms."); Docket Entry No. 32 ¶ 17 ("The intent of the parties was that the Lease would terminate or otherwise be of no force or effect if Gap was unable to operate a first-class retail store consistent with its other stores in 2005."); id. ¶ 23 ("The COVID-19 crisis and the societal disruption it has caused were not anticipated by the parties that drafted and signed the Lease. . . . It was never the intent of the parties that Gap would continue to pay exorbitant, Manhattan real-estate prices for a glorified storage space, or for the placement of signage on the building. Any provisions that can be read to the contrary would more properly be characterized as a mistake in the drafting of the Lease.").

See Chimart Assocs., 66 N.Y.2d at 574 ("As to mutual mistake, Paul sets forth no basis for his contention that both parties reached an agreement other than that contained in the writing."); Khezrie v. Greenberg, No. 98-CV-3638 (ERK), 2001 WL 1922664, at *7 (E.D.N.Y. Dec. 11, 2001) ("New York courts have consistently granted summary judgment against a party seeking reformation where the only evidence supporting the claim was that party's bald and self-serving allegation of an oral agreement or understanding at odds with the written agreement.").[10]

Because Gap has not proffered any facts framing a genuine dispute as to the existence of any basis for termination, rescission, or reformation of the Lease, the Court concludes that Ponte Gadea is entitled as a matter of law to summary judgment dismissing Gap's claims based on the Lease's termination in March 2020, rescission, or reformation. Because all of Gap's claims, including those for unjust enrichment, money had and received, and breach of contract, turn on Gap's unsupported and legally flawed assertion that it had no obligations to make payments under the Lease after March 19, 2020, Ponte Gadea is entitled as a matter of law to summary judgment dismissing Gap's Complaint in its entirety.

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10 In its opposition brief, Gap argues that summary judgment should be denied or deferred on its mutual mistake defense because "there has been no opportunity to take discovery from the only other party that engaged in this mutual mistake, [Ponte Gadea's predecessor-in-interest]." (Pl. Opp. at 20.) However, Gap neither filed an affidavit pursuant to Federal Rule of Civil Procedure 56(d)—which requires a nonmoving party who seeks further discovery in order to oppose a motion for summary judgment to file an affidavit or declaration showing the "specified reasons" why the Court should defer considering the motion or deny it, or allow time to obtain further discovery—nor proffered evidence that could reasonably support an inference that there was an agreement that could support a finding of mutual mistake. "[T]he failure to file an affidavit under Rule 56[d] is itself sufficient grounds to reject a claim that the opportunity for discovery was inadequate[.]" Paddington Partners v. Bouchard, 34 F.3d 1132, 1137 (2d Cir. 1994). In any event, as explained above, Gap's mere conclusory hindsight proffer that its negotiator would have held out for different terms is legally insufficient to support a viable claim for mutual mistake.

For the reasons set forth above, Ponte Gadea is also entitled to summary judgment as to liability on its first and second counterclaims.[11] In that connection, the Court finds and declares, based on the undisputed facts of record, that the Lease was terminated by Ponte Gadea effective June 15, 2020, and that Ponte Gadea is entitled pursuant to section 25.2 of the Lease to payment for holdover occupancy from that date. Because the parties filed and briefed their cross-motions during the term of the Lease, which ended on January 31, 2021, the Court has by separate order entered simultaneously herewith referred this case to the Hon. Katherine H. Parker, United States Magistrate Judge, for an inquest on Ponte Gadea's damages, including outstanding unpaid rent from April 2020, holdover rent from June 15, 2020, and applicable costs and interest under Articles 23 and 24 of the Lease. The parties are directed to contact Judge Parker's chambers for instructions.

CONCLUSION

For the foregoing reasons, Ponte Gadea's motion for summary judgment (Docket Entry No. 15) is granted as to liability only and denied without prejudice in all other respects, and Gap's cross-motion for summary judgment (Docket Entry No. 28) is denied in its entirety.

This case is referred to Magistrate Judge Parker for an inquest on Ponte Gadea's damages.

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11 In light of the Court's conclusions set forth in this Memorandum Opinion and Order, Ponte Gadea's third counterclaim, which is pled in the alternative "in the event the Court determines that the Lease terminated due to a 'casualty,'" is moot and is dismissed without prejudice. The Court also declines to reach Ponte Gadea's request for an order requiring the payment of use and occupancy pending the conclusion of the litigation (see Def. Mem. at 23-24) in light of the Court's resolution of the parties' cross-motions, which entitles Ponte Gadea to a judgment for all amounts determined to be outstanding under the Lease.

The Clerk of Court is respectfully directed to terminate the motions at Docket Entry Nos. 15 and 28.

SO ORDERED.

Dated: New York, New York
March 8, 2021

/s/ Laura Taylor Swain
LAURA TAYLOR SWAIN
United States District Judge

EXHIBIT F

Valentino inks lease for first Soho store

February 10, 2021

UPDATED, Feb. 11 11:48 a.m.: It may be just a two-year deal, but a new lease by Valentino may be a good sign for the city's struggling retail sector.

The luxury fashion brand will open its first Soho store at 135 Spring Street in a space that's currently occupied by Diesel. Valentino is expected to take over the nearly 8,800-square-foot duplex space at the end of February, and will open later this spring.

"Valentino is going to do something special there," said Ariel Schuster, vice chairman of Newmark, who along with senior managing director Ross Berkowitz and associate director Brandon Miller represented the building owner, Invesco Real Estate.

"Soho has turned the corner," he added. "We are not seeing massive bidding wars but there are multiple brands negotiating for spaces."

Valentino was represented by CBRE's Andrew Goldberg, who could not be reached for comment.

Invesco purchased the building, which also includes the Burberry store at 137 Spring Street and several floors of offices, from SL Green Realty in 2015 for $222 million.

But even as it expands in Soho, Valentino has been trying to get out of its Midtown lease. Last June, the brand filed a lawsuit to get out of paying for its nearly 20,000-square-foot space at 693 Fifth Avenue. The building is owned by an LLC controlled by Fimalac — French billionaire Marc de Lacharrière's Paris-based holding company — which bought it from Thor Equities in 2016 for $525 million.

"In the current social and economic climate, filled with Covid-19-related restrictions, social distancing measures, a lack of consumer confidence and a prevailing fear of patronizing in-person, 'non-essential' luxury retail boutiques," it stated in the complaint, "Valentino's business at the premises has been substantially hindered and rendered impractical, unfeasible and no longer workable."

The retailer's lawsuit was dismissed on Jan. 21, with New York State Supreme Court Judge Andrew Borrok stating that the pandemic doesn't change Valentino's obligation to pay its rent.

The store had been open for curbside delivery and appointments when it filed the lawsuit, Borrok noted, and then later chose to move out. "No wrongful act of the landlord is alleged to have caused the necessity of this decision," his ruling reads.

It is unclear if Valentino will appeal the ruling. Neither its attorneys and nor its press representative immediately responded to requests for comment.

UPDATE: This piece was updated to add two additional brokers who represented Invesco Real Estate in the deal.

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

---X VALENTINO U.S.A., INC., Plaintiff-Appellant, -against- 693 FIFTH OWNER LLC, Defendant-Respondent. ---X	Appellate Division Case No. 2021-01099 Sup. Ct. New York Cty. Index No. 652605/2020

MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR STAY PENDING APPEAL AND INTERIM RELIEF

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PRELIMINARY STATEMENT

Defendant-respondent 693 Fifth Avenue Owner, LLC ("693 Fifth") respectfully submits this memorandum of law in opposition to the motion of plaintiff-appellant Valentino U.S.A., Inc. ("Valentino") for a stay, pursuant to CPLR 5518 and 5519(c), pending its appeal from the order of the Supreme Court, New York County entered January 27, 2021 (Borrok, J.) (the "Order") dismissing its complaint.

The motion should be denied. First, Valentino's appeal is not meritorious. Second, Valentino has not alleged and will not suffer irreparable injury absent a stay. Third, the equities do not balance in favor of Valentino. Accordingly, the Court should deny Valentino's motion. Fourth, regardless of whether the Court affirms, modifies, or reverses the Order, the appeal will not resolve the separate action that 693 Fifth has commenced against Valentino to recover unpaid rent (copy of the complaint in the separate action annexed to the accompanying affirmation of Andrew C. Pistor as Exhibit A). Even if Valentino prevails on the appeal – an unlikely outcome – it will merely be able to raise certain defenses in 693 Fifth's separate action to recover rent; this does not mean that Valentino will ultimately prevail.

On the merits: The court below correctly dismissed Valentino's action. Valentino contracted away any right that it might otherwise have to rely upon the doctrines of frustration of the venture and impossibility of performance by the express terms of the commercial lease negotiated and entered into by these sophisticated parties. The law is abundant and clear that because the express terms of the lease demonstrate that the parties considered and allocated risk between them as to potential perils, a pandemic is deemed to have been objectively foreseeable as well, meaning that Valentino could have sought to add address the possibility of a pandemic just as it addressed those perils already contemplated in the lease. See pp. 13 - 16 below.

Valentino alleges it was compelled to close and vacate the Fifth Avenue store it rented from 693 Fifth because of the Covid-19 pandemic and Governor Cuomo's Executive Orders (the "EOs"). Yet, within a few months after announcing the closure of its Fifth Avenue store, Valentino opened a new store in Soho. Apparently, Valentino would have the Court subscribe to the notion that the pandemic and the EOs excused it from its Fifth Avenue lease obligations, but that its new Soho store was somehow free from those same ostensibly devastating, lease-abrogating external conditions. See pp. 16 - 17 below.

On the harm: Valentino does not allege, much less demonstrate, irreparable harm. The only prejudice that Valentino alleges is its potential inability to raise

affirmative defenses in 693 Fifth's newly commenced action to recover rent. See: 693 Fifth Owner, LLC v. Valentino U.S.A., Inc. (Sup. Ct., N.Y. Cty. Index No. 651128/2021) (the "693 Fifth Action"). Presumably, in that suit, Valentino would interpose affirmative defenses sounding in the very claims that the IAS Court dismissed below: frustration of the venture and impossibility of performance among them. However, the dismissal of claims is not irreparable harm or cognizable prejudice for stay purposes. Courts routinely dismiss plaintiffs' complaints and defendants' affirmative defenses. The parties who suffer those dismissals may seek redress by way of an interlocutory appeal; they have no right to cause the suit in question to grind to a halt. Any other outcome would significantly prejudice the swift administration of justice as tens of thousands of lawsuits would stall (perhaps even more than once) pending the appeal of interlocutory orders. As the rule applies here, Valentino will suffer no prejudice. If the Court affirms, Valentino will remain unable to raise frustration of the venture and impossibility as defenses in the 693 Fifth Action. Should the Court reverse: (i) if the 693 Fifth Action is still ongoing, Valentino will be able to raise those doctrines as defenses; or (ii) if the 693 Fifth Action has already concluded in 693 Fifth's favor, Valentino – which will presumably have bonded the potential judgment – will simply move to vacate based on the reversal. See pp. 16 - 17, below.

On the equities: Valentino delayed for months in pursuing its appeal from the Order. It now comes before this Court seeking a stay, when it could have easily perfected an appeal for the May or June Term. Had Valentino done so, it could have avoided the self-created "emergency" which it alleges may lead to entry of a money judgment against it before the Court decides this appeal. Nowhere do its motion papers even name the Term for which it proposes to perfect its appeal. On the other hand, a stay will stop in its tracks the 693 Fifth Action, by which 693 Fifth seeks to recover significant rentals due from Valentino for the primary retail space at 693 Fifth Avenue, all the while 693 Fifth remains obligated to pay its New York City real estate taxes, any debt service, insurance, maintenance and repair costs for the building. Moreover, as noted immediately above, the IAS Court relied upon a century of well-settled law, and Valentino will suffer no irreparable harm absent a stay. See pp. 17 - 20, below.

On the "related" action: At the outset, as of this date, this action and the 693 Fifth Action have not been deemed "related" actions by the IAS Court. Indeed, no such request has even been made. Even so, to stay one action in favor of another, the movant must show that the non-stayed action will resolve all of the issues in the stayed action. Here, the outcome of the appeal will not resolve all of the issues in the 693 Fifth Action because: (i) rent is not at issue here, while it is the primary issue in the 693 Fifth Action, and (ii) even a reversal would entitle Valentino merely to raise

its proposed affirmative defenses in the 693 Fifth Action; it would not amount to a determination that those defenses would prevail (barring recovery of rent) as a matter of law. See pp. 20 - 21, below.

The proper forum: The proper court to decide a motion for a stay pending appeal is the one before which the action to be stayed is pending. Valentino's motion is properly brought before Justice Borrok in the IAS Court. See pp. 11 - 12, below.

FACTS

We begin with a recitation of the allegations of Valentino's complaint, filed on June 21, 2020 (NYSCEF Doc. No. 1), but also add matters outside.

The Complaint alleges causes of action seeing to abrogate Valentino's lease based principally upon the doctrines of frustration of the venture, impossibility of performance and constructive eviction. All of the claims rest upon a common core of allegations.

By lease dated May 3, 2013 (the "Lease") (NYSCEF Doc. No. 5), Valentino – which identifies itself as the American branch of the eponymous internationally renowned luxury fashion company with retail boutiques located around the world – rented the lower level, ground floor, second floor and third floor (the "Premises") for the period August 1, 2013 through July 31, 2029. Complaint ¶3. The Lease requires Valentino to "'use and occupy the Premises solely and exclusively for the

display and retail sale of women's wear, menswear, accessories, shoes, fragrances and handbags and/or…other luxury items….'" Complaint ¶5; Lease §5.01. It requires Valentino to continuously operate as a Valentino store, but for one day only. Complaint ¶9; Lease §5.04 Valentino did so: "[C]onsistent with the prestige and reputation of the immediate Fifth Avenue neighborhood, Valentino provided its clientele with a world-renowned array of products including clothing, shoes and bags, and also offered expert fittings and tailoring at the Premises." Complaint ¶7.

Valentino alleges that as of the date of the Complaint – June 21, 2020 – it was current in its rent payments. Complaint ¶4. That allegation was false. (See copy of affirmation of Casey Slamani submitted in support of 693 Fifth's motion to dismiss annexed to the Pistor affirmation as Exhibit B).

At the end of January 2020, the federal government had declared a state of emergency on account of Covid-19. Complaint ¶14. As a result, Governor Cuomo issued the EOs that resulted in the closure of non-essential retail stores, Valentino's included. Complaint ¶15. Valentino closed on March 17, 2020. Complaint ¶17. As of June 21, 2020 the restrictiveness of the EOs had eased, but Valentino alleges that it nevertheless "is unable to offer in-boutique retail sales, or associated services such as fittings, as originally contemplated by the parties, and as the company operated before the Covid-19 pandemic, services which are vital to its business and central to the Lease's purpose." Complaint ¶18.

We note, though, that as of July 22, 2020 Valentino was open for business at the Premises, presumably subject to social distancing and other requirements necessary to thwart the spread of the virus. See: photographs, taken on July 22 of the exterior of the Valentino premises and of a notice posted on the inside of the Valentino salon (NYSCEF Doc. No. 11).

Beyond merely alleging a present inability to operate "as the company operated before" the pandemic, Valentino indulges in the purely self-serving speculation that it will not be able to operate properly in the future: "[E]ven in a post-pandemic New York City (should such a day arrive), the social and economic landscapes have been radically altered in a way that has drastically, if not irreparably, hindered Valentino's ability to conduct high-end retail business at the premises." Complaint ¶19.

Nevertheless, several months after alleging that the pandemic and EOs would forever hinder Valentino's ability to operate in the Premises – an allegation that Valentino repeats here (See: Kassenoff Aff. ¶88 ["Appellant's business operations at the Premises were entirely disrupted because of the health crisis"]) – Valentino announced that it would be opening a new Valentino boutique in Soho. See Pistor Aff., Ex. F.

In the meantime, on June 19, 2020, Valentino gave 693 Fifth written notice of its intention to vacate the Premises by December 31, 2020 (NYSCEF Doc. No. 9) Complaint ¶26. For a business that claims it can no longer operate at the Premises as it intended, six (6) months' notice is a considerable lead time, which ended, not coincidentally, just after the conclusion of the holiday sales season which is, for many retailers, sustaining in and of itself. Just after Christmas, Valentino did indeed purport to vacate the Premises, albeit causing or permitting unusually severe and unorthodox damages to the imported marble store installation. See Pistor Aff., Ex. A, ¶39.

693 Fifth responded to the Complaint by moving to dismiss it, principally pursuant to CPLR 3211(a)(1) based on documentary evidence – namely, provisions of the Lease. By virtue of the express provisions of the Lease, Valentino had contracted away its right to rely upon frustration of the venture, impossibility of performance and constructive eviction. Valentino opposed the motion.

By order entered January 27, 2021 (the "Order"), the Court (Borrok, J.) granted the motion and dismissed the Complaint (NYSCEF Doc. No. 44). On February 17, 2021, Valentino filed a notice of appeal from the Order.

693 Fifth had moved to dismiss pursuant to CPLR 3211; thus, it did not counterclaim for unpaid rent. On February 19, 2021, following the dismissal of

Valentino's lawsuit, 693 Fifth filed suit – the 693 Fifth Action – which sought to recover rent. By the 693 Fifth Action, 693 Fifth seeks, inter alia, damages of $207,101,868,33, including $184,000,000 in base rent due under the Lease through the July 31, 2029 expiration date and $15,374,257.50 for the destruction of the leased premises.[1]

Valentino responded to the 693 Fifth Action by requesting, and receiving, an additional three weeks in which to answer the Complaint. Nevertheless, instead of answering, it seeks a stay of its obligation to respond and indeed a stay of the entire 693 Fifth Action pending its appeal from the Order.

Neither party has as yet filed a request for judicial intervention, let alone made any substantive motion, or prepared for trial. Accordingly, the 693 Fifth Action has not been determined to be a "related action." To the extent it is to be determined to be related, it should accordingly be assigned to Justice Borrok in the IAS Court. Given the typical chronology in the IAS Court, let alone the effects of the Covid-19 pandemic on our court system, it is difficult to even speculate when the 693 Fifth Action will be heard, much less when the IAS Court will make any substantive determination.

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[1] In the context of a commercial lease, a landlord has no duty to mitigate damages when its tenant prematurely abandons its leasehold. Holy Props. Ltd. v. Kenneth Cole Prods., Inc., 87 N.Y.2d 130 (1995).

THE GUIDING PRINCIPLE

> [W]here the [stay] motion is predicated upon the pendency of an appeal from an interlocutory order denying dismissal, the motion should only be granted upon an extraordinary showing, such as …whereto proceed to trial very likely will result in a waste of judicial resources because …[dismissal] is clearly warranted. In such circumstance, a stay should only be granted where the decision of the appellate court is imminent. The mere pendency of an appeal is not of itself grounds to stay an action.

Matter of Denton, 2002 NYLJ LEXIS 2080 at *1-2 (Sur. Ct., Westchester Cty.).

The situation here is no different: merely because Valentino must respond to allegations in the 693 Fifth Action that could have been counterclaims here is not a basis upon which to stay the 693 Fifth Action.

Valentino's proper remedy lies in its prosecution of its appeal, which is already delayed and for which remains destined for an unspecified Term, of this Court. Valentino's conduct comports with the record below, which depicts Valentino's self-serving and unauthorized attempt to terminate the Lease, but only after it delayed for six months in order to capitalize upon the Christmas shopping season.

ARGUMENT

It is well-settled that in order to obtain a stay pending appeal pursuant to CPLR 5518 and 5519(c), the movant must show that: (i) it has a likelihood of success on

the merits, (ii) it will suffer irreparable harm absent issuance of the stay, and (iii) the balance of the equities favors it. Nobu Next Door, LLC v. Fine Arts Hous., Inc., 4 N.Y.3d 839, 840 (2005).

Notably, however, when the movant seeks the stay of an action – a motion that rests on CPLR 2201 – a special test applies: the movant must show that resolution of the non-stayed action will resolve all of the issues in the stayed action. Eisner v. Goldberger, 28 A.D.3d 354 (1st Dep't 2006). Tellingly, Valentino never acknowledges, much less addresses, the special test applicable to motions to stay other pending actions.

In the first instance, however, (i) the Court should pass upon determining the stay application, and (ii) the stay application is premature.

I. THE MOTION IS PREMATURE; THE IAS JUDGE PRESIDING IN THE 693 FIFTH ACTION, AND NOT THIS COURT, SHOULD DECIDE THE MOTION.

Typically, a motion to stay a case is presented to the court presiding over the potentially stayed case: "The general rule, which comports with the orderly administration of justice, requires that the stay of an action should be sought from the court in which that action is pending." Safier v. Cohl, 95 A.D.2d 933, 934 (3d Dep't 1983). Accord Church Mut'l Ins. Co. v. State of New York, 251 A.D.2d 1014 (4th Dep't 1998).

Not surprisingly, Valentino has sought to bypass the court before which the 693 Fifth Action is pending. It is likely the 693 Fifth Action will be assigned to Justice Borrok, as he was the IAS judge in this action (and whose determination resulted in the dismissal of Valentino's suit.) He is best positioned to decide whether a stay should issue and, if so, the conditions that should attach to any stay. Indeed, one court has noted that in the context of a motion to stay one action pending an appeal in another, related action, the assignment of the two related cases to the same IAS court judge serves the same purpose as a stay because of her/his familiarity with the dispute:

> Under C.P.L.R. § 2201, a pending appeal in one proceeding may warrant a stay in another action only where the parties, issues, and relief sought are "substantially identical" and if a stay will avoid the "duplication of effort, waste of judicial resources, and possibility of inconsistent rulings," by reaching different conclusions from similar evidence. Thus, the assignment of two proceedings to the same justice based on their relatedness is actually a basis to deny a stay when one proceeding has advanced to an appeal, because the assignment based on relatedness serves the very same purposes as a stay serves.

Smith v. Proud, 2013 N.Y.Misc. LEXIS 6352 at *6-7 (Sup. Ct., N.Y. Cty).

Further, Valentino has not even joined issue in the 693 Fifth Action. As we noted above, to stay a first action in favor of a second, the outcome in the second action must dispose of the first. Even on a lower standard – "identity of issues" – a stay is premature before joinder of issue in the action sought to be stayed: "[T]he granting of a stay… is premature in that, until an answer is interposed, it cannot be

determined…whether or not there may be identity of issues which may justify a stay of this action." Pierre Assocs., Inc. v. Citizens Cas. Co., 32 A.D.2d 495, 497 (1st Dep't 1969).

II. VALENTINO HAS NOT SATISFIED THE TRADITIONAL STANDARD FOR ISSUANCE OF A STAY PENDING APPEAL.

As noted above, a motion for a stay pending appeal is analogous to a motion for a preliminary injunction. Valentino must accordingly show that: (i) it is likely to prevail on the merits, (ii) it will suffer irreparable harm absent issuance of a stay, and (iii) the balance of the equities tips in its favor. Valentino has not satisfied any of these three factors.

A. Valentino Is Unlikely to Succeed on The Merits of Its Appeal Because The Lease Waives Any Right That It Might Otherwise Have Had to Rely Upon Frustration Venture And Impossibility of Performance.

The first element that Valentino must satisfy on its stay application is that it is likely to succeed on the merits. We respectfully refer the Court to our underlying memorandums of law submitted to the IAS Court for an in-depth demonstration that the merits are against Valentino (copies annexed to the Pistor affirmation as Exhibits C and D).

In a nutshell, the lower court correctly determined the motion to dismiss Valentino's suit. See CPLR 3211(a)(1). Lease Article 21.11 is explicit: in contrast to Valentino's claim that Article 21.11 benefits it alone (Kassenoff Aff. ¶ 59), Article

21.11 benefits both parties. It plainly says that if either party is hindered in performing on account of forces outside its control – while naming some, critically continuing on to include others "of a similar or dissimilar nature" – Valentino's obligation to pay rent continues.

For the past century, courts have held that if an event potentially lease/contract abrogating event is deemed foreseeable, a party who/that would seize upon the occurrence of such an event must negotiate for its inclusion in the contract/lease or be precluded from raising it. See Urban Archaeology, Ltd. v. 207 E. 57th St. LLC, 34 Misc.3d 1222 (Sup. Ct., N.Y. Cty.), aff'd, 68 A.D.3d 562 (1st Dep't 2009)("The contract was entered into by sophisticated commercial parties who could have anticipated the possibility that future events might result in financial disadvantage on the part of either party, even if the precise cause or extent of such financial disadvantage was not foreseen at the time the contract was executed." (emphasis added)). Here, the parties did contemplate perils that could disadvantage either of them. See: Sections 9.1 and 21.11. The former requires Valentino to comply with governmental orders (such as the EOs) and the latter to continue to pay the rent in the face of cataclysmic events. "[F]inancial disadvantage to either of the contracting parties was not only foreseeable but was contemplated by the contract, even if the precise causes of such disadvantage were not specified." General Elec. Co. v. Metals Resources Group Ltd., 293 A.D.2d 417, 418 (1st Dep't 2002) (emphasis supplied).

During the same past century, the world and the United States have suffered through pandemics: 1918, 1957-58, and 1968. In the past 20 years, the world and the United States have faced the spectre of SARS, H1N1 and Ebola. The parties to this suit demonstrated their contemplation of perils and the attendant allocation of risk by virtue of, among other things, said Article 21.11 of the Lease. As a matter of law, Valentino is deemed to have had the ability to negotiate the provision to have excused it from performance because of pandemics. It did not do so. As the IAS Court correctly found, Valentino should be held to its bargain.

Admittedly, very recently, a lower court (Kings County, Supreme Court) has issued a decision finding for tenants on the issues of frustration of the venture and impossibility of performance in Covid-19 cases. However, this is truly an outlier and of no precedential effect. For a century now, vastly more have held for landlords (copies of the leading cases holding for landlords are annexed to the Pistor Aff. as Exhibit E).

Valentino says that the courts have determined each case on a fact-specific basis. See Kassenoff Aff. ¶37 fn.3 ("And, even when courts have rejected a frustration of purpose claim or defense, they note that the applicability of that doctrine is a fact-specific inquiry that will vary from case-to-case.") This is misleading. More accurately, courts have traditionally decided the pandemic/EO

cases based on the facts as they related to the negotiated provisions of the leases in question. It is these lease provisions (see CPLR 3211(a)(1)) that carry the day.

Nevertheless, even if Valentino's proffered case-by-case standard applies, Valentino would still fail. Valentino's complaint pleads that the pandemic "undermined and frustrated Appellant's [Valentino's] principal purpose in entering into, and continuing with, the Lease – the ability to conduct retail business…" Kassenoff Aff. ¶35. Yet, within two months of vacating the Premises in December 2020, Valentino opened a boutique at 135 Spring Street in Soho (copies of articles from the trade papers are annexed to the Pistor Aff. as Exhibit F). Thus, even the flawed description of the standard that Valentino proposes would doom Valentino: the pandemic and the EOs did not prevent Valentino from opening in Soho at the very time that Valentino was attempting to exploit the pandemic and EOs in order to extricate itself from its Lease obligations.

For these reasons, Valentino is unlikely to prevail on the merits.

B. Valentino Will Suffer No Irreparable Injury Absent A Stay.

The second element is irreparable harm. Valentino fails to allege (other than a perfunctory conclusory manner) much less demonstrate irreparable harm. In the context of a preliminary injunction – whose principles are incorporated into CPLR 5518, which applies to appellate injunctions pending appeal, see Schwartz v.

Rockefeller, 38 A.D.2d 995 (3d Dep't 1972) – the movant's ability to recover quantifiable money damages defeats irreparable injury. U.S. Re Cos., Inc. v. Scheerer, 41 A.D.3d 152, 155 (1st Dep't 2007); Sports Channel Amer. Assocs. v. National Hockey League, 186 A.D.2d 417 (1st Dep't 1992). Yet is it precisely money damages that would be the harm Valentino would suffer.

Valentino offers up the possibility that 693 Fifth will obtain a money judgment in the 693 Fifth Action before, if ever, this Court reverses the Order. According to Valentino, a reversal here will allow it assert as affirmative defenses to the 693 Fifth Action those bases for abrogation of the Lease already rejected by the IAS Court, thereby preventing 693 Fifth Avenue from obtaining a money judgment. However, this is precisely the type of injury that is not irreparable at law. U.S. Re Cos. If Valentino somehow prevails on appeal, and in the unlikely event a money judgment issues in the 693 Fifth Action prior thereto, Valentino can move to stay or vacate any money judgment that 693 Fifth might have obtained in the interim.

For this reason alone, Valentino has failed to demonstrate irreparable injury.

C. **The Balance of The Equities Favors 693 Fifth.**

The third factor for the Court's consideration on a motion for a stay is the balance of the equities. The harm to Valentino without the stay must outweigh the harm to 693 Fifth with the stay.

Valentino says that without a stay, it may face the entry of a money judgment in the 693 Fifth Action before a decision on the appeal. That is the sole harm that it articulates. Yet, Valentino has only itself to blame for its purported predicament. Had it proceeded apace following service of the Order, from which it appeals, it could have perfected for the May or June Term without need for a stay.

A movant's delay in pursuing an appeal is a factor. SportsChannel. Notice of entry of the Order was served on January 27, 2021. At that point, Valentino could have easily perfected for either the May or June Term. In fact, had Valentino truly been concerned about divergent outcomes of this action and 693 Fifth's potential lawsuit for rent, it could and would have perfected its appeal for the May Term of this Court with alacrity (the record and briefs were due four weeks later, on February 22, 2021). Indeed, once 693 Fifth filed suit on February 19, 2021, Valentino would have had until March 22, 2021 – more than a month – in which to perfect for the June Term.[2]

Instead, Valentino waited for nearly two months from service of the Order and six weeks from filing of the 693 Fifth Action before moving for a stay. Had it done so in a more-timely fashion, it could have avoided any conceivable harm that

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[2] Because it did not perfect for the May or June Term, an unconditional stay will allow Valentino to file its appeal for the September Term at the earliest – a minimum five-month period in which the 693 Fifth Action will be relegated to suspended animation.

might be visited on it by its inability to raise affirmative defenses to 693 Fifth's rent claim.

As we have noted, the procedural posture here is no different from that of a plaintiff suing for money damages who/that succeeds in obtaining the pre-trial dismissal of the defendant's affirmative defenses. The defendant's remedy is to appeal promptly to try to obtain a reversal.

In that regard, the Court can take judicial notice that in the 693 Fifth Action, no request for judicial intervention has been filed and that once it is, it will be many months before 693 Fifth can notice a motion and still many months more before the IAS Court will hear argument and decide. During those many months, 693 Fifth remains obligated to pay its New York City real estate taxes, any debt service, insurance, maintenance and repair costs for the building.

Contrast the – in all events, self-created – "harm" that Valentino will suffer without a stay with the real harm that 693 Fifth will suffer with a stay. In the stay context, this Court has noted the right of a party to pursue an adversary, through the machinery of the judicial system, for breach of substantial contractual obligations:

> While a motion for the stay of an action pending the determination of another action is primarily addressed to the discretion of the court, it is clear that a party is generally entitled to an unrestrained right to resort to the courts for prompt enforcement of substantial contractual rights.

Pierre Assocs., 32 A.D.2d at 496 (emphasis added). A stay will prevent 693 Fifth from pursuing that right.

When the harms are weighed against each other, it is clear that the equities favors 693 Fifth. Valentino's "harm" would spring from its own doing, from speculation and from universal litigative conditions. 693 Fifth's harm would arise from an inability to pursue contractual remedies through the courts. The latter far outweighs the former.[3]

For this additional reason, the Court should deny the motion.

III. VALENTINO HAS NOT SATISFIED THE SPECIAL STANDARD FOR STAYING ONE ACTION IN FAVOR OF ANOTHER.

A party who/that seeks to stay one action in favor of another must satisfy a special standard:

> It is appropriate to stay an action in deference to another only where the determination in the other will resolve all of the issues in the stayed action and the judgment on one trial will dispose of the controversy in both actions.

[3] In arguing for a stay, Valentino says that 693 Fifth is guilty of unclean hands, alleging that the 693 Fifth Action violates EO 202.28. Kassenoff Aff. ¶¶92-95. By its terms, EO 202.28 prevents landlords from commencing eviction proceedings. The EO thus has no application with the 693 Fifth Action to recover unpaid rent from a tenant that had already abandoned its leasehold premises.

Mt. McKinley Ins. Co. v. Corning Inc., 33 A.D.3d 51, 58-59 (1st Dep't 2006)(emphasis added). The test typically applies in the context of two cases, each pending before a different (trial) court. Here, one case is pending before the trial court and the other is on appeal. The question, then, is whether the proposed non-stayed case – the appeal – will dispose of all of the issues in the proposed stayed case (the 693 Fifth Action). The answer is no.

The two matters compare as follows: the appeal: Valentino argues that the Order erroneously dismissed claims that it could abrogate the Lease based on, inter alia, frustration of the venture and impossibility of performance; the 693 Fifth Action: 693 Fifth seeks to recover rent accruing in significant sums both prior to and after Valentino's abandonment of the Premises.

It is readily apparent that the outcome of the appeal will not resolve all of the issues in the 693 Fifth Action, as is required for a stay. Mt. McKinley Ins. Even if this Court reverses the Order – and we are confident that it should not do so on the law – those doctrines will merely become available to Valentino both in its suit and the 693 Fifth Action. In other words, even a reversal of the Order would not result in a holding that the doctrines abrogate the Lease, but merely that Valentino may assert them. Said differently, a reversal of the Order in Valentino's favor here will neither spell the end for, nor affirm, 693 Fifth's right to rent it seeks to recover in the 693 Fifth Action.

In that the appeal will not dispose of the 693 Fifth Action, no stay should issue.[4]

IV. A STAY SHOULD NOT ISSUE; HOWEVER, ANY STAY SHOULD BE CONDITIONED UPON THE POSTING OF A BOND AND PERFECTION OF THE WITHIN APPEAL FOR THE JUNE TERM.

As demonstrated above, Valentino has not satisfied the requisite elements for a stay. Nevertheless, if the Court should determine to grant a stay pending appeal, it may impose conditions. Among them are the posting of a bond and the expediting of the appeal itself. See Lancaster v. Kindor, 64 N.Y.2d 1013 (1985)(bond); Rawe v. State Bd. of Equalization & Assessment, 286 A.D. 1062 (3d Dep't 1955)(expediting appeal). Indeed, as noted above, because Valentino's motion rests in part on CPLR 5518, which permits a court to grant an injunction pending appeal, the principles of CPLR Article 63 apply. CPLR 6312(b) requires the prevailing movant post a bond.

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[4] Valentino makes passing reference to the notion that a stay here will save judicial resources. Kassenoff Aff. ¶83. In fact, it will not. Let us suppose that before the IAS court, 693 Fifth makes a showing that it is entitled to recover rent and enters judgment. Let us further assume that this Court holds for Valentino and allows it to raise the now-dismissed claims. Presumably, Valentino would move to stay and/or vacate the judgment and that motion would likely be granted. Nevertheless, no rehearing on the main rent claim would be necessary. Those facts would have been already established. Rather, the rehearing would be confined to Valentino's newly injected affirmative defenses. Thus, no judicial resources would be wasted.

Here, a stay will bar 693 Fifth from pursuing its own action for significant damages, including a claim for unpaid base rent. According to Valentino itself, Valentino will have no significant defenses to 693 Fifth's rent claim if this Court affirms the Order. See Kassenoff Aff. ¶78 ("[I]f Respondent's [693 Fifth's] Action were permitted to proceed, before this Appeal were decided, Appellant would effectively be left without its central defenses to the litigation."). Thus, in effect, Valentino acknowledges that absent the unlikely event that this Court reverses the Order, 693 Fifth will obtain a money judgment against Valentino for the rent sought in the 693 Fifth Action.

Thus, the issuance of a stay would block 693 Fifth from the "unrestrained right to resort to the courts for prompt enforcement of substantial contractual rights," Pierre Assocs., 32 A.D.2d at 496, including the right to the money judgment that Valentino acknowledges to be inevitable absent the stay. In such event, the Court should require Valentino to post a bond in an amount equal to at least the monthly base rent that has now gone unpaid beginning with September 2020 (copy of the aging detail report annexed to the accompanying affirmation of Casey Slamani as Exhibit A). Base rent of $1,581,250.00 per month is due for each of December 2020, January 2021, February 2021, March 2021 and April 2021. Accordingly, the Court should condition any stay on Valentino posting a bond for $8,365,206.77, further require that Valentino augment the bond by $1,581,250.00 each month until the

appeal is decided, and require the appeal be perfected within the time set forth at length below.

Finally, the Court should require Valentino to expedite its appeal. The time to perfect for the May and June Terms of this Court has now passed, effectively on Valentino's watch. There is neither a July nor an August Term. The last day to perfect for the September Term is July 12, more than three months in the offing. In the event a stay is granted (and the law does not favor it) we respectfully suggest that the Court calendar the appeal for the June Term and set an appropriate briefing schedule.

CONCLUSION

For the foregoing reasons, the Court should deny the motion, together with such other further and different relief as is just or proper.

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