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

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

***Justice***

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ITS SOHO LLC

Plaintiff,

- v -

598 BROADWAY REALTY ASSOCIATES INC.,

Defendant.

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**INDEX NO.** 653648/2020

**MOTION DATE** 12/14/2020

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

were read on this motion to/for DISMISSAL.

The motion to dismiss by defendant is granted and the cross-motion by plaintiff is denied.

**Background**

In this commercial landlord tenant case, plaintiff (the tenant) seeks rescission and termination of a lease it signed with defendant (landlord). Plaintiff contends it entered into a seven-year lease to commence on March 15, 2020 for a second-floor space at 598 Broadway, a building owned by defendant. The lease required the landlord to provide a "white box" to the tenant and the tenant was to do its own build-out. The lease also provided that there was no obligation to pay rent for the first six months, and the first monthly installment was not due until September. The tenant took possession on March 15, 2020 and the very next day, March 16, 2020, gyms were ordered to shut down effective on March 17, 2020 due to the ongoing pandemic. Gyms were not permitted to reopen until September 2020.

Plaintiff admits that the lease and the rider did not contain a force majeure clause or any other similar provision that would permit the parties to terminate the lease. Plaintiff claims that because of the pandemic and the fact that construction was also prohibited, the parties agreed

that the leased space would be considered occupied starting on June 15, 2020 and the first few months would be rent free. Plaintiff claims it was hoping to complete the build-out of the space and open the fitness club. However, plaintiff claims it has been unable to finish construction of the space. It alleges that in June, it attempted to terminate the lease given that it appeared opening the gym was unrealistic but defendant refused and continued to bill plaintiff.

Defendant moves to dismiss on the ground that the ongoing pandemic was known at the time the lease was entered into and plaintiff should have known not to enter into the lease. It also claims that plaintiff's cause of action for breach of the implied duty of good faith and fair dealing does not state a cause of action because defendant was under no obligation to negotiate a termination of the lease months after it was entered into. Besides, because of the ban on construction for three months, defendant allowed an extra three months of free rent after the lease was signed, even though it had no obligation to do so. Defendant insists that although plaintiff's profits were negatively affected, that the alleged frustration of purpose was not substantial. At best, according to defendant, even if plaintiff hadn't gotten the extra three months free plaintiff faced hardship for a few months out of a long-term lease.

In opposition and in support of the cross-motion to amend, plaintiff insists that discovery should proceed. It points out that no depositions have occurred and that it appears gyms are likely to be closed again in the near future. It attaches the affidavit of its principal, who claims that although he was aware of the Covid-19 virus at the time he entered into the lease, he could not have known it would essentially shut down the fitness industry in New York City.

Plaintiff also seeks to amend to add a separate cause of action for defendant's purported breach of the rider. It alleges that defendant breached the good guy guarantee by attempting to compel plaintiff to pay for more than it should.

In reply and opposition to the cross-motion, defendant claims that the proposed amendment is meritless because it relates to a good guy guarantee which involves plaintiff's principal. Plaintiff's principal is not a party to this action.

**Motion to Dismiss**

"On a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true. Further, on such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff" (*Alden Global Value Recovery Master Fund L.P. v Key Bank Natl. Assoc.*, 159 AD3d 618, 621-622, 74 NYS3d 559 [1st Dept 2018] [internal quotations and citations omitted]).

Plaintiff's first cause of action seeks a declaratory judgment that the purpose of the lease has been frustrated, the lease should be terminated and the defendant should refund plaintiff for its first month of rent and security deposit. 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.*).

This does not state a cognizable cause of action. A temporary shut down of a gym does not constitute substantial frustration of a lease stretching for nearly a decade. Moreover, the lease and the papers submitted on this motion suggest that plaintiff intended to build out the space so that it could become a gym. In other words, the lease was for a commercial space and

defendant delivered the space. That plaintiff's preferred use of the premises might not be profitable for a few months is not a basis for this Court to intervene and rip up the contract.

The Court's decision turns on the specific facts of this case. The parties clearly contemplated the effects of the crisis and, according to both parties, after the lease was entered into, they agreed that plaintiff would receive an extra three months free while it attempted to build out the space. After asking for and getting that from the landlord, which would have put plaintiff in the same position because all construction was halted for three months, plaintiff decided to change its mind and concluded that it no longer wanted to operate a fitness center. That business decision does not justify the application of the frustration of purpose doctrine; plaintiff could have built out the space and opened its gym. However, even after getting the extra three months free, which was the functional equivalent of the landlord taking the hit for the ban on construction, plaintiff wants out of the lease. Of course, plaintiff was entitled to do that but it does not state claim to ignore the contract.[1]

The Court also dismisses the second cause of action, which is based on a breach of the implied covenant of good faith and fair dealing. "Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance. Encompassed within the implied obligation of each promisor to exercise good faith are any promises which a reasonable person in the position of the promisee would be justified in understanding were included. This embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389, 639 NYS2d 977 [1995] [internal quotations and citations omitted]).

[1] The Court observes that defendant's claim that the effects of the ongoing pandemic were foreseeable is ridiculous. No one could have predicted that gyms would be shut down for the better part of 2020.

Plaintiff claims that defendant breached this covenant by refusing to negotiate to allow plaintiff out of the lease and continuing to charge rent while plaintiff is unable to build out on the premises. The Court is unable to find that defendant's refusal to accommodate plaintiff's desire to rescind a valid contract constitutes a valid cause of action. Defendant was under no obligation to renegotiate the lease so that plaintiff could walk away and it would be left with a vacant space. And, according to plaintiff's principal, after gyms were shut down, defendant agreed that the first six months would be rent free (NYSCEF Doc. No. 17, ¶ 10) although the lease, rider, and other papers in the motion indicate that the first six months were free and the landlord gave another three months free when construction was halted. Either way, that demonstrates that the defendant did, in fact, negotiate in good faith to factor in the devastating effects of the ongoing pandemic and related closures.

**Cross-Motion to Amend**

The Court denies the cross-motion because the proposed amended pleading (NYSCEF Doc. No. 20) fails to state a cognizable cause of action. The new cause of action alleges that defendant breached the rider to the lease by not returning the security deposit upon termination of the lease despite the good guy guarantee providing that plaintiff's principal and plaintiff would not be liable for any other payments following termination of the lease.

The good guy guarantee is a separate agreement between defendant and Mr. Richey (plaintiff's principal) (NYSCEF Doc. No. 6) and Mr. Richey is not a party to this lawsuit. Moreover, the terms of the good guy guarantee relate to Mr. Richey's potential liability; it does not purport to absolve plaintiff of its obligations should plaintiff properly surrender the premises.

**Summary**

This Court is cognizant of the fact that the pandemic has caused significant financial harm to many businesses across New York City, particularly among gyms and fitness establishments that were shut down for months due to Covid-related orders. But those temporary shutdowns, though they were devastating, are not a basis to rip up a validly signed lease. While the Court empathizes with plaintiff, it cannot ignore the fact that if it were to rip up the contract, the landlord would take the loss. Invalidating the contract would put the landlord in the position of having to comply with its obligations, such as paying property taxes and maintaining insurance, while plaintiff simply walks away. Such a result is simply inequitable.

To be clear, the Court's decision is based on the specific facts alleged here and the relief plaintiff requests. Plaintiff signed a lease and then, after Covid restrictions were imposed, renegotiated the terms of that lease so that it would get extra months of rent free while it built out the space. At some point, plaintiff decided it did not want to continue building out the space and try to run a gym. (Gyms opened with restrictions in September 2020). And now plaintiff brings a case to rescind the entire lease and for its money back. It does not seek relief for the time it was unable to operate a fitness center; it wants to walk away, get its money back and blame defendant for not agreeing to terminate the contract. The Court finds that under these circumstances, plaintiff has not stated valid requests for that relief.

The Court denies the request for attorneys' fees as defendant did not cite the basis for this request or attach any invoices substantiating its claim.

Accordingly, it is hereby

ORDERED that the motion by defendant to dismiss the complaint is granted to the extent that the case is dismissed and the Clerk is directed to enter judgment accordingly along with

costs and disbursements upon presentation of proper papers therefor and denied to the extent that it sought attorneys' fees and it is further

ORDERED that the cross-motion by plaintiff for leave to amend is denied.

12/22/2020
DATE

ARLENE P. BLUTH, J.S.C.

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