

<b>HWA 1290 III LLC v GKNY 1 Inc.</b>
2021 NY Slip Op 31621(U)
May 12, 2021
Supreme Court, New York County
Docket Number: 158142/2020
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

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HWA 1290 III LLC, HWA 1290 IV LLC and
HWA 1290 V LLC, as Tenants-in-Common,

Plaintiff,

INDEX NO. 158142/2020

MOTION DATE

MOTION SEQ. NO. 001

- v -

GKNY1 INC. d/b/a GLOBAL KITCHEN, "ABC CO.,"
and "XYZ" CORP.,

Defendants.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document numbers 6,7, 8, 9, 10, 11, 12, 13, 15, 16,
were read on this motion for MISCELLANEOUS RELIEF.

Plaintiffs HWA 1290 III LLC, HWA 1290 V LLC, and HWA 1290 V LLC
(collectively "HWA") commenced this action seeking, inter alia, a declaration that
its lease with defendant GKNY1 Inc. d/b/a Global Kitchen ("Global Kitchen") is
terminated for non-payment of rent since April 1, 2020, and for damages including
rent arrears and use and occupancy. Global Kitchen answered the complaint and
asserted as affirmative defenses force majeure caused by the Covid-19 pandemic; an
exoneration of its requirement to pay rent during the government-ordered
shutdown, and after the shutdown, a reduced rent amount proportionate to the
partial reopening.

In this motion by order to show cause, HWA seeks an order (i) directing
Global Kitchen to pay HWA all rent and use and occupancy due under the parties'
terminated lease for the period from April 1, 2020 through January 31, 2021, in the
amount of \$531,930.39, or, alternatively, to post an undertaking in the amount of
\$542,569.00 without prejudice to the parties' rights and remedies, (ii) starting as of
February 1, 2021, directing Global Kitchen to pay HWA monthly use and occupancy
pendente lite in the amount of \$64,169.21 per month, which represents holdover
rent set forth in the parties' terminated lease; and (iii) granting HWA leave to seek
an immediate order of ejectment in the event defendant fails to pay the plaintiff the
amount of \$531,930.39, or fails to post an undertaking in the amount of \$542,569.39
by a date set by the court. Global Kitchen opposes the motion.

## Background

By lease dated April 4, 2002, as modified by amendment dated March 29, 2013 (“the Lease”), HWA, as successor-landlord, and Global Kitchen, as successor-tenant, leased portions of the ground floor retail space, mezzanine and sub-concourse level at 1290 Avenue of the Americas, New York, NY (hereinafter “the Premises”) (NYSCEF #'s 10, 11). The Premises is leased for commercial purposes only and is used by Global Kitchen to operate a delicatessen business.

It is undisputed the Global Kitchen stopped paying rent in April 2020, following the outbreak of the Covid-19 pandemic, and that Global Kitchen’s business was closed from late March through early July 2020 as a result of Executive Orders issued by the Governor in response to the pandemic.

HWA served Global Kitchen with Default Notice dated July 23, 2020, and a termination notice dated August 7, 2020 (the “Termination Notice”) terminating the Lease’s term and demanding that Global Kitchen deliver the Premises on August 17, 2020 (NYSCEF # 7, ¶ 3). Global Kitchen, however, remains in possession of the Premises (*id.*, ¶ 4). HWA commenced this action on October 2, 2020, and filed this motion on January 13, 2021.

In opposition, Global Kitchen submits the affidavit of its president, Kwon Ik Cho (“Cho”) who states that he has run his delicatessen business at the Premises since August 2015 and has “been current in paying rents without much difficulty, although [he is] sometimes late in paying rent” (NYSCEF # 16). According to Cho, the business “served around 2,500 customers per day before the outbreak of the Covid-19 pandemic [and that its] income mainly comes from a lot of tourists and commuters ..., and catering customers which are now dramatically dropping” (*id.*, ¶ 3). He also states that “I am intentionally not paying rent because of the business uncertainty caused by the Covid-19 pandemic situation” (*id.*, ¶ 4). Cho further states that since the business reopened in July 2020 “our sales volume has plummeted to around \$74,074 per month which is less than 25% of the total sales we used to have before the Covid-19 pandemic” and requests the court reduce the rent by 75% to reflect the reduced sales volume (*id.*, ¶ 6; NYSCEF # 18).

## Discussion

At issue on this motion is whether the HWA has demonstrated, as a matter of law, that it is entitled to past rent due and owing and a declaration of a default based on Global Kitchen’s failure to pay rent during the Covid-19 pandemic which resulted in a government order closing Global Kitchen’s business for over three months, and the alleged substantial reduction in its business after reopening. An additional issue is whether HWA should pay monthly use and occupancy during the

pendency of this action based on Global Kitchen's continued occupancy of the Premises, and the operation of its business.

Although the Lease does not contain a force majeure clause, the doctrines of frustration of purpose and/or impossibility have been applied under certain circumstances to excuse a tenant's performance of some or all of its obligations under the Lease. "In order to 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]; *see also Jack Kelly Partners LLC v Zegelstein*, 140 AD3d 79, 85 [1st Dept 2016], *lv dismissed* 28 NY3d 1103 [2016] [finding that record raised issues of fact as to whether the plaintiff/tenant could invoke the defense of frustration of purpose when the certificate of occupancy, which allowed for residential use only, prevented plaintiff from using premises for its intended purpose as a commercial office space]). The doctrine "is not available when the event which prevents performance was foreseeable and provision could have been made for its occurrence" (*Warner*, 71 AD3d at 6 [internal citations omitted]). As for the impossibility defense, such defense "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 [and]... the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract" (*id.*, at 2).

Applying these principles here, the court finds that factual questions exist as to whether the Covid-19 pandemic, which resulted in the closure of Global Kitchen's business for more than three months and is alleged to have substantially reduced the number of customers upon reopening, supports a frustration of purpose and/or impossibility defense (*see e.g. 1877 Webster Ave., Inc. v Tremont Center, LLC*, \_\_\_ NY3d \_\_\_, 2021 WL 1621431 [Sup Ct, Bronx County March 29, 2021] [denying defendant landlord's motion to dismiss complaint of plaintiff/commercial tenant seeking relief from payment of rent based on the doctrines of frustration of purpose and impossibility of performance as a result of the Covid-19 pandemic and Executive Orders shutting down plaintiff's business]; *267 Development, LLC v Brooklyn Babies and Toddlers LLC*, 2021 WL 963955, \*2 [Sup Ct Kings County, March 15, 2021] [finding that the shutdown of the defendant/tenant's business during the Covid-19 pandemic precluded the tenant from performing its contractual obligations]; *compare Ten West Thirty Third Assocs. v A Classic Time Watch Co., Inc.*, 2021 WL 1331372 [Sup Ct NY County, April 9, 2021] [denying tenant's motion to dismiss complaint to recover rent under a commercial lease on the grounds of frustration of purpose in light of the Covid-19 pandemic]).

As for the branch of the motion seeking the payment of monthly use and occupancy during the pendency of this action, the court notes that Global Kitchen

has sought a seventy-five percent (75%) rent reduction while it continues to conduct business at the Premises. Under these circumstances, as directed below, Global Kitchen shall be required to pay HWA monthly use and occupancy based on twenty-five percent (25%) of the rent amount provided under the Lease that was due beginning on February 1, 2021, and to continue to pay this amount going forward on the first day of each month, subject to further order of the court (see generally *MMB Assocs. v Dayan*, 169 AD2d 422, 422 [1st Dept 1991] [noting that “[the] award of use and occupancy during the pendency of an action or proceeding accommodates the competing interests of the parties in affording necessary and fair protection to both... and preserves that status quo until a final judgment is rendered”] [internal citations and quotations omitted]).

Accordingly, it is

ORDERED that the motion by plaintiffs HWA 1290 III LLC, HWA 1290 V LLC and HWA 1290 V LLC is denied except to the extent that defendant GKNY1 Inc. d/b/a Global Kitchen shall be required to pay use and occupancy in the amount of twenty-five percent (25%) of the monthly rent provided under the Lease beginning on February 1, 2021, and on the first day of each month during the pendency of this action, subject to further order of this court; it is further

ORDERED that within 30 days of e-filing this order, defendant GKNY1 Inc. d/b/a Global Kitchen shall pay use and occupancy to plaintiffs HWA 1290 III LLC, HWA 1290 V LLC and HWA 1290 V LLC in the amount of twenty-five percent (25%) of the monthly rent amount provided under the Lease that was due on February 1, 2021, March 1, 2021, April 1, 2021, and May 1, 2021; it is further

ORDERED that defendant GKNY1 Inc. d/b/a Global Kitchen shall pay use and occupancy in the amount of twenty-five percent (25%) of the monthly rent provided under the Lease beginning on June 1, 2021, and on the first day of each month going forward; and it is further

ORDERED that a preliminary conference shall be held by telephone on June 22, 2021 at 10 am, with the call-in information to be provided by the court.

This constitutes the Decision and Order of the court.

5/12/21  
DATE



MARGARET A. CHAN, J.S.C.  
MARGARET A. CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  OTHER  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT  REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: