SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

Fifty East Forty Second Company LLC

INDEX NO. 157668/20

MOT. DATE

- v -

MOT. SEQ. NO. 001

Noy LLC et al.

The following papers were read on this motion to/for sj

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS Doc. No(s)._____
Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS Doc. No(s)._____
Replying Affidavits ECFS Doc. No(s)._____

This action arises from breach of a commercial lease and guaranty. Plaintiff Fifty East Forty Second Company LLC ("landlord") now moves to amend the complaint to conform the pleadings to the proof, for summary judgment against the defendants and a money judgment of $176,402.26 plus interest, costs, disbursements, and a hearing on attorneys fees, a declaratory judgment against defendant David Munits (sometimes "guarantor") and to dismiss the defendants' affirmative defenses. Defendants Noy LLC ("tenant") and guarantor oppose the motion and cross-move to amend their answer, for summary judgment dismissing plaintiff's action based upon NYC Admin Code Section § 22-1005 and for a judgment against plaintiff pursuant to NYC Admin Code § 22-903 of no less than $10,000. Plaintiff opposes the cross-motion. Issue has been joined and note of issue has not yet been filed. Therefore, summary judgment relief is available. The court's decision follows.

Plaintiff is the owner of the building located at 315 Madison Avenue (a/k/a 50 East Street), New York, New York (the "building"). The tenant was the commercial tenant of rooms 1805 and 1809 in the Building (the "premises") pursuant to a January 1, 2017 written lease ("lease"), which Lease commenced on January 1, 2017 and was to end on December 31, 2021. The lease expressly provides that the premises was to be used for "Spa for Aesthetician, Acupuncture, Waxing and Medical Massage and for no other purpose." Meanwhile, the guarantor entered into a personal, unconditional guaranty of the lease dated December 14, 2016 (the "guaranty").

Plaintiff claims based upon the affidavit of its principal, Alan Abramson, that "[c]ommencing April 2020, [the tenant] stopped paying to the [l]andlord rent and additional rent." Thereafter, the tenant vacated the premises on or about August 25, 2020. Plaintiff maintains that the tenant's vacatur was unilateral and that plaintiff never waived its right to collect rent, additional rent or damages under the lease.

Meanwhile, defendants' cross-motion is supported by the affidavit of David Munits, principal of the

Dated: 5/18/21

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☒ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☐**GRANTED** ☐ **DENIED** ☒ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☐**SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐**FIDUCIARY APPOINTMENT** ☒ **REFERENCE**

tenant, who maintains that on or about March 19, 2020 the tenant "ceased all operations in compliance with Governor Cuomo's Executive Order 202.7 in order to fight the spread of COVID-19." Munits further states: "[t]o be clear, 100% of NOY's business at the Premises involved facials and the requirement to wear a mask simply obliterated NOY's business; dropping its income from the Premises to zero." Munits further claims that he attempted to negotiate and/or "work out a temporary agreement that would allow [the tenant] to remain" at the premises, but the landlord "refused [his] requests and maintained that all rent would have to be paid even though [the tenant] could not operate its business at the premises and never was able to reopen at the premises because of Executive Order 202.7." Munits asserts that on August 24, 2020, he advised the landlord in writing that the tenant intended to vacate the premises as per the guaranty and the tenant vacated the space on or about August 31, 2020 with the keys returned to the building superintendent.

DISCUSSION

At the outset, plaintiff's motion to conform the pleadings to the proof and amend its claims to include rent and additional rent that has accrued since the action was commenced is granted. As for the cross-motion to amend, it is denied since the proposed counterclaim lacks merit for the reasons that follow (*Hawkins v. Genesee Place Corp.*, 139 AD2d 433 [1st Dept 1988]). The court now turns to the parties' requests for summary judgment.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

A lease is a contract. The four elements required of a cause of action for breach of contract are: [1] formation of a contract between the parties; [2] performance by plaintiff; [3] defendant's failure to perform; and [4] resulting damage (Furia v. Furia, 116 AD2d 694 [2d Dept 1986]). There is no dispute that the tenant stopped paying rent and additional rent in April 2020, thereby breaching the lease. In turn, defendants have failed to raise a triable issue of fact as to plaintiff's claims against the tenant.

Defendants argue that the motion should be denied as to the lease based upon the doctrine of frustration of purpose and that the tenant and guarantor's obligations should be otherwise excused because "performance was rendered objectively impossible."

Litigation in commercial real estate stemming from the effects of the Covid-19 pandemic is just beginning and this will be but one of many cases that where a tenant raises the defense of frustration of purpose. "In order to invoke this defense, 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" (*Jack Kelly Partners LLC v. Zegelstein*, 140 AD3d 79 [1st Dept 2016] [internal quotations omitted] quoting *Crown IT Servs., Inc. v. Koval-Olsen*, 11 AD3d 263 [1st Dept 2004]). While the tenant may not have been able to operate its business as a result of Governor Cuomo's executive orders, that does not frustrate the basis of the lease itself, which was merely to lease commercial space to the tenant, which the tenant obtained the bargain of, even if it was unable to conduct business for some period of time out of the premises. Therefore, the court cannot say that the lease was frustrated so that it is rendered unenforceable. Similarly, defendants' arguments as to impossible performance fail for the same reasons.

Accordingly, plaintiff's motion as to the tenant must be granted.

As for the guarantor, plaintiff's motion is denied. NYC Admin Code § 22-1005, entitled "Personal liability provisions in commercial leases", provides as follows:

> 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;
>
> (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
>
> (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 June 30, 2021, inclusive.

Contrary to plaintiff's contention, there is no real dispute that the tenant was forced to cease operations pursuant to Executive Order Number 202.7. The lease clearly indicates that the premises were to be used for a spa and defendants' cross-motion is supported by the affidavit of its principal who testifies as to the purposes the tenant used the premises for. In turn, defendants have failed to raise a triable issue of fact sufficient to defeat defendants' showing. That the certificate of occupancy indicates that the premises were for office space use does not require a different result. Indeed, the ordinance does not make any reference to certificates of occupancy.

Since there is no real dispute that the conditions of paragraphs 1 and 2 under Section 22-1005 applies to the tenant here, this statute bars enforcement of the guaranty against the guarantor. The court rejects plaintiff's argument that the ordinance is unconstitutional. Rather, the court adopts the reasoning set forth in *Melendez v. City of New York*, --- F.Supp.3d ---- 2020 WL 7705633 [SDNY 2020]), which upheld Section 22-1005 even though it substantially impairs landlords' commercial leases because the ordinance advanced a legitimate public interest and was necessary to advance the public interest. Accordingly, the court rejects this argument.

As for defendants' proposed counterclaim, they seek to assert a claim that plaintiffs' prosecution of this action, and specifically its attempt to enforce the guaranty, is a violation of NYC Admin. Code § 22-902[a]. This ordinance states that:

> A landlord shall not engage in commercial tenant harassment. Except as provided in subdivision b of this section, commercial tenant harassment is any act or omission by or on behalf of a landlord that (i) would reasonably cause a commercial tenant to vacate covered property, or to surrender or waive any rights under

> a lease or other rental agreement or under applicable law in relation to such covered property…

Defendants argue that the guarantor is entitled to damages under Section 22-902[a] because plaintiff continues to prosecute its claims against the guarantor despite the applicability of Section 22-1005. On this point, the court disagrees. It is of no moment whether Section 22-902[a] can apply where a tenant has vacated the premises, since the court does not agree that merely prosecuting this action results in "commercial tenant harassment". While plaintiff may not have prevailed on its motion and ultimately defendants are entitled to summary judgment dismissing plaintiff's claims against the guarantor, such facts do not warrant a different result.

Accordingly, plaintiff's motion as to the guarantor is denied and defendants' cross-motion is granted to the extent that defendants are entitled to summary judgment dismissing plaintiff's claims against the guarantor and the balance of the cross-motion is denied.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion is granted to the extent that the pleadings are conformed to the proof and plaintiff is entitled to summary judgment against the guarantor and the Clerk is directed to enter a money judgment in favor of plaintiff Fifty East Forty Second Company LLC and against defendant Noy LLC for $176,402.26 plus interest, costs, disbursements, and a hearing on attorneys fees; and it is further

ORDERED that the balance of plaintiff's motion is denied; and it is further

ORDERED that defendants' cross-motion is granted to the extent that plaintiff's claims against the individual defendant David Munits are severed and dismissed; and it is further

ORDERED that the balance of the motion is denied; and it is further

ORDERED that that the issue of the amount for which plaintiff should recover from defendant Noy LLC for the reasonable attorneys fees, costs, expenses and disbursements, is referred to the Special Referee Clerk for assignment to a Special Referee to hear and **determine**; and it is further

ORDERED that plaintiff's counsel shall, within 90 days from the date of this order, serve a copy of this order with notice of entry, together with a complete Information Sheet[1], upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 5/18/21
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.

[1] Copies are available in Room 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/supctmanh (under the "References" section of the "Courthouse Procedures link).