AR Retail LLC v Hugo Boss Retail, Inc.
2021 NY Slip Op 31704(U)
May 19, 2021
Supreme Court, New York County
Docket Number: 158385/2020
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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A/R RETAIL LLC

Plaintiff,

- v -

HUGO BOSS RETAIL, INC.,

Defendant.

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INDEX NO. 158385/2020

MOTION DATE 12/22/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 39
were read on this motion for SUMMARY JUDGMENT.

This case involves a long-term commercial lease under which Defendant Hugo Boss Retail, Inc. ("Hugo Boss" or "Tenant") operates a retail store at The Shops at Columbus Circle in Manhattan. The central question is whether the adverse financial impact of the COVID-19 pandemic on Tenant's business, including government orders restricting consumer access to the retail store, should relieve Tenant of the obligations under its Lease with Plaintiff A/R Retail LLC ("Landlord"). Similar disputes between commercial tenants and landlords have flooded New York state and federal courts over the last year.

Both parties assert claims for relief. Landlord seeks to recover from Tenant millions of dollars in past-due rent under the Lease and recovery of its attorneys' fees for bringing this action. For its part, Tenant seeks: (i) rescission or reformation of the Lease due to "frustration of purpose" or "impossibility of performance;" (ii) termination of the Lease because the pandemic constitutes a "casualty" that has "rendered [the Premises] wholly or substantially untenantable;"

(iii) abatement of rent because the pandemic constitutes a "hazard;" and (iv) recovery of "overpaid" rent "for the period of time that [Tenant] was unable to operate a retail store at the Premises as originally contemplated by the Lease."[1]

Landlord moves for summary judgment on all claims asserted by and against it, other than Tenant's claim to recover for alleged pre-pandemic overcharges. Tenant opposes on the ground that its pandemic-related claims and defenses raise fact issues that cannot be resolved at this early stage. For the reasons set forth below, Landlord's motion is granted.

The pandemic undoubtedly has taken a significant toll on Tenant's business. But unlike the permanence of Tenant's proposed remedies of rescission and reformation, government restrictions relating to the pandemic have evolved and eased considerably over time. And as will be shown below, the parties provided in the Lease for certain accommodations in the event performance of their respective obligations was impacted by government restrictions, but did not provide for termination of the Lease or abatement of rent under those circumstances. A harsh result, to be sure, but so in its own way would be mass rescission of commercial leases, assigning all risk of the pandemic to property owners who face their own unrelenting expenses and economic burdens. In any event, this is a contract case and the Court is guided principally by the terms of the Lease to which these sophisticated commercial entities agreed.

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[1] The parties' claims and defenses are asserted in two largely overlapping cases that are before this Court: *A/R Retail LLC v Hugo Boss Retail, Inc.* (158383/2020) [Sup Ct, NY County filed Oct 8, 2020] ["Action 1"] and *Hugo Boss Retail, Inc. v A/R Retail LLC* (655166/2020) [Sup Ct, NY County filed October 9, 2020] ["Action 2"]. Tenant's counterclaims in Action 1 "incorporate[] by reference all of the allegations contained in [Tenant's] Complaint" in Action 2. Essentially, the motions in the two cases are the same and the parties have briefed them together. For simplicity, this decision and order addresses both motions and is being filed in substantially the same form in both actions.

BACKGROUND

A. The Pandemic Disrupts Store Operations

A/R Retail, LLC is the landlord of the luxury indoor shopping center (or indoor mall) known as The Shops at Columbus Circle, located at 10 Columbus Circle in New York City (the "Shops") (Landlord's Rule 19-a stmt. of undisputed material facts ["SUMF"] ¶1 [NYSCEF 36]). Hugo Boss is a fashion brand that sells men's and women's high-end apparel, shoes and accessories (Affidavit of Stephan Born ["Born Aff."] ¶4 [NYSCEF 30]).

Since 2012, Hugo Boss has leased a two-floor retail store (the "Store") in the Shops (Affidavit of Meredith B. Keeler ["Keeler Aff."] ¶3), under the terms of a 13-year lease (the "Lease") (SUMF ¶3; *see* NYSCEF 17 [Lease]). The Store is one of the largest retail stores in the Shops, consisting of almost 15,000 square feet (SUMF ¶4). According to Tenant's CEO and President, Stephan Born, "Hugo Boss' purpose in entering into the Lease was to provide Hugo Boss with a highly visible and trafficked retail location in Columbus Circle, and specifically within the iconic Time Warner Center, that would cater to luxury and premium market customers, and that Hugo Boss could fully utilize to sell products and services under the brand 'HUGO BOSS' for the entire term of the Lease" (Born Aff. ¶5; *see* Lease §1.1 [g] ["Tenant shall operate the Premises as a first-class, high-quality store. . . ."]). For this right, Tenant was paying $692,026.07 per month for rent (SUMF ¶33; NYSCEF 1 ¶2 [Tenant's compl. in Action 2]).

On March 7, 2020, as the COVID-19 pandemic swept through New York, Governor Cuomo signed Executive Order ("EO") 202, "declar[ing] a State disaster emergency for the entire State of New York" that remained "in effect until September 7, 2020" (*id.* ¶22). That began a series of Executive Orders which, as relevant here, mandated commercial and retail closures. EO 202.4, issued on March 16, ordered closure of schools throughout the State and

excused non-essential State employees from coming to work (*id.* ¶23), followed by EO 202.5, issued on March 18, which ordered that "all indoor common portions of retail shopping malls . . . shall close and cease access to the public" (*id.* ¶25).

Landlord closed the Shops – including the Store – on March 17, 2020 at 5:00 p.m. (*id.* ¶24). At that point, even Tenant's employees were barred from accessing the Premises, unless they followed specific guidelines and received permission from Landlord (Born Aff. ¶9). Landlord also restricted deliveries to the Premises during this time (*id.*; *see* Born Aff. Ex. 2 [NYSCEF 32]).

Tenant paid the rent and additional rent due under the Lease for the month of April 2020, in the total amount of $692,026.07, except for $373.89 (SUMF ¶26). Landlord contends that "[s]uch payment was without any reservation of rights by Tenant" (*id.* ¶27). As Tenant points out, however, it expressly "reserve[d] all rights" relating to the rent in a letter written to Landlord on March 18, 2020, the day after the Shops closed (the "March Letter") (Born Aff. Ex. 3 [NYSCEF 33]). In the March Letter, Tenant signaled its expectation that "Rent will be fully abated for the duration of the mall closure period," while "reserv[ing] all rights and remedies available under the Lease" to postpone or abate rental payments as a result of the closure (*id.*). Also in the Letter, Tenant previewed that it "may deem such cessation or diminution of operation as an event of casualty or force majeure which may excuse Tenant from performance under the Lease due to impossibility of performance, commercial impracticability or frustration of the purpose of the Lease" (*id.*).

The next month, Tenant wrote another letter to Landlord, dated April 21, 2020 (the "April Letter"), which alluded to "Landlord's recent position that . . . Tenant is not entitled to any abatements during the current pandemic" (Born Aff. Ex. 4 [NYSCEF 34]). Tenant warned

that if the parties were "unable to reach a mutually agreeable resolution," Tenant "will need to move forward with more drastic steps that will include either a termination of its Lease . . . or a more formal restructuring process" (*id.*). The Letter outlined Tenant's view that section 15.2 of the Lease "affords [it] the right to terminate the Lease," so that "[i]f HUGO BOSS proceeds with exercising this right it could close its store without penalty" (*id.*).[2]

On September 9, 2020, the Shops reopened to the general public (SUMF ¶31). Since then, the Store has continued to remain open for business (*id.* ¶32). Business, however, has not been the same. State guidelines limited occupancy in the Store to 50% of the maximum allowable amount, including customers and employees (Born Aff. ¶10).[3] And Landlord decreased the Operating Hours of the Shopping Center by 20%, from 50 hours of weekly operation to 40 hours per week (*id.*). Mr. Born calculates "[t]he effect has been a decline in traffic of 83% and a decrease in year-over-year sales of 76%" (*id.*). In any event, Tenant continues to operate the Store (SUMF ¶32; Keeler Aff. ¶32), although it has not paid monthly rent in full since May 2020 (SUMF ¶33).[4]

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[2] In addition to the March and April Letters, Mr. Born avers that he personally had "many conversations with the Landlord in the hopes of coming to a compromise on abatement, relocation, rent reduction, and/or potential paths to resolution," but "[a]ll attempts were rebuffed" (Born Aff. ¶18).

[3] These capacity limits are now being lifted (*see Governor Cuomo, Governor Murphy and Governor Lamont Announce Significant Easing Of COVID-19 Pandemic Restrictions on Businesses, Gatherings and Venues*, available at https:/www.governor.ny.gov/news/governor-cuomo-governor-murphy-and-governor-lamont-announce-significant-easing-covid-19 [accessed May 18, 2021]).

[4] Tenant acknowledges in its opposition brief that that it "ceased paying rent," but notes that it "is in the process of completing a 'without prejudice' payment to Landlord in the amount of $1,990,759.36 . . . to balance the equities of [Tenant's] continued occupation of the Premises at 50% capacity" (NYSCEF 35 at 3 [Tenant opp. to SJ]). The Court recently issued an order

B. Relevant Lease Provisions

Five Lease provisions are particularly relevant to this dispute. First, section 26.15 [a] of the Lease states, in pertinent part, that "[a]ll Rent payable to Landlord under the provisions of this Lease shall be paid to Landlord . . . without deduction, set-off or counter claim whatsoever, except as expressly provided herein."

Second, section 15.1 [d] expressly provides that a rent abatement or reduction may be available to Tenant under certain circumstances:

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

(*id.* [emphasis added]).

Third, section 15.2 sets forth the conditions for Tenant and Landlord to terminate the Lease in the event of a "casualty":

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

(*id.* [emphasis added]).

Finally, sections 1.2 and 26.9 define and apply "force majeure." Under section 1.2:

> "Force majeure" shall mean causes beyond the claiming party's reasonable control (other than causes delaying the payment of money due and payable hereunder) and

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requiring that Tenant pay monthly rent and additional rent *pendente lite* in the amount of $692,026.07 (NYSCEF 56). Under that order, the payment due May 1, 2021 was required to be made on or before May 10, 2021.

> occurring without its fault or negligence, including, without limitation, acts of God (including, without limitation, earthquake, flood and/or extreme or extended inclement weather), strikes, lockouts, breakdowns, accidents, **order or regulations of or by any governmental authority**, building department delays, war, acts of terrorism (whether local, national or global in nature), failure of suppliers, subcontractors, and carriers, or party to substantially meet its performance obligations under this Lease, provided that, as a condition to the claim of a Force Majeure delay, the party experiencing the difficulty shall give the other prompt written notice, with full details following the occurrence of the cause relied upon. Dates by which performance obligations are scheduled to be met will be extended for a period of time equal to the time lost due to any delay so caused.

(*id.* [emphasis added]). And in section 26.9, the Lease explains how and when force majeure applies to the parties' obligations:

> Landlord and/or Tenant shall be excused for the period of delay in the performance of any of their obligations hereunder, **except Tenant's obligations to pay any sums of money due under the terms of this Agreement**, and shall not be considered in default, when prevented from so performing because of Force Majeure; provided, however, the claiming party must notify the other party of any such delay within five (5) Business Days following the initial occurrence of such Force Majeure event in order to delay the performance of any obligation hereunder. Notwithstanding anything to the contrary contained in this Section 26S, if any work performed by Tenant, Tenant's contractors and/or subcontractors results in a strike, lockout and/or labor dispute, such strike, lockout and/or labor dispute shall not be deemed Force Majeure for purposes of this Lease.

C. The Instant Actions

Landlord and Tenant have brought separate actions against each other based on overlapping theories of liability and defenses. In Action 1, Landlord filed a Verified Complaint dated October 7, 2020, asserting causes of action against Tenant for breach of the lease and requesting attorneys' fees and costs (NYSCEF 1 [Action 1]). Two days later, in the action with Index No. 655166/2020 ("Action 2"), Tenant filed a Complaint asserting eight causes of action against Landlord: (1) rescission for frustration of purpose, (2) rescission based on impossibility of performance, (3) declaratory judgment that Section 15.1(d) of the Lease entitles Tenant to a rent abatement or reduction because COVID-19 qualifies as an "other hazard", (4) declaratory

judgment that the Lease is terminated under Section 15.2, (5) reformation of the Lease, (6) breach of contract, (7) money had and received, and (8) unjust enrichment (NYSCEF 1 [Action 2]).[5]

In Action 1, Landlord seeks summary judgment on its two causes of action under CPLR 3212, entry of a money judgment against Tenant for the allegedly undisputed amounts due under the Lease, and dismissal of Tenant's affirmative defenses and counterclaims. In Action 2, Landlord seeks summary judgment dismissing Tenant's complaint other than its sixth cause of action for breach of contract based on alleged pre-pandemic overcharges. As directed by the Court, the parties have consolidated their briefing on both motions.

DISCUSSION

"[W]hen there is no genuine issue to be resolved at trial, the case should be summarily decided" (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; CPLR 3212 [b] [summary judgment "shall be granted if, upon all papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party"]). To be entitled to 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 [1985]). The failure to make 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 [1st Dept 2012]). But "it is

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[5] Unless otherwise noted, NYSCEF docket numbers herein refer to Action 1.

incumbent upon the [party opposing summary judgment] . . . to produce 'evidentiary proof, in admissible form, sufficient to require a trial . . . mere conclusions, expressions of hope, unsubstantiated allegations or assertions are insufficient'" (*State Bank of Albany v Fioravonti*, 51 NY2d 638, 647 [1980], *quoting Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

A. Landlord is Entitled to Summary Judgment on its Claims for Breach of the Lease and Attorneys' Fees in Action 1

Landlord's first and second causes of action seek more than $5 million in unpaid rent and attorneys' fees as a result of Tenant's alleged breach of the Lease by not paying rent from May 2020 and thereafter.

On its first cause of action, Landlord has established its prima facie case for breach of the Lease. The elements of this claim are (i) the existence of a valid, binding lease, (ii) Landlord's performance thereunder, (iii) Tenant's failure to pay rent (or other breach), and (iv) damages suffered by Landlord as a result of the breach (*Markov v Katt*, 176 AD3d 401, 401-402 [1st Dept 2019]; *Thor Gallery at S. Dekalb, LLC v Reliance Mediaworks (USA) Inc.*, 143 AD3d 498, 498 [1st Dept 2016] [holding on summary judgment that "[landlord] established prima facie the existence of the lease . . . the tenant's failure to pay the rent . . . and the calculation of the amounts due under the lease"]; *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

The existence and validity of the Lease are not in dispute here (SUMF ¶3; Resp. to SUMF ¶3). Section 26.15 of the Lease requires that "[a]ll Rent payable to Landlord under the provisions of this Lease shall be paid to Landlord . . . without deduction, set-off or counterclaim whatsoever" (NYSCEF 17; *see Steuben Tr. Corp. v Genesee Metal Prod., Inc.*, 63 AD3d 1677, 1677-78 [4th Dept 2009] [granting landlord's motion for summary judgment where "the lease

provided that defendant was to pay monthly rent 'without any abatement, deduction or setoff'"]). While Tenant disputes the precise amounts at issue,[6] it is undisputed that Tenant has failed to pay rent and other charges due under the Lease in full since May 2020 (*see* Resp. to SUMF ¶33; Lease §§5.1 [a], 26.15; Keeler Aff. ¶27; *see also* NYSCEF 35 at 3 [Tenant opp. to SJ]). And Landlord has suffered substantial damages resulting from Tenant's breach.

Landlord's second cause of action, which seeks attorneys' fees and expenses, is based on section 26.14 of the Lease:

> Tenant and Landlord shall pay to the other upon demand, the respective parties' expenses (including reasonable attorneys' fees and disbursements) incurred in enforcing any obligation of the other under this Lease.

Landlord's entitlement to attorneys' fees rises and falls with Landlord's entitlement to summary judgment on its first cause of action. Both turn on whether Tenant is under an obligation to pay rent and other charges to Landlord. For the same reasons above, therefore, Landlord makes out a prima facie case for judgment as a matter of law on its claim for attorneys' fees and expenses (*see Zamir v Ben-Harosk*, 188 AD3d 513 [1st Dept 2020]).

Because Landlord has made this prima facie showing, the burden then shifts to Tenant "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003];

[6] Specifically, Tenant claims that "under the Lease the Landlord has overcharged the Tenant its proportionate share of Real Estate Taxes" (NYSCEF 35 at 5 n.8 [Tenant opp. to SJ]). The tax dispute is subsumed under Tenant's sixth cause of action in Action 2, which alleges that Landlord "breached the Lease contract by, among other things, charging and collecting from Tenant amounts far in excess of its reasonable share of real estate taxes" (NYSCEF 1 ¶107 [Action 2]). Landlord is not seeking to dismiss that claim here, and this Decision and Order is without prejudice to Tenant pursuing that independent claim.

Zuckerman v City of New York, 49 NY2d 557, 560 [1980]). For the reasons below, Tenant fails to carry that burden here.

1. Section 15.2 of the Lease is Inapplicable

To begin with, Tenant looks to section 15.2 of the Lease, which gives Tenant the right to terminate "[i]f . . . the Premises are . . . rendered wholly or substantially untenantable, or damaged as a result of any casualty which is not covered by the insurance required hereunder to be maintained by Landlord." Should that occur, Tenant then "may elect to terminate this Lease by giving the other written notice of such election within ninety (90) days after the occurrence of such casualty event." Tenant's reliance on this provision is unavailing.

First, section 15.2 requires "the occurrence of [a] casualty event," and the pandemic is not such an event. The Lease uses the term "casualty" to denote physical damage to the Premises, as evidenced by surrounding Lease provisions that refer to the repair and restoration needed to rectify such damage. For example, the Tenant may terminate the Lease under section 15.2 if "the insurance proceeds received by Landlord on account of such casualty event **are insufficient to repair or restore the Premises**" (§15.2 [e] [emphasis added]). Neighboring provisions in Article 15 buttress this reading (*see* §15.1 [b] ["If Landlord is required or elects to repair or restore the Premises under the provisions of this Article XV, all repairs to be performed by Landlord shall be done . . . to a level at least equal to the **original construction of the damaged improvements**."] [emphasis added]; §15.3 ["Tenant shall, as soon as possible, **repair, redecorate and refixture the Premises** and restock the contents thereof in a manner to at least a condition equal to that existing prior to its destruction or casualty"] [emphasis added]; *see Newman Myers Kreines Gross Harris, P.C. v Great N. Ins. Co.*, 17 F Supp 3d 323, 332 [SD NY

2014] ["The words 'repair' and 'replace' contemplate physical damage to the insured premises as opposed to loss of use of it."]).

This interpretation accords with a number of recent decisions, which have concluded that "the pandemic is not a 'casualty' as that term is generally used in commercial leases" (*Gap Inc. v Ponte Gadea New York LLC*, 2021 WL 861121, *6 [SD NY Mar. 8, 2021]; *1140 Broadway LLC v Bold Food, LLC*, 2020 NY Slip Op 34017[U], 6 [Sup Ct, New York County 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."]; *Dr. Smood New York LLC v Orchard Houston, LLC*, 2020 NY Slip Op 33707[U], 4 [Sup Ct, New York County 2020] [holding "plaintiff's allegations that the pandemic constitutes a 'casualty' are entirely without merit as there has been no physical harm to the demised premises"]).

Second, even if the COVID-19 pandemic qualified as "such casualty event," Tenant failed to exercise its option under section 15.2 to terminate the Lease. To effectuate a termination, one party must "giv[e] the other written notice of such election within 90 days." Tenant did not give such notice. Instead, in the April Letter to Landlord, which is the only evidence of written notice Tenant points to, Tenant *threatened* termination as one of several "drastic steps" it might take "if Landlord and Tenant are unable to reach a mutually agreeable resolution that addresses both current circumstances and the anticipated post pandemic retail environment" (NYSCEF 34 at 2; *see also id.* ["***If*** HUGO BOSS proceeds with exercising this right ***it could close its store*** without penalty."] [emphasis added]). Tenant was keeping its options open. In another section of the letter, headed "Mutual Path Forward for Tenant and Landlord," Tenant struck a more conciliatory note, offering a compromise to resolve the parties'

ongoing disputes "[i]n order to avoid a termination or formal restructuring" (*id.* at 3). The April Letter was even labeled "Confidential Settlement Communication" (*id.* at 1), a clue to its diplomatic purpose. But whatever else it was, the April Letter did not constitute an election to terminate the Lease. And without evidence of such an election, Tenant cannot avail itself of section 15.2.

2. Section 15.1[d] of the Lease is Inapplicable

Tenant's reliance on Section 15.1 [d] of the Lease, which entitles Tenant to a rent abatement or reduction under specified circumstances, is similarly misplaced. This section applies only "[i]f the Premises are completely or partially destroyed or so damaged by fire or other hazard that the Premises cannot be reasonably used by Tenant or can only be partially used by Tenant. By its terms, then, relief under section 15.1 [d] is limited to situations in which (i) "the Premises" were "completely or partially destroyed or so damaged", (ii) such destruction or damage was caused "by fire or other hazard", and (iii) such destruction or damage rendered the Premises partially or wholly unusable.

Tenant fails to clear the first hurdle: while Tenant focuses on whether the pandemic constituted an "other hazard" that rendered the Premises partially or wholly unusable, it does not overcome the antecedent requirement that the Premises be "completely or partially destroyed" or "damaged." Tenant submits no evidence indicating that such destruction or damage to the Premises occurred. To be sure, Tenant's *use* of the Premises has suffered. But section 15.1 [d] is concerned with the Premises themselves – the "[a]pproximately 14,766 square feet of leasable area within the Shopping Center" (Lease §1.1 [definition of Premises]). And this physical space is not alleged to have incurred any damage (*see Sharde Harvey, DDS, PLLC v Sentinel Ins. Co., Ltd.*, 20CV3350PGGRWL, 2021 WL 1034259, at *6 [SD NY Mar. 18, 2021] ["The COVID-19

pandemic and shutdown orders may have created a 'loss of use' of property, but . . . they did not cause 'physical damage to property'"]; *10012 Holdings, Inc. v Sentinel Ins. Co., Ltd.*, 20 CIV. 4471 (LGS), 2020 WL 7360252, at *2 [SD NY Dec. 15, 2020] ["Nothing in the Complaint plausibly supports an inference that COVID-19 and the resulting Civil Orders physically damaged Plaintiff's property, regardless of how the public health response to the virus may have affected business conditions for Plaintiff."]). As a result, section 15.1 [d] is inapplicable to Tenant's claims.

3. Tenant's Common-Law Defenses and Counterclaims Fail as a Matter of Law

a. Frustration of Purpose – General Principles

Turning from the provisions of the Lease to arguments available at common law, Tenant contends that fact issues preclude summary judgment on its claim for rescission because "[t]he fundamental, express purpose of the Lease was entirely frustrated by COVID-19" (NYSCEF 35 at 12 [Tenant opp. to SJ]). The Court finds, however, that Tenant has failed to raise a genuine fact issue to warrant rescinding or reforming the Lease based on frustration of purpose.

"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" (*Ctr. for Specialty Care, Inc. v CSC Acquisition I, LLC*, 185 AD3d 34, 42 [1st Dept 2020]; *Crown IT Services, Inc. v Koval-Olsen*, 11 AD3d 263, 265 [1st Dept 2004] [same]). 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 [1st Dept 2011], quoting Restatement [Second] of Contracts § 265, Comment *a*). Stated differently, it addresses situations in which "[b]oth parties can perform but, as a result of unforeseeable events,

performance by party X would no longer give party Y what induced him to make the bargain in the first place . . . .[t]hus frustrated, Y may rescind the contract" (*United States v Gen. Douglas MacArthur Senior Vil., Inc.*, 508 F2d 377, 381 [2d Cir 1974].).

"The doctrine has its origin in what are known as the coronation cases" (*Matter of Fontana D'Oro Foods, Inc.*, 122 Misc 2d 1091, 1096 [Sup Ct 1983], *affd as mod*, 107 AD2d 808 [2d Dept 1985], *affd*, 65 NY2d 886 [1985]). The classic case is *Krell v. Henry* [1903] 2 KB 740 (Eng.), in which "the defendant was excused from his duty of payment for use of the plaintiff's apartment along the route of the coronation procession, when the procession was cancelled because the King became ill" (*id.*; *see also* George P. Bernhardt, Jack Fersko, *The Impacts of the Coronavirus Pandemic on Real Estate Contracts Force Majeure, Frustration of Purpose, and Impossibility*, Prob & Prop, January/February 2021, at 36 [noting that in *Krell* "[t]he court determined that there was an implied condition, and when that condition did not occur, the contract was voided" and "was based on analogy to an earlier case, *Taylor v. Caldwell* [1863] 122 Eng. Rep. 309 (Eng.), which relieved the parties from performance of a contract related to the rental of a concert hall after the concert hall burned down"]). "The modern version of this doctrine," however, "recognized by New York courts, has evolved as narrower than its application in *Krell*" (*Noble Americas Corp v Cit Group/Equip. Fin., Inc.*, 2009 N.Y. Slip Op. 33315[U] [Sup Ct, New York County 2009]).

Indeed, "this doctrine is a narrow one" (*Crown IT Services, Inc.*, 11 AD3d at 265). First of all, "there must be complete destruction of the basis of the underlying contract; partial frustration such as a diminution in business, where a tenant could continue to use the premises for an intended purpose, is insufficient to establish the defense as a matter of law" (*Robitzek Inv. Co. v Colonial Beacon Oil Co.*, 265 AD 749, 753 [1st Dept 1943]). "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.*, 185 AD3d at 42-43). Importantly, "[i]t is not enough . . . that the transaction will be less profitable for an affected party or even that the party will sustain a loss" (*Gap Inc. v Ponte Gadea New York LLC*, 20 CV 4541-LTS-KHP, 2021 WL 861121, at *7 [SD NY Mar. 8, 2021]).

In addition, "frustration of purpose . . . is not available where the event which prevented performance was foreseeable and provision could have been made for its occurrence" (*Ctr. for Specialty Care, Inc.*, 185 AD3d at 43; *Gap Inc. v Ponte Gadea New York LLC*, 20 CV 4541-LTS-KHP, 2021 WL 861121, at *8 [SD NY Mar. 8, 2021] [rejecting frustration defense despite government-ordered shutdown during pandemic because "the possibility of just such a prohibition was referenced in the Lease itself, defeating any claim that the possibility was 'wholly unforeseeable'"]; *Fifth Ave. of Long Is. Realty Assoc. v KMO-361 Realty Assoc.*, 211 AD2d 695, 696 [2d Dept 1995] ["Because the event which the defendant now claims frustrated its purpose in entering the lease was foreseeable, the defense of frustration of purpose is not available"]; *see United States v Gen. Douglas MacArthur Senior Vil., Inc.*, 508 F2d 377, 381 [2d Cir 1974] ["Discharge under this doctrine has been limited to instances where a virtually cataclysmic, wholly unforeseeable event renders the contract valueless to one party."]; *see also* Patrick J. O'Connor, *Allocating Risks of Terrorism and Pandemic Pestilence: Force Majeure for an Unfriendly World*, Construction Law, Fall 2003, at 5, 9 ["There is a strong current in American jurisprudence that, if at the time of contracting, the calamity that eventually befell the

promisor was foreseeable and no provisions were made to protect against it, relief would not be afforded."]).

As a corollary, the frustration doctrine is unavailing when the parties' contract made provision for the particular calamity that eventually befell the parties. That is why, as discussed *infra*, force majeure provisions can be fatal to a frustration of purpose defense. Such provisions tend to delineate *ex ante* which disruptions will excuse which obligations. Then, when one of those disruptions occurs, the parties are held to the allocation of risk agreed on in the contract; they cannot seek refuge, *ex post*, in the frustration of purpose doctrine (*Urban Archaeology Ltd. v 207 E. 57th St. LLC*, 68 AD3d 562 [1st Dept 2009] [holding "force majeure clause of the parties' lease agreement . . . conclusively establishe[d] 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"]).

b. <u>The Pandemic Has Not Frustrated the Purpose of the Lease</u>

A number of New York courts assessing commercial lease disputes amidst the COVID-19 pandemic have held that the temporary and evolving restrictions on a commercial tenant's business wrought by the public health emergency do not warrant rescission or other relief based on "frustration of purpose" (*e.g., Bay Plaza Community Ctr., LLC v Bronx Vistasite Eyecare, Inc.*, 2021 WL 1794562 [Sup Ct, New York County May 5, 2021] ["Unfortunately for [tenant], the fact that its business has suffered due [to] the pandemic is not a basis to invoke either doctrine [frustration of purpose or impossibility of performance]…. A temporary hardship, like the one described by [tenant], would vastly expand the reach of these doctrines if it could excuse a tenant's obligation to pay the rent."]; *1140 Broadway LLC v Bold Food, LLC*, 2020 N.Y. Slip Op. 34017[U], 3 [Sup Ct, New York County 2020] [that "tenant's business was devastated by a

pandemic . . . does not fit into the narrow doctrine of frustration of purpose"]; *35 E. 75th St. Corp. v Christian Louboutin L.L.C.,* 2020 N.Y. Slip Op. 34063[U], 3-4 [Sup Ct, New York County 2020] [rejecting defense even though "defendant's business model of attracting street traffic is no longer profitable because there are dramatically fewer people walking around due to the pandemic"]; *E. 16th St. Owner LLC v Union 16 Parking LLC*, 2021 N.Y. Slip Op. 30151[U], 3-4 [Sup Ct, New York County 2021] ["[t]hat their customer base was reduced because of the pandemic is not a basis to find that the frustration of purpose doctrine should apply here"]; *but see, e.g., Intern. Plaza Assoc. L.P. v Amorepacific US, Inc.*, 2020 WL 741660, at *1 [Sup Ct, New York County Dec. 14, 2020] [holding that the "changes in circumstances" presented by COVID-19 "cannot be shown by legal memoranda or oral arguments alone. They require discovery."])

The Southern District of New York reached a similar conclusion in *Gap Inc. v Ponte Gadea New York LLC*, 20 CV 4541-LTS-KHP, 2021 WL 861121, at *8 [SD NY Mar. 8, 2021]. The court found that the tenant in that case did not show that the purpose of the lease ("operation of a 'first-class retail business'") was "'so completely'" frustrated by the COVD-19 pandemic that 'the transaction [makes] little sense'" (*id.* [quoting *Crown IT Servs., Inc. v Koval-Olsen*, 11 AD3d 263, 265 [1st Dept 2004]). Significantly, Gap was able to operate its stores, albeit in a limited capacity, during the pandemic. In those circumstances, the court concluded that "[w]hile 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" (*id.* at *9).

The same is true here. Tenant's core argument is that the pandemic-related restrictions on its use of the leased premises has "entirely frustrated" the express purpose of the Lease. However, the facts, which are largely undisputed, do not support that conclusion. The pandemic

triggered several months of "shutdown" followed by an evolving set of capacity restrictions that have reduced (but not eliminated) Tenant's ability to generate revenue from its retail operation. While there are no guarantees, the path forward appears to be toward further relaxation or elimination of capacity restrictions (*see Governor Cuomo, Governor Murphy and Governor Lamont Announce Significant Easing Of COVID-19 Pandemic Restrictions on Businesses, Gatherings and Venues*, available at https:/www.governor.ny.gov/news/governor-cuomo-governor-murphy-and-governor-lamont-announce-significant-easing-covid-19 [accessed May 18, 2021]). Moreover, as Tenant acknowledged in the April Letter, the Store generated financial losses even before the pandemic (*see* NYSCEF 34 at 1 ["[T]his location loses millions of dollars a year even in the best of circumstances despite Tenant's best efforts . . ."]), and Tenant's senior executive stated that part of the Store's purpose was to promote "visib[ility]" (NYSCEF 30 ¶5), which is not frustrated by the dissipating capacity restrictions.

In sum, although the adverse economic effects of the pandemic undoubtedly are real and significant, they do not rise to the level of triggering an extra-contractual common law right to rescind a 13-year lease (see *BKNY1, Inc. v 132 Capulet Holdings, LLC*, 2020 N.Y. Slip Op. 33144[U], 3 [Sup Ct, Kings County 2020] ["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."]; *Penfield TK Owner, LLC v New York Style Bagels, LLC*, Index No. E2020003872 [Sup Ct, Monroe County March 11, 2021] [holding that "a three month disruption of a five year lease does not establish frustration of purpose"]).

c. The Parties Foresaw and Addressed a Risk of Government Restriction

Dismissal of Tenant's frustration of purpose claims is further supported by Section 26.9 ("Force Majeure") of the Lease, though not for the reasons suggested by Landlord.

Section 26.9 of the Lease does not, as Landlord suggests, unequivocally *mandate* Tenant's continued payment of rent during a Force Majeure. It provides, in relevant part:

> Landlord and/or Tenant shall be excused for the period of delay in the performance of any of their obligations hereunder, **except Tenant's obligations to pay any sums of money due under the terms of this Agreement**, and shall not be considered in default, when prevented from so performing because of Force Majeure . . . .

(NYSCEF 17 §26.9 [emphasis added]). This curious language requires some unpacking, but the most natural reading is that Tenant may be excused by a Force Majeure from a *delay* in meeting its obligations under the Lease *other than* the obligation to pay rent and other charges. But this case is not about an event that purportedly "delayed" Tenant from paying rent. It is about whether Tenant is excused *entirely* from paying rent, timely or otherwise, if the Landlord is unable to provide Tenant with full access to the leased premises. Section 26.9 does not speak directly to that issue.

By contrast, the force majeure provisions at issue in other pandemic-era cases such as *Victoria's Secret Stores, LLC v Herald Sq. Owner LLC*, 2021 WL 69146 [Sup Ct, New York County 2021] [force majeure "shall in no wise" forgive payment of rent], *Valentino U.S.A., Inc. v 693 Fifth Owner LLC*, 70 Misc 3d 1218(A) [Sup Ct, New York County 2021] ["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"], and *35 E. 75th St. Corp. v Christian Louboutin L.L.C.*, 2020 N.Y. Slip Op. 34063[U], 5 [Sup Ct, New York County 2020] ["t]he provisions of this Article shall not operate to excuse Tenant from prompt payment of

Rent"], upon which Landlord relies, are crystal clear on that point. In those circumstances, the courts readily concluded that the tenants could not rely upon "frustration of purpose" or similar common law doctrines to provide a remedy that they had expressly bargained away in the Lease (*Victoria's Secret*, 2021 WL 69146 at *1; *Valentino*, 70 Misc 3d 1218(A) at 1; *Louboutin*, 2020 N.Y. Slip Op. 34063[U] at 5). Those cases involved what in effect are "hell or high water" provisions, requiring payment of rent despite failure of performance by the lessor (*cf. Paulicopter-Cia. v Bank of Am., N.A.*, 182 AD3d 458, 459 [1st Dept 2020]).[7]

In any event, even though Section 26.9 does not expressly mandate continued payment of rent despite a force majeure, it nevertheless undermines Tenant's frustration of purpose defense (and its corresponding claims and counterclaims). As noted above, "frustration of purpose . . . is not available where the event which prevented performance was foreseeable and provision could have been made for its occurrence" (*Ctr. for Specialty Care, Inc.*, 185 AD3d at 43). Here, the risk of government restriction on use of the Premises (though not the specific precipitating event for such restriction) was not only foreseeable, it was actually foreseen and addressed in the text of Section 26.9.

The Southern District's decision in *Gap Inc. v Ponte Gadea New York LLC*, 2021 WL 861121, is again instructive. The lease at issue in that case defined Event of Default as occurring either when the tenant failed to cure nonpayment of rent when due within 5 days of notice by the landlord *or* when the tenant failed to cure violation any *other* covenant (*i.e.*, other than rent) within 30 days unless such cure could not be effected with reasonably diligence due to, among

[7] Section 26.9 does not provide any affirmative support for Tenant's position here. Tenant does not and cannot claim that it was "prevented from" paying rent during the pandemic, only that it should be relieved from that obligation.

other things, a "Force Majeure Event." The Lease defined "Force Majeure Event" to include "governmental preemption of priorities or other controls in connection with a national or other public emergency." In granting summary judgment dismissing the tenant's claim that New York's temporary "prohibition of non-essential business" warranted rescission of the lease due to "frustration of purpose," the court noted that "the possibility of just such a prohibition was referenced in the Lease itself, defeating any claim that the possibility was 'wholly unforeseeable'" (*id.* at *8).

The same is true here. In section 1.2 of the Lease, the parties defined "Force Majeure" to include "order or regulations of or by any government authority," but carved out from that definition any "causes delaying the payment of money due and payable hereunder." And in section 26.9, the parties "except[ed] Tenant's obligations to pay any sums of money due under the terms of this [Lease]" from the excusable delay provision. Although these provisions do not explicitly mandate payment of rent in the event of a government shutdown or capacity limitation, they do anticipate the risk of government orders or regulations and state specific grounds on which the parties' prompt performance of their obligations might be excused (or not). As in *Gap*, such a provision suffices to demonstrate that the government closures and capacity restrictions that interfered with Tenant's use of the Premises in this case were not "wholly unforeseeable."[8]

* * * *

[8] The Court need not peer beyond the four corners of the Lease to divine the effect of extrinsic factors on the parties' subjective expectations about the future. In that vein, the Court finds little interpretive value in "the movie *Contagion*" (NYSCEF 39 at 13 [Landlord reply]), despite Landlord's contention that it (somehow) evinces foreseeability in the Lease.

In sum, while the pandemic undeniably has hurt Tenant's business, the narrow doctrine of frustration of purpose is inapplicable as a matter of law. Therefore, Landlord is entitled to summary judgment dismissing Tenant's defenses and counterclaims in Action 1, to the extent they are based on frustration of purpose.

d. Impossibility

Tenant's claims, defenses, and counterclaims for rescission or reformation based on impossibility of performance are also unavailing. "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 Cent. Markets, Inc.*, 70 NY2d 900, 902 [1987]). Indeed, "[f]inancial difficulty or economic hardship, even to the extent of insolvency or bankruptcy," is not sufficient to invoke the doctrine (*Pettinelli Elec. Co., Inc. v Bd. of Ed. of City of New York (New-PS 43 and IS 44)*, 56 AD2d 520, 521 [1st Dept 1977], *affd sub nom. Pettinelli Electric Co., Inc. v Bd. of Educ. of City of New York*, 43 NY2d 760 [1977]; *Warner v Kaplan*, 71 AD3d 1, 5 [1st Dept 2009] ["where performance is possible, albeit unprofitable, the legal excuse of impossibility is not available"]).

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.*, 70 NY2d at 902; *see Gander Mtn. Co. v Islip U-Slip LLC*, 923 F Supp 2d 351, 362 [ND NY 2013], *affd*, 561 Fed Appx 48 [2d Cir 2014] ["Impossibility and frustration of purpose refer to two distinct doctrines in contract law, but both require unforeseeability."]; *see also* Gregg L. Weiner, et al., *New York Contract Law Remedies in the Face of Disruption Caused by COVID-19*, March 10, 2020 ["In the context of the coronavirus outbreak, impossibility may provide grounds for excusing

performance . . . even then, the party invoking the doctrine must show that the measures were unforeseeable and the risk associated with them could not have been built into the contract."]).

A number of courts have rejected the impossibility defense as an excuse for tenants not performing contractual obligations, such as payment of rent, during the COVID-19 pandemic (*e.g.*, *Maesa LLC v TPR Holdings LLC*, 2020 WL 5499231 [Sup Ct, New York County Sept. 9, 2020] ["defendant submits no evidence or explanation of how performance was impossible . . . rather than being difficult due to the pandemic"]; *Louboutin*, 2020 N.Y. Slip Op. 34063[U], 3-4 [Sup Ct, New York County 2020] ["the impossibility doctrine does not compel the Court to deny the instant motion. 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 v Bold Food, LLC*, 2020 N.Y. Slip Op. 34017[U], 4 [Sup Ct, New York County 2020] ["find[ing] that the impossibility doctrine does not compel the Court to deny the motion" where tenant's primary business – managing and consulting for a group of restaurants – was made unprofitable by the shutdown of the restaurant industry]).

This Court agrees with those decisions and finds that the impossibility defense does not apply here. As noted in *Gap*, the "impossibility defense fails because the very text of the Lease demonstrates that the conditions that [the tenant] claims render performance impossible were foreseeable" (2021 WL 861121, at *10, *citing Gander Mtn. Co.*, 923 F Supp 2d at 362). To the extent Tenant's impossibility argument is predicated on government orders – both during the shutdown period and afterward – the force majeure provisions in the Lease indicate that the risk of such disruptions were not unforeseeable. And for the reopening period, Tenant fails to raise a genuine issue of fact because it is undisputed that Tenant operated the Store during that time.

Although its business was made difficult by the pandemic, Tenant's performance under the Lease was not objectively impossible (*e.g.*, *Maesa LLC*, 2020 WL 5499231 ["defendant submits no evidence or explanation of how performance was impossible . . . rather than being difficult due to the pandemic"]).[9]

Therefore, Landlord is entitled to summary judgment dismissing Tenant's defenses and counterclaims in Action 1 to the extent they are based on Tenant's purported impossibility of performance.

e. Reformation

Tenant alleges, "[i]n the alternative to [its] claims relating to rescission of the Lease," that Tenant is entitled to 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 and that the Lease would terminate automatically when [Tenant] was deprived of its use of the Premises as originally contemplated by the Lease" (Compl. ¶104 [NYSCEF 1] [Action 2]). Tenant's

[9] Some courts have sustained claims of impossibility when the tenant's business was entirely shut down by government orders arising out of the pandemic (*see The Gap, Inc. v 170 Broadway Retail Owner, LLC*, 2020 N.Y. Slip Op. 33623[U], 6 [Sup Ct, New York County 2020] [finding that tenant's "action for a declaration that it is excused due to the impossibility of performance as a result of 'the destruction of the means of performance by an act of God, vis major, or by law', states a viable claim"]; *267 Dev., LLC v Brooklyn Babies and Toddlers, LLC*, 2021 N.Y. Slip Op. 30796[U], 4 [Sup Ct, Kings County March 15, 2021] ["find[ing] that performance under the subject lease was made impossible" because "the shutdown of [tenant's] business has precluded it from performing its contractual obligations" and "[t]he government shutdown was unforeseeable and could not have been built into the contract"]). As the facts of this case show, however, the path of pandemic-related restrictions has veered decidedly away from "impossibility" of performance. Moreover, unlike in the above cases, the Lease in the present case specifically addressed in a force majeure provision the possibility of government restrictions interfering with performance under the Lease.

counterclaim for reformation, which incorporates its allegations in Action 2, is dismissed for at least two reasons.

First, it is time-barred. A mistake claim "must be commenced within six years," counting from the time the mistake was allegedly made (*see* CPLR 213 [6]; *Matter of Wallace v 600 Partners Co.*, 86 NY2d 543, 547 [1995] ["The six-year Statute of Limitations of CPLR 213(6) began to run in 1960, at the time the asserted 'scrivener's error' was allegedly committed."]). Here, that means the reformation claim accrued in 2012, when the Lease was executed (*Natl. Amusements, Inc. v S. Bronx Dev. Corp.*, 253 AD2d 358, 358-59 [1st Dept 1998] ["[T]he underlying claim of mistake is untimely, having accrued when the subject lease was executed."]). The statute of limitations on Tenant's claim expired, therefore, no later than 2018. And "notwithstanding [the court's] comment in *Davis v Davis*, 95 AD2d 674 [1st Dept 1983]," on which Tenant relies, the limitations period is "not subject to a discovery accrual" (*Natl. Amusements*, 253 AD2d at 359).

Second, even if the counterclaim were timely, Tenant's allegations about mutual mistake are insufficient as a matter of law. "In the proper circumstances, mutual mistake or fraud may furnish the basis for reforming a written agreement" (*Chimart Assocs. v Paul*, 66 NY2d 570, 573 [1986]). "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 NY2d 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 AD2d 465, 468 [1st Dept 1997]). "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 NY2d at 574 [citation omitted]). "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" (*id.* at 571).

Tenant's assertion that "[i]t was the Parties' intent that [Tenant] would not pay rent or other consideration for the Premises if such use was rendered impossible or impracticable" is conclusory and entirely speculative and at odds with the Lease provisions described above, including an unconditional obligation to pay rent and a force majeure provision that identifies the risk of government closures but does not provide for relief from obligations to pay rent. Tenant does not put forward any extrinsic evidence about the contemporaneous intent of the parties in entering the Lease that could suggest a lack of meeting of the minds. And "[i]n the absence of the tender of extrinsic evidence to establish otherwise, the court establishes the meaning of [a] provision in question from within the four corners of the agreement and the general circumstances of the relation between the parties, including the subject matter of the agreement" (*Estate of Stravinsky*, 4 AD3d 75, 83 [1st Dept 2003], *citing Bensons Plaza v Great Atl. & Pac. Tea Co.*, 44 NY2d 791, 793 [1978]; *Gap*, 2021 WL 861121 at *12 [the tenant's "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"]).

Therefore, Landlord is entitled to summary judgment dismissing Tenant's counterclaim for reformation.

f. Money Had and Received and Unjust Enrichment

Finally, the existence of the Lease precludes Tenant's quasi-contract counterclaims seeking reimbursement of funds paid based upon the doctrines of "money had and received" and unjust enrichment, respectively, because "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 388 [1987]).[10]

B. Landlord is Entitled to Summary Judgment Dismissing Tenant's Claims in Action 2 (Other Than Tenant's Sixth Cause of Action)

Because Tenant's affirmative causes of action in Action 2 mirror its defenses and counterclaims in Action 1, Landlord's motion for summary judgment dismissing Tenant's complaint (other than the sixth claim) is granted for the reasons described above.

1. Rescission (Frustration of Purpose) [First Cause of Action]

This claim is dismissed for the reasons set forth in Part A [3] [b]-[c], *supra*.

2. Rescission (Impossibility of Performance) [Second Cause of Action]

This claim is dismissed for the reasons set forth in Part A [3] [d], *supra*.

3. Declaratory Judgment (Section 15.1 [d]) [Third Cause of Action]

This claim is dismissed for the reasons set forth in Part A [2], *supra*. Moreover, "[w]hen a court resolves the merits of a declaratory judgment action against the plaintiff, the proper course is not to dismiss the complaint, but rather to issue a declaration in favor of the defendants" (*Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954 [1989]). Therefore, the

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[10] To the extent Tenant's counterclaims in Action 1 also encompass the surviving Sixth Cause of Action in Action 2, the corresponding counterclaim in Action 1 is dismissed, without prejudice, as duplicative.

Court declares that section 15.1 [d] of the Lease does not entitle Tenant to an abatement or reduction of rent as a result of COVID-19 constituting a "hazard."

4. Declaratory Judgment (Section 15.2) [Fourth Cause of Action]

This claim is dismissed for the reasons set forth in Part A [1], *supra*. As with the Third Cause of Action, the Court also must issue a declaration in Landlord's favor on this count. Therefore, the Court declares that section 15.2 of the Lease does not entitle Tenant to terminate the Lease under the circumstances presented here.

5. Reformation [Fifth Cause of Action]

This claim is dismissed for the reasons set forth in Part A [3] [e], *supra*.

6. Money Had and Received [Seventh Cause of Action] and Unjust Enrichment [Eighth Cause of Action]

This claim is dismissed for the reasons set forth in Part A [3] [f], *supra*.

* * * *

Accordingly, it is

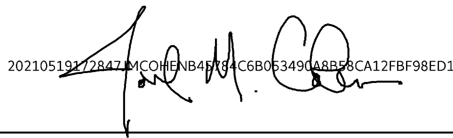
ORDERED that Landlord's motion for summary judgment (motion sequence 001) in Action 1 (158385/2020) is **GRANTED**, such that (i) Landlord is awarded judgment on its first and second causes of action, (ii) Tenant's affirmative defenses and counterclaims are dismissed, and (iii) and the case is disposed; it is further

ADJUDGED AND DECLARED that Section 15.1 [d] of the Lease does not entitle Tenant to an abatement or reduction of rent as a result of COVID-19 constituting a "hazard;" it is further

ADJUDGED AND DECLARED that Section 15.2 of the Lease does not entitle Tenant to terminate the Lease under the circumstances presented here; and it is further

ORDERED that Landlord submit a proposed judgment to the Court, including a bill of costs in support of its application for attorneys' fees, within 7 days of this Decision and Order.

This constitutes the Decision and Order of the Court.



5/19/2021		JOEL M. COHEN, J.S.C.
DATE		

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