SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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DURST PYRAMID LLC,

Plaintiff,

- v -

SILVER CINEMAS ACQUISITION CO. D/B/A LANDMARK THEATRES, SILVER HOLDCO INC.

Defendants.

INDEX NO. 656926/2020

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134

were read on this motion for SUMMARY JUDGMENT.

This is a dispute, one of many in New York courts, between a commercial tenant and its former landlord about whether the tenant may be relieved of its obligation to pay rent due to disruptions caused by the COVID-19 pandemic. On both sides are sophisticated commercial entities. The tenant here is Silver Cinemas Acquisition Co. ("Tenant"), which entered a twenty-year lease with Durst Pyramid, LLC ("Landlord") to operate a movie theater in a building located at 625 West 57th Street in Manhattan (the "Premises"). Tenant had already fallen behind on rent payments to Landlord when, in March 2020, government orders shuttered movie theaters in New York entirely. At that point, Tenant stopped paying rent entirely. Then in August 2020, it surrendered physical possession of the Premises. And in December 2020, Landlord initiated this lawsuit against Tenant and its guarantor, Silver Holdco Inc. ("Guarantor"), to collect unpaid rent arrears and other charges (NYSCEF 16).

Now, Landlord moves for summary judgment on those claims.[1] For the reasons discussed *infra*, Plaintiff's motion is **granted in part and denied in part**. Summary judgment is granted with respect to Landlord's First Cause of Action, premised on unpaid Rent Arrears from January 1, 2020 through September 11, 2020, in the amount of $1,082,317.00. Summary judgment is also granted dismissing Defendants' Affirmative Defenses and First, Third, and Fourth Counterclaims. But summary judgment is denied with respect to Landlord's claims seeking a Declaratory Judgment (Second Cause of Action), Deficiency Damages (Third Cause of Action), and Property Damage (Fourth Cause of Action), and Defendants' Second Counterclaim. Defendants' cross-motion for partial summary judgment, as well as its cross-motion seeking leave to amend the answer, are also **denied**.

DISCUSSION

To prevail on a motion for summary judgment, the movant "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'" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993] [citation omitted]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64

[1] A brief note on process: Motions for summary judgment require Rule 19-a statements, but such a statement "is not a substitute for including a Statement of Facts (with citations to the record) in the Memorandum of Law" (Part 3 Practices and Procedures [emphasis in original]). A statement of facts is an integral part of a summary judgment brief, not merely an appendix. And counsel may not evade the applicable word-count limits by omitting facts sections from their briefs. Here, Landlord's opening submission went on for *414 pages*, including a nearly 7,000-word memorandum of law and numerous exhibits, yet did not include a facts section (NYSCEF 46). Instead, counsel referred the Court to four separate affidavits, totaling an *additional* 11,816 words (*id.* at 3-4; *see* NYSCEF 12-15). Doing so, in the Court's view, circumvented the word-count limit set forth in the Commercial Division Rules. While the Court will not strike the opening brief in this instance, counsel are advised that such submissions will not be considered in the future.

NY2d 851, 853 [1985]). If a prima facie showing is made, the burden then shifts to the party opposing summary judgment to present evidentiary facts sufficient to raise triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The court is required to examine the evidence in a light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]).

A. Summary Judgment against Tenant

1. Breach of Contract for Unpaid Rent Arrears (First Cause of Action)

Landlord is entitled to summary judgment against Tenant on its First Cause of Action for breach of contract, based on unpaid Rent Arrears under the Lease from January 1, 2020, through September 11, 2020, in the amount of $1,082,317.00. Landlord's evidentiary submission shows: (i) the existence of a valid, binding Lease (Pl.'s Rule 19-a stmt. of undisputed facts ["SUF"] ¶ 1 [NYSCEF 47]; Defs.' resp. to SUF ¶ 1 [NYSCEF 123]); (ii) the Lease provisions required Tenant to pay rent and additional charges "without offset, reduction, counterclaim and/or deduction" (SUF ¶¶ 3-4; Lease § 3.2 [NYSCEF 19]); (iii) Tenant's undisputed failure to pay rent due and owing (Neil Aff. ¶¶ 13-17, 27-32 [NYSCEF 14]; and (iv) Landlord's calculation of the Rent Arrears in the amount of $1,082,317.00 (Schuster Aff. ¶ 6 [NYSCEF 13]; NYSCEF 38 [calculation of unpaid amounts]). That evidence establishes a prima facie case for entitlement to summary judgment (*Thor Gallery at S. Dekalb, LLC v Reliance Mediaworks (USA) Inc.*, 143 AD3d 498, 498 [1st Dept 2016] [granting landlord summary judgment where it "established prima facie the existence of the lease . . . and the tenant's failure to pay the rent, the amount of the underpayment, and the calculation of the amounts due under the lease"]).

Tenant fails to raise a triable issue of fact concerning its obligation to pay the Rent Arrears. At the threshold, the Court notes that although Tenant's arguments and defenses rely

heavily upon disruptions caused by the COVID-19 pandemic, the unpaid Rent Arrears date back to January 2020, two months before government orders started to disrupt Tenant's business (*see* Compl. ¶ 23 [NYSCEF 1]; Neil Aff. ¶¶ 13-14 [NYSCEF 30]). Landlord submits a letter dated February 12, 2020, for instance, informing Tenant of an unpaid balance totaling $182,076.47 (Neil Aff. ¶ 14). Further, in an email dated February 21, 2020, Tenant expressed concerns about "our need for some level of economic relief since the theatre, ***even if every seat was sold at every performance***, will likely lose money due, in great part, to the rent obligation" (NYSCEF 31 at 2 [emphasis added]). The pandemic, notably, is not mentioned by Tenant then as a reason for not paying rent (*id.*). In its motion papers, Tenant does not adequately address this early-2020 period or explain how certain defenses, such as frustration of purpose and impossibility, justify non-payment during that period. But in any event, even if Tenant's arguments extended to the full period of non-payment, summary judgment in Landlord's favor is warranted.

First, Tenant's defenses based on frustration of purpose and impossibility are unavailing. A steady drumbeat of New York cases have rejected those doctrines as defenses to claims for unpaid rent, despite government restrictions that temporarily limited, or even outlawed, commercial tenants' businesses (*see, e.g.*, *558 Seventh Ave. Corp. v Times Sq. Photo Inc.*, 194 AD3d 561, 561 [1st Dept 2021] ["reject[ing] defendants' affirmative defenses of frustration of purpose and impossibility" even though "tenant's business, an electronic sales and repair store, was shuttered for a period as a result of pandemic-related executive orders"]; *Knickerbocker Retail LLC v Bruckner Forever Young Social Adult Day Care Inc.*, 204 AD3d 536, 537 [1st Dept 2022] [dismissing affirmative defenses of frustration of purpose and impossibility even though Executive Order "directed adult congregate care facilities such as the tenant's to suspend operations during the pandemic"]; *Fives 160th, LLC v Zhao*, 204 AD3d 439, 440 [1st Dept 2022]

["determin[ing] that the pandemic cannot serve to excuse a party's lease obligations on the grounds of frustration of purpose or impossibility"]; *A/R Retail, LLC v Hugo Boss Retail, Inc.*, 72 Misc 3d 627, 642 [Sup Ct, NY County 2021] [rejecting frustration of purpose and impossibility defenses by luxury retail store closed for several months during pandemic]).

The same result holds here. Starting with frustration of purpose, the defense "is not available where the event which prevented performance was foreseeable and provision could have been made for its occurrence" (*Hugo Boss*, 72 Misc 3d at 642, quoting *Ctr. for Specialty Care, Inc. v CSC Acquisition I, LLC*, 185 AD3d 34, 43). The Lease anticipates the risk of disruption to Tenant's use of the Premises and, as far as the payment of rent is concerned, allocated that risk to Tenant. These sophisticated parties agreed that Tenant would not be "entitled to any abatement or diminution of rent," even "if by reason of an event of Force Majeure . . . Tenant is otherwise unable to use and/or occupy the Premises for the conduct of its business" (Lease § 15.2). The contractual definition of "Force Majeure" specifically includes "governmental restriction[s], governmental preemption in connection with a national emergency," as well as "acts of God" (*id.* at 6-7). The Lease also makes clear that "the non-payment of money" shall, "[u]nder no circumstances," constitute "a Force Majeure delay" (*id.* at 7). And, for good measure, the Lease confirms that Tenant's obligation to pay rent was "without offset, reduction, counterclaim and/or deduction" (*id.* § 3.2; *see Gap Inc. v Ponte Gadea New York LLC*, 524 F Supp 3d 224, 234 [SD NY 2021] [dismissing frustration of purpose defense where "the possibility of just such a prohibition was referenced in the Lease itself, defeating any claim that the possibility was 'wholly unforeseeable'"]). Read as a whole, the Lease refutes the allegation that government restrictions on Tenant's use of the Premises were "wholly unforeseeable," and therefore frustration of purpose does not apply.

That movie theaters like Tenant's were temporarily forced to shut down operations – not just operate at reduced capacity – does not change the result. Even when a commercial tenant's business "was shuttered for a period as a result of pandemic-related executive orders," New York courts still have found "the purpose of the lease . . . not frustrated" (*Times Sq. Photo Inc.*, 194 AD3d at 562; *see, e.g.*, *Knickerbocker Retail*, 204 AD3d at 537 [dismissing frustration of purpose defense even though Executive Order "directed adult congregate care facilities such as the tenant's to suspend operations during the pandemic"]; *Gap, Inc. v 44-45 Broadway Leasing Co. LLC*, 2022 NY Slip Op 03980 [1st Dept June 16, 2022] ["frustration of purpose is not implicated by temporary governmental restrictions on in-person operations"] [internal citation omitted]; *The Ruxton Tower Ltd. Partnership v Cent. Park Taekwondo, LLC*, 2021 NY Slip Op. 32583[U] [Sup Ct, New York County 2021] [dismissing frustration of purpose defense even though "[e]xecutive orders requiring the closure of gyms and fitness facilities beginning on March 16, 2020, necessitated the closure of the Taekwondo school."]; *Avamer 57 Fee LLC v Gorgeous Bride, Inc.*, 2022 NY Slip Op. 31453[U], *2 [Sup Ct, New York County 2022] [dismissing frustration of purpose defense even though "high-end salon . . . was closed by administrative order for a number of months during the pandemic"]).

And movie theaters are not *sui generis*. The same government orders that shut down movie theaters also closed other businesses, such as gyms, indoor fitness studios, and hair salons, similarly reliant on in-person operation (NYSCEF 122 at 9 [Defs.' mem. of law in opp. to mot. for S.J.]). Whatever business the tenant engages in, a temporary closure of that business within the span of a much longer lease generally does not give rise to a viable frustration defense. Here, Tenant absorbed a five-month closure. Movie theaters were forced to close in March 2020 (Cherniak Aff. ¶ 37 [NYSCEF 107]), and Tenant surrendered the Premises in August 2020 (SUF

¶ 17). "A five-month closure," in a 20-year lease, "d[oes] not frustrate the overall purpose of the lease" (*Cent. Park Taekwondo*, 2021 NY Slip Op. 32583[U], *11 ["[T]he defendant vacated the premises as of August 31, 2020, after the restrictions [on indoor fitness classes] had been in place for approximately five months only."]; *CAB Bedford LLC v Equinox Bedford Ave, Inc.*, 2020 NY Slip Op. 34296[U], *4 [Sup Ct, New York County 2020] ["A gym being forced to shut down for a few months does not invalidate obligations in a fifteen-year lease."]; *Williamsburg Climbing Gym Co., LLC v Ronit Realty LLC*, 120CV2073FBRML, 2022 WL 43753, at *3 [ED NY Jan. 5, 2022] ["Against a ten-year time horizon, this temporary period does not 'so completely frustrat[e]' the Lease as to terminate it"] [citation omitted]).

Tenant insists that it "never would have signed a lease requiring it to pay a full year's rent or more while obtaining absolutely no consideration because it was legally impossible to operate a movie theater out of the Premises during such time period" (NYSCEF 122 at 9 [Defs.' mem. of law in opp. to mot. for S.J.]). Some version of that argument could be made, of course, in virtually every case arising in these circumstances. But the legal inquiry in these cases "is guided principally by the terms of the Lease to which these sophisticated commercial entities agreed" (*Hugo Boss*, 72 Misc 3d at 631), not by Tenant's subjective expectations in entering the Lease. "There is no doubt that [Tenant] would not have entered into the lease if [it] knew there would be a pandemic that would shut down [movie theaters] for most of 2020," "[b]ut that is not sufficient to invoke the frustration of purpose doctrine" (*Equinox Bedford Ave*, 2020 NY Slip Op. 34296[U], *4-5).

Tenant's defense based on impossibility fares no better. "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]). As with frustration of purpose, "the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract" (*id.* 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."]). And here, for the reasons stated above, the "impossibility defense fails because the very text of the Lease demonstrates that the conditions that [the tenant] claims render performance impossible were foreseeable" (*Gap*, 524 F Supp 3d at 237). To the extent Tenant's impossibility argument is predicated on government orders, the Lease provisions indicate that the risk of such disruptions were not unforeseeable (*Hugo Boss*, 72 Misc. 3d at 649).

Second, "the failure of consideration argument fails for the same reasons that the frustration of purpose and impossibility arguments fail" (*Valentino U.S.A., Inc. v 693 Fifth Owner LLC*, 203 AD3d 480 [1st Dept 2022], citing *Guthartz v City of New York*, 84 AD2d 707, 708 [1st Dept. 1981]).

Third, and finally, the alleged flaws in Landlord's Default Notice and Termination Notice do not preclude summary judgment in Landlord's favor. "[T]he executive orders cited by [Tenant] did not suspend a commercial tenant's obligation to pay rent" (*Equinox Bedford Ave*, 2020 NY Slip Op. 34296[U], *3-4; *135 E. 57th St., LLC v Saks Inc.*, 2021 NY Slip Op. 30270[U], *9 [Sup Ct, New York County 2021] ["[N]either the executive nor the legislative branches have proscribed the type of contractual remedy against Defendant at issue here, and . . . therefore, Plaintiff here may obtain a judgment for unpaid rent"]). The Notices did not violate the State's moratorium on commercial evictions because they were neither an "initiation of" nor an "enforcement of" an eviction proceeding (*see Natixis, New York Branch v 20 TSQ Lessee*

LLC, 71 Misc 3d 1201(A) [Sup Ct, New York County 2021] ["[R]uling on Lenders' entitlement to judgment does not contravene the EO's moratorium on foreclosure 'enforcement'" because "[t]he latter refers to . . . an event that follows, and is distinct from, the award of judgment entitling the creditor to enforce the terms of the loan"]). In any event, Tenant never faced eviction here because it chose to surrender possession of the Premises in August 2020, before the termination went into effect (SUF ¶¶ 10, 13-17; *compare with, e.g.*, *Ronald Benderson 1995 Tr. v Erie County Med. Ctr. Corp.*, 72 Misc 3d 502, 509 [Sup Ct, Erie County 2021] [granting *Yellowstone* injunction to preserve status quo after landlord directed tenant to "quit and surrender" premises], *affd*, 203 AD3d 1554 [4th Dept 2022]).

2. Declaratory Judgment (Second Cause of Action)

This claim is discussed in the context of Guarantor's liability in Part B.2, *infra*.

3. Breach of Contract for Deficiency Damages (Third Cause of Action)

Landlord is not entitled to summary judgment, however, on its claim for Deficiency Damages under section 20.4 [A] of the Lease. The record raises fact questions as to whether the Deficiency is enforceable as a measure of liquidated damages. "A contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation" (*Truck Rent A–Ctr. v Puritan Farms 2nd, Inc.*, 41 NY2d 420, 425 [1977]; *VII MP Miami Hotel Owner, LLC v Hycroft, LLC*, 2022 NY Slip Op 03983 [1st Dept June 16, 2022]). On the other hand, "[i]t is plain that a provision which requires, in the event of contractual breach, the payment of a sum of money grossly disproportionate to the amount of actual damages provides for penalty and is unenforceable" (*Truck Rent*, 41 NY2d at 424).

Here, Landlord is seeking to recover unpaid rent in the amount of $1,082,317 but claims the Deficiency provision entitles it to "at least" an additional $46,067,473.99 (Compl. ¶ 118). Tenant points to evidence showing "either that damages flowing from a prospective [breach] were readily ascertainable at the time [the parties] entered into their [ ] agreement, or that the [liquidated damages clause] is conspicuously disproportionate to these foreseeable losses" (*Hycroft*, 2022 NY Slip Op 03983, at *1). Tenant asserts, with evidence, that Landlord "is attempting to re-let the Premises," and "[i]f successful in re-letting," would reap "a massive windfall . . . as high as 20 times the amount of actual out-of-pocket costs" (Cherniak Aff. ¶ 94). In reply, Landlord does not attempt to defend the amount of Deficiency Damages sought in the Complaint, but insists it "is seeking summary judgment as to liability" only (NYSCEF 133 at 13 [Pl.'s reply]). But on a claim seeking to enforce a liquidated damages provision, liability is inextricably intertwined with the amount of damages sought. As a result, summary judgment is denied on this cause of action.

4. Breach of Contract for Damage to the Premises (Fourth Cause of Action)

Fact questions also preclude summary judgment on Landlord's claim for property damage. Section 22.1 of the Lease requires Tenant to "quit and surrender the Premises in good order and condition." Simply put, the parties dispute whether that happened here. Landlord submits an affidavit stating that Tenant caused "substantial damage to the Premises" (Neil Aff. ¶ 37). Among many other things, Landlord asserts that Tenant left the floor "unusable with countless bolts raised above it and protruding through it" (*id.* ¶ 57). For its part, Tenant submits an affidavit calling those allegations "false and untrue" (Fant Aff. ¶¶ 10, 41-49 [NYSCEF 116]; *id.* ¶ 44 ["[T]he floor was left in such manner so that Plaintiff can simply bolt its own replacement seating to the floor and carpet with minimum effort and cost."]). Tenant also

disputes Landlord's estimated costs for replacing various parts in the Premises (*see id.* ¶¶ 29-30, 32). Based on this record, therefore, the Court finds the existence of fact issues concerning whether Tenant satisfied section 22.1 of the Lease.

B. Summary Judgment against Guarantor

1. Breach of Contract for Unpaid Rent Arrears (First Cause of Action)

For the reasons set forth in Part A.1, *supra*, Landlord is entitled to summary judgment against Guarantor on its First Cause of Action for breach of contract, based on unpaid Rent Arrears under the Lease from January 1, 2020, through September 11, 2020, in the amount of $1,082,317.00. Guarantor is liable under the terms of the Guaranty (SUF ¶ 2; NYSCEF 109 §§ 2-3), the existence and validity of which Defendants do not dispute (Defs.' resp. to SUF ¶ 2).

2. Declaratory Judgment (Second Cause of Action)

In its Second Cause of Action, Landlord seeks a declaratory judgment that (A) Tenant failed to surrender the Premises in the condition required by the Lease and thereby failed to satisfy the conditions under Section 3B of the Guaranty; and (B) Guarantor remains liable under the Guaranty and the Lease for Damages (Compl. ¶ 110). The two findings intertwine. Under the Guaranty, Guarantor's liability "shall terminate on the date (the 'Surrender Date') that Tenant surrenders vacant possession of the Premises to Landlord in the condition required by the Lease" (Guaranty ¶ 3 [B]). And the Lease requires that Tenant "remove" from the Premises "Tenant's Property on Surrender" (Lease § 22.1). That term is defined to include "all movable property, furniture, furnishings and trade fixtures installed by Tenant on the Premises ***but not affixed to the realty so that they can be removed without material damage***" (*id.* § 1.1 [emphasis added]). In tandem, therefore, those provisions tie Guarantor's liability to the condition of the Premises on Tenant's surrender.

Summary judgment on this claim is denied because there are fact questions surrounding Tenant's surrender of the Premises. *First*, as discussed *supra*, the parties dispute whether, and to what extent, Tenant caused "material damage" to the Premises (*see* Neil Aff. ¶ 37; Fant Aff. ¶¶ 10, 29-30, 32, 41-49). And *second*, the parties also dispute whether certain Seats, Lights, and Kiosks, which Tenant removed, constituted Tenant's Property on Surrender. Landlord contends they were not. In its view, the Seats, Lights, and Kiosks cannot be considered Tenant's Property because they were "affixed to the realty," regardless of whether their removal caused "material damage" (NYSCEF 133 at 11 [Pl.s' reply mem. of law]).

Even if Landlord's interpretation were reasonable, it is not the only reasonable interpretation. Arguably, sections 1.1 and 22.1 of the Lease requires Tenant to remove "moveable property" other than items "affixed to realty" in such a manner that removal could cause "material damage." Under that reading, Tenant's removal of the Seats, Lights, and Kiosks complied with section 22.1 unless the removal caused "material damage" (which, again, is a fact dispute of its own). In addition, the parties dispute whether the Seats, Lights, and Kiosks "became [Landlord's] property" under section 13.4 of the Lease when Landlord issued a Work Allowance to Tenant for, among other things, "Stadium Seating Installation" (Neil Aff. ¶ 47; Neil Aff., Ex. S [NYSCEF 34]). Tenant argues that the Work Allowance was used to build "the platform upon which seating was affixed," not the seating itself (Cherniak Aff. ¶ 74). And in any event, section 13.4 specifically exempts "Tenant's Property on Surrender."

3. Breach of Contract for Deficiency Damages (Third Cause of Action)

For the reasons set forth in Part A.3, *supra*, summary judgment on this claim against Guarantor is denied.

4. Breach of Contract for Damage to the Premises (Fourth Cause of Action)

For the reasons set forth in Part A.4, *supra*, summary judgment on this claim against Guarantor is denied.

C. Defendants' Affirmative Defenses and Counterclaims

1. Affirmative Defenses

The branch of Landlord's motion seeking to strike Defendants' affirmative defenses is granted. Defendants raise sixteen affirmative defenses in its Answer (NYSCEF 17). To the extent they repeat Tenant's arguments about frustration of purpose, impossibility, and other arguments relating to the pandemic, the affirmative defenses are dismissed for the reasons stated in Part A.1, *supra* (*see* Second Affirmative Defense [frustration of purpose]; Third Affirmative Defense [impossibility]; Fifth Affirmative Defense [illegality]; Seventh Affirmative Defense [condemnation, casualty, and force majeure provisions]; Eighth Affirmative Defense [intervening acts]; Thirteenth Affirmative Defenses [unconscionability]).

The remaining affirmative defenses, a laundry list of "bare legal conclusion[s] without supporting facts," are also dismissed (*Commissioners of State Ins. Fund v Ramos*, 63 AD3d 453, 453 [1st Dept 2009] [dismissing affirmative defense]; CPLR 3013 ["Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."]; *see also Scholastic Inc. v Pace Plumbing Corp.*, 129 AD3d 75, 79 [1st Dept 2015] ["Defendant failed to properly plead the statute of limitations, because its inclusion of the defense within a laundry list of predominantly inapplicable defenses did not provide plaintiff with the requisite notice."]). Tenant's papers on this motion do not address, much less salvage, these residual affirmative defenses.

2. Counterclaims

Landlord also seeks summary judgment dismissing Defendants' four counterclaims: (1) Declaratory Judgment for Rescission of the Lease and Guaranty; (2) Declaratory Judgement that Guarantor has no further liability under the Guaranty; (3) Money Damages for Improper Draw Down of Letter of Credit; and (4) Commercial Tenant Harassment. The discussion in Parts A and B, *supra*, dispose of this branch of Landlord's motion:

Summary judgment is granted dismissing the First Counterclaim because, for the reasons stated in Parts A.1 and B.1, *supra*, the Court finds that the COVID-19 pandemic did not relieve either Tenant or Guarantor's obligations under their respective contracts with Landlord.

Summary judgment (in both directions) is denied with respect to the Second Counterclaim for the reasons stated in Part B, *supra*.

Summary judgment is granted with respect to the Third and Fourth counterclaims because, for the reasons stated in Part A.2., *supra*, neither the Default Notice nor the Termination Notice were invalid.

D. Cross-Motion for Leave to Amend the Answer

Defendants' cross-motion, seeking leave to amend the answer to add a counterclaim for defamation, is denied. Under CPLR 3025 [b], leave to amend "shall be freely given" provided that the movant satisfies its burden of showing that "the proffered amendment is not palpably insufficient or clearly devoid of merit" (*Fairpoint Cos., LLC v Vella*, 134 AD3d 645, 645 [1st Dept 2015] [internal citation omitted]). "[I]n determining whether to grant leave to amend the court must examine the underlying merits of the causes of action asserted therein, since to do otherwise would constitute a waste of judicial resources" (*Glenn Partition, Inc. v Trs. of Columbia Univ. in N.Y.*, 169 AD2d 488, 489 [1st Dept 1991]). Accordingly, "[a] proposed

amendment that cannot survive a motion to dismiss should not be permitted" (*Scott v Bell Atl. Corp.*, 282 AD2d 180, 185 [1st Dept 2001]; *Olam Corp. v Thayer*, 2021 NY Slip Op. 30345[U], *3-4 [Sup Ct, New York County 2021]).

Under New York law, a claim for defamation must allege "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se" (*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]). "A false statement constitutes defamation per se when it charges another with a serious crime or tends to injure another in his or her trade, business or profession" (*Geraci v Probst*, 61 AD3d 717, 718 [2d Dept 2009]).

But New York law also recognizes that certain kinds of statements are "absolutely privileged," and therefore immune from defamation liability. As relevant here, Civil Rights Law § 74 provides that "[a] civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding." "To be 'fair and true,'" and thus receive the protection of the statute, "the account need only be 'substantially accurate'" (*McRedmond v Sutton Place Rest. and Bar, Inc.*, 48 AD3d 258, 259 [1st Dept 2008], quoting *Holy Spirit Assn. for Unification of World Christianity v New York Times Co.*, 49 NY2d 63, 67 [1979]). And "[t]he case law has established a liberal interpretation of the 'fair and true report' standard of Civil Rights Law § 74 so as to provide broad protection to news accounts of judicial or other official proceedings" (*Cholowsky v Civiletti*, 69 AD3d 110, 114 [2d Dept 2009]). Among other things, the statute bars defamation claims against individuals who make statements about judicial proceedings to the press (*Ford v Levinson*, 90 AD2d 464, 465 [1st Dept 1982] [holding that Civil Rights Law § 74 barred claim based on "newspaper article attributing certain statements to the defendant" about a prior case]).

Here, Defendants seize on a statement attributed to Landlord in an article that appeared in IndieWire, "a national media outlet in the film industry," in July 2021 (Proposed Am. Counterclaims ["PAC"] ¶ 60 [NYSCEF 115]). The subject of the article is Landlord's filing of this lawsuit (*see* PAC, Ex. 1 ["Landmark Theatres Hit with $48 Million Lawsuit Over Departure from NYC's 57 West"]). And in reporting on the allegations here, the article singled out some details for the reader:

> The company also claims that, since announcing its permanent closure last August, Landmark removed 700 seats along with light fixtures and ticket kiosks. Durst continues to show the space to prospective tenants. Said spokesman Jordan Barowitz, "We are still showing the space — ***minus the stuff they stole***"

(*id.* [emphasis added]). According to Defendants, this statement about stealing Landlord's "stuff" "is false and defamatory because Defendant Tenant did not 'steal' any of Landlord's property, but rather, only removed property belonging to it and constituting 'Tenant's Property on Surrender', which it was contractually required to remove on surrender of the Premises, under Section 22.01 of the Lease" (PAC ¶ 62). The accusation, Defendants now allege, "subject [them] to hatred, distrust, ridicule, contempt, and disgrace" (*id.* ¶ 67). Indeed, Defendants claim that the remark to IndieWire caused them at least $50 million in money damages, plus at least $25 million in punitive damages (*id.* ¶ 70).

The proposed defamation claim fails as a matter of law because the statement attributed to Landlord is privileged under Civil Rights Law § 74 as "a fair and true report of [a] judicial proceeding" (*Panghat v New York State Div. of Human Rights*, 89 AD3d 597, 598 [1st Dept 2011] ["den[ying] the motion for leave to amend the claim as the proposed amendments were not

viable and could not overcome the privilege under Civil Rights Law § 74"]).[2] Stating that Defendants "stole" "stuff" is a "substantially accurate," if legally imprecise, account of Landlord's allegations in the Complaint. To "steal" something is "to take or appropriate without right or leave" (Merriam-Webster Online Dictionary, "steal," *available at* https://www.merriam-webster.com/dictionary/steal). The Complaint alleges that Defendants took Seats, Light Fixtures, and Kiosks – "stuff" – without the contractual right to do so (*see* Compl. ¶¶ 55, 59). Thus, the comment in the article conveys the substance of Landlord's allegations, even if the word "steal" carries negative "denotative meanings" (*Holy Spirit Ass'n*, 49 NY2d at 68 [cautioning that statements should not be "parsed and dissected on the basis of precise denotative meanings which may literally, although not contextually, be ascribed to the words used"]).

Defendants construe section 74's protection too narrowly. That the Complaint "does not include a cause of action for conversion or replevin" (NYSCEF 134 at 3 [Defs.' reply in supp. of cross-mot.]) is immaterial. At bottom, in both the Complaint and in the article, Landlord accuses Defendants of taking property without permission. The spokesperson was not purporting to recite Landlord's specific theories of liability in the case, and his words "should not be dissected and analyzed with a lexicographer's precision" (*Holy Spirit Ass'n*, 49 NY2d at 68). Moreover, any confusion about the nature of Landlord's claim is put to rest in the article itself, which describes the contractual basis for the lawsuit (PAC, Ex. 1 [explaining Landlord's contention that

[2] The following analysis is limited by the arguments advanced – and not advanced – by the parties. First, Landlord does not argue that Defendants have failed to state the elements of a defamation claim, only that Landlord is immune from liability under Civil Rights Law § 74. As such, this discussion assumes, without deciding, that Defendants can make out a prima facie case for defamation. Second, Defendants do not argue that Civil Rights Law § 74 is inapplicable, only that Landlord's statement is not "substantially accurate" (or, at least, that the issue raises fact questions).

Defendants "removed the seats and other items that were not theirs to remove, based on the definition of 'moveable objects'"]). While Defendants dispute the underlying legal conclusion, "there was no requirement that the publication report [their] side of the controversy" (*Cholowsky*, 69 AD3d at 115).

* * * *

Accordingly, it is

ORDERED that Plaintiff Durst Pyramid LLC's motion for summary judgment is GRANTED IN PART and DENIED PART, such that: (A) summary judgment is granted in Plaintiff's favor on the First Cause of Action for breach of contract for unpaid Rent Arrears in the amount of $1,082,317.00, (B) summary judgment is denied with respect to Plaintiff's Second, Third, and Fourth Causes of Action, (C) summary judgment is granted in Plaintiff's favor dismissing Defendants' affirmative defenses and Defendants' First, Third, and Fourth Counterclaims; and (D) summary judgment is denied with respect to Defendants' Second Counterclaim; it is further

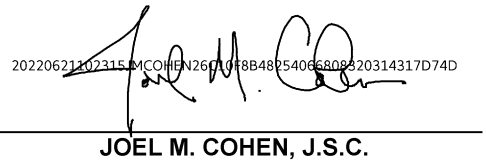
ORDERED that Defendants' cross-motion for summary judgment and for leave to amend the Answer is DENIED; it is further

ADJUDGED and DECLARED that Tenant's rent obligation was not and is not permanently excused or suspended as a result of the COVID-19 pandemic and resulting closure orders[3]; and it is further

[3] "When a court resolves the merits of a declaratory judgment action against the plaintiff [in the instant case, the counterclaim plaintiff], the proper course is not to dismiss the complaint, but rather to issue a declaration in favor of the defendant" (*Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954 [1989]).

ORDERED that the parties appear for a preliminary conference on **June 28, 2022 at 11:00 a.m.**, with the parties circulating dial-in information to chambers at SFC-Part3@nycourts.gov in advance of the conference date.[4]

This constitutes the Decision and Order of the Court.



6/21/2022
DATE

JOEL M. COHEN, J.S.C.

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

[4] If the parties agree on a proposed preliminary conference order in advance of the conference date (consistent with the guidelines in the Part 3 model preliminary conference order, available online), they may file the proposed order and email a courtesy copy to chambers with a request to so-order in lieu of holding the conference.