SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY BANNON** **PART** **42**

Justice

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140 WEST STREET (NY) RETAIL, LLC

Plaintiff,

- v -

RUMBLE FITNESS LLC,

Defendant.

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INDEX NO. 651683/2021

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

In this action to recover damages for breach of a lease agreement, the plaintiff landlord, 140 West Street, (NY) Retail, LLC, owner of commercial property at 140 West Street in Manhattan, moves pursuant to CPLR 3212 for summary judgment against the defendant tenant, Rumble Fitness LLC, which operates a gym on the premises (MOT SEQ 002). The plaintiff seeks (1) on the first cause of action, $2,356,011.57 for unpaid rent and additional rent; (2) on the second cause of action, attorneys' fees.[1] The plaintiff also moves to dismiss the defendant's affirmative defenses. The defendant opposes the motion. The motion is granted in part.

It is well-settled that the movant on a summary judgment motion "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The "facts must be viewed in the light most favorable to the non-moving party." Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden,

[1] By an order dated July 11, 2022, the court granted the plaintiff's motion for use and occupancy (MOT SEQ 003) and directed the defendant to pay $65,000.00 monthly to the plaintiff.

it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986).

In support of its motion, plaintiff submits, *inter alia*, the pleadings, a statement of material facts, the subject lease agreement, a notice of termination and a rent ledger. The plaintiff also submits an affidavit of Mouyin Chen, the Chief Accounting Officer of Magnum Real Estate Group, the managing agent for the plaintiff, and Benjamin Shaoul, a member of the plaintiff LLC. The lease, dated December 5, 2018 and amended on August 7, 2019, both signed by defendant, provides that defendant agreed to rent the premises from plaintiff for a period of ten years beginning on December 17, 2018 and ending on December 31, 2028. The "permitted use" was for "the operation of an upscale boxing and/or exercise studio" as well as ancillary uses such as "the retail sale of fitness apparel and goods, food, juice, beverages" and "personal training and other fitness activities." The plaintiffs allege that the defendant breached the lease and owes arrears of $2,356,011.57 as of March 2021, the sum reflected in the rent ledger.

In opposition to the motion, the defendant submits, *inter alia*, a statement of material facts and the affidavit of Andrew Stenzler, co-founder of Rumble Fitness, LLC. In his affidavit, Stenzler argues that the COVID-19 pandemic prevented Rumble Fitness from operating, and that the permitted use for the premises as stated in the lease was too narrow for compliance with COVID restrictions, such as holding online fitness classes. The defendant alleges that there was a mandated closure of all gyms and fitness centers in accordance with Executive Order of the Governor in March of 2020, and that Rumble Fitness could not fully comply with safety mandates until May of 2021. The defendant further alleges that when it sought to reopen in May 2021, it discovered that a steam pipe on the premises had burst, causing a substantial amount of hot water to flood the premises including the studio, back office and retail storage. The defendant alleges that the time and work expended to restore the premises delayed the opening until the end of July 2021. The defendant argues that this amounts to an affirmative defense of frustration of purpose or impossibility of performance.

The plaintiff's proof establishes, *prima facie*, its entitlement to relief on the first cause of action seeking unpaid rent. The plaintiff's proof demonstrates (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendants' breach of that contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010); Flomenbaum v New York Univ., 71 AD3d 80 (1st Dept. 2009). It is well-settled that a lease is a contract which is subject to the same rules of construction as any other agreement. See George Backer Mgt. Corp. v Acme Quilting Co., Inc., 46 NY2d 211 (1978); New York Overnight Partners, L.P. v Gordon, 217 AD2d 20 (1st Dept. 1995), aff'd 88 NY2d 716 (1996).

The branch of the plaintiff's motion seeking dismissal of the defendant's affirmative defenses is also granted. Initially, the court notes that all 15 of the defendant's ten affirmative defenses are improperly asserted in a conclusory manner in the answer without any detail. See Commissioners of State Ins. Fund v Ramos, 63 AD3d 453 (1st Dept. 2009); Manufacturers Hanover Trust Co. v Restivo, 169 AD2d 413 (1st Dept. 1991). CPLR 3013 expressly requires that all "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." For that reason, "summary judgment cannot be avoided on the basis of general, conclusory and unsubstantiated allegations." US 7 Inc. v Transamerica Ins. Co., 173 AD2d 311, 312 (1991); see Commissioners of State Ins. Fund v Ramos, supra.

The defendant attempts to expound the first, second, tenth, thirteenth, fourteenth and fifteenth affirmative defenses in its opposition papers. However, little is offered in regard to all but the last two affirmative defenses - "the doctrine of frustration of purpose" and the "doctrine of impossibility."

The frustration of purpose doctrine "offers a defense against enforcement of a contract when the reasons for performing the contract cease to exist due to an unforeseeable event which destroys the reasons for performing the contract." Structure Tone, Inc. v Univ. Svcs. Group, Ltd., 87 AD3d 909, 912 (1st Dept. 2011). "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." Center for Specialty Care, Inc. v CSC Acquisition I, LLC, 185 AD3d 34, 42 (1st Dept. 2020) (quoting Warner v Kaplan, 71 AD3d 1, 6 [1st Dept. 2009]) (quotation marks omitted). Moreover, economic hardship and reduced revenues alone, even if occasioned by an arguably unforeseeable circumstance such as a pandemic, do not warrant application of the frustration of purpose doctrine. See Gap, Inc. v 170 Broadway Retail Owner, LLC, 195 AD3d 575 (1st Dept. 2021); 558 Seventh Ave. Corp. v Times Square Photo Inc., 194 AD3d 561 (1st Dept. 2021).

Impossibility is a defense to a breach of contract action "only when … performance [is rendered] objectively impossible … by an unanticipated event that could not have been foreseen or guarded against in contract." Kel Kim Corp. v Central Markets, Inc., 70 NY2d 900, 902 (1987); see 407 East 61st Garage, Inc. v Savoy Fifth Ave. Corp., 23 NY2d 275, 281 (1968) ("[T]he excuse of impossibility of performance is limited to the destruction of the means of performance by an act of God, vis major, or by law."). The impossibility defense to contract performance should be applied narrowly, "due in part to judicial recognition that the purpose of contract law is to allocate risks that might affect performance and that performance should be excused only in extreme circumstances." Kel Kim Corp. v Central Markets, Inc., supra at 902. "[W]here impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused." 407 East 61st Garage, Inc. v Savoy Fifth Ave. Corp., supra at 281-82; see Valenti v Going Grain, Inc., 159 AD3d 645 (1st Dept. 2018) [failure to pay rent as agreed and ensuing eviction proceeding did not excuse performance under contract of sale]; Urban Archaeology Ltd.

v 207 E. 57th Street LLC, 68 AD3d 562 (1st Dept. 2009) [economic downturn did not excuse tenant's performance under lease].

Applying this caselaw to the facts presented, the defendant fails to establish either defense. First, the mandatory closure of gyms ended in March of 2021, amounting to approximately one year out of a ten-year lease. Save for several months in 2020, the defendant was able to conduct its business, albeit on a reduced, modified and less profitable scale. During that time, the defendant conducted classes remotely or outdoors. This was allowable under the permitted use clause of the lease, which included "personal training and other fitness activities" and "related fitness services." While the defendant's gym, like most gyms, undoubtedly suffered some economic hardship during 2020 and 2021 as a result of the pandemic, that is insufficient to establish this defense. See Gap, Inc. v 170 Broadway Retail Owner, LLC, supra; 558 Seventh Ave. Corp. v Times Square Photo Inc., supra. Under these facts, the defendants fail to demonstrate that the purpose of the lease was frustrated.

For similar reasons, the defendant cannot claim that the means of performance under this ten-year lease were completely destroyed either by the pandemic or attendant shutdown orders. The fact that the number of gym memberships declined and remained suppressed even upon re-opening does not rise to the level of impossibility of performance. As per the applicable decisional authority, economic hardship or financial difficulty alone cannot support application of these two defenses. See Gap, Inc. v 170 Broadway Retail Owner, LLC, supra; 558 Seventh Ave. Corp. v Times Square Photo Inc., supra. In this regard, the court notes that Section 22.7 of the parties' lease, "Effect of Unavoidable Delays", does not excuse the tenant from performance under the lease in the event of a "force majeure event", defined to include "acts of God, governmental restrictions, and regulations or controls." Rather, it expressly applies only to the landlord such that if the landlord shall "fail to perform timely any obligation on its part… then such failure shall be excused and not be a breach of this Lease by Landlord, but only to the extent occasioned by such event." This indicates that the parties

intended to allocate "risks that might affect performance" (Kel Kim Corp. v Central Markets, Inc., supra at 902) to the defendant.

In the second cause of action, the plaintiff seeks contractual attorney's fees pursuant to Section 16.2 of the lease, which provides in part that "all legal fees and expenses incurred by Landlord in enforcing its rights under this Lease shall be deemed Additional Rent and due and payable by Tenant upon demand." The defendant proffers no argument in opposition to attorney's fees. While the plaintiff has thus established entitlement to fees, it has failed to provide any documentation in support, such as invoices or billing records. Therefore, the second cause of action is denied without prejudice to renewal on proper papers.

The court notes that both sides have also submitted an affirmation of their attorney, Erez Glambosky, for the plaintiff and Matthew Meisel for the defendant. Since counsel claims no personal knowledge of the underlying facts, their affirmations are without probative value or evidentiary significance on this motion. See Zuckerman v City of New York, supra; Trawally v East Clarke Realty Corp., 92 AD3d 471 (1st Dept. 2012); Thelen LLP v Omni Contracting Co. Inc., 79 AD3d 605 (1st Dept. 2010). Legal arguments are more properly advanced in a Memorandum of Law.

Generally, interest is computed "from the earliest ascertainable date the cause of action existed." CPLR 5001(b). In a breach of contract action, interest "accrues from the time of an actionable breach." Kellman v Mosley, 60 AD3d at 457 (1st Dept. 2009); see generally Brushton Moira Cent. Sch. Dist. v Fred H. Thomas Assocs., P.C., 91 NY2d 256 (1998); Love v State of New York, 78 NY2d 540 (1991). The plaintiff is entitled to interest from April 1, 2020.

Accordingly, and upon the foregoing papers, it is hereby,

ORDERED that the plaintiff's motion for summary judgment is granted to the extent that (1) it is awarded judgement on the first cause of action of the complaint in the sum of

$2,356,011.57, plus cost and statutory interest from April 1, 2020, and (2) the defendant's affirmative defenses are dismissed, and it is further

ORDERED that the plaintiff's second cause of action, seeking contractual attorney's fees, is denied without prejudice to renewal on proper papers within 30 days of the date of this order, or it is waived, and it is further

ORDERED that the Clerk is to enter judgment in favor of the plaintiff and against the defendant in the amount of $2,356,011.57, plus statutory interest from April 1, 2020.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

8/22/022
DATE

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION

[ ] GRANTED [ ] DENIED [X] GRANTED IN PART [ ] OTHER