SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

----------X

ZV NY, INC.,

Plaintiff,

- v -

MARK PROPCO LLC,

Defendant.

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INDEX NO. 656833/2020

MOTION DATE 07/12/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 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, 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, and 99

were read on this motion and cross-motion for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.

Upon the foregoing documents, defendant's motion for summary judgment is granted, and plaintiff's cross-motion for summary judgment is denied, based on the following memorandum decision.

Background

In this commercial landlord-tenant action, defendant Mark Propco LLC ("Landlord") moves for summary judgment pursuant to CPLR 3212 (1) dismissing the complaint in its entirety; (2) dismissing plaintiff ZV NY, Inc.'s ("Tenant") affirmative defenses to Landlord's counterclaims; (3) on Landlord's counterclaims; and (4) amending the amount sought on the first counterclaim to conform to the proof adduced on the motion pursuant to CPLR 3025(c). In the event summary judgment is denied, Landlord seeks *pendente lite* use and occupancy while Tenant remains in possession. Tenant opposes the motion, and cross-moves for summary

judgment on its fourth through seventh causes of action for breach of contract, breach of the covenant of good faith and fair dealing, private nuisance, and nuisance *per se*.

Pursuant to a lease dated November 18, 2011, Tenant leased from Landlord a portion of the ground floor retail space and corresponding basement storage space (the "Premises") in the building located on the northwest corner of East 77th Street and Madison Avenue in Manhattan, having an address of 25 East 77th Street, and otherwise known as the Mark Hotel (NYSCEF Doc. No. 50). The lease provides that Tenant shall pay Landlord monthly base rent (*id.*, ¶¶ 1, 41) and several items of additional rent, including HVAC usage charges (*id.*, ¶ 49B), electric charges (*id.*, ¶ 49A), interest and fees on late rent (*id.*, ¶ 59), and real estate tax escalation adjustment charges (*id.*, ¶ 46). The rent was to be paid "without any set off, deduction or reduction of any kind whatsoever" (*id.*, at 1). The lease also provides that "this lease and the obligation of tenant to pay rent hereunder . . . shall in no wise be affected, impaired or excused" due to landlord's failure to fulfill any of its obligations as a result of "government preemption or restrictions or by reason of any rule, order or regulation . . . or by . . . war or other emergency" (*id.*, ¶ 26). The lease was for a term of ten years (*id.* at 1). Defendant does not dispute that it has not paid rent or additional rent since December 2020, and as of the filing of this motion there are $1,355,508.83 in outstanding arrears (NYSCEF Doc. No. 38 ¶ 7).

Nonparty Mark 2 Restaurant LLC (the "Restaurant") operates the Mark Restaurant by Jean-Georges within the Mark Hotel (NYSCEF Doc. No. 39 ¶ 1). On June 27, 2020, and September 9, 2020, the Restaurant applied to New York City's Open Restaurants Program (NYSCEF Doc. No. 70) for permission to install sidewalk and roadway seating for outdoor dining (NYSCEF Doc. No. 69). The Department of Transportation ("DOT") approved the Restaurant's submission (NYSCEF Doc. No. 58), and since August 2020 the Restaurant has

operated in the roadway and on the sidewalk outside of the Mark Hotel (NYSCEF Doc. No. 75 ¶ 14). As of November 2020, Tenant asserts that the Restaurant's outdoor dining setup "comprises a barricade of tents, tables, chairs, and shrubs that are situated directly in front of [Tenant's] display windows," which obscures Tenant's storefront "to such an extent that, for all intents and purposes, [Tenant's] store is invisible from the street and no one other than the diners at [the Restaurant] would even know [Tenant's] store was at the location (*id.*, ¶¶ 17-18 and annexed photographs). Tenant asserts further that this setup, which it claims violates the rules of the Open Restaurants Program, has adversely impacted its business over and above the problems caused by the ongoing Coronavirus pandemic and its attendant restrictions (*id.*, ¶ 21).

Tenant commenced this action on December 8, 2020, seeking a declaration that the lease was void, rescinded, or otherwise unenforceable by Landlord due to frustration of purpose, impossibility of performance, and failure of consideration (first through third causes of action), and asserting additional claims for breach of contract, breach of the covenant of good faith and fair dealing, private nuisance, and nuisance *per se* (fourth through seventh causes of action). Landlord answered, and interposed three counterclaims: breach of contract (first counterclaim); continuing damages (second counterclaim); and attorneys' fees and disbursements (third counterclaim). Shortly thereafter, the instant motion practice ensued.

Standard of Review

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]). The opposing party must proffer its own evidence to show disputed material facts requiring a trial (*id.*). However, the reviewing court should accept the opposing party's evidence as true

(*Hotopp Assocs., Ltd. v Victoria's Secret Stores, Inc.*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]).

Discussion

As an initial matter, so much of Landlord's motion to dismiss the first through fourth and eighth through sixteenth affirmative defenses is granted as unopposed. Tenant's opposition is silent with regard to these defenses (*Steffan v Wilensky*, 150 AD3d 419, 420 [1st Dept 2017] ["By his silence in his opposition brief, defendant concedes, as plaintiff argues, that the second, third, and sixth affirmative defenses should be dismissed"]).

Frustration of Purpose, Impossibility of Performance, and Failure of Consideration (First, Second, and Third Causes of Action, Fifth, Sixth, and Seventh Affirmative Defenses)

In the many commercial landlord-tenant cases that have been commenced during the pandemic, the tenants have frequently alleged some or all of these defenses in seeking to have their obligations to pay rent excused. Accordingly, the court will consider them together.

"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. 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. v Central Mkts., Inc.*, 70 NY2d 900, 902 [1987]). "[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 E. 61st Garage, Inc. v Savoy Fifth Ave. Corp.*, 23 NY2d 275, 281 [1968]; *see also 558 Seventh Ave. Corp. v Times Square Photo Inc.*, 194 AD3d 561, 561-62 [1st Dept] [holding that reduced revenues due to the COVID-19 pandemic did not render performance impossible], *appeal dismissed* 37 NY3d 1040 [2021]). "[A]bsent an express

contingency clause in the agreement allowing a party to escape performance under certain specified circumstances, compliance is required even where the economic distress is attributable to the imposition of governmental rules and regulations or the inability to secure financing" (*Stasyszyn v Sutton E. Assocs.*, 161 AD2d 269, 271 [1st Dept 1990]).

Similarly, frustration of purpose applies only where the tenant was "completely deprived of the benefit of its bargain" (*Gap, Inc. v 170 Broadway Retail Owner, LLC*, 195 AD3d 575, 577 [1st Dept 2021]). In other words, frustration of purpose 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]). "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] [internal quotation marks and citations omitted]). "[T]his doctrine is a narrow one which does not apply "unless the frustration is substantial" (*Crown IT Servs., Inc. v Koval-Olsen*, 11 AD3d 263, 265 [1st Dept 2004]).

Finally, failure of consideration "looks to the whole contract, and the things to be done and/or stipulated to be done on both sides" (*Enrico & Sons Contr., Inc. v Bridgemarket Assocs.*, 252 AD2d 429, 430 [1st Dept 1998]). As a general matter, the contract should be "interpreted as of the date of its execution, not the date of its breach" (*X.L.O. Concrete Corp. v John T. Brady & Co.*, 104 AD2d 181, 184 [1st Dept 1984], *affd* 66 NY2d 970 [1985]), and where consideration is present at the inception of the contract then a subsequent claim for failure of consideration is improper (*Royal Equities Operating, LLC v Rubin*, 154 AD3d 516, 517 [1st Dept 2017] [holding,

in action for rent arrears, that failure of consideration "(did) not apply here, since it (was) conceded that the tenant is still in possession"]).

In *558 Seventh Ave. Corp. v Times Square Photo, Inc.* (194 AD3d 561 [1st Dept], *appeal dismissed* 37 NY3d 1040 [2021]), the Appellate Division, First Department, held that an electronic sales and repair store that was restricted to curbside service and could still access the premises during the pandemic could not rely on defenses to liability of impossibility of performance or frustration of purpose (*id.*, at 562 ["Thus, although the pandemic has been disruptive for many businesses, the purpose of the lease in this case was not frustrated, and defendants' performance was not rendered impossible, by its reduced revenues"]). Since then, the First Department has repeatedly held the same in cases alleging similar facts (*e.g.*, *Knickerbocker Retail LLC v Bruckner Forever Young Social Adult Day Care Inc.*, 204 AD3d 536, 537 [1st Dept 2022] [rejecting frustration of purpose defense where "New York City Executive Order No. 100 of 2020 (N.Y.C EEO 100), which, under § 17, directed adult congregate care facilities such as the tenant's to suspend operations during the pandemic, was temporary"]; *Fives 160th, LLC v Zhao*, 204 AD3d 439, 440 [1st Dept 2022] ["Although the pandemic did make it more difficult and less profitable for defendants to run their business, they were never prevented from using the space or operating their restaurant"]; *Valentino U.S.A., Inc. v 693 Fifth Owner LLC*, 203 AD3d 480 [1st Dept 2022] ["Here, the pandemic, while continuing to be 'disruptive for many businesses,' did not render plaintiff's performance impossible, even if its ability to provide a luxury experience was rendered more difficult, because the leased premises were not destroyed"]).

Applying these cases to the record on the instant motion and cross-motion, Tenant's causes of action and affirmative defenses of impossibility of performance, frustration of purpose,

and failure of consideration fail for the reasons set forth in said cases. It is undisputed that Tenant continued to operate its business out of the Premises, albeit with reduced revenues (*see*, NYSCEF Doc. No. 75 [Affidavit of Plaintiff's Senior Vice President of Finance & Operations]).[1] Tenant's argument that its situation is unique given its operation of a high-end luxury boutique in a high-end shopping district, is unavailing. As the Appellate Division, First Department, has held in a case involving a similar luxury retail establishment, "the pandemic, while continuing to be 'disruptive for many businesses,' did not render plaintiff's performance impossible, even if its ability to provide a luxury experience was rendered more difficult, because the leased premises were not destroyed" (*Valentino U.S.A., Inc.*, 203 AD3d at 480). The court in *Valentino U.S.A.* also rejected defenses of frustration of purpose and failure of consideration, holding that "the parties' respective duties were to pay rent in exchange for occupying the leased premises, and plaintiff acknowledged that it was open for curbside retail services as of June 4, 2020 and services by appointment as of June 22, 2020," and "the failure of consideration argument fails for the same reasons that the frustration of purpose and impossibility arguments fail" (*id.*).

Accordingly, so much of Landlord's motion as seeks summary judgment dismissing the first through third causes of action and the fifth through seventh affirmative defenses relating to frustration of purpose, impossibility of performance, and failure of consideration is granted, and those causes of action and affirmative defenses are dismissed.

[1] The closing paragraph of the referenced affidavit (NYSCEF Doc. No. 75) goes only as far as stating that plaintiff's "sales have declined" on account of the pandemic. At no time does it state that that plaintiff was completely foreclosed from conducting business out of the Premises (*see also, id.*, ¶¶ 11 ["reduced . . . number of tourist shoppers"], 12 [operations continued, but not "consistent with" pre-pandemic expectations], 13 ["strain on ZV's business"], 19 [shoppers needed "to navigate"], 21 [operations continued, but not "consistent with" pre-pandemic expectations]).

Breach of Contract (Fourth Cause of Action)

A breach of contract requires allegations of "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Housing Corp.*, 79 AD3d 425 [1st Dept 2010]). After withdrawing certain aspects of this claim during the briefing of the motion and cross-motion, Tenant now asserts that Landlord has breached two provisions of the lease: Insert 23 of the Notes to Printed Form of Store Lease and Paragraph 58 of the Rider to the Lease.

Insert 23 is meant to be a part of Paragraph 13 of the lease, which covers Landlord's access to the premises "to examine the same and to make such repairs, replacements and improvements as [Landlord] may deem reasonably necessary and reasonably desirable to any portion of the building" (NYSCEF Doc. No. 68 ¶ 13; Insert 20). Insert 23 specifically relates to Landlord's entry into the premises to perform work and provides that once work has begun Landlord "shall use commercially reasonable efforts . . . to minimize any disruption of or interference with tenant's use and occupancy of the demised premises" (*id.*, Insert 23). Tenant argues that Landlord has breached this provision of the lease by erecting, or allowing to be erected, the roadway and sidewalk seating operated by the Restaurant, which assertedly obscured Tenant's premises from view. The plain language of Insert 23, however, clearly applies only to work being done inside the Premises itself, and not to anything taking place outside the Premises. It is axiomatic that where the parties set down the unambiguous terms of their agreement in writing, the court has no power to vary that writing (*Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). Moreover, assuming *arguendo* that Landlord had breached this provision of the lease, Paragraph 13 specifically provides that a breach thereof will not entitle tenant to "any abatement of rent while such work is in progress nor

to any damages by reason of loss or interruption of business or otherwise" (NYSCEF Doc. No. 68 ¶ 13). Such exculpatory language is enforceable (*e.g.*, *Cut-Outs, Inc. v Man Yun Real Estate Corp.*, 286 AD2d 258, 260 [1st Dept 2001] [relying on similar exculpatory language to uphold the landlord's walling off of space next to the elevator on tenant's floor to accommodate renovation of the elevator], *lv denied* 100 NY2d 507 [2003]).

Paragraph 58 of the Rider provides that Landlord "may alter, restore and/or renovate the entrance lobby, façade, and/or other portions of The Mark Hotel and/or the Building" and that such work "may result in certain inconveniences or disturbances to tenant and its customers" (NYSCEF Doc. No. 68 ¶ 58). Tenant specifically agreed that any such work would not constitute a "constructive eviction or be grounds for a termination of this lease or the term thereof, nor shall the same in any way effect the obligations of tenant under this lease, including, without limitation, the obligation to pay the rents herein reserved or give the tenant the right to claim damages (to any extent)" (*id.*). It is far from clear that the phrase "alter, restore and/or renovate the entrance lobby, façade, and/or other portions of The Mark Hotel" encompasses sidewalk and roadway seating setup outside the building. Assuming *arguendo* that it does, however – any potential violation of this paragraph does not give rise to a damages claim, as set forth above. Tenant argues that the exculpatory clause in this paragraph should be read as contingent upon Landlord's duty to "use commercially reasonable efforts to minimize interference with tenant's normal business operations" (*id.*). The exculpatory language precedes Landlord's duty in this paragraph, however – and the sentence encompassing Landlord's duty begins with the word "[n]evertheless" (*id.*). Giving the word "nevertheless" its plain and ordinary meaning (*e.g.*, *JFURTI, LLC v First Capital Real Estate Advisors, L.P.*, 165 AD3d 419, 420 [1st Dept 2018]), the court does not read the unambiguous provisions of Paragraph 58 to

require that Landlord use commercially reasonable efforts before it may resort to the exculpatory provision; but rather, that the exculpatory provision applies whether Landlord does so or not.

Accordingly, so much of Landlord's motion for summary judgment dismissing the fourth cause of action for breach of contract is granted, and so much of Tenant's cross-motion for summary judgment in its favor on that claim is denied.

Breach of the Covenant of Good Faith and Fair Dealing (Fifth Cause of Action)

Implicit in every contract is a covenant of good faith and fair dealing (*Dalton v Educational Testing Serv.*, 87 NY2d 384 [1995]). The implied covenant exists only "in aid and furtherance of other terms of the agreement of the parties" (*Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304 [1983]). Where the facts underlying the claim for breach of the implied covenant are the same as those underlying the breach of contract claim, the claim for breach of the implied covenant should be dismissed as duplicative (*Baker v 16 Sutton Place Apt. Corp.*, 2 AD3d 119, 121 [1st Dept 2003]).

Here, the facts alleged in the complaint in support of Tenant's breach of contract and breach of the covenant of good faith and fair dealing claims are identical (*compare* NYSCEF Doc. No. 1 ¶ 77 *with id.*, ¶ 87). The record before the court discloses no difference in the factual basis for these two causes of action. Tenant argues that this claim may be pled in the alternative given that Landlord disputes whether its alleged actions are covered by the lease. *Demetre v HMS Holdings Corp.* (127 AD3d 493 [1st Dept 2015]), cited by Tenant in support of this proposition, is unavailing, as there, the court found that the provisions of the contract were ambiguous. Here, the provisions of the lease unambiguously provide no recourse to Tenant. "The covenant of good faith and fair dealing cannot be construed so broadly as to effectively nullify other express terms of the contract, or to create independent contractual rights" (*National*

Union Fire Ins. Co. v Xerox Corp., 25 AD3d 309, 310 [1st Dept], *appeal dismissed* 7 NY3d 886 [2006]).

Accordingly, so much of Landlord's motion for summary judgment dismissing the fifth cause of action for breach of the covenant of good faith and fair dealing is granted, and so much of Tenant's cross-motion for summary judgment in its favor on that claim is denied.

Nuisance (Sixth Cause of Action)

A person or entity is liable for nuisance where "the wrongful invasion of the use and enjoyment of another's land is intentional and unreasonable," and more specifically where the complaining party shows "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act" (*Copart Indus., Inc. v Consolidated Edison Co. of N.Y., Inc.*, 41 NY2d 564, 570, *rearg denied* 42 NY2d 1102 [1977]). "[N]ot every annoyance will constitute a nuisance. . . . Nuisance imports a continuous invasion of rights – a pattern of continuity or recurrence of objectionable conduct" (*Domen Holding Co. v Aranovich*, 1 NY3d 117, 124 [2003] [internal quotation marks and citations omitted]). "The term use and enjoyment encompasses the pleasure and comfort derived from the occupancy of land and the freedom from annoyance" (*id.* [internal quotation marks and citations omitted]).

Here, Tenant alleges that the outdoor dining facilities operated by the Restaurant obscured its display windows to the detriment of its business, causing an actionable nuisance. The record before the court, however, does not indicate that the dining facilities are sufficiently substantial so as to rise to the level of an actionable nuisance. A nuisance is substantial where it is not "fanciful, slight, or theoretical, but certain and substantial, and must interfere with the physical comfort of the ordinarily reasonable person" (*McNeary v Niagara Mohawk Power*

Corp., 286 AD2d 522, 524 [3d Dept 2001]). In other words, the alleged nuisance must make it difficult or impossible to fully use and enjoy one's property, whether by excessive noise (*Massaro v Jaina Network Sys., Inc.*, 106 AD3d 701, 703 [2d Dept], *appeal dismissed* 21 NY3d 1057 [2013]), interference with access for repairs (*Chelsea 18 Partners, LP v Sheck Yee Mak*, 90 AD3d 38, 41-42 [1st Dept 2011]), interference with use or obstruction of portions of the property (*Cangemi v Yeager*, 185 AD3d 1397, 1399 [4th Dept 2020]), or similar impediment. The cases cited by Tenant are in accord with this principle (*see, Arbern Realty Co. v Clay Craft Planters Co., Inc.*, 188 Misc 2d 314, 315-16 [App Term 2d Dept 2001] [defendant restricted plaintiff's access to plaintiff's loading dock and parking spaces with its own loading dock practices]; *Fifth Ave. Center, LLC v Dryland Properties LLC*, 2016 NY Slip Op 30290 [U] [Sup Ct NY County 2016] [nonparty's gym above plaintiff's space caused excessive noise and disturbance];[2] *Upper E. Lease Assocs., LLC v Cannon*, 30 Misc 3d 1213 [A] [Dist Ct Nassau County 2011], *affd* 37 Misc 3d 136 [A] [App Term 9th&10th Dists 2012] [second hand smoke from defendant's apartment infiltrated plaintiff's apartment]). Where there is no showing "that the plaintiff [was] denied the use and enjoyment of their property," no nuisance exists (*Ward v City of N.Y.*, 15 AD3d 392, 393 [2d Dept 2005]).

As set forth above, Tenant does not show that its operations were substantially impaired by the Restaurant's outdoor dining facilities. Tenant does not contest that it remained in operation for the entirety of the lease term once it was able to reopen, and the record does not reflect that Tenant's customers were prevented from entering the premises and patronizing Tenant's business. Nor does Tenant allege that its business was complete obscured, and the photographs submitted show that the Premises are simply less visible than before. The outdoor

[2] This case, cited by Tenant, was reversed on other grounds (149 AD3d 445 [1st Dept 2017]).

dining facilities, while potentially "'annoying and disagreeable' to [Tenant], do not constitute a substantial and unreasonable interference with the use and enjoyment of [its] land" (*Pilatich v Town of New Baltimore*, 170 AD3d 1463, 1464 [3d Dept 2019], citing *McCarty v Natural Carbonic Gas Co.*, 189 NY 40, 50 [1907] [defendant built wall and pipes that made it difficult but not impossible for large vehicles to access plaintiff's driveway]). Moreover, the court notes Tenant's repeated argument that its business has suffered tremendously due to the pandemic and the general economic environment engendered thereby (NYSCEF Doc. No. 75 ¶¶ 11, 24). Not only does Tenant report reduced sales, but also a decrease in foot traffic in its store and through the entire shopping district (*id.*, ¶ 11 ["The hotels, restaurants, and stores along the formerly teeming Madison Avenue shopping corridor remain largely empty. . . . It will be years before tourism and retail commerce along Madison Avenue will return to their pre-COVID levels"]). In such an environment, the record does not disclose a triable issue of fact as to whether the outdoor dining facilities constitute a substantial interference with Tenant's business on top of the generally poor retail environment.

Accordingly, so much of Landlord's motion for summary judgment dismissing the sixth cause of action for nuisance is granted, and so much of Tenant's cross-motion for summary judgment in its favor on that claim is denied.

Nuisance *Per Se* (Seventh Cause of Action)

"Nuisance per se is a nuisance based on an act which is unlawful, even if performed with due care" (*State v Fermenta ASC Corp.*, 238 AD2d 400, 403 [2d Dept], *lv denied* 90 NY2d 810 [1997]). "In an action based on a theory of nuisance per se, the plaintiffs need only establish a violation of law, and need not show that the nuisance was intentional or negligent. They must still, however, establish the remaining elements of the cause of action" (*id.*). As set forth above,

Tenant has not established that the outdoor dining facilities constitute a substantial interference with Tenant's use of the Premises, and, therefore, cannot establish this cause of action, regardless of whether or not the outdoor dining facilities, as alleged, violated the rules of the Open Restaurants Program.

Accordingly, so much of Landlord's motion for summary judgment dismissing the seventh cause of action for nuisance *per se* is granted, and so much of Tenant's cross-motion for summary judgment in its favor on that claim is denied.

Landlord's Counterclaims

Landlord asserts three counterclaims: for rent due as of the time of the filing of the complaint; for damages continuing to accrue over the course of this action; and for its reasonable attorneys' fees. Landlord's request to amend its answer to conform to the amount sought on the first counterclaim to the $1,355,508.83 in arrears as of the date of the filing of Landlord's motion is granted, as leave to amend shall be freely given, and Tenant does not demonstrate any prejudice from the amendment (*Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014]).

Further, so much of Landlord's motion for summary judgment on its counterclaims is granted. Landlord has established the existence of the lease between the parties, Landlord's performance thereunder, and Tenant's failure to pay rent and additional rent as required (*Harris*, 79 AD3d at 425). As set forth above, Tenant's arguments to the contrary are unavailing, and Tenant fails to raise an issue of fact as to either the fact of its indebtedness or the amount claimed to be in arrears.

Finally, the court declines to address Landlord's request for use and occupancy, asserted only in the alternative if the court were not inclined to grant summary judgment in its favor on the first counterclaim. In any case, as set forth above, Tenant has vacated the premises.

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment dismissing the complaint, as well as plaintiff's affirmative defenses to defendant's counterclaims, is granted, and the complaint and the affirmative defenses to the counterclaims are dismissed; and it is further

ORDERED that defendant's motion to conform its counterclaims to the amount of damages established on the instant motion is granted, and the court deems the counterclaims to have been amended accordingly; and it is further

ORDERED that defendant's motion for summary judgment on its first and third counterclaims for outstanding rent and attorneys' fees is granted; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is denied in its entirety; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendant Mark Propco LLC and against plaintiff ZV NY, Inc., dismissing the complaint, and to enter judgment on said defendant's first counterclaim for rental arrears in the amount of $1,355,508.83, with statutory interest thereon from December 1, 2020, through the date of entry of judgment as calculated by the Clerk, and accruing thereon at the statutory rate through satisfaction of the judgment, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that on the third counterclaim, defendant Mark Propco LLC is entitled to its reasonable attorneys' fees in this action under the lease (NYSCEF Doc. No. 68 ¶¶ 19, 60) in an amount to be heard and determined by a Judicial Hearing Officer ("JHO") or Special Referee at inquest; and, therefore, it is

ORDERED that the issue of such fees is severed and a JHO or Special Referee shall be designated to conduct an inquest and determine the amount of plaintiff's said fees, which is hereby submitted to the JHO/Special Referee for such purpose; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above.

This constitutes the decision and order of the court.

ENTER:

Louis L. Nock

9/2/2022
DATE

LOUIS L. NOCK, J.S.C.

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