SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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SRI ELEVEN 1407 BROADWAY OPERATOR LLC

Plaintiff,

- v -

INFINITY EQUITY VENTURES LLC,

Defendant.

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INDEX NO. 654166/2020

MOTION DATE 09/14/2022

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff's motion for summary judgment and dismissal of defendant's affirmative defenses is granted.

Background

In this action to recover unpaid rent, plaintiff (the landlord) moves for summary judgment and dismissal of defendant's affirmative defenses. Defendant (the tenant) leased approximately 13,805 square feet on the 30th floor of a building located at 1407 Broadway. The parties initially entered into a written lease agreement in 2009; however, the most recent renewal of the lease was for a term of 5 years and 4 months from August 1, 2019 to November 30, 2024. In a letter dated June 26, 2020, defendant attempted to surrender the premises to plaintiff, advising that it was delivering the keys to management. Plaintiff rejected this surrender on July 9, 2020. Defendant vacated the premises anyway and plaintiff subsequently served a termination notice on July 28, 2020.

In opposition, defendant contends that plaintiff violated the lease agreement and focuses on four of the nine affirmative defenses it asserted in its answer. Defendant's third affirmative defense claims that plaintiff breached the covenant of quiet enjoyment when it shut off public and common areas, limited passenger elevator usage, closed off entrances to the lobby discouraging visitors, and prevented defendant from utilizing the loading dock and freight elevator. Defendant's remaining affirmative defenses assert partial constructive eviction and actual eviction when plaintiff reduced building staff and security and failed to prevent vandalism to the premises and vagrant loitering in and around the building.

Plaintiff asserts that defendant never mentioned its issues with the premises and many of defendant's complaints are either false or were rational given the onset of the COVID-19 pandemic. Plaintiff further contends that defendant was in default and failed to pay rent dating back to November 2019, way before the pandemic hit New York, rendering defendant's affirmative defenses as moot. Additionally, plaintiff asserts that defendant's failure to file a Statement of Material Facts should result in summary judgment for plaintiff.

Affirmative Defenses

"In moving to dismiss an affirmative defense pursuant to CPLR 3211(b), the plaintiff bears the heavy burden of showing that the defense is without merit as a matter of law. The allegations set forth in the answer must be viewed in the light most favorable to the defendant, and the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed" (*Granite State Ins. Co. v Transatlantic Reins. Co.*, 132 AD3d 479, 481, 19 NYS3d 13 [1st Dept 2015] [internal quotations and citations omitted]).

Defendant alleges nine affirmative defenses. With respect to the first, second, fourth, fifth, and ninth affirmative defenses, the Court dismisses these claims because defendant did not offer any opposition to their dismissal in its opposition papers.

Defendant's third affirmative defense for breach of quiet enjoyment is dismissed. "To make out a prima facie case of breach of the covenant of quiet enjoyment, a tenant must establish that the landlord's conduct substantially and materially deprived the tenant of the beneficial use and enjoyment of the premises" (*Jackson v Westminster House Owners Inc.*, 24 AD3d 249, 250, 806 NYS2d 495 [1st Dept 2005]).

Defendant did not dispute that it was in default since at least November of 2019. Even so, defendant's complaints about the freight elevator, loading dock, and common areas are products of an unprecedented worldwide pandemic. During the beginning and height of the pandemic, it was not uncommon to see areas that were previously used by numerous people and services simultaneously, distilled into single occupancy or single-use areas. Moreover, plaintiff demonstrated that the loading docks and freight elevators were continuously available to defendant, and had they not been, it was defendant who failed to comply with plaintiff's policies regarding reserving the dock (*see* NYSCEF Doc. 209 at 17). The imposition of a few additional procedures does not constitute a substantial or material deprivation of the premises to support this affirmative defense, that is, a defense to not paying the rent that defendant owed. Defendant fails to show how its inability to access common spaces during the onset of COVID-19 is relevant to its refusal to pay rent for months, long before the virus entered the United States.

Defendant's sixth, seventh, and eight affirmative defenses for partial constructive eviction, constructive eviction, and actual partial eviction are dismissed. "To establish constructive eviction, a tenant need not prove physical expulsion, but must prove wrongful acts

by the landlord that substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises" (*Pacific Coast Silks, LLC v 247 Realty, LLC*, 76 AD3d 167, 172, 904 NYS2d 407 [1st Dept 2010] [internal quotations and citation omitted]). A partial constructive eviction occurs when the tenant *abandons* only the portion of the premises affected by the landlord's actions (*see Minjak Co. v Randolph*, 140 AD2d 245, 248-50, 528 NYS2d 554 [1st Dept 1988]). On the contrary, partial actual eviction requires that the tenant be physically *prevented* from using a portion of the leased premises (*Pacific Coast Silks*, 76 AD3d 167). Defendant claims the reduction in staffing, requiring visitors to stand in long lines six feet apart, and discontinuing the visitor sign-in procedures were foundational elements in defendant eventually being vandalized in "Mid-June 2020" (NYSCEF Doc. No. 222 at 14). But Defendant provided only one supporting document of this vandalism, a photo with piles of boxes. That does not come close to supporting a claim based on any of these affirmative defenses. It certainly does constitute an affirmative defense to not paying the rent.

Courts have routinely found that disruption as a result of the COVID-19 pandemic cannot be used as defenses to claims for unpaid rent (*see Gap, Inc. v 44-45 Broadway Leasing Co. LLC*, 206 AD3d 503, 504, 171 NYS3d 466[1st Dept 2022] [finding the plaintiff's affirmative defenses of frustration of purpose were not implicated by government restrictions]; *558 Seventh Ave. Corp. v Times Sq. Photo Inc.*, 194 AD3d 561, 561, 149 NYS3d 55 [1st Dept 2021] ["reject[ing] defendants' affirmative defenses," even though "tenant's business, and 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, 167 NYS3d 462 [1st Dept 2022] [dismissing affirmative defenses despite Executive Orders directing facilities such as the tenants to suspend operations]; *Fives 160th, LLC v Zhao*,

204 AD3d 439, 440, 164 NYS3d 427 [1st Dept 2022] [finding "the pandemic cannot serve to excuse a party's lease obligations on the grounds of frustration of purpose"]).

Summary Judgment

To be entitled to the remedy of 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, 487 NYS2d 316 [1985]). The failure to make such 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, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

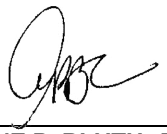
Defendant's failure to file a Statement of Material Facts is not dispositive with respect to whether plaintiff's summary judgment motion should prevail. In any event, the Court can overlook that mistake (*see* 22 NYCRR 202.1). The fact is that defendant does not dispute that it

did not pay the rent and, therefore, plaintiff is entitled to summary judgment on its claims. Defendant did not raise an issue of material fact in opposition to this point, and its affirmative defenses were unsuccessful in convincing this Court that the plaintiff played a role in defendant's abandonment of the lease. Moreover, plaintiff is entitled to reasonable legal fees as permitted by the lease.

Accordingly, it is hereby

ORDERED that the motion by plaintiff is granted as to liability only and that defendant's affirmative defenses are severed and dismissed; and it is further

ORDERED that on or before October 10, 2022, plaintiff file a Note of Issue for an inquest on damages and attorneys' fees (defendant is absolutely entitled to appear and contest damages and attorneys' fees – it is only called an inquest because liability has been determined). After the Note of issue is filed, plaintiff to follow up with the clerk of this part to schedule said inquest.



9/19//2022
DATE

ARLENE P. BLUTH, J.S.C.

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