SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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TRINITY CENTRE LLC,

Plaintiff,

- v -

NBTV, INC., and NICHOLAS BUZZELL,

Defendants.

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INDEX NO. 652521/2021

MOTION DATE 08/09/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (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, and 41 were read on this motion for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.

Upon the foregoing documents, it is ordered that the motion is granted in part pursuant to the following memorandum decision

Background

Plaintiff Trinity Centre LLC ("landlord") is the owner and landlord of the building located at 115 Broadway, New York, New York (Lease, NYSCEF Doc. No. 15). Landlord leased to defendant NBTV, Inc. ("tenant") a portion of the seventeenth floor of the building (the "premises") for a term of eight years commencing on May 1, 2018 (*id.*, Art. 37). The rent for the premises began at $24,080.84 per month for the first year of the term and increased yearly to $28,337.57 during the final year of the term (*id.*, ¶ 38[c]). The lease also provides that tenant will pay a proportionate share of the real estate taxes and electricity costs as additional rent, as well as late charges and interest on late payments (*id.*, Arts. 40, 41, 51). The rent and the additional rent were to be paid "without any setoff or deduction whatsoever" (*id.* at 1). Upon any default in payment, the balance of the rent for the term would become due and payable in full (*id.*, Art. 18).

As part of the lease, defendant Nicholas Buzzell ("Buzzell"), tenant's Chief Executive Officer, entered into a Guaranty of Lease with landlord. Buzzell agreed to guaranty "the full and prompt payment of all unaccelerated fixed (a.k.a Base Rent) and unaccelerated additional rent . . . payable by tenant under the lease" (Guaranty of Lease, NYSCEF Doc. No. 17). Buzzell's liability under the guaranty was limited to the period between the commencement date and the "Cut-Off Date" (*id.*). The Cut-Off Date is defined as the date by which tenant has fully vacated the premises, "delivered and surrendered vacant possession of the premises to landlord, free of all claims of occupancy" and in the condition required by the lease, and has "executed and delivered to landlord a written instrument pursuant to which tenant irrevocably and unconditionally waives and relinquishes all rights of tenant in or to the premises" (*id.*).

Following the onset of the COVID-19 pandemic, in March 2020, tenant began suffering economic setbacks and ceased paying rent under the lease. Pursuant to Executive Orders issued by the Governor's Office to combat the pandemic, tenant's workforce was barred from working at the premises from March 2020 through May 2020 (Buzzell Aff. dated October 5, 2021, NYSCEF Doc. No. 29, ¶¶ 15-17). Further, beginning in late May and continuing into the fall of 2020, protests and riots following the murder of George Floyd took place in the vicinity of the premises (*id.*, ¶¶ 20-21). Buzzell asserts that the rioting was severe enough at times that "[tenant's] employees were unable to enter or exit the leased premises for several hours during workdays. Even when access . . . was not obstructed, numerous employees reported to me that they felt unsafe attempting to enter the leased premises" (*id.*, ¶ 21).

On May 29, 2020, landlord and tenant entered into a letter agreement, pursuant to which landlord applied tenant's security deposit to cover the rent arrears for March, April, and May 2020, and a portion of the rent for June 2020 (Letter dated May 29, 2020, NYSCEF Doc. No.

19). Tenant remained liable for the balance of the June 2020 rent, and was required to replenish the security deposit within a year (*id.*). Tenant continued not to pay rent, and on August 12, 2020, landlord sent tenant a default notice, stating that tenant and Buzzell were in default under the Lease and Guaranty of Lease in the amount of $57,791.38 in rent and additional rent arrears (Default Notice dated August 12, 2020, NYSCEF Doc. No. 20). The Default Notice required payment of the outstanding amounts before August 31, 2020 (*id.*). Tenant did not make further payments following the default notice (Albert Aff. dated July 29, 2021, NYSCEF Doc. No. 13, ¶ 28). Buzzell asserts that tenant attempted to obtain a rent reduction or a reduction in the size of the premises, but was unable to obtain either (NYSCEF Doc. No. 29, ¶¶ 22-23). Further he claims landlord would not allow tenant to find a replacement tenant for the remainder of the lease (*id.*, ¶ 23).

Finally, on October 5, 2020, tenant informed landlord it was vacating the premises. Tenant sent landlord a letter, referencing the Lease and the Guaranty of Lease and stating that tenant would vacate the premises on October 8, 2020 and "deliver and surrender vacant possession of the entire premises to landlord free of all claims of occupancy, and otherwise in the condition required by the lease" (Vacate Notice dated October 2, 2020, NYSCEF Doc. No. 32). Tenant then vacated the premises as stated in the notice (NYSCEF Doc. No. 29, ¶ 27).

According to landlord, the rent and additional rent arrears for the period beginning March 1, 2020 and running through the date tenant vacated the premises is $208,890.36, with an additional $163,309.46 accruing between the vacatur and the commencement of the action and a further $1,472,141.83 over the remainder of the lease term, for a total of $1,844,341.15. Landlord presently moves for summary judgment against tenant and Buzzell for the full amount

of the arrears, as well as its reasonable attorneys' fees. Buzzell and tenant cross-move for summary judgment dismissing the complaint against them.

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

Discussion

Landlord has established *prima facie* entitlement to summary judgment by submission of "the existence of the lease . . . the tenant's failure to pay the rent, the amount of the underpayment, and the calculation of the amounts due under the lease (*Thor Gallery at S. Dekalb, LLC v Reliance Mediaworks (USA) Inc.*, 143 AD3d 498 [1st Dept 2016]). As set forth above, the lease provides for the payment of rent and additional rent by tenant (NYSCEF Doc. No. 15, Arts. 38, 40-41), and for the acceleration of the remaining rent due under the lease in the event of tenant's default in paying the rent (*id.*, Art. 18). In response, defendants do not dispute that tenant failed to pay rent from March 2020 until it vacated the premises in October 2020. Instead, defendants rely upon common law defenses of impossibility of performance and frustration of purpose to excuse tenant's default in payment. Further, defendants claim that the

pandemic and the protests/rioting in front of the building constitute "casualty" events under the lease, entitling them to a setoff. The court will address these issues in turn.

"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.*, 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 A.D.3d 561, 561-62 [1st Dept 2021] [holding that reduced revenues due to the COVID-19 pandemic did not render performance impossible]). "[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" (*Ctr. 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 Services, Inc. v Koval-Olsen*, 11 AD3d 263, 265 [1st Dept 2004]).

In *558 Seventh Ave. Corp. v Times Square Photo, Inc.* (194 AD3d 561 [1st Dept 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"]).

Here, it is undisputed that neither the means of performance nor the premises were destroyed, nor was the purpose of the contract substantially frustrated. Tenant does not dispute that its ability to conduct its business was only temporarily halted, and then allowed to resume, albeit under restrictions (NYSCEF Doc. No. 29, ¶ 18). Moreover, to the extent that any protesting or rioting that took place actually impeded access to the premises, by Buzzell's own description these disruptions were not constant and did not entirely prevent tenant from utilizing the premises (*id.*, ¶ 21). Temporary restrictions on use of the premises are not grounds for impossibility of performance or frustration of purpose (*Knickerbocker Retail LLC*, 204 AD3d at 537; *Gap, Inc.*, 195 AD3d at 577 ["plaintiff's assertion that Executive Order (A. Cuomo) No. 202.8 (9 NYCRR 8.202.8) rendered it objectively impossible to perform its operations as a retail store as required by the lease is unavailing as defendant correctly points out that by the time plaintiff filed its complaint in July 2020, this was no longer the case"]).

Defendants' reliance on the casualty provision for a setoff is also unavailing. As a general matter, the Lease provides that the rent was to be paid "without any setoff or deduction whatsoever" (NYSCEF Doc. No. 15 at 1). Moreover, the specific provision of the lease provides that if the premises

> or any part thereof shall be damaged by fire or other casualty, tenant shall give immediate notice thereof to [landlord], and the lease shall continue in full force and effect as hereinafter set forth . . . . (c) If the demised premises are totally damaged or rendered wholly unusable by fire or other casualty, then the rent or other items of additional rent . . . shall be proportionately paid up to the time of the casualty, and thenceforth shall cease until the date when the demised premises shall have been repaired and restored by Owner.

(*Id.*, ¶ 9.)

As the Appellate Division, First Department, has previously held, such language or similar language in a lease "refers to singular incidents causing physical damage to the premises

and does not contemplate loss of use due to a pandemic or resulting government lockdown" (*Gap, Inc.*, 195 AD3d at 577; *see also Andreas v 186 Tenants Corp.*, 2022 WL 3204680 at *1 [1st Dept, Aug. 9, 2022] ["this Court has also found that when the term "fire," as employed in a lease, "is placed in the same category" with the term "casualty," it also clearly evidences a sudden damage-causing event like a fire"]). Similarly, the protesting and riots did not render the premises "wholly unusable," as any interruptions in access to the premises did not physically damage the premises and were, as set forth above, temporary. Moreover, the record does not reflect that tenant ever gave landlord the required notice of fire or other casualty required under the Lease (NYSCEF Doc. No. 15, ¶ 9).

The cases cited by defendants in their opposition, to the extent they are binding on this court, are not to the contrary. In *Blue Water Realty, LLC v Salon Mgt. of Great Neck, Corp.* (189 AD3d 496 [1st Dept 2020]), the court considered whether repeated leaks and flooding were "the types of casualties contemplated by paragraph 9 of the lease" (*id.* at 497). The court ultimately held that they were not, because even though the flooding damaged the premises, they were such a common occurrence that they could not be considered as an accident or "sudden and unexpected" (*id.*). Conversely, the court in *45 Broadway Owner LLC v NYSA-ILA Pension Trust Fund* (107 AD3d 629 [1st Dept 2013]) held that a singular flood causing damage to the leased premises *was* a "casualty" under the lease (*id.* at 631). But common to both cases is that the flooding in question caused damage to the leased premises, whether it was of a singular nature or not. Here, neither the pandemic nor the protests caused damage to the premises.

Defendants argue as a last resort that discovery is necessary to determine the parties' intent in drafting the casualty provision and the extent to which the pandemic and the protests "interfered with [tenant's] ability to use the [premises]" (Defs.' Mem. of Law in Opp., NYSCEF

Doc. No. 28 at 22). However, the best evidence of the parties' intent is "what they say in their writing" (*Osprey Partners, LLC v Bank of N.Y. Mellon Corp.*, 115 AD3d 561, 562 [1st Dept 2014]). Terms in a contract are not ambiguous simply because the parties interpret them differently (*Mount Vernon Fire Ins. Co. v Creative Housing Ltd.*, 88 NY2d 347, 352 [1996]), and "[e]vidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing" (*W.W.W. Assocs., Inc. v Giancontieri*, 77 NY2d 157, 162 [1990]). Regarding the extent to which tenant was prevented from using the premises, evidence of that is surely in tenant's possession, as tenant would know when it was able to use the premises and when it was not. A request under CPLR 3212 (f) for discovery in response to a summary judgment motion requires the opposing party to demonstrate that "facts essential to justify opposition to the motion may lie within [the moving party's] exclusive knowledge or control" (*Barreto v City of N.Y.*, 194 AD3d 563, 564 [1st Dept 2021]). The "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis for denying the motion" (*Morales v Amar*, 145 AD3d 1000, 1003 [2d Dept 2016]).

Accordingly, landlord has established *prima facie* entitlement to the sums sought from tenant, and tenant has not raised a triable issue of fact in opposition. However, as regards Buzzell's Guaranty of Lease, landlord is limited in the amount that it may recover from Buzzell thereunder. The Guaranty of Lease provides that Buzzell's liability will end on the date that tenant has vacated, surrendered possession of the premises in the required condition and free of claims of occupancy, and delivered to landlord a written instrument waiving tenant's rights "in or to the premises (NYSCEF Doc. No. 17 at 1). The record reflects that tenant fulfilled these requirements as of October 8, 2020, by vacating the premises, surrendering possession to

landlord, and having sent the Vacate Notice to landlord on October 5, 2020 in which it expressly waived "all claims of occupancy" of the premises (NYSCEF Doc. No. 32). Landlord does not assert that tenant failed to vacate the premises or left the premises in a condition other than as required by the Lease. Landlord instead argues that the language of the Guaranty of Lease requires that Buzzell have executed a separate release, and that Buzzell is liable for the full accelerated rent because the rent accelerated prior to the Cut-Off Date. As set forth below, neither proposition is supported by the language of the Guaranty of Lease.

It is settled law that a court may interpret the unambiguous terms of a contract (*e.g., Maysek & Moran, Inc. v S.G. Warburg & Co.*, 284 AD2d 203, 204 [1st Dept 2001]). When doing so, a court should not read the contract in a way that renders any provision or clause meaningless (*Warner v. Kaplan*, 71 AD3d 1, 5 [1st Dept 2009]). "[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]).

To begin with, the only party required to waive any claims with respect to the premises pursuant to the Guaranty of Lease is tenant. There is no provision under which Buzzell must directly release claims against landlord. While landlord cites language purporting to require such a release (Pl.'s Reply Mem. of Law, NYSCEF Doc. No. 39 at 18), landlord does not indicate where such language may be found, and the court's own review of the Guaranty of Lease does not disclose such language. Moreover, the Guaranty of Lease specifically obligates Buzzell to pay "all unaccelerated fixed (a.k.a Base Rent) and unaccelerated additional rent," not simply all rent (NYSCEF Doc. No. 17 at 1). To interpret the Guaranty of Lease to include accelerated rent simply because the rent was accelerated prior to the Cut-Off Date would render the use of the

term "unaccelerated" meaningless, and, accordingly, that interpretation is not permissible (*Warner*, 71 AD3d at 5). Buzzell's liability is, therefore, limited to the unaccelerated rent that accrued prior to October 8, 2022, which landlord states is $208,890.36.

Accordingly, it is hereby

ORDERED that plaintiff Trinity Centre LLC's motion for summary judgment on the first and second causes of action is granted as set forth herein, and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff Trinity Centre LLC and against defendant NBTV, Inc., in the principal amount of $1,844,341.15, and of that amount, the amount of $208,890.36 against said defendant and defendant Nicholas Buzzell jointly and severally, with statutory interest from October 8, 2020, as computed by the Clerk, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff is entitled to its reasonable attorneys' fees incurred in this action as set forth in the Lease (NYSCEF Doc. No. 15, Art. 19) and the Guaranty of Lease (NYSCEF Doc. No. 17, ¶ 15), against the defendants jointly and severally 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

9/23/2022
DATE

LOUIS L. NOCK, J.S.C.

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