At an IAS Term, Comm Part 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23rd day of September, 2020.

PRESENT:

HON. LAWRENCE KNIPEL,
Justice.

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BKNY1, INC., d/b/a 132 LOUNGE,

Plaintiff,

- against -

132 CAPULET HOLDINGS, LLC,

Defendant.

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DECISION AND ORDER

Index No. 508647/16

Mot. Seq. No. 16

The following e-filed papers read herein:	NYSCEF #:
Notice of Motion, Affidavits (Affirmations), and Exhibits Annexed	547-557
Opposing Affidavits (Affirmations) and Exhibits Annexed	558-562
Reply Affidavits (Affirmations)	566-567

In this action for a *Yellowstone* injunction and other relief, defendant 132 Capulet Holdings, LLC (defendant), moves for: (1) leave, pursuant to CPLR 2221 (d), to reargue its prior motion for, among other things, partial summary judgment on its affirmative defenses and counterclaims, and, upon reargument, granting that branch of its prior motion; and/or (2) an order vacating the *Yellowstone* injunction entered in favor of plaintiff BKNY1, Inc., d/b/a 132 Lounge (plaintiff), on the grounds that the latter has failed to pay rent for the months of April and May 2020; and/or (3) "[a]lternatively setting this matter down for trial on a date certain"; and/or (4) reimbursement of costs, expenses, and attorneys' fees incurred by defendant in making this motion. Plaintiff opposes the motion.

(1)

The initial branch of defendant's motion which is for leave to reargue its prior motion for partial summary judgment on its affirmative defenses and counterclaims is *denied.* The record reflects that the legal and factual issues underlying defendant's affirmative defenses and counterclaims are scheduled to be tried in or about November 2020 by a Civil Court Judge presiding over the holdover proceeding commenced by defendant against plaintiff in the Housing Part of the Kings County Civil Court (*see 132 Capulet Holdings, LLC v BKNY1, Inc., d/b/a 132 Lounge*, index No. LT-79902-19-KI) (the holdover proceeding).[1] There is a "strong preference for resolving landlord-tenant disputes in Civil Court due to its unique ability to resolve such issues" (*44-46 W. 65th Apt. Corp. v Stvan*, 3 AD3d 440, 441 [1st Dept 2004]). The interests of judicial economy, fairness, and consistency are better served by deferring to the Civil Court's upcoming hearing and determination in the holdover proceeding.

(2)

The *Yellowstone* injunction has been predicated on plaintiff's representation made on the record of the hearing that it has paid, and will continue paying, rent.[2] It is undisputed that plaintiff has failed to pay rent for the months of April and May 2020.[3] The mandatory

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[1] *See* Affidavit of Nasser Ghorchian (plaintiff's president), dated July 26, 2020 (NYSCEF #559) (Plaintiff's Affidavit), ¶¶ 1-3; Amended Petition with attachments filed in the holdover proceeding (NYSCEF #562).

[2] *See* Order, dated Aug. 5, 2016 (NYSCEF #41), incorporating Transcript of Hearing, held on Aug. 5, 2016 (NYSCEF #42), at page 89, lines 19-21 (statement of plaintiff's counsel: "Rent is being paid and we'll continue to pay rent as we always have to the owners of the building.").

[3] *See* Plaintiff's Affidavit, ¶ 16.

closure of plaintiff's restaurant business during those months by Executive Order No. 202.3 as cited by plaintiff, did not relieve it of its contractual obligation to pay rent. Plaintiff has failed to cite – and the Court's own review has not uncovered – any provision of the lease excusing it from timely and fully paying its rent during (and notwithstanding) the state-mandated closure of its business.

The common-law doctrine of frustration of purpose is inapplicable under the circumstances. "[T]o 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" (*Warner v Kaplan*, 71 AD3d 1, 6 [1st Dept 2009] [internal quotation marks omitted], *lv denied* 14 NY3d 706 [2010]). "The doctrine applies when a change in circumstances makes one party's performance virtually worthless to the other, frustrating [its] purpose in making the contract" (*PPF Safeguard, LLC v BCR Safeguard Holding, LLC*, 85 AD3d 506, 508 [1st Dept 2011] [internal citations omitted]). Examples include a situation where the tenant was unable to use the premises as a restaurant until a public sewer was completed approximately three years after the lease had been executed (*see Center for Specialty Care v CSC Acquisition I, LLC*, 185 AD3d 34, 42 [1st Dept 2020] [citation omitted]). On the other hand, "impossibility occasioned by financial hardship does not excuse performance of a contract" (*Urban Archaeology Ltd. v 207 E. 57th St. LLC*, 68 AD3d 562, 562 [1st Dept 2009]). Inasmuch as the initial term of the lease, as amended by the March 2012 rider, is for approximately nine years (Nov. 2012 to Sept. 2021), a temporary closure of plaintiff's business for two months (April and May 2020) in the penultimate year of its initial term could not have frustrated its overall purpose.

Nor is the doctrine of impossibility of performance available to plaintiff in this case. "Generally, once a party to a contract has made a promise, that party must perform or respond in damages for its failure, even when unforeseen circumstances make performance burdensome" (*Kel Kim Corp. v Central Markets, Inc.*, 70 NY2d 900, 902 [1987]). "[A]bsent an express contingency clause in the agreement allowing a party to escape performance under certain specified circumstances, compliance is required" (*Stasyszyn v Sutton E. Assoc.*, 161 AD2d 269, 271 [1st Dept 1990]). Nothing in the lease at issue permits termination or suspension of plaintiff's obligation to pay rent in the event of the issuance of a governmental order restricting the use of the leased premises (*see Casteel USA v V.C. Vitanza Sons, Inc.*, 170 AD2d 568, 569 [2d Dept 1991]). To the contrary, the lease specifically provides that plaintiff's obligation to pay rent "shall in no wise be affected, impaired or excused because Owner is unable to fulfill any of its obligations under this lease . . . by reason of . . . government preemption or restrictions" (Lease [NYSCEF #24], ¶ 26), which is the case here.[4] Accordingly, the branch of defendant's motion for an order vacating the *Yellowstone* injunction on account of plaintiff's failure to pay rent for the months of April and May 2020 is granted to the extent set forth in the decretal paragraphs below.

The alternative branches of defendant's motion are either academic or without merit.

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[4] Notably, neither plaintiff's president nor plaintiff's counsel has demonstrated, via any competent evidence, such as plaintiff's financial documentation or an affidavit by its accountant with supporting evidence, that plaintiff was (and still is) unable to pay the April and May 2020 rent (*accord 538 Morgan Ave. Props. LLC v 538 Morgan Realty LLC*, 2020 NY Slip Op 32780[U], *10 [Sup Ct, Kings County 2020]).

Conclusion

Accordingly, it is

ORDERED that defendant's motion is *granted to the extent* that (1) plaintiff is directed to pay to defendant the April and May 2020 base rent ($10,927 per month as set forth in the Rent Rider) within 30 days after electronic service of this decision and order with notice of entry on its counsel by defendant's counsel; and (2) if plaintiff fails to pay such rent on time and in full, defendant may, if it be so advised, renew its request for the vacature of the *Yellowstone* injunction upon further order of the Court; and the remainder of its motion is denied; and it is further

ORDERED that defendant's counsel is directed to electronically serve a copy of this decision and order with notice of entry on plaintiff's counsel and to electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the decision and order of the Court.

E N T E R,

J. S. C.

Justice Lawrence Knipel