SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

35 EAST 75TH STREET CORPORATION, Plaintiff, -against- CHRISTIAN LOUBOUTIN, L.L.C., Defendant.	Index No. 154883/2020 Hon. Arlene P. Bluth Motion Sequence: 001

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

Defendant-Counterclaim Plaintiff Christian Louboutin, L.L.C., ("Louboutin"), respectfully submits this memorandum of law in opposition to Plaintiff 35 East 75th Street Corporation's ("Landlord's") motion requesting pre-discovery summary judgment pursuant to CPLR 3212. Landlord's premature application, which seeks to deny Louboutin the opportunity to take discovery and to have its day in court, is misguided and should be rejected. Landlord's counsel's own Affirmation in Support of Plaintiff's Motion for Summary Judgment and to Dismiss Defendant's Affirmative Defenses ("Landlord's SJM") demonstrates that questions of fact abound, and that summary judgment is inappropriate.

I. PRELIMINARY STATEMENT

This action was brought by Landlord for breach of a commercial lease. But it is far from straightforward. The issues in this case revolve around the frustration of purpose and impossibility of performance doctrines, each of which "***focuses on events*** which materially affect the consideration received by one party for his performance." *United States v. Gen. Douglas MacArthur Senior Vill., Inc*., 508 F.2d 377, 381 (2d Cir. 1974) (emphasis added). The doctrine of frustration of purpose is particularly applicable to "instances where a virtually cataclysmic, wholly unforeseeable event renders the contract valueless to one party." *Id*.

In this instance, the cataclysmic and wholly unforeseeable event was the COVID-19 pandemic and the social distancing regulations and requirements that were instituted in its wake. Quite simply, in early 2013 when the Lease[1] was signed, no one foresaw the onset of such a calamitous disease. Since March 2020, however, its effects have been devastating and unprecedented. It has resulted in a governmental and societal response that shut down the entire

[1] The term "Lease" refers to the written commercial lease agreement made between Louboutin and Landlord as of March 14, 2013, for a portion of the ground floor store premises located at 965 and 967 Madison Avenue, New York, NY (the "Leased Premises") and storage space in the basement of the building comprising the Leased Premises, a copy of which is annexed to Landlord's SJM as Exhibit D.

New York economy for months, made customary mask-wearing a universal sign of the times, and imposed social distancing protocols that continue to keep us six feet apart at all times from just about everyone, except those with whom we live.

In late-March of 2020, with the crisis worsening daily, the governor of New York ordered all non-essential New York businesses to shut down, including Louboutin's retail store at the Leased Premises. Restaurants and Broadway theaters went dark, the subways were halted, and even professional sports were put on hold. New York City became the epicenter of a global pandemic, and was turned into a veritable ghost-town. There has not been a shutdown of business of this magnitude in modern times.

Even today, governmental restrictions continue to prohibit or severely restrict people from engaging in the sorts of social activities that before the pandemic were taken for granted as ordinary, such as eating, working, going to school, and of course, shopping. These restrictions have fundamentally altered the retail landscape of New York City in ways that neither Louboutin nor any other commercial tenant could have possibly imagined. Louboutin's fundamental assumption in entering into the Lease – that it would be provided a highly visible and well trafficked luxury retail location on Madison Avenue in Manhattan's Upper East Side that would cater to luxury market customers – has been completely frustrated by COVID-19.

When its retail location at the Leased Premises shut down due to the COVID restrictions, Louboutin naturally ceased paying rent. Rather than negotiate a mutually acceptable resolution with Louboutin regarding the rent, Landlord chose to bring this action seeking payment for $1,680,454.73 in back rent and other fees purportedly owed by Louboutin since March 2020, when the shutdown order came into effect. Louboutin responded by filing an answer asserting counterclaims and affirmative defenses to Landlord's claims arising out of the unforeseeable

effects of the COVID-19 pandemic, including frustration of purpose, impossibility of performance, and failure of consideration.

Now, rather than engage in discovery as to the various fact-dependent issues arising out of Louboutin's counterclaims and affirmative defenses of impossibility of performance and frustration of purpose – *e.g.*, the parties' purpose at the time they entered the Lease, the extent to which that purpose has been frustrated, and the foreseeability of the COVID-19 pandemic – Landlord has instead filed this motion for summary judgment seeking to deny Louboutin its day in court. Landlord's principal argument appears to be that, as a matter of law, Louboutin could have and should have foreseen the event and the effects of COVID-19 – a catastrophe that neither party could possibly have predicted.

The fact is that neither party could have foreseen the scope of the total shutdown in business activity in New York commencing in March 2020, or the cataclysmic effects that the shutdown would have on luxury retail in Manhattan that continue to this day. Louboutin and Landlord alike should be given the opportunity to gather evidence about (among other things) what the fundamental purpose of the Lease was, how and to what extent the COVID-19 pandemic completely frustrated that purpose, and as to the foreseeability of the global pandemic at the time the Lease was executed. All these issues are plainly questions of fact necessitating discovery, and for that reason alone merit denial of Landlord's motion for summary judgment at this early stage in the case.

II. APPLICABLE LAW

Summary judgment pursuant to CPLR 3212 deprives the litigant of its day in court, and is a drastic remedy that should be denied where there is any doubt as to the existence of a material issue of fact. *See Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978) ("[S]ummary

judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue.") (citation omitted); *see also Van Noy v. Corinth Cent. Sch. Dist.*, 111 A.D.2d 592, 593, 489 N.Y.S.2d 658, 659 (3d Dep't 1985) ("Summary judgment deprives the litigant of his day in court and is considered to be a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues.") (citations omitted).

A summary judgment movant has the burden to set forth evidentiary facts sufficient to entitle that party to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact. *See Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985) ("The proponent of 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.") (citations omitted). "Failure to make that showing requires denial of the motion." *Id.*

III. ARGUMENTS

A. Summary Judgment Should Be Denied as To Louboutin's Counterclaim and Affirmative Defense of Frustration of Purpose Because Material Factual Disputes Exist With Regard to Key Issues

1. Frustration of Purpose Focuses on Events External to the Contract

The frustration of purpose doctrine excuses performance under a contract when an unexpected supervening event eliminates the impacted party's main purpose for entering into the transaction, although performance is still possible. Frustration of purpose has three main elements:

1. A change in circumstances external to the contract that makes one party's performance virtually worthless to the other. *PPF Safeguard, LLC v. BCR Safeguard Holding,*

LLC, 85 A.D.3d 506, 508 (1st Dep't 2011); *Arons v. Charpentier*, 36 A.D.3d 636, 637 (2d Dep't 2007).

2. The change in circumstances so completely altered the basis of the contract that without it, the transaction would make little sense. *PPF Safeguard, LLC*, 85 A.D.3d at 508.

3. The frustrating event was not foreseeable, could not have been guarded against in the contract, and was not caused by the defendant. *407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 282 (1968); *Warner v. Kaplan*, 71 A.D.3d 1, 5-6 (1st Dep't 2009).

Stated differently: frustration of purpose "focuses on events which materially affect the consideration received by one party for his performance. Both parties can perform, but as a result of unforeseeable events, performance by party X would no longer give party Y what induced him to make the bargain in the first place." *United States v. Gen. Douglas MacArthur Senior Vill., Inc.*, 508 F.2d 377 at 381.

2. Louboutin's Purpose In Entering Into the Lease Was To Obtain Space That It Could Fully Utilize To Run a Luxury Brick-and-Mortar Business In a Well-Trafficked Upscale Neighborhood For the Entire Duration Of the Lease

The evidence in this case will show that the main purpose in entering into the Lease was to provide Louboutin with a brick-and-mortar retail location in New York City's world-renowned Upper East Side neighborhood with a steady flow of traffic from luxury shoppers that Louboutin could fully utilize to sell high-end fashion products under the brand "Christian Louboutin" for the entire term of the Lease. De Cazotte Aff. ¶ 5.[2] This purpose is apparent from the language of the Lease itself. For example, the Lease states that "Tenant acknowledges that the Building is a first-class luxury residential cooperative" and requires that Louboutin use the

[2] "De Cazotte Aff." refers to the Affidavit of Clément De Cazotte, filed concurrently with, and in support of, this memorandum of law.

Leased premises "solely for the sale of high-end shoes, handbags, belts, cosmetics and such other accessories and ancillary items as are typically sold in 'Christian Louboutin' retail stores, and for no other purpose." Lease ¶¶ 2(a) and 2(n). Thus, it is clear even from the language of the Lease that the primary purpose of the parties was not simply to provide Louboutin with retail space. Rather, the primary purpose of the Lease was to provide Louboutin with a retail store in a first-class luxury location on the Upper East Side of Manhattan, and to obtain the reputational and revenue-generating benefits that come from being exposed to a steady traffic of well-heeled luxury shoppers. *See* De Cazotte Aff. ¶ 5.

This purpose is further supported by the high amount of base rent due under the Lease, which ranged from $170,833.33 a month (in year one of the Lease) to $258,400.74 (in year fifteen). Lease ¶ 1. This premium rent was justified (at least, prior to the COVID-19 pandemic) by the Leased Premises' location in a high-end residential area located a block away from the luxury Carlyle Hotel and Central Park, and surrounded by fashionable boutiques and restaurants. *See* De Cazotte Aff. ¶ 6. In other words, Louboutin agreed to the terms of the Lease (including the exorbitant rent) to obtain the benefit of exposure to a steady flow of tourists and luxury shoppers that, prior to the pandemic, were ever-present in Manhattan's luxury shopping areas. *See id.* Had the Leased Premises not had these benefits, Louboutin would never have agreed to enter into the Lease, much less incur its onerous rent obligations. *See, id.*

Landlord apparently intends to dispute what the purpose of the Lease was, as it appears to argue that the Lease's purpose was simply the use and occupancy of the Leased Premises. *See, e.g.,* Landlord's SJM ¶ 18. Therefore, at a minimum there exists a material factual dispute as to what the parties' purpose was in entering the Lease. And "[i]n determining the principal purpose of a contract, a court may consider both extrinsic evidence and the surrounding circumstances."

Rembrandt Enters., Inc. v. Dahmes Stainless, Inc., No. C15-4248-LTS, 2017 WL 3929308, at *5 (N.D. Iowa Sept. 7, 2017) (citation omitted).

3. Louboutin's Purpose in Entering the Lease Has Been Completely Frustrated By the COVID-19 Pandemic, and Landlord's Argument To the Contrary Creates a Material Factual Dispute That Renders Summary Judgment Improper

In early 2013 when the Lease was signed, the Upper East Side of Manhattan was considered one of the most desirable residential locations in the world, with well-trafficked luxury shopping all along Madison Avenue. *See* De Cazotte Aff. ¶ 4. By mid-March 2020, the COVID-19 pandemic had prompted state and local governments to begin imposing social distancing restrictions and shutdowns of retail operations on an unprecedented scale.

On March 20, 2020, Governor Cuomo issued Executive Order 202.8, which ordered all nonessential businesses to "reduce [their] in-person workforce at any work locations by 100% no later than March 22 at 8 p.m." Louboutin's retail store at the Leased Location was deemed non-essential. Within weeks, shopping districts all over Manhattan became an unrecognizable patch work of boarded-up and closed storefronts. The commuters, businesspeople, tourists and well-heeled shoppers that had been the life blood of retail on the Upper East Side as well as in other luxury areas of Manhattan had, in effect, disappeared.

As a non-essential retail business, Louboutin's store at the Leased Premises was not permitted to begin to reopen again until June 22, 2020. And although retail businesses were permitted to reopen, they were, and still remain, subject to social distancing requirements. For example, in-store retailers in New York City are required to enforce mask wearing among their

employees and customers, and to ensure that customers and (to the extent possible) staff remain separated at all times by at least six feet of distance while inside the retail premises. [3]

In addition, at the present time, there are virtually no office workers commuting to Manhattan. At least 85 percent of New York City office workers remain working from home, which may be an undercount.[4] There also remain in place government-imposed travel restrictions on tourist and business travel between numerous countries, including between the U.S. and the European Schengen area (*i.e.*, most of Western Europe), the United Kingdom, the Republic of Ireland, China, and Brazil.[5] This has dramatically reduced (effectively to zero) the number of tourist shoppers available to view, visit, or shop in, Manhattan. *See* De Cazotte Aff. ¶ 10. These social distancing and travel restrictions are expected to continue until a COVID-19 vaccine has been developed, approved, and distributed to a sufficient number of people, *i.e.*, for the foreseeable future. Even now infections are increasing and with a second wave of the COVID-19 pandemic in New York City on the horizon, New York State is instituting new restrictions on restaurants and private gatherings.[6] Another government-ordered shutdown of retail businesses in Manhattan is a real possibility.

The effect of these requirements on Manhattan retail has been to drastically reduce the number of customers permitted to visit stores at any given time, with a commensurate decrease in sales. *See* De Cazotte Aff. ¶ 8. In addition, mandated social distancing within stores has

---

[3] *See* https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/GeneralRetailSummaryGuidance.pdf (Roman Aff. Ex. A). The Court may take judicial notice of facts such as these. *See Cole Fisher Rogow, Inc. v. Carl Ally, Inc.,* 29 A.D.2d 423, 426 (1st Dep't 1968).

[4] *See* https://www.nytimes.com/2020/10/30/nyregion/new-york-city-office-coronavirus.html). (Roman Aff. Ex. B). The Court may take judicial notice of facts such as these. *See Cole Fisher Rogow, Inc.*, 29 A.D.2d at 426.

[5] *See* https://www.cdc.gov/coronavirus/2019-ncov/travelers/map-and-travel-notices.html (Roman Aff. Ex. C). The Court may take judicial notice of facts such as these. *See Cole Fisher Rogow, Inc.*, 29 A.D.2d at 426.

[6] *See* https://www.governor.ny.gov/news/governor-cuomo-announces-restaurants-bars-other-sla-licensed-entities-must-close-person-service (Roman Aff. Ex. D). The Court may take judicial notice of facts such as these. *See Cole Fisher Rogow, Inc.*, 29 A.D.2d at 426.

resulted in limited space, and in a reduction in the amount and type of services that can be provided to customers.

As a result of COVID-19, the government shut down orders, and the evisceration of Manhattan's retail sector, performing under the Lease no longer gives Louboutin what induced it to enter into the Lease in the first place. *See* De Cazotte Aff. ¶¶ 7-12. Louboutin cannot operate a high-end luxury goods establishment as originally envisioned given the current environment. *See id*. More particularly, Louboutin's purpose in paying a premium rent for the Leased Premises in order to obtain the benefits of foot traffic in a luxury shopping area has been completely frustrated by (i) the drastic reduction in foot traffic caused by COVID-19 restrictions, business closures, travel bans, and work-from-home policies, and (ii) the social distancing requirements, which prevent Louboutin from having more than a fraction of its intended capacity of customers in its store at any given time and actually discourage potential customers from visiting the retail store. *See* De Cazotte Aff. ¶ 8.

This is not merely a case of a store being forced to stop its operations temporarily due to health concerns. Nor is COVID-19 just another economic downturn or financial difficulty that has rendered the Lease deal merely less profitable or less desirable for Louboutin. COVID-19 and its effects have been nothing short of cataclysmic for retail in Manhattan. *See* De Cazotte Aff. ¶¶ 9-11.

As a result of the fundamentally altered circumstances caused by COVID-19 and the social distancing requirements that have been imposed as a result, the Leased Premises simply no longer has any economic value to Louboutin. *Id.* ¶ 12. To the contrary, it is now a burden. *Id.* COVID-19 has resulted in a drastically changed retail environment, where Louboutin cannot attract steady foot traffic to the Leased Premises because that foot traffic has ceased to exist since

March 2020, and for the indefinite future. *See id*., ¶¶ 9-10,13. Louboutin cannot derive the benefit of paying a premium rent in exchange for exposure to luxury shoppers for the same reason: luxury shoppers at brick-and-mortar stores in the Upper East Side, and in Manhattan as a whole, have all but disappeared. *See id*. ¶ 10. This fact is sharply reflected in the significant decline in retail rents on Madison Avenue. Rents have reportedly declined as much as 52 percent from their peak over the past five years due directly to the COVID-19 pandemic.[7] In short, COVID-19 has so completely altered Louboutin's basis for entering into the Lease that the deal that Louboutin struck with the Landlord in early 2013 is now essentially worthless.

The Landlord appears to argue that the COVID-19 pandemic did not make Plaintiff's grant of possession to the Leased Premises "virtually worthless," because Louboutin continues to use and occupy the Leased Premises. Landlord's SJM at 18. This argument misses the entire point of the frustration of purpose defense. It is irrelevant whether Louboutin continues to use and occupy the space. The question is whether a supervening, unprecedented, cataclysmic event like COVID-19 has so completely frustrated Louboutin's purpose in entering into the Lease that Louboutin's further use or further occupancy of the space no longer makes any sense. At a minimum, there exists a material factual dispute as to whether, and to what extent, the COVID-19 pandemic and ensuing government restrictions have affected the basis for Louboutin's bargain under the Lease, and whether that rises to the level necessary to trigger the frustration of purpose doctrine.

[7] *See* https://www.businessoffashion.com/articles/news-analysis/madison-avenue-rent-plunges-with-manhattan-retail-taking-a-hit (Roman Aff. Ex. E). The Court may take judicial notice of facts such as these. *See Cole Fisher Rogow, Inc.*, 29 A.D.2d at 426.

4. The COVID-19 Pandemic Was Not Reasonably Foreseeable at the Time of the Lease, and Landlord's Allegation That It Was Creates A Material Factual Dispute That Renders Summary Judgment Improper

Landlord alleges that the COVID-19 pandemic was a foreseeable event. That is to say, Landlord argues that as of March 2013 when the Lease was executed, COVID-19 and its effects on government regulation, retail, tourism, remote work, and on social interaction itself, *i.e.*, the masks, the social distancing – all of this was foreseeable. Unsurprisingly, Landlord provides no factual support for this allegation. Its principal argument appears to be that COVID-19 and its effects were foreseeable as a matter of law.

Landlord is incorrect. At the time that the Lease was executed in early 2013, New York City was a veritable tourist and shopping mecca and had been for as long as anyone could remember. *See* De Cazotte Aff. ¶ 13. No one, and certainly not Louboutin, could have foreseen that a global pandemic in the form and scope of COVID-19 would happen, or that such a pandemic would result in social distancing and other governmental restrictions that would devastate Manhattan's retail economy for the indefinite future. *Id.*

Moreover, under New York law, "foreseeability" is a question of fact that is not amenable to a pre-discovery summary judgment determination. *See, e.g., In re M & M Transp. Co.*, 13 B.R. 861, 869 (S.D.N.Y. 1981) (noting with respect to the doctrine of commercial frustration in New York that "[t]he basic test is whether the parties contracted on a basic assumption that a particular contingency would not occur . . . An analysis of the facts is crucial for the proper application of this doctrine.") (citations omitted).

The importance of a factual inquiry here is underscored by the fact that the courts themselves have repeatedly recognized, in different contexts and disputes, the unique and unprecedented nature of the COVID-19 pandemic. *See, e.g., The Gap, Inc. v. 170 Broadway*

Retail Owner, LLC, No. 652732/2020, 2020 WL 6435136, at *2 (Sup. Ct. N.Y. Cnty. Oct. 30, 2020) (denying landlord's motion to dismiss tenant's claims for impossibility of performance and frustration of purpose, noting that the complaint "alleges in some factual detail, that such performance has been made objectively impossible, by an unanticipated event that could not have been foreseen or guarded against in the Lease, ***a credible description of the current worldwide pandemic***, shutting down New York City 'brick and mortar' retail stores.") (emphasis added); *Jones v. Wolf*, No. 20-CV-361, 2020 WL 1643857, at *12 (W.D.N.Y. Apr. 2, 2020) (noting that "the recommended measures for preventing the spread of COVID-19 are unprecedented. Indeed, this Court is not aware of any other disease that caused New York State – let alone most of the nation – to decide that the *only* reasonable course of action was to shutter the economy, shelter in place, and isolate at home for weeks on end."); *United States v. Martin*, No. 18-CR-834-7 (PAE), 2020 WL 1819961, at *3 (S.D.N.Y. Apr. 10, 2020) ("The COVID-19 pandemic is extraordinary and unprecedented in modern times in this nation."). Certainly, a crisis that is being described by the courts as "unanticipated," "unprecedented," and "extraordinary," could not have been foreseen, as a matter of law, in early 2013 when the Lease was executed.

Landlord also argues that the *force majeure* language in paragraph 26 of the Lease establishes as a matter of law that at the time the Lease was executed both parties foresaw that an event such as the global COVID-19 pandemic might occur. That is also incorrect. The Lease does not include any mention of illness, disease, or epidemics – much less a global pandemic. Landlord appears to argue that broad phrases such as "act of God," "restrictive governmental laws or regulations," "casualty," or "emergency" should be read to include the COVID-19 pandemic, its attendant months-long governmental shutdown of the entire New York economy,

and the social distancing requirements that have been imposed on a society-wide basis and that continue to affect human interaction at every level, from business, to recreation and worship, and even the home. These terms cannot, and should not, be read broadly enough to encompass the society-altering effects of the global COVID-19 pandemic as a matter of law.

The social distancing requirements that have become ubiquitous throughout our society as a result of COVID-19 are unlike any "restrictive governmental law or regulation" that has ever been seen in modern times. Indeed, what has been revolutionary about the aftermath of COVID-19 has been the extent to which social distancing requirements continue to be adhered to by large segments of society even in the absence government regulations requiring it. For example, there is no law requiring office workers to work remotely from home, or requiring wealthy residents of Manhattan's most exclusive neighborhoods to relocate to suburban or country homes. Yet these have had a cataclysmic effect on brick-and-mortar luxury retail in Manhattan. The social distancing requirements that have arisen in the wake of COVID-19 represent a change in our society itself that is much more fundamental and multifaceted than the sort of "restrictive governmental law or regulation" to which paragraph 26 of the Lease broadly refers. The COVID-19 social distancing requirements are the result of an unprecedented global health crisis that has irretrievably altered and impacted retail business operations across New York City and the world. COVID-19 and its social distancing effects represent precisely the sort of "virtually cataclysmic, wholly unforeseeable event [that] renders the contract valueless to one party." *United States v. Gen. Douglas MacArthur Senior Vil., Inc*., 508 F.2d at 381.

As for terms like "act of God," "casualty," or "emergency," it simply cannot be that those terms can be validly interpreted to encompass the COVID-19 pandemic and its effects. If so, the concept of foreseeability, and with it the doctrines of impossibility of performance and

frustration of purpose, would be rendered meaningless. At the very least, there exists a material factual dispute as to whether the COVID-19 pandemic would have been foreseeable given the language in paragraph 26 of the Lease.

5. No Court Has Summarily Denied a Commercial Tenant Its Day in Court to Seek Relief From the COVID-19 Disaster Under the Doctrines of Either Impossibility of Performance or Frustration of Purpose

Courts across the country, including in New York, have been offering relief to tenants due to the unforeseeable and cataclysmic effects of the COVID-19 pandemic. *See, e.g., The Gap, Inc.*, 2020 WL 6435136, at *2 (denying landlord's motion to dismiss tenant's claims for impossibility of performance and frustration of purpose due to the effects of COVID-19); *Simon Prop. Grp., L.P. v. Pacific Sunwear Stores LLC*, No. 49D01-2006-PL-020195, 2020 WL 5984297, at *6 (Ind. Super. Ct. June 26, 2020) (finding that tenant was likely to succeed on the merits of its impossibility of performance claim because, noting that "[t]he effects of both the COVID-19 disease and the public health responses to it on the national economy have sent profound [s]hockwaves throughout all facets of the commercial sector. Courts around the country are grappling with how the monumental impacts of the COVID-19 crises are affecting arrangements between businesses and other service providers who entered into deals without ever entertaining the possibility that the performance would be interrupted by a global pandemic."); *Elmsford Apartment Assocs., LLC v. Cuomo*, No. 20-cv-4062 (CM), 2020 WL 3498456 (S.D.N.Y. June 29, 2020) (noting the unprecedented scope of COVID-19 in holding against landlords' suit seeking to block government's efforts to protect tenants during COVID-19 crisis on constitutional grounds); *In re Pier 1 Imports, Inc.*, 615 B.R. 196 (E.D. Va. 2020) (granting relief for tenant on unpaid rent obligations while retail business was shut down by governmental regulation due to COVID-19).

In fact, New York courts have routinely found frustration of purpose where the leased premises could no longer be fully occupied or fully utilized for the contractual purpose. For example, in *Elkar Realty Corp. v. Kamada*, 6 A.D.2d 155 (1st Dep't 1958), the Appellate Division ruled that a tenant was justified in disavowing a lease. In *Elkar*, the parties entered into a ten-year lease for a tea room and restaurant on W. 105th Street. *See id*. at 156. The parties later discovered, however, that the weight-bearing capacity of the premises did not satisfy the local building code. *Id*. Although the tenant attempted to make structural changes to bring the premises up to code, it was unable to attain the required consent of another tenant of the building. *Id*. at 158. In resolving the dispute, the court ruled that the parties "must, therefore, be deemed to have been entering into a lease for a purpose not then legally permissible because of the physical condition of the premises." *Id*. at 157.

In *Benderson Dev. Co. v. Commenco Corp*., 44 A.D.2d 889 (4th Dep't 1974), *aff'd*, 37 N.Y.2d 728 (1975), the tenant had entered into a twenty-year lease with Commenco to operate a restaurant. *See id.*, 44 A.D.2d at 889. However, the premises could not be used as restaurant until a sewer was constructed, which did not occur until nearly three years after the execution of the lease. *See id*. Even though more than seventeen years remained on the lease, the court ruled that "the purpose of the lease was defeated, [and] the [tenant] properly cancelled it." *Id*.

Most recently, in *Jack Kelly Partners LLC v. Zegelstein*, 140 A.D.3d 79 (1st Dep't 2016), the parties had entered into a five-year commercial lease agreement for floor space located on East 60th Street. *Id.* at 81. The lease there specified that the tenant "shall use and occupy the Demised Premises for general offices of an executive recruiting firm and no other purpose." *Id*. (internal quotations omitted). Ultimately, however, it was discovered that the certificate of occupancy for the building required that the leased premises be used only for residential

purposes. *See id*. The tenant asked the landlord "to amend and correct the CO to permit the demised premises to be used for commercial purposes, but [the landlord] refused to comply." *Id*. The tenant sued the landlord seeking excusal from the lease based on impossibility of performance and frustration of purpose. *Id*. The Appellate Division ruled in the tenant's favor on both counts. As to the impossibility claim, the Court held that the tenant "properly raises the excuse of impossibility of performance as its ability to perform under the lease was destroyed by law." *Id*. at 84. And, as to the frustration claim, "without the ability to use the premises as an office, the transaction would have made no sense, and the inability to lawfully use the premises in that manner combined with defendants' alleged failure and refusal to correct the CO constitutes a frustration of purpose entitling plaintiff to terminate the lease." *Id*. at 85 (citations omitted).

These cases teach that the application of the frustration and impossibility doctrines provide a safety valve for tenants, like Louboutin, that are facing substantially changed circumstances beyond their control. Those doctrines were applicable pre-COVID, and remain applicable during these challenging and unprecedented times.

B. Summary Judgment Should Be Denied As To Louboutin's Impossibility of Performance Counterclaim and Affirmative Defense

Performance under a contract may also be excused under the doctrine of impossibility of performance where it is rendered impossible by governmental activities and restrictions that could not have been foreseen at the time the contract was executed. *See Metpath, Inc. v. Birmingham Fire Ins. Co. of Pa.*, 86 A.D.2d 407, 411 (1st Dep't 1982) ("There is ample authority holding that where performance becomes impossible because of action taken by government, performance is excused.") (citations omitted); *A & S Transp. Co. v. Cnty. of Nassau*, 154 A.D.2d 456, 459 (2d Dep't 1989) ("the law of impossibility provides that

performance of a contract will be excused if such performance is rendered impossible by intervening governmental activities, but only if those activities are unforeseeable . . .") (citations omitted); *Bush v. ProTravel Int'l, Inc*., 192 Misc. 2d 743 (Civ. Ct. Richmond Cnty. 2002) (terrorist attacks of September 11, 2001, was an extraordinary situation that excused performance under a ticket purchase contract).

From mid-March until June 22, 2020, COVID-19 governmental restrictions rendered non-essential retail activities, such as those at the Leased Premises, effectively illegal and therefore made it impossible for Louboutin to perform under the Lease, or to obtain the benefit of its bargain under the Lease. As the imposition of those COVID-19 restrictions were in no way foreseeable (*see* the discussion of foreseeability in Section III.A.4., *supra*), the doctrine of impossibility of performance excuses Louboutin from performing under the Lease for at least the duration of the COVID-19 shutdown. Certainly, no rent should be due under the Lease for the period of time during which performance was impossible.

In addition, the unforeseeable governmental restrictions imposed as a result of the COVID-19 pandemic have made it impossible for Louboutin to perform, for the entire term of the Lease, its obligation to use the Leased Premises "solely for the sale of high-end shoes, handbags, belts, cosmetics and such other accessories and ancillary items as are typically sold in 'Christian Louboutin' retail stores, and for no other purpose." Lease ¶¶ 2(n) and 2(a). It has also been impossible for Louboutin to perform its obligation to "continuously operate and conduct its business in one hundred percent (100%) of the Demised Premises" as required by paragraph 2 of the Lease. Lease ¶ 2(h). And with infections currently on the rise and the looming arrival of a second wave of the pandemic in the New York City area, it is simply not possible for Louboutin to comply with these requirements for the remaining term of the Lease.

This impossibility of performance is sufficient to excuse Louboutin from its obligations under the Lease, and at a minimum creates a question of fact as to whether it is or is not possible for Louboutin to comply with its continuous use obligations under paragraph 2 of the Lease.

C. Summary Judgment Should Be Denied as To Louboutin's Failure of Consideration Defense

New York courts recognize rescission as an available equitable remedy when there is failure of consideration between contracting parties. *See Callanan v. Powers*, 199 N.Y. 268, 284 (1910). Such a failure "depends on what the parties had in contemplation at the time of the lease." *Elk Realty Co. v. Yardney Elec. Corp*., 153 N.Y.S.2d 730, 731 (1st Dep't 1956). *See also Say-Phil Realty Corp. v. De Lignemare*, 131 Misc.827, 828-29 (Mun. Ct. N.Y. Cnty. 1928) (holding that "[t]he doctrine of failure of consideration is predicated upon the happening of events which materially change the rights of parties, which events were not within the contemplation of the parties, at the time of the execution of the contract."). Courts have in fact rescinded leases in which the parties contemplated a use that is later found to be barred by governmental regulation. *See Mariani v. Gold*, 13 N.Y.S.2d 365 (Sup. Ct. N.Y. Cnty. 1939) (rescinding lease for premises leased as a health resort, where such use was not approved under the zoning ordinance).

In the present instance, the facts support an affirmative defense of rescission for failure of consideration. First, the Lease requires Louboutin to "continuously operate and conduct its business" in the Leased Premises and to operate it "solely for the sale of high-end shoes, handbags, belts, cosmetics and such other accessories." Lease ¶¶ 2(a) and (h). As was previously explained, Louboutin also agreed to pay a premium rent in the expectation that Louboutin would be able to operate as a boutique retail store along a well-trafficked, premium

retail corridor, and that this expectation was a fundamental consideration for the substantial rent that Louboutin agreed to pay.

As such, the COVID-19 pandemic, and the governmental restrictions and social distancing requirements that were instituted to fight the pandemic, have deprived Louboutin of the benefit of its bargain. This constitutes failure of consideration, and Louboutin is entitled to rescission of the Lease or an abatement of rent as a result.

IV. CONCLUSION

For the above-stated reasons, Louboutin respectfully requests that Landlord's motion for summary judgment on Louboutin's (i) first and second counterclaims for a declaratory judgment of frustration of purpose (for lease termination and abatement of rent), (ii) third and fourth counterclaims for a declaratory judgment of impossibility of performance (for lease termination and abatement of rent), (iii) second and third affirmative defenses of impossibility of performance and frustration of purpose, and (iv) fourth affirmative defense of failure of consideration, be denied.

Dated: November 23, 2020

Respectfully submitted,

Arent Fox LLP
1301 Avenue of the Americas, Floor 42
New York, NY 10019-6040
Tel. 212.629.3900
Fax 212.484.3990

By: /s/ Eric Roman
Eric Roman
Counsel for Defendant-Counterclaim Plaintiff Christian Louboutin, L.L.C.