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

VICTORIA'S SECRET STORES, LLC successor in interest to VICTORIA'S SECRET STORES, INC.; and L BRANDS INC., successor in interest to THE LIMITED, INC. and INTIMATE BRANDS, INC.,

Plaintiffs,

-against-

HERALD SQUARE OWNER LLC successor in interest to 1328 BROADWAY, LLC,

Defendant.

Index No.: 651833/2020

Hon. Andrew Borrok

Motion Sequence: 001

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION SEEKING PRE-DISCOVERY SUMMARY JUDGMENT

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Plaintiffs respectfully submit this memorandum of law in opposition to Defendant's motion requesting pre-discovery summary judgment pursuant to CPLR 3212. The Defendant Landlord's premature application seeking to deny Plaintiff's right to discovery is misguided and should be rejected. Indeed, Defendant's counsel's own words demonstrate that questions of fact abound, rendering summary judgment entirely inappropriate.

PRELIMINARY STATEMENT[1]

At the outset, we recognize this motion's significance. This Court will likely be the first to rule on the novel issues presented, and its ruling will have sweeping consequences reaching beyond this action to the many other suits mirroring the allegations of the Complaint.

This case involves a commercial lease with but one purpose: to permit Victoria's Secret to operate a retail store at Two Herald Square, for the entire term of that lease. For this privilege, Victoria's Secret agreed to pay the Landlord upwards of $1 million per month.

With both Landlord and Tenant parties being sophisticated and experienced commercial entities, the Lease – spanning nearly 100 pages across 40 sections, and amended ten times – accounted for scores of "what ifs." These "what ifs" allocated risk among the parties for countless contingencies including fire, flood, casualty, and even warfare.

But this case is about what happens when the unthinkable occurs; indeed, something so profound – so extraordinary – that it exceeds that which was reasonably possible or even perceivable when those "what ifs" were conjured. Where (as here) such an occurrence shatters the very core of a commercial deal, the frustration of purpose doctrine operates to rescind the contract.

COVID-19 epitomizes such an event, ravaging communities, killing thousands, and spawning a government response more massive and complete than any in mankind's history. With

[1] Capitalized terms not defined herein shall have the meaning set forth in the Complaint [Dkt. 3].

the crisis worsening daily by mid-March 2020, government officials pleaded with citizens to stay home. And by Executive Order, Governor Andrew Cuomo commanded New York business to shut down more or less completely. Retail stores were closed. Restaurants were shuttered. Broadway went dark. Playgrounds were locked. Subways were halted. Professional sports were sidelined. Hotels were repurposed as medical housing, and convention centers doubled as wartime hospitals. New York became a veritable ghost-town. Never has there been such a complete and total shutdown of American commerce for an indefinite period.

With its Herald Square location shuttered by emergency government order, Victoria's Secret considered the Lease's fundamental purpose shattered, and naturally ceased paying rent. When the Landlord demurred, threatening termination and eviction and demanding payment of amounts purportedly remaining due under the Lease, Victoria's Secret brought this action, seeking a declaration that COVID-19 and its massive government response constitute a classic case of frustration of purpose.

Yet, rather than engage in discovery as to the parties' reasonable expectations at the time they entered the Lease, the Landlord instead asks this Court to summarily deny Victoria's Secret its day in court. Its core argument is that Victoria's Secret was prescient, and should have foreseen and "guarded" against these remarkable occurrences. Both the proof in this case (and common sense) will demonstrate otherwise: ***neither party could have contemplated the scope of the total shutdown of business activity in New York City commencing in March 2020***.

Of course, the Landlord is entitled to argue to a factfinder that the parties considered, or could have considered, the drastic effects of the nationwide commercial shutdown due to the pandemic that we have all now experienced. And in fact, the Landlord has asserted in its Answer exactly that: "Tenant plainly considered, in entering into the Lease, the possibility that its Retail

Premises might be forced to close due to various circumstances…." Answer, Dkt. 6 at ¶ 144. This issue plainly presents questions of fact necessitating discovery. This Court cannot accept Landlord's extraordinary invitation to rule as a matter of law because, here, issues of fact abound.

LEGAL STANDARD

Summary judgment pursuant to CPLR 3212 deprives the litigant of its day in court, and is thus a drastic remedy that should be denied where there is *any doubt* as to the existence of a material issue of fact. *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 (1978); *see also Van Noy v. Corinth Cent. School Dist.*, 111 A.D.2d 592 (3d Dept. 1985); *Krupp v. Aetna Life & Cas. Co.*, 103 A.D.2d 252 (2d Dept. 1984).

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. Failure to make that showing requires denial of the motion. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985).

Here, Defendant cites ***not a single analogous case***, from any jurisdiction, reaching the drastic result it urges: the finding of foreseeability as a matter of law, without any discovery whatsoever.[2] Defendant's failure to cite any case reaching the result it urges is sufficient, standing alone, to deny its application. But what is more, Defendant's very own arguments, and its own counsel's public statements, demonstrate that issues of fact abound.

[2] While *Gander Mountain v. Islip U-Slip LLC*, 923 F. Supp. 2d 351 (N.D.N.Y. 2013) was dismissed on a motion to dismiss, the court there rejected the frustration of purpose claim because the complaint expressly alleged that the frustrating event – flooding – occurred multiple times in the years preceding the contract at issue. ("The subject event, flooding, was clearly foreseeable. The complaint contains factual averments pertaining to four floods from 1986 until 2000…Based upon plaintiff's own admissions, it was aware of the flood risks associated with the property prior to executing the Lease."). No similar allegation appears in Plaintiffs' Complaint in this case.

ARGUMENT

I. THE LEASE DOES NOT PRECLUDE COMMON LAW ASSERTIONS OF FRUSTRATION OF PURPOSE AND/OR IMPOSSIBILITY OF PERFORMANCE

A. The "Store Closure" Contemplated In The Lease Describes A Discreet Event That Is Irrelevant As To The Destruction That Actually Occurred

The Complaint asserts that, beginning in mid-March, the COVID-19 emergency lockdown restrictions expressly precluded Victoria's Secret from operating its retail store at the Premises. Compl. ¶ 55. The Landlord's leading argument for dismissal is the irrelevant assertion that the Lease "contemplated the possibility of a store closure" and, thus, could have guarded against this COVID-19 closure. Defendant's Memorandum of Law In Support of Motion For Summary Judgment ("Br.") at 7. The Landlord urges, incorrectly, that this precludes Plaintiffs' reliance upon the common law doctrines of frustration of purpose and impossibility of performance. *Id*. Nonsense.

Landlord's flawed argument rests on Lease Article 26, which abates rent for a temporary store closure due to a Landlord breach. That clause considers a closure caused by the Landlord's failure to "provide…[some] service" or "perform [some] obligation." Landlord contends that, because no Landlord breach is alleged, there are no issues of material fact. Br. at 7.[3]

But the Landlord, and even a casual reader, knows well that a simple "store closure" is not contemplated here. Rather, the Complaint describes something entirely different: a massive, government-ordered shutdown of ***all*** non-essential commercial activity in New York City – in the interest of public health – seeking to quell a deadly virus ravaging the community.[4] This sort of

[3] In addition, the Landlord relies upon Lease Section 2(c)(vi), which purports to hold Tenant in default for "failure to do business" at the Premises and permits Landlord to collect Minimum Rent.

[4] Specifically, the Complaint alleges that by March 7, 2020, Governor Cuomo declared that "a disaster [was] impending in New York State, for which the affected local governments [would be] unable to respond adequately" and therefore "a State disaster emergency for the entire State of New York" was necessary. Compl. ¶ 58. As March 2020 continued, the COVID-19 crisis worsened, and culminated in Executive Order 202.8, requiring "all nonessential businesses and nonprofit organizations to reduce [their] in-person workforce at any work locations by 100% no later

government-mandated total and indefinite shutdown of business in the interest of saving lives is markedly different from the temporary "store closure" concept contemplated in Article 26. Discovery concerning what the parties intended by this "store closure" concept will further highlight the distinction.

Moreover, the Complaint's bare allegations go well beyond the store's "closure." Rather, the Complaint contends that "New York City's business landscape has been shattered, and is forever altered." Compl. ¶ 7. Indeed, even when the Victoria's Secret store is permitted to reopen, "COVID-19 remains virulent, and businesses have been advised of ***extensive and mandatory*** guidelines intended to offer at lease some measure of protection." *Id.* ¶ 7 (emphasis added). Thus, the scant "marginal capacity" (*Id.* ¶ 8) or other requirements in any phased reopening of New York City business – applicable for the foreseeable future – are not contemplated anywhere in the Lease.

Landlord points to no Lease provision which addresses what is to occur regarding these drastic government requirements as to operating capacity or other social distancing protocols. Indeed, the Complaint alleges that any "phased reopening" will dramatically alter "the experience of shopping for consumer products in a retail store" forever (*Id.* ¶ 7) and is, thus, highly material to the Lease. But the face of the Lease reveals a contract completely silent on issues of global pandemic and/or mandated government shutdown and/or phased reopening.

Since the Landlord contends that risks of pandemic and mandated shutdown were contemplated in the Lease language, then this unquestionably raises a question of fact necessitating discovery. *See Ames v. Cty. of Monroe*, 162 A.D.3d 1724, 1726 (1st Dept. 2018) ("[W]here 'contract language is reasonably susceptible of more than one interpretation, ... extrinsic or parol

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than March 22[, 2020] at 8 p.m." *Id.* ¶ 63. Thus, the Complaint asserts that "[p]ursuant to these extraordinary and unforeseeable executive acts and decrees, [Tenant] was *required* to close all of its operations at the Premises. The VS store at the Retail Premises remains shuttered to this day by government order." ¶ 64.

evidence may be then permitted to determine the parties' intent as to the meaning of that language.'"). Landlord's application should be denied for this reason alone.

B. The Absence of a Force Majeure Clause Does Not Preclude Common Law Claims

Landlord also relies upon the Lease's lack of a general *force majeure* clause, suggesting – without legal support – that this somehow obliterates Plaintiffs' common law right to assert frustration of purpose or impossibility of performance. (Br. at 8 & n. 15). It does nothing of the sort.

It is well understood that a *force majeure* clause and common law principles of contract law are separate concepts. *See, e.g., Aukema v. Chesapeake Appalachia, LLC*, 904 F.Supp.2d 1991(N.D.N.Y. 2012) (considering *separately*, a defense founded upon the relevant *force majeure* clause and the defense of frustration of purpose). Indeed, the best proof of this concept comes from Landlord's own counsel (Mr. Koh). Contrary to the position Landlord now takes, Mr. Koh wrote publicly in a COVID-related thought piece entitled "Is My Force Majeure Defense Likely to Succeed?" (dated March 30, 2020), that ***"Non-performing parties without a force majeure provision in the contract may still rely on the common law defenses of impossibility of performance or frustration of purpose..."***[5] It is, thus, not surprising that Landlord cites no case authority for its invented proposition of law.

In sum, the Lease never entertained the possibility that performance would be interrupted by a global pandemic spawning the most massive and unprecedented economic shutdown in history. Thus, again quoting Landlord's counsel: the Court must "look beyond the language of the contract and examine ***what the parties could have theoretically foreseen at the time the contract***

[5] *See* https://www.meisterseelig.com/wp-content/uploads/2020/03/MSF-Client-Alert-Force-Majeure-COVID-19-Guidance.pdf (last viewed June 30, 2020) (emphasis added). Also annexed as Exhibit 1 to the Affirmation of William Mack dated July 29, 2020 ("Mack Aff.")

was being negotiated."[6] This exercise demands discovery, necessitating denial of Landlord's summary judgment application.

II. SUMMARY JUDGMENT IS PRECLUDED BECAUSE FACTUAL ISSUES ABOUND AS TO PLAINTIFFS' FIRST CAUSE OF ACTION FOR RESCISSION FOR FRUSTRATION OF PURPOSE

Although Landlord urges that the frustration of purpose doctrine does not apply, it deliberately avoids defining it. That is presumably because this case falls squarely within New York courts' application of the doctrine.

Frustration is properly invoked where "the frustrated purpose [is] 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 A.D.3d 1, 6 (1st Dept. 2009) *lv. denied* 14 N.Y.3d 706 (2010); *Crown IT Servs., Inc. v. Koval–Olsen*, 11 A.D.3d 263, 265 (1st Dept. 2004); *see also Restatement [Second] of Contracts*, § 265, Comment (a). 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, 381 (2d Cir.1974).

The COVID-19 shutdown presents the classic frustration scenario. Here, an unforeseeable government proscription has indefinitely banned the use of Premises (in full or in part) as a retail store. *See* Compl. ¶¶ 5-7. This strips Victoria's Secret of the consideration it bargained for (the unfettered use of the Premises as a retail store), and renders the Lease nonsensical. As alleged in the Complaint, beginning in mid-March 2020, Victoria's Secret was expressly precluded by

[6] *See* https://www.meisterseelig.com/wp-content/uploads/2020/05/MSF-Client-Alert-Considerations-for-Invoking-the-Defenses-of-Frustration-May-5-2020.pdf (last viewed June 30, 2020) (emphasis added). Also annexed as Exhibit 2 to the Mack Aff.

Executive Order from operating its store at the Premises. *Id.* ¶ 55. COVID-19 and its related government shutdown orders "alter[ed] every aspect of business and life in New York City," and were "neither foreseen nor foreseeable by any party to the Lease." *Id.* ¶ 70. Indeed, the COVID-19 shutdown "is unlike anything ever before experienced in America in terms of severity and duration…." *Id.* ¶ 5.

The Landlord's insistence that the Tenant could have bargained for contractual protection from the COVID-19 shutdown (Br. at 8-9) cannot be taken seriously. Discovery will reveal that no commercial party – no matter how sophisticated – could have foreseen anything remotely similar to what has occurred in 2020. At the very least, whether such protection could or should have been bargained for is a question of fact.

Courts nationwide have already begun considering the effects of COVID-19 on commercial dealings. Unlike the Landlord, these courts have taken an honest view of what has occurred, uniformly recognizing the gravity of the situation. Importantly, ***no court*** has summarily denied a commercial tenant its day in court to seek relief from the COVID-19 disaster.

Instead, courts have offered relief to tenants, and in some cases have already cleared the way for common law arguments sounding in frustration and impossibility. *See Simon Property Group, L.P. v. Pacific Sunwear Stores, LLC*, Cause No. 49DO1-2006-PL-020195 (Indiana Commercial Court, June 26, 2020) (granting defendant's motion for a temporary restraining order, and provisionally finding that defendant's impossibility defense satisfies the likelihood of success on the merits because "The effects of both the COVID-19 disease and the public health responses to it on the national economy have sent profound shockwaves throughout all facets of the commercial sector. Courts around the country are now 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***.") (emphasis added); *Elmsford Apartment Associates v. Cuomo*, 2020 WL 3498456 (S.D.N.Y. June 29, 2020) (noting the unprecedented scope of COVID-19); *In re Bread & Butter Concepts, LLC*, No. 19-22400 (DLS) [Dkt. 219] (Bankr. D. Kan. May 15, 2020) (acknowledging that if the debtor were forced to pay rent immediately despite pandemic-related shut downs, it would likely be unable to continue operations. Accordingly, the court held that "these ***unprecedented circumstances*** require flexible application of the Bankruptcy Code and exercise of the Court's equitable powers … to grant further relief" such as deferring rent payments) (emphasis added); *In re Pier 1 Imports, Inc.*, 2020 WL 2374539 (Bankr. E.D. Va. May 10, 2020) (delaying debtor-retailers' payment of certain accrued but unpaid rent during a "limited operations period" when their stores were closed due to stay-at-home orders entered in connection with corona virus pandemic).

More generally, New York courts have routinely found frustration of purpose where, as here, the bargained-for premises could not be occupied or used for the contractual purpose. For example, in *Benderson Dev. Co. v. Commenco Corp.*, 44 A.D.2d 889 (4th Dept. 1974), *aff'd* 37 N.Y.2d 728 (1975), the court found frustration where the tenant was ***unable to use*** the premises it had leased as a restaurant until a ***public*** sewer was completed. Similarly, in *Jack Kelly Partners LLC v. Zegelstein*, 140 A.D.3d 79, 85 (1st Dept. 2016), *lv. dismissed* 28 N.Y.3d 1103 (2016), frustration was found where an office space tenant ***could not occupy*** the premises because the certificate of occupancy allowed only residential use. The doctrine even reaches back to prohibition, when the First Department affirmed a finding that a brewery's lease was frustrated when a Constitutional amendment barred the sale of alcohol. Thus, the intended activity ***could***

not take place at the premises. *Doherty v. Eckstein Brewing Co.*, 115 Misc. 175, 179 (1st Dept. 1921).

The cases cited by the Landlord, on the other hand, are inapposite and readily distinguishable. In fact, each involves an economic downturn or a financial difficulty that simply rendered the deal less profitable or less desirable for one of the parties. In the cases Landlord cites,[7] no party was actually *prevented by law* from enjoying the consideration for which it bargained. Here, on the other hand, the Complaint asserts just that: a *legal proscription* against using the Premises *at all* for an indefinite period of time.

More to the point, the fundamental purpose of tendering rent to operate a retail store is completely frustrated when that store cannot open, or can operate only at a marginal capacity. It can also be frustrated when customers are too fearful of profound illness and potential death to venture out to shop for lingerie or other personal items, or when drastic capacity caps and/or other social distancing protocols are required by law. *See Port Chester Central Corp. v. Leibert*, 179 Misc. 839, 839–40 (Westchester Cty. Ct. 1943) (denying landlord's summary judgment motion where retailer contended that the government's wartime ban on the manufacture of certain consumer goods "destroyed the subject matter" of the lease since the tenant could no longer obtain

[7] *Urban Archeology, Ltd. v. 207 E. 57th St. LLC*, 2009 WL 8572326 (Sup. Ct. N.Y. Co. Sept. 10, 2009) (2008 recession "could have been foreseen or guarded against in the lease."); *General Electric Co. v. Metals Resources Group Ltd.*, 293 A.D.2d 417 (1st Dep't 2002) (labor strike which increased the price of cobalt was foreseeable); *A & E Television Networks, LLC v. Wish Factory Inc.*, 2016 WL 8136110, at *13-*14 (S.D.N.Y. 2016) (comments made by star of a television show which made licensing rights to the show less valuable were foreseeable); *Noble Ams. Corp. v. CIT Grp./Equip. Fin., Inc.,* 2009 WL 9087853 (Sup. Ct. N.Y. Co. 2009), (bankruptcy of two ethanol producing facilities was foreseeable); *Fifth Ave. of L.I. Realty Assocs. v. KMO-361 Realty Assoc.*, 211 A.D.2d 695 (2d Dep't 1995) (bankruptcy was foreseeable); *Profile Publ'g and Mgmt. Corp. v. Musicmaker.com, Inc.*, 242 F. Supp. 2d 363 (S.D.N.Y. 2003) (changes in the marketplace are foreseeable); *Trinity Centre, LLC v. Wall St. Correspondents, Inc.*, 2004 WL 2127216 (Sup. Ct. N.Y. Co. 2004) ("a down turn in the economy partially resulting from the 9/11 tragedy, however, is not a valid reason for relieving a party from its responsibilities under a lease").

those goods for sale. The court granted the tenant "his day in court" to show that he could no longer conduct business because he could not obtain inventory.)

At base, Landlord seeks a pre-discovery finding *as a matter of law* that COVID-19 and the related economic shutdown was "reasonably foreseeable." Br. at 11. However, under New York law, such "reasonable foreseeability" constitutes a quintessential question of fact that is not subject to a pre-discovery summary judgment determination. *M&M Transp. Co. v. Schuster Express, Inc.*, 13 B.R. 861, 869 (S.D.N.Y.1981) ("The 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***.") (emphasis added). For example, in *City of New York v. Local 333, Marine Div. & Intern. Longshoremen's Ass'n*, 79 A.D.2d 410 (1st Dept. 1981), the court considered a contract to provide towage services to New York City. As the result of a port-wide strike, the defendant did not render any towing services. The city sought summary judgment, arguing that the strike did not excuse the defendant from performing under the contract. The First Department reversed Special Term's granting of summary judgment, finding:

> We think in the present case ***an appraisal of all the circumstances requires a further exploration of the facts than has been possible on this motion for summary judgment made before disclosure*** proceedings. We cannot say, as a matter of law, that in the case of this portwide tugboat strike the parties reasonably expected that Moran would still perform or at least pay damages….True the contract provided that if Moran did not perform the contract, the City could do so and hold Moran for the additional expenses. But was this provision intended to apply to a strike which tied up all tugboat services in the port of New York?

Id. at 437 (emphasis added). Just as in *Local 33*, this case requires a factual inquiry as to the parties' intentions and expectations, and that requirement necessarily precludes pre-discovery summary judgment.

Indeed, the Landlord's own argument underscores the importance of a factual inquiry. Landlord has relied upon literature published in 2013 and 2017 for the proposition that pandemic risk was being discussed at that time. Br. at 11. This necessitates an examination of these cited articles, and a discovery inquiry as to whether the parties to *this* Lease were contemplating pandemic and government mandated shutdowns. After all, the relatively recent articles that the Landlord cites *long postdate* (by more than a decade) the August 2001 execution of the Lease. [Joint Statement of Undisputed Facts, ¶ 2.]

Landlord also cites the 2002/3 SARS outbreak, urging that some insurance carriers responded with a "virus exception" in their business interruption policies. Br. at 11. Again, this argument postdates the execution of the Lease in this case. And even if not, Landlord's argument demands a factual inquiry concerning similarities and/or differences between SARS and the COVID-19 crisis. This cannot be accepted as a matter of law. Even so, Landlord's papers lack any contention that SARS or any other "pandemic" caused the complete shutdown of commerce, as the Complaint alleges here. Finally, even Defendant's reliance upon the 120-year-old case of *Majestic Hotel Co. v. Eyre*, 53 A.D. 273 (1st Dept. 1900), is unavailing because that case dealt with a tenant who ***voluntarily*** vacated his apartment for fear of disease (as opposed to a government mandated shutdown).

In a halfhearted nod to the extraordinary occurrences of 2020, Landlord writes: "[i]t does not matter whether the specific eventuality (*e.g.*, a global pandemic) that forced the closing of Tenant's store was anticipated…. Instead, the question is whether it is reasonable to conclude that a sophisticated party like [Victoria's Secret]…could have worded the Lease in a manner that could have broadly 'protected' it, including a rent abatement, without expressly mentioning the

pandemic." Br. at 8. Thus, Landlord seeks to focus solely on the foreseeability of the *harm*, and not the foreseeability of the *event*. This is an incorrect statement of the law.

In fact, Defendant's singular focus on the foreseeability of the harm, and not the event, conflicts with almost all case law on the subject.[8] It also ***conflicts with Defendant's counsel's own public statements*** on the law in yet another published piece entitled "Considerations for Invoking the Defenses of Frustration of Purpose & Impossibility of Performance" (dated May 5, 2020). There, Landlord's counsel wrote that "***businesses intending to assert a defense of … frustration of purpose should be prepared to demonstrate … that this change of circumstances could not have been reasonably foreseen at the time the contract was negotiated.***"[9] Plaintiffs agree (as do New York courts and Defendant's counsel) that the inquiry requires a factual analysis of whether the event itself was foreseeable. Summary judgment must therefore be denied.

III. QUESTIONS OF FACT PRECLUDE SUMMARY JUDGMENT ON PLAINTIFFS' SECOND CAUSE OF ACTION, FOR RESCISSION FOR IMPOSSIBILITY OF PERFORMANCE

Hornbook contract law provides that performance will be excused if it is rendered impossible by unforeseeable governmental activities. *Metpath, Inc. v. Birmingham Fire Ins. Co.*,

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[8] *See, e.g., Restatement [Second] of Contracts*, § 265, Comment (a) ("Third, the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made."); *Center for Specialty Care, Inc. v. CSC Acquisition I, LLC*, --- N.Y.S.3d ----, 2020 N.Y. Slip Op. 03631 (1st Dept. 2020) ("frustration of purpose ... is not available where the event which prevented performance was foreseeable ***and*** provision could have been made for its occurrence.")(emphasis added); *407 E. 61st Garage v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 282 (1968). (finding that frustration of purpose was not available where the business closure did not result from unanticipated circumstances); *Fifth Ave. of Long Is. Realty Assocs. v. KMO-361 Realty Assocs.*, 211 A.D.2d 695, 696 (2d Dept. 1995) ("Because the event which the defendant now claims frustrated its purpose in entering the lease was foreseeable, the defense of frustration of purpose is not available"); *Frenchman & Sweet v. Philco Discount Corp.*, 21 A.D.2d 180, 182 (4th Dept. 1964) ("Frustration of performance is no defense where no unusual or unforeseeable event prevented performance…"); *Warner*, 71 A.D.3d at 6 ("frustration of purpose... is not available where the event which prevented performance was foreseeable ***and*** provision could have been made for its occurrence") (emphasis added); *M&M Transp. Co.,* 13 B.R. at 869 ("It is this third factor, more than any other upon which New York cases have generally focused, *i.e.*, whether or not the supervening event was within the contemplation of the parties ***and*** might have been guarded against.") (emphasis added).

[9] *See* https://www.meisterseelig.com/wp-content/uploads/2020/05/MSF-Client-Alert-Considerations-for-Invoking-the-Defenses-of-Frustration-May-5-2020.pdf (last viewed June 30, 2020). *See also* Mack Aff., Exh. 2.

86 A.D.2d 407, 411-412 (1st Dept 1982); *Matter of A&S Transp. Co. v. County of Nassau*, 154 A.D.2d 456, 459 (2d Dept. 1989); *Bush v. Protravel International, Inc.*, 192 Misc. 2d 743 (N.Y. Sup. Ct., Richmond Cty., 2002) (parties seeking to cancel travel tickets after the terrorist attacks of September 11, 2001 could be excused from performing under the contract, because of the extraordinary situation which arose after that occurrence).

Here, since mid-March and continuing for months, emergency government regulations have outlawed Victoria's Secret's operation of its store, and even now, impeded the Tenant's ability to fully open. Thus, performance under the Lease, which ***requires*** the Tenant to operate as a retail store, has been rendered impossible. *See* Article 2(C)(i) of the Lease ("Tenant agrees to keep the Premises continuously open and operated for retail trade with the general public at least Monday through Friday (excluding holidays) ("Operating Hours"). Tenant shall at all times during Operating Hours offer for sale a complete line of merchandise and shall employ an adequate number of employees, for the diligent and active conduct of Tenant's business in the Premises. If Tenant shall fail to operate during the Operating Hours, such failure shall constitute a default hereunder.").

Landlord's counsel agrees, again writing publicly:

> ***In the context of COVID-19, the case law suggests that businesses may have a better chance of relying on a frustration of purpose or impossibility of performance defense based on new laws, such as Governor Cuomo's executive orders requiring nonessential business to close their doors, rather than the negative economic impact of COVID-19 in general***. However, when relying on a law as the basis for being excused, a party must still prove that enactment or issuance of the law in question was unforeseeable at the time the contract was made. (emphasis added).[10]

[10] *See* https://www.meisterseelig.com/wp-content/uploads/2020/05/MSF-Client-Alert-Considerations-for-Invoking-the-Defenses-of-Frustration-May-5-2020.pdf (last viewed June 30, 2020). *See also,* Mack Aff., Exh. 2.

Despite this correct statement of law, Defendant now unconvincingly challenges the applicability of the impossibility of performance doctrine on two bases: foreseeability and impossibility.

As to ***foreseeability***, Defendant again sidesteps this issue of fact, by incorrectly narrowing the scope of the analysis to the foreseeability of *damage* (store closure), asking whether the risk "could . . . have been . . . guarded against in the contract." (Br. at 14, citing, in part to *MidFirst Bank v. 159 West 24th St. LLC*, 2010 WL 2639221 (Sup. Ct. N.Y. Co. June 21, 2010)).[11] However, as discussed *supra*, the effects of COVID-19 (and the related government orders) could not have been "guarded" against by simply allocating the risk of store closure, as the impact also effects, *inter alia*, Victoria's Secret's ability to open its store at full capacity. Indeed, as discussed above, the inquiry is ***not*** simply whether the risk could have been guarded against, but also whether the ***event*** was foreseeable. *See Sage Realty Corp. v. Jugobanka, D.D.*, 95-civ-0323, 1998 WL 702272, at *4, n. 4 (S.D.N.Y. 1998) (the relevant inquiry is, "whether the party seeking to avoid liability could have anticipated the frustrating event **and** guarded against it.") (emphasis added). As explained again by ***Defendant's counsel*** in their public writing: "when relying on a law as the basis for being excused, a party must still prove that enactment or issuance of the law in question was unforeseeable at the time the contract was made."[12] Accordingly, here, the question of whether Governor Cuomo's Executive Orders were foreseeable remains a classic issue of fact.

As to ***impossibility***, Defendant argues simply that it is not "impossible" for Victoria's Secret to pay rent. Br. at 13. This crude analysis entirely misses the point. Victoria's Secret has *not* alleged that it cannot afford the rent. Rather, the Complaint asserts that COVID-19 and the related government orders shutting down all "non-essential business" have rendered performance

[11] Defendant's citation to *MidFirst Bank* is incorrect, as the cited quote does not appear anywhere in that decision.
[12] *See* https://www.meisterseelig.com/wp-content/uploads/2020/05/MSF-Client-Alert-Considerations-for-Invoking-the-Defenses-of-Frustration-May-5-2020.pdf (last viewed June 30, 2020). *See also*, Mack Aff., Exh. 2.

by both parties impossible. Compl. ¶ 90. Indeed, beginning in mid-March, the operation of a retail store at the Premises was precluded by law. These government proscriptions (and not an inability to pay) are the proximate causes of the impossibility. *See In re Hitz Restaurant Group*, 2020 WL 2924523, at *3 (Barkr. N.D. Ill. 2020) (granting the debtor-tenant's request to suspend rental payments and clarified that the issue was not the ability or inability to pay rent).

In similar instances, courts have rescinded leases for impossibility where ability to pay rent is not an issue. For instance, in *Adler v. Miles*, 69 Misc. Rep. 601, 604 (1st Dept. 1910), the defendant, when sued for rent, asserted that while originally it was lawful for him to conduct a motion picture business on the leased premises, subsequently an ordinance was passed banning such use. In finding that the lease was terminated by act of law, Justice Seabury wrote:

> The parties to the lease contracted to do a thing which at the time the lease was made was lawful. Public authority, in accordance with law, has provided that the very thing, which the parties in their lease contemplated, should not be done. To carry out the lease according to its terms has now become unlawful. It follows, therefore, that the lease cannot be performed according to its terms; and under such circumstances the obligation of the lessee to pay rent is discharged.

More recently, in *Seoul Garden Bowery Inc v. Ng*, 653635/2018, 2020 WL 3104371 (N.Y. Sup. Ct., N.Y. Cty., June 8, 2020), this Court found that plaintiff sufficiently pled rescission based upon impossibility of performance, when the lease expressly limited the plaintiff's use of the premises to the operation of the restaurant, and the lack of a valid certificate of occupancy legally prevented that use. The tenant could pay, but the operation of a restaurant was deemed illegal. *See also, Two Catherine St. Mgt. Co. v. Yam Keung Yeung*, 153 A.D.2d 678, 679 (2d Dept.1989) ("Since the intended purpose of the lease may have become impossible to effectuate through no fault of the defendant tenant, he may have been entitled to terminate the lease"); *L.N. Jackson & Co. v. Royal Norwegian Government*, 177 F.2d 694 (2d Cir. 1949) ("it is well settled that a contractual

duty is discharged, in the absence of circumstances showing either a contrary intention or contributing fault on the part of the person subject to the duty, where performance is subsequently prohibited by an administrative order made with due authority by an officer of the United States."); *Levy v. Johnston & Hunt*, 224 Ill. App. 300 (App. Ct., First Dist., 1922) (permitting rescission where the premises leased were to be used for a saloon, and prohibition later rendered that use illegal).

Defendant cites only one inapposite, century-old case for the proposition that the impossibility of performance doctrine is not available when it is possible to pay rent. Br. at 13. In *Raner v. Goldberg*, 244 N.Y. 438, 440 (1927), dismissal was *not* on the basis of the parties' ability to pay. Rather, the parties contemplated that the leased space would be used as a dance hall, which required a license. Although the license was denied, that denial was a *foreseeable* possibility at the time the lease was entered. The tenant was thus deemed to have assumed the risk that the license would not be issued. It cannot be said that, here, any party could have contemplated COVID-19 and the wholesale shutdown of the economy at the time the Lease was entered.

The Landlord also seeks to distinguish between what it calls the "primary obligation" to pay rent (which it contends remains "possible"), as opposed to a so-called "secondary obligation" to operate a retail business at the Premises. Br. at 13. It is no surprise that Landlord cites not one single case for this phony distinction between "primary" and "secondary" contractual obligations, because it does not exist in the law. *Kel Kim Corp. v. Central Mkts.*, 70 N.Y.2d 900, 902 (1987) ("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.").

Even if there were such a distinction, this too creates an issue of fact. Despite Landlord's statement as to the Lease's "primary purpose," the Complaint alleges that "both parties recognized

that the Lease's ***principal purpose*** was the operation of a first-class retail location, which would generate income for VS in the form of retail sales, and [Landlord], in the form of percentage rent based upon VS' gross sales." Compl. ¶ 53. That "principal purpose" is now impossible, and has been since mid-March. If Landlord seriously contends that there is a meaningful distinction between "primary" and "secondary" purposes, then discovery is warranted as to what the parties intended.

Landlord again focuses on Section 2(C)(vi) of the Lease, arguing that it relieves the Tenant of an obligation to "continuously operate" its store in certain circumstances, namely "fire or casualty." Landlord then argues that Tenant "could have refused to sign the Lease unless [it] provided that Tenant would be relieved of the duty to 'continuously operate,' and would receive a rent abatement, in a broader set of circumstances." Br. at 14. This, again, assumes that Victoria's Secret is prescient, and could have foreseen the extraordinary events of 2020. Neither it, nor any other reasonable commercial party, could have done so. And this lack of foreseeability will be revealed in discovery, and in fact is precisely why the doctrine of impossibility exists in the law.

To summarize, it is axiomatic that contract performance is excused when unforeseeable government action makes such performance objectively impossible. Here, Governor Cuomo's Executive Order 202.8 and related orders, shuttering all non-essential businesses in New York City, was both unforeseen and unforeseeable. These emergency enactments effectively destroyed the ability to perform under the Lease. Any suggestion that these extraordinary measures could have been guarded against in the Lease necessarily requires a factual inquiry, and for this reason, summary judgment must be denied.

IV. PLAINTIFFS' THIRD CAUSE OF ACTION FOR REFORMATION RAISES NUMEROUS FACTUAL ISSUES

The Lease plainly does not represent the parties' meeting of the minds at the time of contracting. Rather, the Complaint contends that the parties' true intent was that Victoria's Secret would not pay rent or other consideration for the Premises if the use of the store was rendered impossible by no fault of Tenant or Landlord. Compl. ¶ 98. Indeed, had the parties been able to anticipate the extraordinary events of COVID-19, they would have provided language abating rent during the government-mandated shutdown. *Id.*

Defendant's now-familiar primary argument is, again, that the Lease considers the contingency of a store closure, and that such risk is allocated to the Tenant. Br. at 15. As above, Landlord misinterprets Lease Article 26, which abates rent for a store closure due to certain Landlord breaches. As discussed *supra*, that section does not *limit* rent abatement to this contingency. In fact, the Lease lists the situations where Victoria's Secret ***cannot*** obtain a rent abatement. Article 26 is silent as to the instant scenario, where the Premises are indefinitely closed by emergency government order. Discovery is required as to the parties' understanding on this point.

Defendant also argues that Plaintiff's Reformation cause of action is time-barred because the Lease was executed over six-years ago. However, an action to reform an agreement based on mutual mistake can be commenced within six years of the Lease's execution ***or*** two years from the discovery of the mistake. *Davis v. Davis*, 95 A.D.2d 674 (1st Dept. 1983) ("action to reform an agreement based on mutual mistake must be commenced within six years of the occurrence (CPLR 213(6)) or two years from the discovery of the mistake (CPLR 203(f)."); *F.D.I.C. v. Five Star Management, Inc.*, 258 A.D.2d 15, 20 (1st Dept. 1999) (Court recognizes "a two-year date of discovery accrual for reformation claims based on mistake."). Here, as alleged in the Complaint,

the mistake was plainly discovered in March 2020 upon the unfolding of the extraordinary and unforeseeable events relating to COVID-19. Thus, Plaintiffs' reformation cause of action is timely.

Lastly, Defendant asserts that there was no mutual mistake about an *existing* fact at the time the Lease was executed, but only *future* events. Br. at 15. This mischaracterizes the Complaint's allegations. At the time of execution, it was the Parties' "true intent that Plaintiffs would have no obligation to pay rent once [Tenant] was deprived of the use of the Premises and that the Lease would terminate automatically when [Tenant] was deprived of its use of the Premises as originally contemplated in the Lease." Compl. ¶ 100.

In any event, the question of whether the parties' so intended can only be resolved after discovery. Thus, summary judgment must be denied.

V. PLAINTIFFS' FOURTH CAUSE OF ACTION (BREACH OF CONTRACT) MUST SURVIVE

This Court should reject Defendant's one-sentence attempt to dismiss Plaintiffs' Fourth Cause of Action for Breach of Contract. The Landlord's entire argument is stated here: "Because Tenant's stated 'excuses' for its failure to have paid rent lack merit, Landlord is not, conversely, somehow in breach of the Lease for demanding that Tenant pay rent." Br. at 16.

The Complaint asserts that Landlord has breached the contract by "demanding that Plaintiffs pay rent and/or other expenses that ***were not owed*** under the Lease." Compl. ¶ 103 (emphasis added). The Complaint further asserts that Landlord breached the Lease by "failing to reimburse VS for the prorated amount of the rent, charges and other expenses attributable to the period that VS has been deprived of its use of the Premises." *Id.*

Because, as demonstrated above, there are material issues of fact as to, *inter alia*, the foreseeability of the COVID-19 crisis and related economic shutdown, summary judgment must similarly be denied on this cause of action.

VI. PLAINTIFFS' FIFTH CAUSE OF ACTION (MONEY HAD AND RECEIVED) MUST SURVIVE

This Court should reject Defendant's argument to dismiss Plaintiffs' Fifth Cause of Action for Money Had and Received. In sum and substance, this cause of action seeks to recover the substantial rent and taxes that Tenant paid *in advance* for use of the Premises that were ultimately shuttered by government order. Landlord asserts as follows: "Leaving aside that a tenant cannot in any event recover, based on subsequent changed circumstances, rent required to be paid in advance, we have shown above that Tenant's "excuses" lack merit." Br. at 17. Accordingly, Defendant tethers this argument entirely to its other arguments as to recession. Because those causes of action present material issues of fact, summary judgment on the Fifth Cause of Action must similarly be denied.

VII. PLAINTIFFS' SIXTH CAUSE OF ACTION (UNJUST ENRICHMENT) MUST SURVIVE

This Court should reject Defendant's argument to dismiss Plaintiffs' Sixth Cause of Action for Unjust Enrichment. Defendant's entire argument follows: "Because the Lease is a binding contract, and Tenant is not entitled to rescind it, there is no basis for Tenant to seek 'quasi-contract' relief for supposed 'unjust enrichment.' *Clark-Fitzpatrick, Inc. v. Long Island Rail Road Co.*, 70 N.Y.2d 382, 388 (1987)." Br. at 17.

Thus, Landlord's entire argument as to this cause of action rests upon the assertion that the Lease is not rescinded. Because Tenant has demonstrated *supra* myriad issues of fact as to this question, summary judgment as to unjust enrichment must also be denied.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendant's motion in its entirety, and grant such other and further relief as it deems just and proper.

Dated: New York, New York
July 29, 2020

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH WORD COUNT LIMIT

I hereby certify pursuant to Rule 17 of the Rules of Practice for the Commercial Division of the Supreme Court of the State of New York that the total number of words in the foregoing document, exclusive of the caption, table of contents, table of authorities, and signature block, is 6,998 according to the "Word Count" function of Microsoft Word, the word-processing system used to prepare the document, and thus that the document complies with the word count limit set forth in Rule 17.

Dated: New York, New York
July 29, 2020

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