

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

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SCHULTE ROTH & ZABEL LLP, Index No.

Plaintiff,

COMPLAINT

-against-

METROPOLITAN 919 3rd AVENUE LLC, in JURY TRIAL DEMANDED
its individual capacity and as successor in
interest to 919 THIRD AVENUE
ASSOCIATES L.P.,

Defendant.

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Plaintiff SCHULTE ROTH & ZABEL LLP (“SRZ,” “Tenant,” or “Plaintiff”) by and through its undersigned attorneys, Foley & Lardner LLP, as and for its Complaint against Defendant METROPOLITAN 919 3rd AVENUE LLC, in its individual capacity and as successor in interest to 919 THIRD AVENUE ASSOCIATES L.P. (“919 Third Ave LLC,” “Landlord,” or “Defendant”), hereby alleges as follows:

NATURE OF THE ACTION

1. This is an action for breach of contract and declaratory relief arising out of and relating to the COVID-19 global pandemic.
2. SRZ is a prominent New York City law firm that has maintained its Manhattan offices at 919 Third Avenue, New York, NY 10022 (the “Premises”) since 2000, when SRZ relocated its headquarters. Leading up to its relocation, SRZ entered into a commercial lease agreement, as tenant, with 919 Third Avenue Associates L.P., as landlord (as amended from time to time, the “Lease”) that included a rent abatement provision (Section 5.4), under which SRZ would be entitled to an abatement of rent, taxes, and operating costs (collectively, “Rent

Abatement”) if SRZ was unable to use its offices at the Premises for the ordinary conduct of its business due to “Unavoidable Delays” continuing for a period in excess of fifteen (15) consecutive business days.

3. Under Article 24 of the Lease, the term “Unavoidable Delays” specifically includes, but is not limited to, delays caused by, among other things, “laws, governmental preemption in connection with a national emergency or by any Legal Requirements . . . or other emergency.”

4. The COVID-19 pandemic has caused an unprecedented public health crisis, resulting in more than 1,000,000 deaths worldwide, including over 215,000 deaths here in the United States. In response, all levels of government have scrambled to enact measures to slow the spread of the virus and mitigate its impact. President Donald J. Trump declared a national public health emergency, and both New York Governor Andrew M. Cuomo and New York City Mayor Bill de Blasio have issued Executive Orders to, among other things, manage workplace density, promote social distancing, and reduce public gatherings. SRZ has complied with all government mandates responsive to the COVID-19 pandemic, and, pursuant to those mandates (and to protect its personnel) was forced to vacate its offices at the Premises on March 13, 2020. Since then, SRZ has been unable to use its offices at the Premises for the ordinary conduct of its business. Like all major New York law firms, SRZ has maintained small, rotating skeleton crews to manage SRZ’s simplest office functions, such as mail and deliveries.

5. Because SRZ has been unable to use its offices at the Premises for the ordinary conduct of its business for a period in excess of fifteen (15) consecutive business days, SRZ is entitled to Rent Abatement under the express terms of the Lease.

6. However, 919 Third Ave LLC, SRZ’s current landlord under the Lease, has refused to acknowledge SRZ’s rights, including, as described below, rejecting SRZ’s April 3, 2020

“Abatement Notice.” 919 Third Ave LLC has likewise refused to reimburse SRZ for rent and other amounts paid by SRZ in connection with the Lease.

7. Accordingly, SRZ seeks to hold 919 Third Ave LLC to the agreed-upon terms of the parties’ contract, enforce SRZ’s right to Rent Abatement, and secure the rights for which SRZ bargained when it entered into the Lease.

8. As such, SRZ seeks a determination that 919 Third Ave LLC’s conduct in refusing to acknowledge SRZ’s right to Rent Abatement under the Lease, and its refusal to reimburse rent and other amounts paid in connection with the Lease, constitutes a material breach of 919 Third Ave LLC’s contractual obligations to SRZ, for which SRZ is entitled to monetary damages plus interest, attorneys’ fees, and costs.

9. Further, pursuant to New York CPLR § 3001, SRZ requests a judgment declaring the rights, duties, and obligations of the parties with respect to the rent abatement provision of the parties’ contract.

10. SRZ also seeks a declaration that, under the express terms of the Lease, it is entitled to Rent Abatement as a result of the COVID-19 pandemic, including governmental action taken in response thereto, for the time period beginning April 3, 2020—fifteen (15) consecutive business days after SRZ vacated the Premises—and continuing throughout the pendency of the COVID-19 pandemic emergency.

11. Whether or not SRZ might otherwise be entitled to Rent Abatement under the *force majeure* provision of the Lease (Article 24), the specific language of Section 5.4 demonstrates that SRZ’s right to Rent Abatement is clear.

PARTIES

12. Plaintiff SRZ is a domestic limited liability partnership organized under the laws of the State of New York, with its principal place of business located at 919 Third Avenue, New York, New York 10022. At all relevant times, SRZ was authorized to transact business in New York.

13. Defendant 919 3rd Ave LLC is a foreign limited liability company organized under the laws of the State of Delaware, with its principal place of business located at 420 Lexington Avenue, New York, New York 10170. At all relevant times, 919 3rd Ave LLC was authorized to and is both doing and transacting business in New York.

JURISDICTION AND VENUE

14. Jurisdiction in this Court is proper pursuant to CPLR § 3001, and all other applicable provisions of the CPLR, including § 301 and § 302, because 919 Third Ave LLC has its principal place of business in New York, New York, and this lawsuit concerns, in part, a request for a declaratory judgment in connection with premises owned and/or rented in New York, New York.

15. This action falls within the jurisdiction of the Commercial Division of this County pursuant to Sections 202.70(a) and 202.70(b)(3) of the Rules of the Commercial Division of the Supreme Court because the action involves a transaction with respect to commercial real property, and the amount in dispute exclusive of punitive damages, interest, costs, disbursements, and attorneys' fees exceeds \$500,000.

16. Venue in this Court is proper pursuant to CPLR §§ 503(a), (c) and (d) since one or more parties is a resident of New York County, the Defendant is subject to personal jurisdiction in New York, and the Lease was negotiated and executed in New York County.

FACTUAL BACKGROUND

The Commercial Lease for 919 Third Avenue

17. On May 13, 1998, SRZ, as tenant, entered into the Lease with 919 Third Avenue Associates L.P., as landlord. Over the twenty-two years since the Lease was executed, it has been amended eight times. 919 Third Ave LLC succeeded in interest to 919 Third Avenue Associates L.P., in the second amendment to the original agreement.

18. Negotiations between Tenant and Landlord in connection with the Lease were conducted at arm's length over the course of more than four months.

19. Both Tenant and Landlord are sophisticated business parties; and both had the benefit of counsel during negotiations.

20. Among other things, negotiations included specific discussions and changes to the rent abatement provision set forth in Section 5.4 of the Lease, pursuant to which SRZ brings the instant action.

21. Importantly, Section 5.4 and Article 24 remain in full force and effect since they have not been modified by any amendments to the parties' original agreement—indeed, they were ratified by the parties in each amendment to the parties' original agreement.

22. Section 5.4 of the Lease specifically addresses Tenant's rights to Rent Abatement, and provides, in pertinent part, as follows:

Notwithstanding anything to the contrary contained in any other provision of this Lease, in the event that (a) Tenant is unable to use the Premises, or any portion thereof consisting of 750 Rentable Square Feet or more, for the ordinary conduct of Tenant's business, due to Landlord's breach of an obligation under this Lease to provide services, perform repairs, or comply with Legal Requirements, in each case other than as a result of Unavoidable Delays or Tenant Delays (or, if Tenant's inability to use the Premises or portion thereof results, in whole or in part, from Unavoidable Delays and such condition continues for a period in excess of fifteen (15) consecutive Business Days) after Tenant gives a notice to Landlord (the "Abatement Notice") stating that Tenant's inability to use the

Premises or such portion thereof is solely due to such condition, (b) Tenant does not actually use or occupy the Premises or such portion thereof during such period, and (c) such condition has not resulted from the negligence or misconduct of Tenant or any Tenant Party, then Fixed Rent, Tenant's Tax Payment and Tenant's Operating Payment shall be abated as to the Premises or affected portion on a per diem basis for the period commencing immediately (or on the fifteenth (15th) Business Day, if such condition results, in whole or in part, from Unavoidable Delays) after Tenant gives the Abatement Notice, and ending on the earlier of (i) the date Tenant reoccupies the Premises or such portion thereof for the ordinary conduct of its business, or (ii) the date on which such condition is substantially remedied and Landlord has notified Tenant thereof.

23. The term "Unavoidable Delays" is defined in Article 24 of the Lease, in pertinent part, as:

delay[s] from . . . any cause whatsoever reasonably beyond [Landlord or Tenant's] control, including but not limited to, laws, governmental preemption in connection with a national emergency or by reason of any Legal Requirements or by reason of the conditions of supply and demand which have been or are affected by war or other emergency ("Unavoidable Delays"), but excluding such party's financial inability.¹

24. Consequently, the Lease is clear that where SRZ has been forced to vacate its offices at the Premises by laws or government mandates in response to a national emergency for a period in excess of fifteen (15) consecutive business days, then SRZ is entitled to Rent Abatement while SRZ could not occupy or use its offices at the Premises for the ordinary conduct of its business.

25. The Lease is also clear that SRZ is entitled to Rent Abatement where SRZ has been unable to use its offices at the Premises for the ordinary conduct of its business for more than fifteen (15) consecutive business days, due to "any cause whatsoever reasonably beyond the [Landlord or Tenant's] control," including "other emergenc[ies]," which encompasses the events

¹ Under the Lease, Legal Requirements include: "all present and future laws, rules, orders, ordinances, regulations, statutes, requirements, codes, executive orders, and any judicial interpretations thereof, extraordinary as well as ordinary, of all Governmental Authorities."

and circumstances related to the COVID-19 pandemic emergency, including the unprecedented public health crisis.

The Emergence of COVID-19—A Deadly Pandemic of Epic Proportions

26. In early 2020, the World Health Organization (“WHO”) was aware that a cluster of viral pneumonia cases had been reported in Wuhan, Hubei province, in the People’s Republic of China.

27. On January 4, 2020, the WHO tweeted that investigations to identify the cause of those pneumonia cases were underway. On January 9, 2020, the WHO reported that Chinese authorities had determined that the outbreak was caused by a “novel coronavirus.” The WHO and other international health organizations then began a coordinated effort to investigate the novel coronavirus, including its likely impact on global health and security.

28. The novel coronavirus spread rapidly throughout the world. The first confirmed case within the United States was reported on January 21, 2020.

29. Shortly thereafter, Europe, and specifically Italy, was designated as the global epicenter of the rapidly-spreading virus. By January 30, 2020, four countries had evidence of human-to-human transmission of the virus (Germany, Japan, the United States, and Vietnam), and the United States Secretary of Health and Human Services declared that the novel coronavirus presented a public health emergency. Also on January 30, 2020, the Director-General of the WHO declared the novel coronavirus a Public Health Emergency of International Concern (“PHEIC”).

30. On February 11, 2020, the WHO, in accordance with its best practices guidelines, named the disease caused by the novel coronavirus, “COVID-19.” On March 7, 2020, the WHO

issued a statement, following confirmation of over 100,000 cases globally, calling for action to stop, contain, control, delay, and reduce the impact of COVID-19 at every opportunity.

31. Soon thereafter, COVID-19 took hold in the United States and throughout New York. In response, on March 7, 2020, Governor Andrew M. Cuomo issued Executive Order No. 202, declaring a Disaster Emergency in the State of New York. On March 11, 2020, deeply concerned by the alarming levels of spread, severity, and inaction, the WHO characterized COVID-19 as a pandemic.

32. On March 12, 2020, New York City Mayor Bill de Blasio issued Emergency Executive Order No. 98, declaring a State of Emergency in the City of New York due to the threat posed by COVID-19 to the health and welfare of New York City residents. The next day, March 13, 2020, President Donald J. Trump issued the “Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak,” declaring a national public emergency as a result of COVID-19. Also on March 13, 2020, Governor Cuomo issued Executive Order No. 202.1, directing, in part, that large gatherings and events be cancelled or postponed, and that the maximum occupancy of places of business or public accommodation operate at no greater than fifty percent occupancy or seating capacity.

33. On April 2, 2020, the WHO reported on evidence of pre-symptomatic transmission of COVID-19, and on April 4, 2020, the WHO reported that there had been over one million cases of the virus globally.

34. The WHO confirmed that the COVID-19 pandemic was still a PHEIC on July 31, 2020. Since then, COVID-19 has continued to spread throughout the United States and abroad. As of October 11, 2020, the number of COVID-19 cases across the globe has expanded more

than thirtyfold since the WHO's April 4 report to over 37 million reported cases of the virus throughout the world.

35. In the United States, the WHO and the CDC have reported over 7.7 million cases—including U.S. President Donald J. Trump, First Lady Melania Trump, and a growing number of high-level government officials—and more than 215,000 deaths. In New York State, there have been over 479,000 reported cases and over 32,000 deaths, and in New York City more than 25,000 confirmed cases and over 23,800 deaths.

New York Issues In-Person Workforce Reduction Orders—SRZ Complies

36. On March 18, 2020, in further response to the COVID-19 pandemic, Governor Cuomo issued Executive Order No. 202.6, requiring every employer across New York to reduce its in-person workforce by fifty percent no later than March 20 at 8 p.m. The next day, March 19, 2020, by Executive Order No. 202.7, Governor Cuomo increased New York's workplace density restriction, ordering that employers throughout the State reduce their in-person workforces by seventy-five percent no later than March 21 at 8 p.m.

37. Notwithstanding those measures, on March 20, 2020, recognizing the severity of COVID-19, its communicability, and the fact that social distancing is the most effective way to slow its spread, Governor Cuomo issued Executive Order No. 202.8, mandating, in pertinent part, that all “non-essential businesses” in New York State, “reduce the[ir] in-person workforce . . . by 100% no later than March 22 at 8 p.m.” (together with Executive Order Nos. 202.6 and 202.7, the “Workforce Reduction Orders”).²

² Executive Order Nos. 202.6, 202.7, and 202.8 are each entitled, “Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency.”

38. The Governor issued the Workforce Reduction Orders, as well as other Executive Orders related to the COVID-19 pandemic, by virtue of authority vested in him by the New York State Legislature under Section 29-a of Article 2-B of the New York Executive Law, which authorizes the Governor to temporarily suspend or modify (i.e., to preempt), “any statute, local law, ordinance, orders, rules, or regulations, or parts thereof, of any agency during a State disaster emergency, if compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster emergency or if necessary to assist or aid in coping with such disaster.”

39. Governor Cuomo’s Executive Orders issued in response to the COVID-19 pandemic as well as the unprecedented public health crisis that befell New York City during the second week of March 2020 left SRZ with no choice but to vacate its offices at the Premises on March 13, 2020.

40. By April 3, 2020, fifteen (15) consecutive business days later, SRZ was still unable to use the Premises, including for the ordinary conduct of its business.

41. On April 26, 2020, Governor Cuomo announced a phased approach to reopening industries and businesses in New York, New York City, and specifically New York County. On June 22, 2020, New York County officially entered “Phase 2” of the phased reopening, at which time SRZ was permitted to access its offices at the Premises at fifty percent occupancy. Notably, the Executive Orders allowing fifty percent occupancy of office-based businesses also placed substantial other social distancing and hygiene restrictions on such access, including relating to physical distancing, movement and commerce, the use of protective equipment, screening, testing, tracing, and the establishment of communications and safety plans. Effective July, 20, 2020, New York County entered “Phase 4” of New York’s staged reopening. The restrictions

imposed on office-based businesses permitted to reopen under Phase 2, however, including the occupancy limitation, continue to apply.

42. The COVID-19 pandemic has not been abated, and experts predict a “second wave” of cases to continue throughout the fall and into the winter months. Indeed, the national, state, and local states of emergency remain in effect and this unprecedented public health crisis persists.

43. SRZ is still operating in accordance with the governmental restrictions imposed by the Workforce Reduction Orders and other Executive Orders and directives as well as the states of emergency generally. As such, SRZ continues to be unable to operate its business in the ordinary course at the Premises.

44. As relevant to Section 5.4 of the Lease, there are at least four bases for “Unavoidable Delays” continuing for more than fifteen (15) consecutive business days, which caused SRZ to vacate its offices at the Premises: (1) Governor Cuomo’s Executive Orders, issued in connection with a national emergency—including as declared by the President of the United States—constitute “governmental preemption in connection with a national emergency”; (2) Governor Cuomo’s Executive Orders constitute “Legal Requirements”; (3) the COVID-19 pandemic constitutes a cause “reasonably beyond [the] part[ies]’ control,” which prevented SRZ from using or occupying its offices at the Premises; and (4) the public health crisis caused by the COVID-19 pandemic constitutes an “other emergency,” the likes of which we have not seen for one hundred years.

SRZ Notifies 919 Third Ave LLC of Its Right to Rent Abatement

45. On March 31, 2020, 12 consecutive business days after SRZ was forced to vacate its offices at the Premises, SRZ provided 919 Third Ave LLC written “Abatement Notice” pursuant

to the terms of Section 5.4 of the Lease. Therein, SRZ advised that “Unavoidable Delays [] have occurred and/or exist . . . relat[ing] to the COVID-19 pandemic emergency, including, without limitation public health conditions, certain governmental actions, preemptions, directives and proclamations, which have caused an inability of Tenant to use its Premises for the ordinary conduct of Tenant’s business.”

46. 919 Third Ave LLC rejected SRZ’s “Abatement Notice” by letter dated April 4, 2020, advancing a contorted interpretation of Section 5.4, under which Tenant is only entitled to Rent Abatement in the event of a breach by Landlord—an interpretation that is not supported by a plain reading of Section 5.4.

47. By letter dated April 8, 2020, SRZ advised that it maintains its position with respect to Rent Abatement, and has paid rent due and owing in April under protest—without waiving, releasing, or otherwise modifying its rights under the Lease.

48. SRZ has continued to pay rents due and owing under protest, which 919 Third Ave LLC has refused to refund. Accordingly, SRZ has commenced this action.

FIRST CAUSE OF ACTION

(Breach of Contract)

49. Plaintiff incorporates by reference and repeats and realleges the allegations of Paragraphs 1 through 48 of the Complaint above as if fully set forth herein.

50. Plaintiff entered into the Lease, a valid written contract with the Landlord, dated May 13, 1998, for the Premises located at 919 Third Avenue, New York, New York, 10022, where SRZ became and remains a tenant in that space.

51. The Lease is still in full force and effect.

52. Plaintiff has fully complied with all of its duties and obligations under the Lease.

53. In accordance with Article 24, “Unavoidable Delays” have occurred and exist as a result of the COVID-19 global pandemic.

54. The “Unavoidable Delays” have continued for a period in excess of fifteen (15) consecutive business days, and, as described herein, forced SRZ to vacate its offices at the Premises, which SRZ has been unable to use for the ordinary conduct of its business since March 13, 2020.

55. Pursuant to Section 5.4 of the Lease, SRZ is entitled to Rent Abatement.

56. Plaintiff has, among other things, demanded that Defendant recognize and honor its right to Rent Abatement pursuant to Section 5.4 of the Lease, both for past amounts paid, and for any such future amounts due and owing during the pendency of the COVID-19 pandemic and/or application of the Governor’s Executive Orders and any other applicable governmental mandates that constitute “Unavoidable Delays” and trigger Plaintiff’s rights under Section 5.4.

57. Defendant has refused to acknowledge SRZ’s right to Rent Abatement under the Lease and has refused to excuse or reimburse SRZ’s payments of rent or other amounts paid in connection with the Lease.

58. Defendant is therefore in breach of the Lease.

59. Defendant’s breach of the Lease is material and continuing.

60. As a result of Defendant’s breach of the Lease, Plaintiff is entitled to monetary damages in an amount of no less than \$10,000,000, which is continuing, plus pre- and post-judgment interest, attorneys’ fees, costs, and other disbursements incurred in connection with this action.

SECOND CAUSE OF ACTION

(Declaratory Judgment Pursuant to CPLR § 3001)

61. Plaintiff incorporates by reference and repeats and realleges the allegations of Paragraphs 1 through 60 of the Complaint above as if fully set forth herein.

62. Plaintiff SRZ seeks a declaratory judgment to resolve questions concerning the respective rights, obligations, and duties of Plaintiff and Defendant under the Lease with respect to Tenant's rights to Rent Abatement pursuant to Section 5.4 of the Lease, as well as other applicable provisions.

63. An actual case or justiciable controversy exists between Plaintiff and Defendant concerning Plaintiff's entitlement to Rent Abatement pursuant to Section 5.4 of the Lease during the pendency of the COVID-19 pandemic and/or application of the Governor's Executive Orders and any other applicable governmental mandates that constitute "Unavoidable Delays" and trigger Plaintiff's rights under Section 5.4.

64. The issuance of declaratory relief by this Court will terminate some or all of the existing controversy between the parties, and will provide certainty to the parties with respect to their rights and obligations under the Lease.

65. By reason of the foregoing, Plaintiff is entitled to a declaratory judgment establishing the rights and obligations of the parties and determining the extent of Plaintiff's entitlement to reimbursement for amounts paid in connection with the Lease during "Unavoidable Delays" and its inability to use and occupy the Premises.

66. Plaintiff therefore requests a declaration by this Court that it is entitled to Rent Abatement in accordance with Section 5.4 of the Lease for all past rent and other amounts paid in connection with the Lease, and for any such future payments made during the pendency of the

COVID-19 pandemic and/or application of the Governor's Executive Orders and any other applicable governmental mandates that constitute "Unavoidable Delays" and trigger Plaintiff's rights under Section 5.4.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that the Court enter judgment against Defendant as follows:

(1) For a judgment declaring that Plaintiff is entitled to abatement in accordance with Section 5.4 of the Lease for all past and future amounts of "Fixed Rent, Tax Payments, and Operating Payments" paid during the pendency of the COVID-19 pandemic and/or application of the Governor's Executive Orders and any other applicable governmental mandates that constitute "Unavoidable Delays" and trigger Plaintiff's rights under Section 5.4;

(2) For a judgment declaring that Defendant is in breach of the Lease and as a result is liable to SRZ for monetary damages in an amount of no less than \$10,000,000, which is continuing, plus pre- and post-judgment interest, attorneys' fees, costs, and other disbursements incurred in connection with this action; and

(3) That Plaintiff be awarded such other and further relief as this Court deems proper and just.

JURY DEMAND

PLAINTIFF hereby demands a trial by jury on all claims so triable.

Dated: New York, New York
October 23, 2020

/s/ Peter N. Wang
Peter N. Wang
Douglas S. Heffer
Christopher A. DeGennaro
Foley & Lardner LLP
90 Park Avenue

New York, New York 10016

Phone: (212) 682-7474

Fax: (212) 687-2329

pwang@foley.com

dheffer@foley.com

cdegennaro@foley.com