

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

Plaintiff selects New York
County as the location of the
trial.

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LITTLE FISH CORP. a/k/a LITTLE FISH
INC.,

Index No. /21

Plaintiffs,

-against-

SUMMONS

PARAMOUNT LEASEHOLD LP,

Defendant.

-----X

TO THE ABOVE NAMED DEFENDANT:

YOU ARE HEREBY SUMMONED to answer the complaint in this action by serving an answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, or within thirty days after service is complete if this summons is not personally delivered to you within the State of New York. In the case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: New York, New York
January 7, 2021

HIMMELSTEIN McCONNELL GRIBBEN
DONOGHUE & JOSEPH LLP
Attorneys for Plaintiff
15 Maiden Lane - Suite 1700
New York, New York 10038-4003
212.349.3000

By:

David Frazer

David E. Frazer, of counsel

ROBERT M. OLSHEVER, PC
Attorneys for Plaintiff
148 West 24th Street, 3rd floor
New York, New York 10011
212.741.3510

By: 

Robert M. Olshever, of counsel

Defendant's Address:

1501 Broadway, 19th fl
New York, New York 10036

ghost town. Prior to March 2020, Tenant's business thrived on the presence of many thousands of tourists and office workers in Times Square. Both tourists and office workers have substantially disappeared. Tenant depended mightily on the business of Broadway theatre-goers. Broadway, however, has been shuttered since March 2020 and will likely remain so for the foreseeable future.

3. These unforeseeable events constitute a casualty under the Lease and otherwise relieve Tenant of its obligations for the duration of the emergency.

4. Nevertheless, Landlord has served Tenant with a Notice of Default ["Default Notice"] threatening to terminate the Lease because, among other allegations, Tenant has been unable to operate in this unprecedented environment. Landlord also falsely claims that Tenant has failed to install a sprinkler system that, by law, is Landlord's responsibility.

5. In this action, Tenant seeks a *Yellowstone* injunction tolling the time to cure under the Default Notice and enjoining Landlord from terminating the tenancy and recovering possession of the Premises. Tenant also seeks a judgment declaring that Tenant is not in default under the Lease and that Landlord is liable for commercial tenant harassment under NYC Admin.Code §22-902 and issuing appropriate relief.

PARTIES AND VENUE

6. Plaintiff Little Fish Corp. a/k/a Little Fish, Inc. is a New York corporation with an office at 200 West 44th Street, in the building 1501 Broadway, New York, New York.

7. Upon information and belief, defendant Paramount Leasehold, LP is a New York limited partnership with an office at 1501 Broadway, New York, New York.

8. Venue is proper in New York County as the location of each party's respective office per CPLR §503(c) & (d) and as the location of the real property per CPLR §507.

FACTUAL BACKGROUND**A. The Lease.**

9. Tenant is the tenant of certain premises located on the first floor, basement, second floor and storage area known as 200 West 44th Street in the large office building located at 1501 Broadway, New York, New York [the "Premises"] pursuant to a commercial lease dated as of August 1, 1991, as amended [the "Lease"].

10. The Lease term, as amended and extended, expires January 31, 2030.

11. Tenant operates a restaurant called "Carmine's" at the premises.

12. Landlord is the owner and landlord of the building located at 1501 Broadway, New York, New York and successor in interest to the original landlord under the Lease.

B. The Notice of Default.

13. By notice of default dated December 9, 2020 [the "Default Notice"], Landlord alleges that Tenant is in default of certain provisions of the Lease.

14. The Default Notice alleges that Tenant is in violation of ¶7(f) of the Second Amendment to the Lease by reason of Tenant's purported failure to continuously operate its business.

15. The Default Notice also alleges that Tenant is in violation of ¶6 [comply with laws] & ¶29 [sprinklers] of the Lease by failing to install at its sole cost and expense a sprinkler system that complies with Local Law 26.

16. The Default Notice also alleges that Tenant is in default of its obligation to pay rent and additional rent in the amount of \$2,983,15.98, and seeks to enforce a penalty of 150% of certain rent due to the failure to continuously operate its business.

17. The Default Notice gives Tenant until January 11, 2021 to cure the alleged defaults, failing which Landlord

would exercise its proclaimed right to terminate the Lease pursuant to ¶17(1) of the Lease.

C. The Pandemic.

18. In or about March 2020, the coronavirus COVID-19 exploded in New York City, killing over 37,000 people and infecting almost a million more.

19. The ensuing pandemic was unprecedented and unforeseeable.

20. The government response was severe and uncompromising.

21. On March 7, 2020, Governor Cuomo issued Executive Order 202 declaring a disaster in the State of New York.

22. On March 12, 2020, Governor Cuomo issued Executive Order 202.1 requiring any place of business to operate at no greater than 50% of capacity.

23. On March 16, 2020, Governor Cuomo issued Executive Order 202.3 closing all restaurants, except for take-out and delivery.

24. On March 18, 2020 Governor Cuomo issued Executive Order 202.6 requiring non-essential businesses to reduce their workforce by 50%.

25. On March 20, 2020, Governor Cuomo issued Executive Order 202.8 requiring all non-essential businesses to reduce their workforce by 100%.

26. Office buildings throughout New York City, including in Times Square, emptied out as all non-essential business were closed and/or their employees began working from home.

27. Broadway theatres were closed, and tourism dried up. Times Square became a wasteland.

28. Tenant complied with EO 202.3 and ceased operation.

29. Because the vast majority of Tenant's business consisted of tourists and nearby office workers, almost all of whom vanished overnight, it was not practicable for Tenant to operate on a take-out and delivery only model.

30. Economically, it was not feasible to operate a kitchen built to service a 401-seat restaurant as a take-out joint. Tenant would have lost even more money than simply being closed.

31. Prior to the pandemic, take-out represented about 5% of Tenant's gross revenue, most of which consisted of deliveries to offices, which are now largely closed or empty.

32. In any event, use of the Premises for only take-out and delivery would arguably violate the use clause of the Lease which requires Tenant to operate "a full service with seating and utensils intended primarily for on-site consumption." See Lease, ¶44(A).

33. As of June 11, 2020, outdoor dining was allowed in New York City.

34. At the time outdoor dining was permitted, the sidewalk in front of the Premises was a Con Ed worksite, making it physically impossible for Tenant to do outdoor dining.

35. Even without the Con Ed obstruction, outdoor dining at the Premises was not feasible. At most, the area in front of the Premises would accommodate approximately 20 seats, a tiny fraction of the seats in the actual restaurant. As with take-out, Tenant would have lost money on outdoor dining.

36. On September 30, 2020, indoor dining was permitted but at a mere 25% of capacity. Again, as with take-away and outdoor dining, given the cost of operating a kitchen built for over 400 seats at 25% of capacity was prohibitive. Tenant would have continued to lose money.

37. On December 14, 2020, Governor Cuomo again shut down indoor dining completely in New York City, a ban that continues through today.

38. As a result, Carmine's remains closed.

39. Given the current renewed surge in COVID-19 and a painstakingly slow roll out of the vaccine, it is impossible to predict when the NYC economy is going to return to normal and permit Tenant to reopen.

FIRST CAUSE OF ACTION
(Yellowstone Injunction)

40. Without conceding the existence of any violations, Tenant is not able to complete the cure of the alleged violations by the cure deadline.

41. If necessary, Tenant is ready, willing and able to cure any defaults found to exist.

42. Tenant, which will lose the Lease and its substantial investment in the Premises, will be irreparably harmed if the cure period expires and Landlord terminates the Lease prior to completion of any required cure.

43. Tenant has no adequate remedy at law.

44. Accordingly, Tenant seeks a judgment permanently tolling the cure period and staying Landlord from terminating the Lease or otherwise seeking possession of the Premises.

SECOND CAUSE OF ACTION

(Declaratory Judgment - Continuous Operation Claim)

45. Tenant contends that it is not in breach of ¶7(f) of the Second Amendment to the Lease and does not owe any Fee for Failure to Operate per ¶7(g) of the Lease.

46. Tenant ceased operation as a direct and necessary response to a government order, which, per ¶6 of the Lease, Tenant is obliged to comply.

47. Further, ¶63 of the Lease provides:

If the Tenant shall be delayed in, or prevented from performance of any act required hereunder by reason of strike's, lockouts, labor troubles, inability to procure materials, failure of power, **restrictive governmental laws and regulations**, riots, insurrections, or **other reason of like nature**, then performance of such act, other than the payment of rent or additional rent or Tenant's use of the Demised Premises in a manner not permitted under the terms of this Lease unless otherwise excused by law or under the terms of this Lease, shall be excused for the period of delay and the performance of any such act shall be extended for a period equivalent to the period of such delay [emphasis added].

48. Tenant contends that the series of Executive Orders barring or drastically limiting Tenant's operation constitute a *force majeure* excusing Tenant from any obligation to continuously operate, extinguishing any liability for the Fee for Failure to Operate per ¶7(g) of the Second Amendment and bars Landlord from terminating the Lease.

49. Landlord contends it has the right to so terminate the Lease as well as to collect the 150% penalty as a Fee for Failure to Operate per ¶7(g) of the Second Amendment.

50. A justiciable controversy exists.

51. Tenant has no adequate remedy at law.

52. Accordingly, Tenant is entitled to a judgment declaring that Tenant is not in breach of the continuous operation provision of ¶7(f) the Lease, does not owe any Fee for Failure to Operate per ¶7(g) of the Lease, and Landlord is barred from terminating the Lease on these grounds.

THIRD CAUSE OF ACTION

(Declaratory Judgment - Sprinkler Claim)

53. Tenant contends that it is not in breach of ¶6 and/or ¶29 of the Lease by reason of its failure to install a sprinkler system in compliance with Local Law 26.

54. Local Law 26 of 2004 established retroactive sprinkler requirements for buildings of a certain height.

55. Local Law 26 requires building *owners* to install the required sprinkler systems.

56. Paragraph 29 of the Lease requires Tenant to install sprinklers only if, and to the extent, such installation is due to the operation of Tenant's business or the layout of the Premises.

57. Paragraph 29 of the Lease does not include work required by Local Law 26.

58. Paragraph 6 of the Lease does not include work required by Local Law 26.

59. Landlord contends that ¶6 and ¶29 require Tenant to install sprinklers mandated by Local Law 26.

60. A justiciable controversy exists.

61. Tenant has no adequate remedy at law.

62. Accordingly, Tenant is entitled to a judgment declaring that it is not required to install sprinklers mandated by Local Law 26 and that Landlord is barring from terminating the Lease on this ground.

FOURTH CAUSE OF ACTION

(Declaratory Judgment - Rent Claim)

63. Tenant contends that ¶17(1) of the Lease does not permit termination of the Lease for failure to pay rent or additional rent.

64. Paragraph 17(1) provides, in relevant part:

If Tenant defaults in fulfilling any of the covenants of this lease **other than the covenant for the payment of rent and additional rent, ...** [emphasis added].

65. The sole provision pursuant to which Landlord seeks to terminate the Lease expressly exempts termination based on failure to pay rent or additional rent.

66. Landlord contends that it is entitled to terminate the Lease upon such grounds.

67. A justiciable controversy exists.

68. Tenant has no adequate remedy at law.

69. Accordingly, Tenant is entitled to a judgment declaring that Landlord is barred from terminating the Lease based upon failure to pay rent or additional rent.

FIFTH CAUSE OF ACTION

(Commercial Tenant Harassment)

70. Tenant is a "commercial tenant" pursuant to NYC Admin.Code §22-901.

71. The Building is a "covered property" pursuant to NYC Admin.Code §22-901.

72. Landlord is a "landlord" pursuant to NYC Admin.Code §22-901.

73. Landlord has engaged in "commercial tenant harassment" in violation of NYC Admin.Code §22-902(a)(11) by, among other things, seeking to terminate the Lease based on meritless claims.

74. Landlord's acts and omissions "would reasonably cause a commercial tenant to vacate covered property, or surrender or waive any rights under a lease ... in relation to such covered property" in violation of NYC Admin.Code §22-

902(a)(11) by, among other things, seeking to terminate the Lease based on meritless claims.

75. Tenant is a business "impacted by COVID-19" pursuant to 22 NYC Admin.Code §22-902(a)(11)(c)(i) & (ii).

76. Tenant seeks the imposition a civil penalty pursuant to 22 NYC Admin.Code §22-903(a).

77. Tenant seeks an order restraining Landlord from engaging in commercial tenant harassment pursuant to 22 NYC Admin.Code §22-903(a)(1).

78. Tenant seeks the award of damages, injunctive relief, equitable relief and reasonable attorney's fees and costs as the court finds appropriate pursuant to 22 NYC Admin.Code §22-903(a)(3).

Wherefore, plaintiff demands judgment on the first, second, third, fourth and fifth causes of action as set forth above and such other and further relief as the court deems just, proper and equitable.

Dated: New York, New York
January 7, 2021

HIMMELSTEIN McCONNELL GRIBBEN
DONOGHUE & JOSEPH LLP
Attorneys for Plaintiff
15 Maiden Lane - Suite 1700
New York, New York 10038-4003
212.349.3000

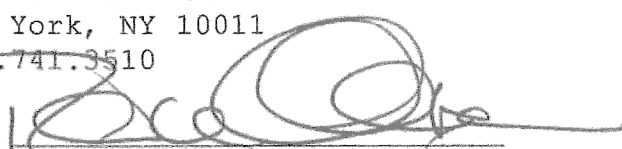
By:

David Frazer

David E. Frazer, Esq., of
counsel

Robert M. Olshever, PC
Attorneys for Plaintiff
148 West 24th Street - 3rd Floor
New York, NY 10011
~~212.741.3510~~

By:


Robert M. Olshever, Esq., of
counsel

VERIFICATION

State of New York)

ss.:

County of New York)

Jeffrey Bank, being sworn, deposes and says:

I am CEO of plaintiff LITTLE FISH CORP. a/k/a LITTLE FISH INC. I have read the attached complaint and know its contents to be true. As to those items stated upon information and belief, I believe them to be true.



Jeffrey Bank

Sworn to before me
January 6 2021



Notary Public

ROBERT M. OLSHEVER
Notary Public, State of New York
No. 02OL4643583
Qualified in New York County
Commission Expires 05/31/2023