IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT- LAW DIVISION

PONTE GADEA CHICAGO, LLC,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
BANANA REPUBLIC, LLC,	)	
	)	
Defendant.	)	Case No. 20 L 6235
_____	)	
	)	
BANANA REPUBLIC, LLC,	)	
	)	
Counter-Plaintiff,	)	
vs.	)	
	)	
PONTE GADEA CHICAGO, LLC,	)	
	)	
Counter-Defendant.	)	

MEMORANDUM OPINION AND ORDER

This is a landlord-tenant dispute. Plaintiff, Ponte Gadea Chicago, LLC ("Ponte Gadea"), the landlord, has sued its tenant, Banana Republic, LLC ("BR") for Breach of Contract and Future Rent. BR admits that it has not paid the rent required by the parties' written lease agreement since April 2020. Moreover, BR does not contend that any provision of the lease excused its obligation to pay rent. Thus far, this would appear a fairly simple case.

BR has, however, filed fifteen affirmative defenses[1] and a four-count counterclaim.[2] BR does not contend that Ponte Gadea has failed to perform any of its obligations under the lease, not really. (Although one of BR's affirmative defenses and one of its counterclaims are captioned breach of

[1] Recission, Reformation, Setoff, Estoppel, Frustration of Purpose, Failure of Consideration, Impossibility, Illegality, Commercial Impracticability, Actions of Landlord and Third Parties, Breach of Contract, Unclean Hands, Mistake, Failure of Condition Precedent, and Failure to Mitigate

[2] Breach of Contract, Declaratory Relief, Unjust Enrichment, and Reformation

contract, those pleadings are not an exception to the following.) BR's pleadings all boil down, essentially, to a contention that it would be unfair to require BR to abide by the terms of the lease in light of the global COVID-19 pandemic and the Executive Orders issued by Illinois Governor JB Pritzker to combat the spread of the disease.

The matter is now before the court on Ponte Gadea's Motion pursuant to section 2-615 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615) to Strike BR's Affirmative Defenses (AD'S) and Dismiss BR's Counterclaims. The matter is fully briefed, and the court has heard oral argument. The motion is granted in its entirety. A contract – such as a lease – is a vehicle for parties to declare, between themselves, their rights and responsibilities, and to allocate risk. Here, the parties' lease provided for abatement of rent in certain circumstances,[3] but not when the store could not for some reason be opened for sale other than at the fault of the landlord. Moreover, the lease expressly anticipated the possibility that the property might be inaccessible due to, *inter alia,* governmental action, but the lease did not provide for an abatement of rent in such circumstances – it merely abrogated BR's contractual obligation in such circumstances to keep its store open during normal business hours. The court finds that the risk that BR might not be able to operate its store due to pandemic or governmental action was foreseeable (and in the latter case foreseen). The parties did not contract for cancellation of the lease or abatement of rent in such circumstances. The court will not rewrite the parties' contract for them.

FACTUAL BACKGROUND

Ponte Gadea and The Gap, Inc. ("Gap") (parent company to BR, but non-party to this case) first entered into a lease agreement governing BR's tenancy at 730-744 North Michigan Avenue (the

[3] The Lease provided for rent abatement in the event of loss of utilities caused by Ponte Gadea's negligence where such loss was not covered by insurance, closure of common areas, condemnation of the property, and any entry by Ponte Gadea into the Premises which would restrict BR's use of the Premises.

Property) on November 26, 1996. Ponte Gadea and Banana Republic, Inc., the predecessor to BR, executed the First Amendment to Lease on March 30, 1999. Finally, Ponte Gadea and BR executed the Second Amendment to Lease on June 15, 2016. The lease and its two amendments (collectively "Lease") all concern the Property.

The Lease

The parties cite to numerous provisions of the Lease in support of their respective positions. There is no dispute as to the text of the Lease. Several relevant provisions are summarized here. Article 1 of the Lease defines "Permitted Use" of the Premises. BR may engage in "the sale of wearing apparel for men and/or women and, at [BR's] option, [BR] may sell wearing apparel for infants, toddlers and children." Article 8 of the Original Lease specifically provides that BR may only use the premises for purposes as outlined in Article 1.

Article 8A of the Lease provides: "[BR] shall comply with all Law relating to the Premises and [BR's] use thereof, including without limitation, Laws requiring the Premises to be closed on Sundays or any other days or hours, health, safety and building codes…" No rent abatement is provided for in Article 8.

Article 8B requires BR to operate its store at the premises during certain "Required Hours." Article 27Q excuses BR from operating during "Required Hours" in circumstances of "Unavoidable Delay", which it defines as:

> [D]elays due to strikes, lockouts, labor troubles, inability to procure labor or materials or reasonable substitutes therefor, failure of power, governmental requirements, restrictions or Laws, fire or other casualty damage, war or civil disorder, or other causes beyond the reasonable control of the party delayed. Unavoidable delays hereunder shall not include delays resulting from changes in economic or market conditions, or financial or internal problems that can be satisfied by the payment of money.

Neither Article 8B nor Article 27Q of the lease provides for rent abatement in the event of "Unavoidable Delay."

Article 20E of the Lease permits Ponte Gadea to deny access to the entirety of the retail property, including the Premises subject to the Lease, in the event of "riot or other civil disorder, strike or labor unrest, public excitement or other dangerous condition, or threat thereof." No rent abatement is provided for in Article 20E.

The Lease expressly provides for rent abatement in several sections, including: Article 9C, covering loss of utilities caused by Ponte Gadea's negligence where such loss is not covered by insurance; Article 11B, covering closure of common areas; Article 14, covering condemnation of the property; and Article 20A, covering any entry by Ponte Gadea into the Premises which would restrict BR's use of the Premises.

Closure and Nonpayment of Rent

On March 20, 2020, Governor Pritzker issued Executive Order 2020-10 (COVID-19 Executive Order No. 8) (the "Stay-at-Home Order"). The Stay-at-Home Order mandated the temporary cessation of operations for all non-essential businesses in Illinois. The order required that all non-essential businesses be closed to the public. The Stay-at-Home Order was further clarified in Executive Order 2020-30 (COVID-19 Executive Order No. 28), which explicitly stated in relevant part that "Nothing in this Executive Order shall be construed as relieving any individual or entity of the obligation to pay rent or comply with any other obligation that an individual or entity may have pursuant to a lease or rental agreement."

There is no dispute that BR stopped paying rent in April 2020, and resumed paying only a portion of the rent due under the Lease in June 2020.

STANDARD OF REVIEW

"A cause of action should not be dismissed pursuant to a section 2–615 motion unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief." *Pooh-Bah Enterprises, Inc. v. Cty. of Cook*, 232 Ill. 2d 463, 473 (2009). The same standard

applies to affirmative defenses. *Wells Fargo Bank, N.A. v. Terry, 401 Ill. App. 3d 18, 19* (2010). In ruling on such a motion, "the trial court must interpret all pleadings in the light most favorable to the nonmoving party." *Doe ex rel. Ortega-Piron v. Chicago Bd. of Educ.*, 213 Ill. 2d 19, 23–24 (2004). Further, "only those facts apparent from the face of the pleadings, matters of which the court can take judicial notice, and judicial admissions in the record may be considered." *K. Miller Const. Co. v. McGinnis*, 238 Ill. 2d 284, 291 (2010).

In this case, the parties' dispute involves interpretation of their Lease. A lease is simply a contract between a landlord and tenant, interpreted according to well-established principles of contract interpretation. *Nationwide Mut. Fire Ins. Co. v. T & N Master Builder & Renovators*, 2011 IL App (2d) 101143, ¶ 16. Thus, the court's primary objective is to effectuate the parties' intent. *Id.*; *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011). The court must consider and construe the contract as a whole, considering all provisions in context, not viewing individual clauses or provisions in isolation. *Id.* Courts "will not interpret a contract in a manner that would nullify or render provisions meaningless, or in a way that is contrary to the plain and obvious meaning of the language used." *Id.* at 442. "If the words in the contract are clear and unambiguous, they must be given their plain, ordinary and popular meaning," without regard to parol evidence. *Id.* at 441.

The same rules of construction generally apply to interpretation of legislation or other governmental laws. *See, e.g., Vill. of N. Riverside v. Ill. Labor Rels. Bd.*, 2017 IL App (1st) 162251, ¶ 17.

ANALYSIS

BR raises 15 affirmative defenses (Recission, Reformation, Setoff, Estoppel, Frustration of Purpose, Failure of Consideration, Impossibility, Illegality, Commercial Impracticability, Actions of Landlord and Third Parties, Breach of Contract, Unclean Hands, Mistake, Failure of Condition Precedent, and Failure to Mitigate) and four counts in its counterclaim (Breach of Contract,

Declaratory Relief, Unjust Enrichment, and Reformation). Ponte Gadea argues in its motion that each of these counts should be dismissed and each of these affirmative defenses stricken with prejudice, with the exception of portions of BR's claim for Breach of Contract and its Third Affirmative Defense for Setoff insofar as they relate to alleged overcharges prior to the COVID-19 pandemic. Although Ponte Gadea also contends the latter Affirmative Defense and counterclaim fail to state a claim, Ponte Gadea concedes BR may be entitled to attempt to replead them.

Given that all (or nearly all) of BR's affirmative defenses and counterclaims stem from the same central factual allegations, there is considerable overlap among them. Accordingly, for the sake of efficiency, the court has grouped them in its analysis, below.

1. Governor Pritzker's Stay-at-Home Order Did Not Frustrate the Purpose (AD5) of the Landlord-Tenant Relationship, Nor Did It Render BR's Performance Impossible (AD7) or Impracticable (AD9) to the Extent Which Would Excuse BR from Performance of Its Contractual Obligations.

Illinois common law recognizes BR's Fifth Affirmative Defense, frustration of purpose, when a party is entitled to excuse performance of contractual obligations because such performance "is rendered meaningless due to an unforeseen change in circumstances." *Ill.-Am. Water Co. v. City of Peoria*, 332 Ill. App. 3d 1098, 1106 (2002) (citing *Smith v. Roberts*, 54 Il. App. 3d 910 (1977)). For frustration of purpose to apply in a commercial setting, (1) the frustrating event must not be reasonably foreseeable, and (2) the value of either party's performance "must be totally or almost totally destroyed by the frustrating cause." *Id*. If the "contingency that causes the impossibility might have been anticipated or guarded against in the contract, it must be provided for by the terms of the contract or else impossibility does not excuse performance." *YPI 180 N. LaSalle Owner, LLC v. 180 N. LaSalle II, LLC*, 403 Ill. App. 3d 1, 7 (2010). Thus, foreseeability is key. Here, the court must reject BR's position that (i) a government-mandated closure of retail stores due to disease, and (ii) the pandemic itself, were unforeseeable when the parties entered into the Lease.

a. Foreseeability Is Not a Question of Fact.

BR argues that foreseeability is a question of fact which must be presumed in its favor when challenged under a 2-615 Motion to Dismiss or Motion to Strike, citing to *Bank of Am., N.A. v. Shelbourne Dev. Group, Inc.*, 732 F. Supp. 2d 809, 828 (N.D. Ill. 2010). The court disagrees. Not only is *Shelbourne* factually distinguishable (there, the district court found a factual issue because the parties to a loan transaction for real estate were uniquely affected by the 2008 economic crisis), it is irrelevant, because the Illinois Appellate Court – which this court is bound to follow – has treated the issue of foreseeability as a question of law. *See YPI 180 N. LaSalle Owner, LLC*, 403 Ill. App. 3d 1 (affirming trial court dismissal pursuant to section 2-615 of complaint for rescission due to impossibility on the grounds that the frustrating events were reasonably foreseeable).

b. Closure of Business Was Reasonably Foreseeable, Both as a Result of Governmental Action and as a Result of the Public Health Crisis Which Precipitated Governmental Action in This Case.

As made evident by the specific language in Article 8B of the Lease, "governmental requirements, restrictions or Laws" which could impact or limit business operating hours were not only foreseeable, but were in fact foreseen by the parties when drafting the Lease. While BR argues that the effect of COVID-19 is better characterized as "economic or market conditions" which are explicitly excluded from the definition of "Unavoidable Delays" under Article 8B, the Stay-at-Home Order is plainly a "governmental … restriction[] or Law[]."

BR argues, however, that even if the parties may have anticipated that some type of governmental action would restrict business under the Lease, the pandemic itself was entirely unforeseeable. The court is bound to hold otherwise, however. As Ponte Gadea notes, the Illinois Supreme Court has specifically rejected the argument that a pandemic is so unforeseeable as to excuse contractual obligations. *See Phelps v. School Dist. No. 109 Wayne County*, 302 Ill. 193, 197 (1922) (holding that an Illinois school district could not avoid its contractual obligations to pay a teacher's

salary based upon the allegedly unforeseeable closure of the school due to the 1918 Spanish Flu).

BR argues that medical science has changed dramatically since 1918, and that the past hundred years without a pandemic have created an environment where landlords and tenants could not be expected to anticipate building closures due to disease. As an initial matter, this is not an argument within this court's power to accept. *Phelps* remains good law and compels the result here; this court cannot decline to follow Illinois Supreme Court precedent because of advances in medical science. Moreover, even if this court were not bound by *Phelps*, it would reject the argument on its merits. The possibility of a store closure due to pandemic was foreseeable in 2016 (when the parties entered into the Second Amendment to lease). Although certainly, and mercifully, none approached the severity of the 1918 Spanish Flu epidemic, numerous pandemics have occurred in recent history, including Swine flu (H1N1) in 2009-2010; Ebola in 2013-2016; Bird flu (H5N1) in 2013; and Zika virus in 2015-2016, to name merely a few recent incidents. Although COVID-19 also exceeded these recent pandemics in severity (while still falling short of the devastation wrought by the 1918 pandemic), it has remained regrettably clear – certainly at the time of the Second Amendment to the Lease – that medical science has not, as yet, eliminated pandemics.

c. Impossibility and Commercial Impracticability Do Not Apply Where Payment of Rent is the Remedy Sought.

An affirmative defense of impossibility should be "narrowly applied 'due in part to judicial recognition that the purpose of contract law is to allocate the risks that might affect performance and that performance should be excused only in extreme circumstances.'" *YPI 180 N. LaSalle Owner*, 403 Ill. App. 3d at 6, quoting *Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y. 2d 900, 902 (1987). Ponte Gadea notes that Illinois has taken particular care to recognize this allocation of risk in declining to apply a separate impracticability standard. *Joseph W. O'Brien Co. v. Highland Lake Construction Co.*, 17 Ill. App. 3d 237, 241 (1974); *Bank of America., N.A. v. Shelbourne Dev. Group, Inc.*, 732 F. Supp. 2d 809, 827 (N.D. Ill. 2010). Ponte Gadea argues that the entirety of this risk was allocated to

BR per Article 12A of the Lease, which requires BR to retain an "all risk" insurance policy for business interruption and property damage. Just as this court found that the risk of government action was anticipated by the parties and the parties agreed not to provide for rent abatement in that event, so too must this court find that general risk of business interruption was allocated to BR.

2. BR's Other Affirmative Defenses Similarly Fail.

a. Failure of Consideration (AD6) and Failure of Condition Precedent (AD14)

Failure of consideration occurs when anticipated consideration in a transaction is never tendered. *Worner Agency, Inc. v. Doyle*, 121 Ill. App. 3d 219, 222 (1984). Failure of condition precedent occurs under similar circumstances but instead involves performance prior to the contract becoming effective or performance prior to the other party's obligation to perform accrues. *McKee v. First Nat. Bank of Brighton*, 220 Ill. App. 3d 976 (1991). BR argues that as a tenant the benefit of its lease with Ponte Gadea was not the right to make use of the premises, but instead the right to operate a retail store, consideration that it failed to receive after March 20, 2020. Alternatively, Ponte Gadea argues that use of the Premises as a retail location was a condition precedent to BR's payment of rent. BR argues that recission of the contract is the appropriate remedy regarding each of these claims. *Davies v. Arthur Murray, Inc.*, 124 Ill. App. 2d 141, 153 (1970).

These affirmative defenses fail to acknowledge the limited extent of Ponte Gadea's obligations under the Lease agreement. Ponte Gadea is merely a landlord, and there is no allegation that it has failed to perform their obligations as a landlord, i.e. to provide access to the Premises where business could be conducted. Article 1 of the Lease only defines "Permitted Use" of the Premises. Taken alongside Article 8, Article 1 must be understood not as Ponte Gadea's promise to BR, but rather as BR's promise to Ponte Gadea (that the Premises would be used for the Permitted Use and no other). In no part of the Lease did Ponte Gadea assume responsibility for the continued legality of this use, and this court will not imply conditions precedent or required consideration in the Lease

where it was not explicitly agreed to by the Parties. Ponte Gadea did not and could not provide the right to operate a retail store; permission to operate a business was temporarily ceased by the Illinois government, not by Ponte Gadea.

Each of these affirmative defenses is functionally a reworked attempt to argue commercial frustration as was addressed above. As stated above, governmental restriction on the right to operate a business was anticipated by the parties, and the parties chose not to provide rent abatement in such circumstances. Ponte Gadea has upheld its obligations under the Lease.

b. Illegality (AD8)

BR argues that its use of the Premises was made illegal, rendering the remainder of the Lease void as "the refusal to enforce the other provisions of an agreement would promote the policy of voiding the illegal provision." *In re Trecker's Estate*, 107 Ill. App. 2d 94, 101 (1969). BR argues that because operating a storefront retail establishment was made illegal by the Stay-at-Home Order, enforcing the payment of rent would "encourage retailers to flout government restrictions and endanger public safety." BR's Memo in Opposition to the Motion, p. 14.

The fact that governmental action has made the operation of an apparel retailer unprofitable does not excuse BR from its obligation to pay rent. To the contrary, the Stay-at-Home Order explicitly clarified that no part of the order should be construed as relieving an entity of the obligation to pay rent. COVID-19 Executive Order No. 28. This court cannot overlook the specific language of an executive order to protect the policy goal of safeguarding public safety. BR's legal obligation to comply with governmental restrictions remains regardless of whether economic pressure might "encourage" it to "flout" such laws in pursuit of profit. Economic hardship is not grounds for invalidating a contract. *See Hoosier Energy Rural Electric Co-op., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 727-28 (7th Cir. 2009) ("it is hard to see how an economic downturn can be alleviated by making contracts less reliable. Enforceable contracts are vital to economic productivity.").

c. Unclean Hands (AD12)

Ponte Gadea argues that the affirmative defense of Unclean Hands must be stricken for the simple reason that the doctrine of unclean hands can only be used to bar equitable remedies, and does not apply to legal rights such as money damages. *American National Bank & Trust Co. of Chicago v. Levy*, 83 Ill. App. 3d 933, 936 (1980); *John O. Schofield, Inc. v. Nikkel*, 314 Ill. App. 3d 771, 786–87 (2000). BR counters that Count II of the complaint seeks "future rent", and that an order of this court requiring a future payment is best characterized as injunction. *Gould v. Lambert Excavating, Inc.*, 870 F.2d 1214, 1215 (7th Cir. 1989). Ponte Gadea clarifies by way of its reply that its claim for "future rent" is limited to only such money damages as may accrue and then be proven at trial. The court accepts such concession, with the corollary that any request for relief based on future payments will be stricken.

d. Estoppel (AD4), Failure to Mitigate (AD15), and Actions of Landlord (AD10)

Each of these affirmative defenses must fail because BR has failed to allege facts in its Answer that would constitute defenses on these grounds.

To prove estoppel, a party must allege that they were led "to do something that the party would not have done but for such statements and conduct." *Geddes v. Mill Creek Country Club, Inc.*, 196 Ill. 2d 302, 313 (2001). BR does not allege that Ponte Gadea misrepresented or concealed any facts which altered its course of action.

The defense of Failure to Mitigate is predicated on "[requiring] landlords to make reasonable efforts to relet the premises *following a tenant's departure*, rather than allowing the premises to stand vacant and the landlord to collect rent in the form of damages." (Emphasis added.) *St. George Chicago, Inc. v. George J. Murges & Assocs., Ltd*., 296 Ill. App. 3d 285, 290-91 (1998). BR does not allege that it has vacated the Premises, and thus it cannot maintain that Ponte Gadea breached an obligation to relet the Premises. Nor does BR identify any other mitigation efforts Ponte Gadea might

reasonably have made.

BR's tenth affirmative defense, titled "Actions of Landlord and Third Parties", does not provide any specific factual allegations nor reference any terms which would direct this court to a legal defense against Ponte Gadea's complaint. To the extent that BR seeks to argue that Landlord's actions, or the actions of third parties (presumably the governmental action in this case) excuses BR's obligations under the Lease, BR has not pled facts specific to identify these actions separate from the actions pertinent to the other affirmative defenses addressed in this opinion.

e. Mistake (AD13), Rescission (AD1), and Reformation (AD2)

BR argues that the parties made a mutual mistake by omitting terms to the Lease which would reflect the supposed mutual understanding of the parties that no rent would be owed if BR's use of the premises was interrupted. The court must deny this argument for the same reasons stated in its above discussion on commercial frustration. The parties did anticipate government action which might interfere with normal business operation, and they elected not to include rent abatement in that event despite the fact that rent abatement was explicitly provided for elsewhere in the Lease, specifically Articles 9C, 11B, 14, and 20A.

As for BR's affirmative defenses of rescission and reformation, both are based on the same underlying factual premises as the already-discussed defenses of frustration, impossibility, impracticability, illegality, and lack of consideration; they fail for the same reason those defenses fail.

f. Setoff (AD3) and Breach of Contract (AD11)

BR's final affirmative defenses are for setoff and breach of contract. To the extent that these affirmative defenses are based on BR's position that its obligations under the lease were excused in whole or in part by the pandemic or governmental orders relating thereto, they are stricken with prejudice for the same reasons discussed *supra* with respect to BR's other affirmative defenses. To the extent these affirmative defenses are based on BR's contention in the counterclaim that Ponte

Gadea overcharged BR for rent for reasons having nothing to do with the pandemic, they will be discussed *infra* in Part 4 of this Order.

3. BR Has Failed to State a Claim with Respect to Each of Its Counterclaims.

a. Breach of Contract

A claim for breach of contract requires "(1) the existence of a valid and enforceable contract; (2) the performance of the contract by the plaintiff; (3) the breach of the contract by the defendant; and (4) a resulting injury to the plaintiff." *Klem v. Mann*, 279 Ill. App. 3d 735, 740-41 (1996). BR argues that its claim for breach has been successfully alleged because Ponte Gadea "[required] payment when none was due or should have been prorated." BR Memo in Opp. p. 11. In the alternative, it argues that "a breach [was] alleged for Landlord's failure to return or credit Tenant with that portion of the rent paid for the second half of March when the Premises could not be used as intended." *Id*. Each of these arguments is premised upon the legal conclusion that BR's payment of rent was excused for one of the myriad reasons argued in its affirmative defenses, a conclusion which for the reasons discussed above the court rejects. Because BR has not effectively stated any affirmative defense which excuses its obligation to pay rent as a result of the pandemic, the Stay-at-Home Order, or subsequent market conditions, so too has it failed to state a claim for Breach of Contract on those grounds.

BR additionally alleges that it was overcharged for rent before the Pandemic began, however, for reasons having nothing to do with the pandemic. This claim is factually insufficient but survives if BR chooses to replead it, as the court will discuss *infra* Part 4.

b. Declaratory Relief

A claim for declaratory relief requires "(1) a plaintiff with a tangible legal interest, (2) a defendant with an adverse interest, and (3) an actual controversy regarding that interest." *Local 1894 v. Holsapple*, 201 Ill. App. 3d 1040, 1050 (1990). Ponte Gadea argues that a claim for declaratory

judgment is no longer viable or necessary, as it should be brought to address a controversy after a dispute has arisen, but before claims for relief or damages arise. *See Beahringer v. Page*, 204 Ill. 2d 363, 372-73 (2003); *Eyman v. McDonough Dist. Hosp*., 245 Ill. App. 3d 394, 396 (1993). The court agrees. BR's failure to pay rent has already occurred. The parties' dispute is now in the realm of breach of contract, not declaratory judgment.

c. Unjust Enrichment

A claim for unjust enrichment must be based on an implied contract; "where there is a specific contract which governs the relationship of the parties, the doctrine of unjust enrichment has no application." *La Throp v. Bell Federal Savings & Loan Association*, 68 Ill. 2d 375, 391 (1977). BR argues that claims for unjust enrichment survive where "parties dispute the existence of the contract." *Grayson v. Shanahan*, 2016 U.S. Dist. LEXIS 164684, *9. However, despite such citation, BR does not dispute the existence of a contract, it merely asserts affirmative defenses which it hopes will render the contract unenforceable. For the reasons stated above, no affirmative defense stated which would lead to the contract being unenforceable applies. BR's claim "include[s] allegations of an express contract which governs the relationship of the parties," and must accordingly be dismissed. *Guinn v. Hoskins Chevrolet*, 361 Ill. App. 3d 575, 604 (2005).

d. Reformation

BR's counterclaim for reformation fails to state a claim on the same basis as it fails to state an affirmative defense, for the reasons laid out above in Section 2(e) of this opinion.

4. BR's Affirmative Defenses for Setoff and Breach of Contract Relating to Events Prior to the COVID-19 Pandemic are not Sufficiently Pled But May be Repled.

Finally, Count I of BR's counterclaim and its third and eleventh affirmative defenses contend Ponte Gadea overcharged BR for rent for reasons unrelated to (indeed, prior to) the pandemic. Ponte Gadea argues that BR's claims regarding the alleged overcharge fail to meet Illinois' fact pleading standard. Under the Illinois fact pleading standard, a pleader is required to set out ultimate facts that

support his or her cause of action. *Edelman, Combs & Latturner v. Hinshaw & Culberston*, 338 Ill. App. 3d 156, 168 (2003). BR does not argue that it has sufficiently set forth such facts, but instead argues that such issues can be addressed in discovery, or in the alternative that this court should grant leave to amend to include such ultimate facts. The former approach is unsupported by law – a party cannot bring an insufficient pleading and then seek discovery in hopes of finding facts to support a proper pleading – but leave to replead is granted.

CONCLUSION

Ponte Gadea's Motion to Strike Affirmative Defenses and Counterclaims is GRANTED, with prejudice in part and without prejudice in part, as follows:

- BR's Affirmative Defenses I (Rescission), II (Reformation), IV (Estoppel), V (Frustration of Purpose), VI (Failure of Consideration), VII (Impossibility), VIII (Illegality), IX (Commercial Impracticability), X (Actions of Landlord and Third Parties), XII (Unclean Hands), XIII (Mistake), XIV (Failure of Condition Precedent), and XV (Failure to Mitigate) are all stricken with prejudice.

- Affirmative Defenses III (Setoff) and XI (Breach of Contract) are stricken in part with prejudice (as they relate to the pandemic) and in part without prejudice (as they relate to alleged overcharges unrelated to the COVID-19 pandemic).

- BR's Counterclaim as to Count I (Breach of Contract) is dismissed in part with prejudice (as it relates to the pandemic) and in part without prejudice (as it relates to alleged overcharges unrelated to the pandemic)

- Counts II (Declaratory Relief), III (Unjust Enrichment), and IV (Reformation) of BR's Counterclaims are dismissed with prejudice.

BR may replead Counterclaim Count I and Affirmative Defenses III and XI within 21 days of this Order.

Entered:

Judge Michael F. Otto
MAR 24 2021
Circuit Court – 2065

_____
Hon. Michael F. Otto