

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

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SIMPSON THACHER & BARTLETT LLP,	:	<b><u>SUMMONS</u></b>
	:	
Plaintiff,	:	Index No. _____
	:	
- v -	:	Date Purchased: July 27, 2020
	:	
VBGO 425 LEXINGTON LLC,	:	The basis of venue is CPLR § 503 as
	:	Plaintiff and Defendant are residents
	:	of New York County
Defendant.	:	
	:	
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**TO THE ABOVE NAMED DEFENDANT:**

PLEASE TAKE NOTICE THAT YOU ARE SUMMONED to answer the Complaint of the Plaintiff herein and to serve a copy of your answer, or if the Complaint is not served with this Summons, to serve a notice of appearance, on the Plaintiff within 20 days after the service of this Summons, exclusive of the day of service (or within 30 days after the service is complete if this Summons is not personally delivered to you within the State of New York).

YOU ARE HEREBY NOTIFIED THAT and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the Complaint.

Dated: White Plains, New York  
July 27, 2020

MENZ BONNER KOMAR & KOENIGSBERG LLP

By:   
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*Attorneys for Plaintiff Simpson Thacher & Bartlett LLP*

**TO:**  
VBGO 425 LEXINGTON LLC  
292 Madison Avenue  
New York, New York 10017

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

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SIMPSON THACHER & BARTLETT LLP,	:
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Plaintiff,	:
	:
- v -	:
	:
VBGO 425 LEXINGTON LLC,	:
	:
Defendant.	:
	:
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**COMPLAINT**

Index No. \_\_\_\_\_

Plaintiff SIMPSON THACHER & BARTLETT LLP, by and through their undersigned attorneys, Menz Bonner Komar & Koenigsberg LLP, as and for their Complaint against defendant VBGO 425 LEXINGTON LLC (“VBGO,” “Landlord” or “Defendant”), hereby alleges as follows:

**NATURE OF THE ACTION**

1. This is an action for breach of contract and declaratory relief that arises out of the COVID-19 global pandemic.

2. The Plaintiff in this case – Simpson Thacher & Bartlett LLP (“STB,” “Tenant” or “Plaintiff”) – is a New York City law firm that has maintained an office at 425 Lexington Avenue, New York, New York 10017 (the “Premises”) since 1987. At that time, STB entered into a commercial lease that included a relatively unique clause that sets forth the circumstances under which STB, as tenant, would be entitled to rent abatement for Force Majeure events.

3. Under the lease, the term “Force Majeure” specifically includes, but is not limited to, the circumstance where the government – here New York State and New York City –

steps in and preempts the right of Tenant to use and occupy its commercial space in connection with a “national or other public emergency.”

4. Because of the COVID-19 global pandemic, the declaration of a national public health emergency by the President of the United States, and the Executive Orders of New York State Governor Andrew M. Cuomo and New York City Mayor Bill de Blasio, STB was ordered by government mandates to vacate its New York City law offices located at 425 Lexington Avenue.

5. STB complied with those directives and has been unable to use and has vacated its law offices at 425 Lexington Avenue since March 22, 2020. Consequently, STB has been unable to continue the reasonable operation of its business for a period of over sixty (60) days, and under the express terms of the lease, STB is entitled to rent abatement.

6. Notwithstanding, STB’s landlord here – the Defendant VBGO – has refused to acknowledge STB’s rights to rent abatement under the lease. VBGO has likewise refused to reimburse STB for rent amounts paid by the firm in accordance with the lease.

7. With this action, STB seeks to hold Landlord to the express terms of the parties’ contract, enforce Tenant’s negotiated rights to rent abatement, and secure the economic benefits for which STB bargained when it entered into the lease.

8. Plaintiff therefore seeks a determination that VBGO’s conduct in refusing to acknowledge STB’s right to rent abatement under the lease, and its refusal to reimburse STB for monies paid in the form of Fixed Rent and Additional Charges, constitutes a material breach of VBGO’s contractual obligations to Plaintiff, for which Plaintiff is entitled to monetary damages, plus interest, attorneys’ fees and costs of suit.

9. In addition, pursuant to New York CPLR § 3001, Plaintiff requests a judgment declaring the rights, duties and obligations of the parties with respect to the rent abatement and Force Majeure clauses of the lease.

10. Plaintiff seeks a declaration that it is entitled to rent abatement as a result of the COVID-19 pandemic and/or the governmental action taken in connection therewith for the period following sixty (60) days after STB vacated the Premises by operation of law – a period that began on May 21, 2020 (i.e. sixty (60) days after STB vacated the Premises on March 22, 2020). Plaintiff further seeks a declaration that it is entitled to rent abatement under 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 trigger Tenant’s rights under Section 35.19.

### **THE PARTIES**

11. Plaintiff Simpson Thacher & Bartlett LLP is a domestic limited liability partnership organized under the laws of the State of New York, with its principal place of business located at 425 Lexington Avenue, New York, New York 10017. At all relevant times, STB was authorized to transact business in New York.

12. Defendant VBGO 425 Lexington LLC is a foreign limited liability company organized under the laws of the State of Delaware, with its principal place of business located at 292 Madison Avenue, New York, New York 10017. In October 2018, VBGO became the owner of the building located at 425 Lexington Avenue, New York, New York 10017. At all relevant times, VBGO was authorized to and is transacting business in New York.

### **JURISDICTION AND VENUE**

13. Jurisdiction in this Court is proper pursuant to CPLR § 3001, and all other applicable provisions of the CPLR (including § 301 and § 302), because STB has its principal place of business in New York, New York, VBGO is located in New York County, and this action concerns, in part, a request for a declaratory judgment in connection with premises owned and/or rented in New York, New York.

14. This matter 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 counsel fees exceeds \$500,000.

15. Venue in this Court is proper pursuant to CPLR § 503(a), (c) and (d) because one or more parties are a resident of New York County, the defendant is subject to personal jurisdiction in New York, and the commercial lease at issue was negotiated and executed in New York County.

### **FACTUAL BACKGROUND**

#### ***The Commercial Lease For 425 Lexington Avenue***

16. In October 1987, STB entered into a commercial lease entitled “Lease between Orion Limited Partnership ‘Landlord’ and Simpson Thacher & Bartlett ‘Tenant’ dated October 14, 1987,” which has been amended frequently over the thirty-three years since it was executed (together with all amendments, the “Lease”).

17. The negotiations with the landlord and owner of 425 Lexington Avenue relating to the Lease were protracted, hard-fought and performed at arm’s length between

sophisticated businesses. Since that time, the owners and landlord of 425 Lexington Avenue have changed and, as of October 2018, the current owner of the building and landlord is defendant VBGO. Regardless, the provisions in the Lease relevant to this lawsuit have not been modified by any of the lease amendments, were ratified by the parties in such amendments, and therefore remain in full force and effect.

18. Section 35.19 of the Lease specifically addresses Tenant's rights to rent abatement when a Force Majeure event occurs. Section 35.19, entitled "Rent Abatement," provides in pertinent part as follows:

Notwithstanding anything to the contrary ... if Tenant shall be unable to use, and shall have vacated, the Premises or any substantial portion thereof (i.e., more than 6,000 contiguous usable square feet) for at least ... (b) sixty (60) consecutive days if a result of Force Majeure (provided such Force Majeure has not been caused by Tenant's negligence or improper acts) and Tenant is unable to continue the reasonable operation of its business, then Tenant (as its sole remedy) shall be entitled to a rent abatement with respect to all rent allocable to such portion of the Premises which is unusable and unoccupied for the period in excess of the aforesaid number of days until such time as the Premises or the applicable portion thereof shall be again usable or shall be occupied by Tenant ..."

19. The term "Force Majeure" is defined in Section 35.05(q) of the Lease as follows:

**"Force Majeure"** shall mean fire, casualty, any strike, lock-out or other labor trouble, governmental preemption of priorities or other controls in connection with a national or other public emergency or shortages of fuel, supplies or labor resulting therefrom, or any other cause, whether similar or dissimilar, beyond Landlord's or Tenant's reasonable control, as the case may be; or any failure or defect in the supply, quantity or character of electricity or water furnished to the Premises, by reason of any requirement, act or omission of the public utility or others serving the Building with electric energy, steam, oil, gas or water, or for any other reason whether similar or dissimilar, beyond Landlord's or Tenant's reasonable control, as the case may be.

20. Consequently, the Lease is clear that where STB, through no fault of its own, has been forced by government mandate to vacate the Premises at 425 Lexington Avenue

for a period of sixty (60) consecutive days, because of a “national or other public emergency,” and since that time is unable to continue the reasonable operation of its business, then STB is entitled to rent abatement for all rent allocable to that portion of the space that is unusable and unoccupied for the period in excess of the sixty (60) days.

21. The Lease is also clear that Force Majeure events include “any other cause, whether similar or dissimilar,” which encompasses the existence and impact of the global COVID-19 pandemic that has caused Plaintiff to vacate the Premises.

22. Under Section 35.19 of the Lease, STB’s entitlement to rent abatement continues until such time as the Premises becomes usable again.

*The Emergence of COVID-19 As A Deadly Global Pandemic*

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

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

25. Thereafter, the coronavirus spread rapidly throughout the world. On January 13, 2020, the Ministry of Health of Thailand reported the first confirmed case of coronavirus. The first confirmed case within the United States was reported on January 21, 2020. Shortly thereafter, Europe, and specifically Italy, was designated as the global epicenter of the rapidly spreading coronavirus.

26. 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 coronavirus presented a public health emergency. On that same date, the Director-General of the WHO declared the novel coronavirus a Public Health Emergency of International Concern (“PHEIC”).

27. On February 11, 2020, the WHO, following its best practices guidelines, named the disease caused by coronavirus as “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 the virus at every opportunity.

28. Soon thereafter, the coronavirus and resulting COVID-19 cases swept into the United States and into New York. On March 7, 2020, Governor Andrew M. Cuomo issued Executive Order No. 202, declaring a State disaster emergency for the entire State of New York as a result of COVID-19. On March 11, 2020, deeply concerned both by the alarming levels of spread and severity, and by the alarming levels of inaction, WHO made the assessment that COVID-19 could be characterized as a pandemic.

29. 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 public health threat posed by the COVID-19 global pandemic, and 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.



30. On April 2, 2020, the WHO reported on evidence that coronavirus could be transmitted from a pre-symptomatic case before symptom onset, and on April 4, 2020, the WHO reported that there had been over one million cases globally.

31. As of the end of July 2020, the number of COVID-19 cases across the globe has expanded more than tenfold since the WHO's April 4 report to over 16 million reported cases of COVID-19 throughout the world. In the United States, the WHO and the CDC reported over 4.1 million cases with over 145,000 deaths. In New York State, there have been over 416,000 reported cases and over 32,000 deaths, and in New York City approximately 228,000 confirmed cases and over 22,900 deaths.

*New York Issues In-Person Workforce Reduction Orders, and STB Complies*

32. On March 20, 2020, in response to the COVID-19 pandemic, New York State Governor Andrew M. Cuomo issued Executive Order No. 202.8 ("EO 202.8"), entitled "Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency." EO 202.8, among other things, mandated that with respect to all "non-essential businesses" in New York State, "each employer [in the state] shall reduce the in-person workforce at any work locations by 100% no later than March 22 at 8 p.m." (the "Workforce Reduction Order").

33. The authority to issue the Workforce Reduction Order resulted from rights granted to the Governor by the New York 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, order, rule, or regulation, or parts thereof, of any agency during a State disaster emergency, if compliance with such statute, local law,

ordinance, order, rule, or regulation 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.”

34. In issuing EO 202.8, and subsequent Executive Orders relating to the COVID-19 pandemic, the Governor expressly referenced Section 29-a of Article 2-B of the New York Executive Law. The Governor’s EO No. 202.8, and subsequent Executive Orders, both by New York State and New York City, therefore left STB with no choice – vacating the Premises was mandated by operation of law.

35. In compliance with those governmental orders, and New York State law, STB was required to vacate the Premises, and did so vacate, as of March 22, 2020. By May 21, 2020, sixty (60) days after STB vacated the Premises, STB was still unable to use the Premises and continue the reasonable operation of its business.

36. On April 26, 2020, Governor Cuomo announced a phased approach to reopening industries and businesses in the state, the City of New York, and specifically New York County. On June 22, 2020, New York County officially entered “Phase 2” of the staged reopening, at which time STB was permitted to access the Premises at 50% occupancy. The New York State Executive Orders allowing 50% occupancy also placed substantial other social distancing and hygiene restrictions on such access, including restrictions relating to physical distancing, gatherings in enclosed spaces, workplace activity, movement and commerce, the use of protective equipment, screening and testing, tracing and tracking of employee contacts, and the establishment of communications and safety plans.

37. For these reasons, STB is still operating within the governmental restrictions imposed by EO 202.8 and subsequent Executive Orders, and other directives, has

been unable to use and has vacated the Premises, and remains unable to continue the reasonable operation of its business.

*STB Notifies Landlord Of Its Right To Rent Abatement*

38. On May 29, 2020, STB provided written notice to VGBO that it was entitled to rent abatement as a result of COVID-19 and, among other directives, the Executive Orders of New York State Governor Cuomo.

39. STB also notified VGBO that it was electing to exercise its rights to pay the June Fixed Rent and Additional Charges for the Premises “under protest,” pursuant to Section 35.17 of the Original Lease, entitled “Payment or Performance Under Protest.”

40. In the May 29 letter, STB further informed its Landlord that Tenant’s payment of June Fixed Rent and Additional Charges “under protest” pursuant to Section 35.17 also applied to any future payments made during the pendency and application of the Governor’s Executive Orders and any other applicable governmental mandates that may trigger Tenant’s rights under Section 35.19.

41. Following the May 29 letter, STB demanded both an acknowledgment of its rights to full rent abatement under the Lease, and reimbursement of any rent payments made pursuant to the Lease.

42. Landlord VGBO has denied both requests, and this action ensued.

**FIRST CAUSE OF ACTION**  
**(Breach of Contract)**

43. Plaintiff incorporates by reference and repeats and realleges the allegations of Paragraphs 1 through 42 of the Complaint above as if fully set forth herein.

44. Plaintiff entered into a valid written contract with its Landlord entitled “Lease between Orion Limited Partnership ‘Landlord’ and Simpson Thacher & Bartlett ‘Tenant’

dated October 14, 1987” for the Premises located at 425 Lexington Avenue, New York, NY 10017, where STB became and remains a tenant in that space.

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

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

47. Pursuant to Sections 35.05(q) of the Lease, a Force Majeure event has occurred as a result of the COVID-19 global pandemic, and as described herein, STB has been forced to vacate the Premises by operation of law and governmental mandate as a result of a national and public emergency for more than sixty (60) consecutive days.

48. Moreover, a commercial tenant’s access to and use of its office space pursuant to a commercial lease is necessary for the reasonable operation of its business.

49. After STB was forced to vacate the Premises for sixty (60) consecutive days, STB has been unable to use and has vacated the Premises, and has not been able to continue the reasonable operation of its business.

50. Pursuant to Section 35.19 of the Lease, STB is entitled to rent abatement.

51. Plaintiff has, among other things, demanded that Defendant recognize and honor its right to rent abatement pursuant to Sections 35.19 and 35.05(q) of the Lease, both for past payments of Fixed Rent and Additional Charges, and for any 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 trigger Tenant’s rights to rent abatement under Section 35.19.

52. Defendant has refused to acknowledge STB's rights under the Lease and has refused to reimburse STB in the form of rent abatement pursuant to Sections 35.19 and 35.05(q) of the Lease.

53. Defendant is therefore in breach of the Lease.

54. Defendant's breach of the Lease is material and continuing.

55. As a result of Defendant's breach of the Lease, Plaintiff is entitled to monetary damages in the amount of no less than \$8,000,000.00, which such amount 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)**

56. Plaintiff incorporates by reference and repeats and realleges the allegations of Paragraphs 1 through 55 of the Complaint above as if fully set forth herein.

57. Plaintiff STB seeks a declaratory judgment to resolve questions concerning the respective rights, obligations and duties of Plaintiff and VBGO under the Lease with respect to Tenant's rights to rent abatement pursuant to Sections 35.05(q) and 35.19 of the Lease, as well as other applicable provisions.

58. An actual case or justiciable controversy exists between Plaintiff and Defendant concerning (a) Plaintiff's entitlement to rent abatement pursuant to Section 35.19 of the Lease; (b) application of the Force Majeure clause under Section 35.05(q) of the Lease to Tenant's use and occupancy of the Premises; and (c) Plaintiff's right and entitlement to rent abatement for past rent payments and any payments going forward during the pendency of the COVID-19 pandemic and/or application of the Governor's Executive Orders and any other applicable governmental mandates that trigger Tenant's rights under Section 35.19.

59. 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.

60. 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 the time of Force Majeure and its inability to use and occupy the Premises.

61. Plaintiff therefore requests a declaration by this Court that it is entitled to rent abatement in accordance with Sections 35.19 and 35.05(q) of the Lease for all past amounts of Fixed Rent and Additional Charges, and for any future payments of Fixed Rent and Additional Charges made during the pendency of the COVID-19 pandemic and application of the Governor's Executive Orders and any other applicable governmental mandates that trigger Tenant's rights under Section 35.19.

### **RELIEF REQUESTED**

**WHEREFORE**, Plaintiff respectfully requests that the Court enter judgment against Defendant as follows:

(1) For a judgment declaring that Plaintiff STB is entitled to rent abatement in accordance with Sections 35.19 and 35.05(q) of the Lease for all past and future amounts of Fixed Rent and Additional Charges 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 trigger Tenant's rights under Section 35.19;


(2) For a judgment declaring that Defendant is in breach of the applicable commercial lease referenced herein and as a result is liable to STB for monetary damages in an

amount no less than \$ 8,000,000.00, which such damages are continuing, plus pre- and post-judgment interest, attorneys' fees, costs and other disbursements incurred in connection with this action; and

(3) For such other and further relief as the Court deems just and proper.

Dated: White Plains, New York  
July 27, 2020

MENZ BONNER KOMAR & KOENIGSBERG LLP

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