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VIA ECF
Hon. Frederic Block, U.S.D.J.
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *Williamsburg Climbing Gym Company LLC and Fifth Concerto Holdco, Inc. v. Ronit Realty, LLC* – Case No. 20-cv-02073 (FB) (RML)
Request for Pre-Motion Conference – Motion for Judgment on the Pleadings

Dear Judge Block:

We represent Defendant/Counterclaim-Plaintiff Ronit Realty LLC ("Ronit") in the above-referenced action. Pursuant to Rule 2.A. of Your Honor's Individual Motion Practices and Rules, Ronit requests a pre-motion conference concerning its intention to file a motion, pursuant to Fed. R. Civ. P. 12(c), for judgment on the pleadings on all of Plaintiffs' claims and Ronit's counterclaims.

This action was brought by a sophisticated commercial tenant asking this Court to sign off on the total abandonment of its long-term lease obligations, utilizing the global pandemic as pretext to shop for a better deal. Plaintiff Williamsburg Climbing Gym Company LLC ("Williamsburg Climbing") and Ronit are the parties to a lease, dated as of November 1, 2018, pursuant to which Williamsburg Climbing agreed to lease from Ronit over 30,000 square feet of a property located in Williamsburg, Brooklyn for a period of ten years (the "Lease"). Plaintiff Fifth Concerto Holdco, Inc. ("Fifth Concerto" and together with Williamsburg Climbing, "Plaintiffs"), is a guarantor of the Lease.

Williamsburg Climbing is an entity formed by Brooklyn Boulders, a company that operates climbing, co-working and entertainment facilities. Despite Ronit's massive investment into Williamsburg Climbing – including over $1.2MM in contributions towards the buildout of its customized facility (a significant portion of which was paid after the onset of the COVID-19 outbreak), hundreds of thousands of dollars in rent deferrals before the onset of COVID-19, and other concessions – Williamsburg Climbing recently notified Ronit that it was terminating the Lease. Citing Governor Cuomo's recent Executive Orders in connection with COVID-19 (the "Executive Orders") and the social distancing guidelines then in effect, Williamsburg Climbing claimed that it was terminating the remaining term of the Lease, which ends in January 2029, under the doctrines of frustration of purpose and impossibility. Williamsburg Climbing took this step months before it was even set to open to the public. It has since failed to pay any amounts due under the Lease and, as described in Ronit's Counterclaims, contrary to its claim of "impossibility," is now seeking space elsewhere in Brooklyn on more favorable terms.

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Plaintiffs subsequently filed the instant action on May 6, 2020, seeking (i) a declaratory judgment that, under the doctrine of frustration of purpose, they have no obligation to pay rent to Ronit, and (ii) rescission of the Lease based on the doctrine of impossibility of performance.

Today, Ronit filed its Answer and Affirmative Defenses to Plaintiffs' Complaint, while asserting Counterclaims (i) against Williamsburg Climbing for breach of Lease and anticipatory repudiation; and (ii) against Fifth Concerto for breach of Guaranty and anticipatory repudiation.

Ronit now seeks to file a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) as to (i) Plaintiffs' two sole claims in the Complaint for frustration of purpose and impossibility; and (ii) Plaintiffs' liability on all of Ronit's counterclaims for breach and anticipatory repudiation of the Lease and Guaranty.

Plaintiffs have purported to terminate the ten-year Lease and to abandon their obligations solely on the grounds of frustration of purpose and impossibility. These claims may be easily disposed of as a matter of law at the pleading stage for at least three reasons.

First, the express language of the Lease forecloses Plaintiffs' claim that they should be relieved of paying rent due to the Executive Orders and social distancing guidelines. Section 59 of the Lease contains a *force majeure* provision, under which Williamsburg Climbing is required to pay rent even if governmental orders, regulations, or any manner of cataclysm prevents or substantially interferes with the parties' ability to perform under the Lease. Moreover, Section 44.07 of the Lease provides that Williamsburg Climbing is required, "at its sole cost and expense", to comply with all present and future governmental laws, regulations, and ordinances, regardless of whether they are "foreseen or unforeseen, ordinary as well as or extraordinary," and even if they would affect the "manner of use of the demised premises."

Williamsburg Climbing – a sophisticated entity backed by a prominent private-equity firm – negotiated a long-term Lease that specifically allocated the financial risk of extraordinary business interruptions to Williamsburg Climbing. Under the Lease, Williamsburg Climbing was required to insure against such risks. For its part, Ronit invested millions in building out its space for Williamsburg Climbing's business in reliance upon this agreed upon allocation of risk. Thus, Williamsburg Climbing cannot now re-write the express terms of the parties' bargain by reference to the doctrines of frustration of purpose and impossibility. *One World Trade Ctr. LLC v. Cantor Fitzgerald Sec.*, 6 Misc. 3d 382, 385-86, 789 N.Y.S.2d 652, 654-55 (Sup. Ct. N.Y. Cnty. 2004) ("The defendants are sophisticated commercial tenants and there is no reason to excuse them from the operation of the force majeure clause which they freely negotiated. Defendants bargained away their right to hold the lessor liable for nonperformance in the face of the tragic, unanticipated events which destroyed the building."); *Sage Realty Corp. v. Jugobanka, D.D. N.Y. Agency*, 1998 U.S. Dist. LEXIS 15756, at *14-15 (S.D.N.Y. 1998) (holding that a tenant was required to "continue paying rent despite government interference, such as [an] Executive Order requiring the closing of [tenant]'s New York office", since the lease contained a *force majeure* provision which "require[d] the tenant to continue to pay rent where a government action prevents the landlord from performing any of its duties under the lease").

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Second, the fact that the parties contemplated and included provisions in the Lease addressing potential scenarios in which governmental laws, ordinances or regulations might interfere with the parties' ability to perform under the Lease – and nevertheless mandated that Williamsburg Climbing continue paying rent to Ronit in such circumstances – renders the doctrines of frustration of performance and impossibility wholly inapplicable. Indeed, while those defenses "refer to two distinct doctrines in contract law, . . . both require unforeseeability." *Gander Mt. Co. v. Islip U-Slip LLC*, 923 F. Supp. 2d 351, 362 (N.D.N.Y. 2013) (quotations omitted).

Williamsburg Climbing and Ronit *did* foresee the possibility, however remote, that there would be regulations that would impact or make impossible the parties' performance, and allocated the risk to Williamsburg Climbing. The doctrines of frustration of purpose and impossibility therefore cannot justify Williamsburg Climbing's termination of the Lease and nonpayment of rent. *Axginc Corp. v. Plaza Automall, Ltd.*, 2017 U.S. Dist. LEXIS 227928, at *23 (E.D.N.Y. 2017) ("[T]he language of the contract indicates that this type of circumstance was anticipated when the Sublease was signed — and that its risk was allocated to [defendant].); *Bank of Am. Nat'l Tr. & Sav. Ass'n v. Envases Venezolanos, S.A.*, 740 F. Supp. 260, 267 (S.D.N.Y. 1990) ("Where the risk which causes the alleged impossibility of performance is foreseen, accounted for, and allocated in the contract, failure to perform cannot be excused. Accordingly, the defense of impossibility of performance must fail.").

Third, although Williamsburg Climbing claims that the Executive Orders and social distancing guidelines reduce its studio capacity and therefore its membership capacity, "New York law is clear that financial hardship, even to the point of insolvency, is not a defense to enforcement of a contract." *A + E TV Networks, LLC v. Wish Factory*, 2016 U.S. Dist. LEXIS 33361, at *41 (S.D.N.Y. 2016). Nor does a reduction in membership capacity frustrate or make impossible Williamsburg Climbing's performance under the Lease. The Lease granted Williamsburg Climbing broad rights to use the property as it wished (including, *inter alia*, as an indoor climbing facility, a fitness center or for studios, a juice bar, a cafe, a restaurant or bar, for lounges, as a general office space or for coworking, an event space, and for the retail sale of merchandise) through January 6, 2029.

In sum, there is no legal basis for Williamsburg Climbing to be relieved of its long-term contractual obligations on the grounds that current events may require it to temporarily adjust its operations. *Walden Fed. S&L Ass 'n v. Slane Co.*, 2011 U.S. Dist. LEXIS 37010, at *3 (S.D.N.Y. 2011) ("New York courts do not recognize the defense of temporary commercial impracticability."); *see also Beardslee v. Inflection Energy, LLC*, 904 F. Supp. 2d 213, 220 (N.D.N.Y. 2012) (holding that a governmental directive did not frustrate the purpose of oil leases because although the directive prohibited certain methods of drilling, other methods of drilling were still permitted and the leases did not limit the right to drill to a specific method).

Accordingly, Ronit respectfully requests a pre-motion conference with the Court concerning its intention to file a motion for judgment on the pleadings.

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Respectfully Submitted,

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cc: All counsel of record (via ECF)