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July 1, 2020

VIA ECF

The Honorable 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-2073 (FB) (RML)

Dear Judge Block:

We are attorneys for plaintiffs Williamsburg Climbing Gym Company LLC ("Williamsburg") and Fifth Concerto Holdco, Inc. ("Fifth Concerto") in the above-referenced action. Pursuant to Rule 2(A) of Your Honor's Individual Motion Practices and Rules, we write in response to defendant's request for a pre-motion conference set forth in defendant's letter to Your Honor dated June 24, 2020.

This is a suit against defendant seeking a declaratory judgment that as a result of the COVID-19 global pandemic and Governor Andrew Cuomo's Executive Orders resulting in the mandatory closure of all gyms in the State of New York and the stoppage of all non-essential construction, the purpose of the lease with defendant was frustrated and Williamsburg lawfully terminated its lease with defendant effective May 1, 2020. Alternatively, Williamsburg seeks rescission of the lease based on impossibility of performance.

The Williamsburg facility is not your typical gym. Rather the facility is based on a model developed within the boutique studio niche of the fitness industry whereby group fitness studio style rooms are filled with customers, each assigned to an exercise station, and classes are led by a live instructor. This model not only presumes the ability to convene classes where people are densely packed but also that this tight co-mingling with like-minded individuals is in-fact a significant part of the appeal. The Williamsburg facility was designed with four studios, each with a specialized theme and purpose, and each built for a large group of individuals who exercise together while being led by instructors trained to execute classes within each studio theme. The designs were discussed with and approved by the defendant. Pursuant to the terms of the lease, Williamsburg was required to obtain defendant's approval of the plans.

The pandemic and the resulting Executive Orders have frustrated Williamsburg's very purpose for renting space from defendant at the property located at 58 North 9th Street, Brooklyn, New York. It is undisputed that COVID-19 and the social, professional, and economic effects thereof were not reasonably foreseeable at the time the lease was entered into in November 2018, and, therefore Williamsburg should be excused from performance.

The doctrine of impossibility excuses a party's contract performance when an unforeseen and unanticipated event makes performance objectively impossible. *See Kolodin v. Valenti*, 115 A.D.3d 197 (1st Dep't 2014); *Moyer v. City of Little Falls*, 134 Misc.2d 299 (Sup. Ct., Herkimer Co. 1986). Here, a global pandemic and subsequent Executive Orders have rendered the lease impossible to perform.

Defendant's request to this Court to file a motion pursuant to Fed. R. Civ. P. 12(c) for judgment on the pleadings is premature since, at this time, the pleadings are not closed. Rule 12(c) states: "*After the pleadings are closed* – but early enough not to delay trial – a party may move for judgment on the pleadings." Fed Rules Civ Pro Rule 12 (2020) (emphasis added). In *Niederland v. Chase*, 2012 WL 2402603, (S.D.N.Y. 2012), defendant Chase moved for judgment on the pleadings after it filed counterclaims but before plaintiff had served a reply to the counterclaims. The court denied Chase's Fed. R. Civ. P. 12(c) motion as premature because the pleadings were not closed. Similarly, in *Kraus USA, Inc. v. Magarik*, 2018 WL 4682016, (S.D.N.Y. 2018), the court held that defendants' motion for judgment on the pleadings was premature because plaintiff Kraus had not filed answers to defendants' counterclaims. *See also T.D. Bank, N.A. v. JPMorgan Chase Bank, N.A.*, 2010 WL 4038826, at *4 n.4 (E.D.N.Y. Oct. 14, 2010) ("When cross-and counterclaims are filed, pleadings are not closed until answers to those claims have been filed.")

Here, defendant served its Answer, Affirmative Defenses, and Counterclaims on June 24, 2020. The pleadings are not closed because plaintiffs have until July 15, 2020 to answer or otherwise respond to the counterclaims. As a result, defendant's request to this Court to file a motion pursuant to Fed. R. Civ. P. 12(c) for judgment on the pleadings is premature.

Defendant's reliance on the *force majeure* provision in the lease is totally misplaced since (1) it is limited to specifically described conditions, not including a global pandemic, and (2) it is not a waiver of Williamsburg's claims for frustration of purpose and impossibility of performance, which are separate doctrines, due to the pandemic.

Despite defendant's assertion to the contrary, neither party to this lease could have foreseen or anticipated this devastating and ongoing pandemic when the lease was signed. As a result, *Gander Mt. Co. v. Islip U-Slip LLC*, 923 F. Supp. 2d 351, (N.D.N.Y. 2013), *Axginc Corp. v. Plaza Automall, Ltd.*, 2017 WL 11504930, (E.D.N.Y. 2017), and *Bank of America Nat. Trust & Savings Ass'n v. Envases Venezolanos, S.A.*, 740 F. Supp. 260 (S.D.N.Y. 1990), are inapposite. In *Gander Mt. Co.*, the court held that the relevant inquiry for determining whether a contract's purpose has been frustrated is whether the party seeking to avoid liability could have anticipated the frustrating event and guarded against it. *Gander Mt. Co.*, 923 F. Supp. 2d at 360. In that case, the court dismissed plaintiff's cause of action for frustration of purpose because the subject event (flooding)

was foreseeable. *Id.* at 362-363.

In *Axginc Corp.*, the court rejected defendant subtenant's argument that its inability to procure flood insurance for the vehicles it intended to store on the land leased from the plaintiff following the signing of the sublease constituted a frustration of purpose that would excuse its nonperformance under the sublease. Again, the court was persuaded by the fact that the defendant's "inability to procure flood insurance was not unforeseeable" because the sublease was signed two weeks after Hurricane Sandy." *Axginc Corp.*, 2017 WL 11504930 *9 (E.D.N.Y. 2017).

In *Bank of America National Trust and Savings Association v. Envases Venezolanos, S.A.*, 740 F. Supp 260 (S.D.N.Y. 1990), the court held that the doctrines of frustration of purpose and impossibility of performance did not make the plaintiff bank's loan restructuring agreement with defendant borrower unenforceable. Unlike here, provisions in the agreement specifically took into account the possibility of change in exchange agreements, making cancellation of a favorable currency exchange arrangement foreseeable.

The fundamental concept of opening and operating a gym with four studio themes – calisthenic movement, Olympic weightlifting, rock climbing inspired fitness, and general athletic training – has been completely frustrated and made it impossible for Williamsburg to comply with the terms of its lease with defendant. On the other hand, defendants own a valuable piece of property in Williamsburg that they can easily re-let. This is prime rental property on the water with views of the Manhattan skyline.

Williamsburg is seeking a judgment from Your Honor declaring that Williamsburg lawfully terminated the lease and that the lease is hereby terminated and of no further force and effect, pursuant to the doctrine of frustration of purpose. Alternatively, Williamsburg seeks a judgment of this Court acting as a court of equity rescinding the lease and all obligations of the parties under the lease.

Respectfully Submitted,

Richard A. Coppola

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cc: All counsel of record (via ECF)