

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

WILLIAMSBURG CLIMBING GYM COMPANY LLC
and FIFTH CONCERTO HOLDCO, INC.,

Plaintiffs,

-against-

RONIT REALTY LLC,

Defendant.

Case No. 1:20-CV-2073-FB-RML

**ANSWER TO AMENDED
COUNTERCLAIMS**

Plaintiffs Williamsburg Climbing Gym Company LLC (“Williamsburg Climbing”) and Fifth Concerto Holdco, Inc. (“Fifth Concerto”) (collectively, “Plaintiffs”), by their undersigned counsel, as and for their answer to the amended counterclaims of Ronit Realty LLC (“Defendant” or “Ronit”), allege as follows:

AS TO THE INTRODUCTION

1. The allegations of Paragraph 1 are denied.
2. That portion of Paragraph 2 that alleges that Fifth Concerto is the holding company of Brooklyn Boulders is admitted. That portion of Paragraph 2 that alleges that Brooklyn Boulders’ plan was to build its fifth large “active lifestyles” facility in which its patrons would engage in rock-climbing is denied. As to the remainder of the allegations of Paragraph 2, the Defendant is left to its proof.
3. The allegations of Paragraph 3 are denied in the terms alleged. It is admitted however, that Defendant entered into a license agreement with Williamsburg Climbing.
4. The allegations of Paragraph 4 are denied. Moreover, to the extent that Paragraph 4 alleges legal conclusions, such legal questions are submitted to the Court.

5. The allegations of Paragraph 5 are denied. Plaintiffs respectfully refer the Court to the terms of the lease, and respectfully refer all questions of law to the Court.

6. That portion of Paragraph 6 which alleges that the general contractor is still owed money is admitted. As to the remainder of Paragraph 6, Plaintiffs deny the allegations therein and the Defendant is left to its proof.

7. The allegations of Paragraph 7 are denied. Plaintiffs respectfully refer the Court to the terms of the lease, and respectfully refer all questions of law to the Court.

AS TO THE PARTIES

8. The portion of Paragraph 8 that alleges that Ronit is a New York limited liability company whose members reside in the State of New York is admitted. As to the remainder of Paragraph 8, the Defendant is left to its proof.

9. The allegations of Paragraph 9 are admitted.

10. The allegations of Paragraph 10 are admitted.

AS TO JURISDICTION AND VENUE

11. The allegations of Paragraph 11 are admitted.

12. As to the allegations of Paragraph 12, it is admitted that venue is proper in this Court as a substantial portion of the events giving rise to the claims occurred in this district.

AS TO THE FACTUAL ALLEGATIONS

13. The allegations of Paragraph 13 are denied in the terms alleged. However, it is admitted that Williamsburg Climbing was formed by Fifth Concerto.

14. The allegations of Paragraph 14 are admitted.

15. The allegations of Paragraph 15 are denied in the terms alleged. However, it is admitted that North Castle Partners made an investment in Fifth Concerto.

16. The allegations of Paragraph 16 are denied in the terms alleged. However, it is admitted that Fifth Concerto through wholly owned limited liability companies opened various facilities, and signed a lease in Washington, D.C.

AS TO THE WILLIAMSBURG LEASE

17. The allegations of Paragraph 17 are denied in the terms alleged. However, it is admitted that Williamsburg Climbing entered into a lease with Defendant dated November 1, 2018 (the “Lease”).

18. The allegations of Paragraph 18 are denied in the terms alleged. It is admitted however, that the Plaintiffs were told by the Defendant that the free rent period pursuant to the Lease would actually commence when the property was tendered to Williamsburg Climbing irrespective of what the Lease said to the contrary.

19. The allegations of Paragraph 19 are admitted.

20. As to the allegations of Paragraph 20, the Defendant is left to its proof and Plaintiffs respectfully refer the Court to the Lease for its full content, meaning, and legal import, if any.

21. Plaintiffs refer the Court to the Lease for its full content, meaning, and legal import, if any. To the extent the allegations in Paragraph 21 of the amended counterclaims are inconsistent with the Lease, those allegations are denied.

22. The allegations of Paragraph 22 are denied. Plaintiffs refer the Court to Section 59 of the Lease.

23. That portion of Paragraph 23 that alleges that the Defendant was to perform certain work is admitted; however, it is averred that Defendant failed to deliver the property with a working elevator, which resulted in delay damages. Moreover, Defendant had told Williamsburg Climbing that it was to receive eight months of rent abatement during the fixturing period, despite

Lease terms to the contrary. The Defendant wrote this portion of the Lease to assist Defendant in obtaining financing.

24. The allegations of Paragraph 24 are denied in the terms alleged. However, it is averred that the Defendant was to provide the lesser of (i) the Permitted Tenant Construction Costs, and (ii) Two Million Seven Hundred Seventy-Five Thousand Dollars (\$2,775,000).

25. Plaintiffs refer the Court to the Lease for its full content, meaning, and legal import, if any. To the extent the allegations in Paragraph 25 of the amended counterclaims are inconsistent with the Lease, those allegations are denied. Williamsburg Climbing fully informed the Defendant that the property was specifically designed for studio-based classes.

FIFTH CONCERTO GUARANTY

26. The allegations of Paragraph 26 are admitted.

27. Fifth Concerto admits that it agreed to guarantee Williamsburg Climbing's obligation. However, because of frustration of purpose and impossibility of performance, there are no obligations owed by Williamsburg Climbing to Defendant.

28. Plaintiffs deny that they waived anything relating to the Lease or Guaranty of Lease. Plaintiffs refer the court to the Guaranty of Lease for its full content, meaning, and legal import, if any. To the extent the allegations in Paragraph 28 of the amended counterclaims are inconsistent with the Guaranty of Lease, those allegations are denied.

29. Plaintiffs refer the Court to the Guaranty of Lease for its full content, meaning, and legal import, if any. To the extent the allegations in Paragraph 29 of the amended counterclaims are inconsistent with the Guaranty of Lease, those allegations are denied.

RONIT'S DELIVERY

30. It is denied that Defendant completed its obligations under the Lease

31. Plaintiffs refer the Court to the content of the June 20, 2019 letter. That letter was provided to support the Defendant with its lender. The undisputed facts show that the property was not properly delivered at that time.

32. The allegations of Paragraph 32 are admitted.

33. The allegations of Paragraph 33 are denied in the terms alleged. However, it is admitted that Williamsburg Climbing was paying rent to Defendant as it was abiding by the written Lease, despite Williamsburg Climbing being told that the Lease was being signed to help Defendant with its lender and that Williamsburg Climbing was still going to be receiving eight months of rent abatement during the fixturing period.

34. Williamsburg Climbing and Fifth Concerto lack sufficient information to form a belief as to the truth of the allegations regarding communications between Defendant and its lender. However, it is admitted that Defendant permitted rent to be paid at 50% through December 2019, although Williamsburg Climbing still contended that rent was not due at the time.

35. The allegations of Paragraph 35 are admitted as alleged. However, Williamsburg Climbing contends that no rent was due for the first eight months following the tendering of the building to Williamsburg Climbing for fixturing.

36. The allegations of Paragraph 36 are denied in the terms alleged. However, it is admitted that Williamsburg Climbing entered into a license agreement with Defendant.

BUILDOUT

37. The allegations of Paragraph 37 are denied in the terms alleged. Williamsburg Climbing's contract with its general contractor was delayed as a result of the Landlord's Work (as that term is defined in the Lease) not yet being completed by Defendant.

38. The allegations of Paragraph 38 are admitted.

39. The allegations of Paragraph 39 are denied in the terms alleged. However, it is admitted that Williamsburg Climbing made payment requests to Defendant.

40. The allegations of Paragraph 40 are denied in the terms alleged. However, it is admitted that the payments referenced in Paragraph 40 were paid to Williamsburg Climbing.

41. The allegations of Paragraph 41 are denied in the terms alleged. However, it is admitted that the disbursements referenced in Paragraph 41 were made to Williamsburg Climbing.

GOVERNOR CUOMO'S DECLARATION

42. The allegations of Paragraph 42 are admitted.

43. The allegations of Paragraph 43 are admitted.

44. The Plaintiffs admit that the CDC as well as various other governmental bodies issued and implemented social distancing guidelines and directives to stem the COVID-19 pandemic and “flatten the curve” of transmission in March 2020 that continue to the present day and will continue for the foreseeable future.

45. The allegations of Paragraph 45 are denied.

46. The allegations of Paragraph 46 are denied in the terms alleged. However, it is admitted that Williamsburg Climbing submitted a Construction Contribution request in the amount of \$951,836.92.

47. The allegations of Paragraph 47 are denied in the terms alleged. However, it is admitted that Williamsburg Climbing submitted a reimbursement request in April 2020 for \$609,046.32. As to the remainder of the allegations of Paragraph 47, the Defendant is left to its proof.

LEASE TERMINATION

48. The allegations of Paragraph 48 are admitted.

49. That portion of Paragraph 49 that states: “In retrospect, it is now evident that Brooklyn Boulders was the party that was ‘planning to not honor its contractual obligation’ under the lease as of April 27, 2020 and in reality, was merely trying to grab whatever funds it could before walking away” is denied. Those portions of Paragraph 49 quoting the April 24, 2020 letter are accurately set forth. As to the remainder of the allegations of Paragraph 49, the Defendant is left to its proof.

50. It is admitted that counsel for Defendant made the statement set forth in Paragraph 50. As to the truthfulness of the allegations, Defendant is left to its proof.

51. It is admitted that Williamsburg Climbing informed Defendant that due to Governor Cuomo’s Executive Order closing gyms indefinitely and that because of the CDC’s social distancing requirement, Williamsburg Climbing was terminating the Lease due to the doctrine of frustration of purpose. Plaintiffs deny the remaining allegations in Paragraph 51.

52. That portion of Paragraph 52 that alleges that the May 5, 2020 letter “was bereft of any further reasoning” is argumentative and assumes that any further reasoning was necessary. Plaintiffs admit the contents of the letter and respectively refer the Court to said letter.

53. The allegations of Paragraph 53 are denied.

54. The allegations of Paragraph 54 are denied. It is averred that Defendant was well aware that the leased property was going to be used as a studio-based facility. The designs were reviewed by and approved by Defendant. The studio-based facility, for which construction was well underway, was not a viable business as a result of COVID-19 and social distancing, which created frustration of purpose of the Lease. Neither the Defendant nor Plaintiffs could have foreseen a global pandemic when entering into the Lease. Moreover, the force majeure provision of the Lease does not apply to the situation created by COVID-19.

55. That portion of Paragraph 55 that alleges that Williamsburg Climbing “illicitly noticed its termination of the Lease” is denied. Moreover, it is admitted that a small portion of Williamsburg Climbing’s business model included a “Cardio + Strength Training Area” and was going to provide “Small Group Training.” These were small components of the larger offering to be provided at Williamsburg Climbing, which were, among other things, mentioned in advertising materials placed on the façade of the property.

56. The allegations of Paragraph 56 are admitted.

57. The allegations of Paragraph 57 are admitted.

58. The allegations of Paragraph 58 are denied as the Lease was terminated by Williamsburg Climbing due to frustration of purpose.

ABANDONMENT

59. The allegations of Paragraph 59 are denied.

60. That portion of Paragraph 60 that alleges “Adding further insult to injury” is argumentative and, therefore, Plaintiffs do not respond. As to the remainder of the allegations of Paragraph 60, the Plaintiffs lack sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore leave the Defendant to its proof.

61. Plaintiffs lack sufficient knowledge or information to form a belief as to the truth of the allegations set forth in Paragraph 61, and therefore leave the Defendant to its proof.

62. Plaintiffs lack sufficient knowledge or information to form a belief as to the truth of the allegations set forth in Paragraph 62, and therefore leave the Defendant to its proof.

63. The allegations of Paragraph 63 are denied.

64. Plaintiffs refer the Court to the Lease for its full content, meaning, and legal import, if any. To the extent the allegations in Paragraph designated 64 of the amended counterclaims are inconsistent with the Lease, those allegations are denied.

65. The allegations of Paragraph 65 are denied.

66. While it is admitted that Defendant is a family property owner, the remainder of the allegations of Paragraph 66 are denied.

67. The allegations of Paragraph 67 are denied.

68. Answering Paragraph 68, Fifth Concerto admits that it was seeking additional space in Brooklyn to expand its Life-Style facilities requiring high ceilings. However, it is denied that Fifth Concerto's property search had anything to do with Williamsburg Climbing.

FIRST COUNTERCLAIM

69. Answering Paragraph 69 of the amended counterclaims, Plaintiffs repeat and reallege each and every response set forth above to Paragraphs 1 through 68 of the amended counterclaims, as though fully set forth herein.

70. The allegations of Paragraph 70 are denied, and Plaintiffs respectfully refer all questions of law to the Court, and respectfully refer the Court to the terms of the Lease.

71. The allegations of Paragraph 71 are denied.

72. The allegations of Paragraph 72 are denied, and Plaintiffs respectfully refer all questions of law to the Court, and respectfully refer the Court to the terms of the Lease.

73. Plaintiffs refer the Court to the Lease for its full content, meaning, and legal import, if any. To the extent the allegations in Paragraph designated 73 of the amended counterclaims are inconsistent with the Lease, those allegations are denied.

74. The allegations of Paragraph 74 are denied, and Plaintiffs respectfully refer all questions of law to the Court.

75. The allegations of Paragraph 75 are denied, and Plaintiffs respectfully refer all questions of law to the Court, and respectfully refer the Court to the terms of the Lease.

76. The allegations of Paragraph 76 are denied, and Plaintiffs respectfully refer all questions of law to the Court, and respectfully refer the Court to the terms of the Lease.

77. The allegations of Paragraph 77 are denied, and Plaintiffs respectfully refer all questions of law to the Court.

SECOND COUNTERCLAIM

78. Answering Paragraph 78 of the amended counterclaims, Plaintiffs repeat and reallege each and every response set forth above to Paragraphs 1 through 77 of the amended counterclaims, as though fully set forth at length herein.

79. Fifth Concerto lacks sufficient knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 79 of the amended counterclaims, and respectfully refers the Court to the terms of the Guaranty of Lease, and respectfully refers all questions of law to the Court.

80. Plaintiffs refer the Court to the Guaranty of Lease for its full content, meaning, and legal import, if any. To the extent the allegations in Paragraph designated 80 of the amended counterclaims are inconsistent with the Guaranty of Lease, those allegations are denied.

81. Plaintiffs refer the Court to the Guaranty of Lease for its full content, meaning, and legal import, if any. To the extent the allegations in Paragraph designated 81 of the amended counterclaims are inconsistent with the Guaranty of Lease, those allegations are denied.

82. The allegations of Paragraph 82 are denied, and Plaintiffs respectfully refer all questions of law to the Court.

THIRD COUNTERCLAIM

83. Answering Paragraph 83 of the amended counterclaims, Plaintiffs repeat and reallege each and every response set forth above to Paragraphs 1 through 82 of the amended counterclaims, as though fully set forth at length herein.

84. The allegations of Paragraph 84 are denied as the Lease was terminated due to the doctrine of frustration of purpose. Moreover, the Plaintiffs respectfully refer all questions of law to the Court, and respectfully refer the Court to the terms of the Lease.

85. The allegations of Paragraph 85 are denied as the property was not delivered to Williamsburg Climbing in the proper condition irrespective of any writing to the contrary. Moreover, once the Lease was terminated, all obligations, except for the return of the security deposit and personal property (XBoards and bouldering walls), terminated.

86. It is admitted that on May 1, 2020 and May 5, 2020, Williamsburg notified Defendant orally and in writing that it was terminating the Lease effective May 1, 2020. The remainder of the allegations of Paragraph 86 are denied.

87. The allegations of Paragraph 87 are denied. Moreover, Paragraph 87 contains questions of law, which are respectfully referred to the Court.

88. The allegations of Paragraph 88 are denied. Moreover, Paragraph 88 contains questions of law, which are respectfully referred to the Court.

89. The allegations of Paragraph 89 are denied. Moreover, Paragraph 89 contains questions of law, which are respectfully referred to the Court.

90. Plaintiffs lack sufficient knowledge or information upon which to form a belief as to the truth of the allegations set forth in Paragraph 90. Moreover, Paragraph 90 contains questions of law and Plaintiffs respectfully refer all questions of law to the Court.

91. The allegations of Paragraph 91 are denied. Paragraph 91 contains questions of law and Plaintiffs respectfully refer all questions of law to the Court.

92. The allegations of Paragraph 92 are denied. Paragraph 92 contains questions of law and Plaintiffs respectfully refer all questions of law to the Court.

FOURTH COUNTERCLAIM

93. Answering Paragraph 93 of the amended counterclaims, Plaintiffs repeat and reallege each and every response set forth above to Paragraphs 1 through 92 of the amended counterclaims, as though fully set forth at length herein.

94. Plaintiffs deny the allegations of Paragraph 94 of the amended counterclaim and respectfully refer all questions of law to the Court.

95. The allegations of Paragraph 95 are denied as the Lease was terminated for frustration of purpose and, as such, there are no obligations that exist under the Lease regarding any payments by Plaintiffs.

96. The allegations of Paragraph 96 are denied as the Lease was terminated for frustration of purpose and, as such, there are no obligations that exist under the Lease regarding any payments by Plaintiffs.

97. The allegations of Paragraph 97 are denied.

FIFTH COUNTERCLAIM

98. Answering Paragraph 98 of the amended counterclaims, Plaintiffs repeat and reallege each and every response set forth above to Paragraph 1 through 97 of the amended counterclaims, as though fully set forth at length herein.

99. The allegations of Paragraph 99 are denied, and Plaintiffs respectfully refer all questions of law to the Court, and respectfully refer the Court to the terms of the Lease.

100. The allegations of Paragraph 100 are denied, and Plaintiffs respectfully refer all questions of law to the Court.

101. The allegations of Paragraph 101 are denied, and Plaintiffs respectfully refer all questions of law to the Court.

102. The allegations of Paragraph 102 are denied, and Plaintiffs respectfully refer all questions of law to the Court.

SIXTH COUNTERCLAIM

103. Answering Paragraph 103 of the amended counterclaims, Plaintiffs repeat and reallege each and every response set forth above to Paragraphs 1 through 102 of the amended counterclaims as though fully set forth at length herein.

104. Plaintiffs deny the allegations of Paragraph 104 of the amended counterclaims and respectfully refer all questions of law to the court.

105. Plaintiffs refer the Court to the Guaranty of Lease for its full content, meaning, and legal import, if any. To the extent the allegations in Paragraph designated 105 of the amended counterclaims are inconsistent with the Guaranty of Lease, those allegations are denied.

106. Plaintiffs refer the Court to the Guaranty of Lease for its full content, meaning, and legal import, if any. To the extent the allegations in Paragraph designated 106 of the amended counterclaims are inconsistent with the Guaranty of Lease, those allegations are denied.

107. The allegations of Paragraph 107 are denied, and Plaintiffs respectfully refer all questions of law to the Court.

108. The allegations of Paragraph 108 are denied, and Plaintiffs respectfully refer all questions of law to the Court.

109. The allegations of Paragraph 109 are denied, and Plaintiffs respectfully refer all questions of law to the Court.

110. The allegations of Paragraph 110 are denied, and Plaintiffs respectfully refer all questions of law to the Court.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

111. Williamsburg Climbing has paid all amounts due under the Lease before legally terminating the Lease.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

112. When Defendant first tendered delivery of the leased premises to Williamsburg Climbing on or about June 20, 2019, there were three known issues: (1) water in the basement, (2) electrical service being incomplete, and (3) the elevator stopped approximately six inches short from the third floor of the leased premises.

113. The elevator was necessary for use by the general contractor during construction as well as to make the leased premises ADA compliant.

114. Williamsburg Climbing reluctantly accepted delivery of the leased premises when the water issue was resolved, and the Defendant represented that the elevator and electrical issues would be corrected.

115. Despite agreeing to immediately rectify these issues, the elevator was not corrected until March 19, 2020, when the elevator received its certificate of use; however, the electrical service issues have yet to be corrected. As a result, of defendant's failure to tender the property to Williamsburg with a working elevator, Williamsburg's general contractor and the subcontractors were forced to use the stairs, which significantly slowed the construction process down, resulting in delay damages.

116. Further, during construction, it was revealed that the mezzanine that the Defendant designed and installed to hold Williamsburg Climbing's water heaters were not constructed to the specification.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

117. Defendant is barred from bringing its amended counterclaims on the grounds of waiver and estoppel.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

118. The amended counterclaims are barred as a result of Defendant's breach of the covenant of good faith and fair dealing.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

119. At all relevant times, Plaintiffs acted in good faith and in a commercially reasonable manner and did not engage in any culpable conduct.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

120. The purpose of the Lease has been frustrated by the COVID-19 pandemic and Executive Orders mandating the closures of gyms and fitness centers and prohibiting non-essential construction and the CDC's recommendation of social distancing, which is becoming the new normal.

121. Plaintiffs are entitled to a judgment declaring that the Lease is terminated effective May 1, 2020 and of no force and effect pursuant to the doctrine of frustration of purpose.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

122. Performance of the Lease has been rendered impossible by the COVID-19 pandemic and Executive Orders mandating the closures of gyms and fitness centers and prohibiting non-essential construction and the CDC's recommendation of social distancing, which is becoming the new normal.

123. Plaintiffs are entitled to a judgment declaring that the Lease and all obligations thereunder are rescinded under the doctrine of impossibility of performance.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE

124. The damages alleged by Defendant, all of which are denied by Plaintiffs, were caused by the intervening and superseding acts of parties not under the control of Plaintiffs.

AS AND FOR A NINTH AFFIRMATIVE DEFENSE

125. To the extent that Defendant has not suffered any injury as a direct or proximate cause of Plaintiffs' actions, Defendant may not recover any damages against Plaintiffs.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE.

126. The claims are barred to the extent that Defendant failed to mitigate its damages, if any.

AS AND FOR AN ELEVENTH AFFIRMATIVE DEFENSE

127. The amended counterclaims are barred, in whole or in part, to the extent that Defendant recovers or has recovered any alleged damages sought against Plaintiffs from sources other than Plaintiffs, including, but not limited to, any insurer, surety, or bonding company of Defendant.

AS AND FOR A TWELFTH AFFIRMATIVE DEFENSE

128. Williamsburg Climbing fully informed the Defendant that the leased property was specifically designed for studio-based classes.

AS AND FOR A THIRTEENTH AFFIRMATIVE DEFENSE

129. Defendant intentionally misrepresented to Plaintiffs that by signing the Lease as written in order to assist Defendant with its lender that Williamsburg Climbing would still be receiving a rent abatement for eight months following the Delivery Date (as that term is defined in the Lease) in which to complete its fixturing of the property.

AS AND FOR A FOURTEENTH AFFIRMATIVE DEFENSE

130. Defendant's amended counterclaims are barred by the doctrine of the Statute of Frauds.

AS AND FOR A FIFTEENTH AFFIRMATIVE DEFENSE

131. Defendant's amended counterclaims are barred as a result of Defendant's breach of the covenant of quiet enjoyment.

AS FOR A SIXTEENTH AFFIRMATIVE DEFENSE

132. Defendant's amended counterclaims are barred by the doctrine of constructive eviction.

AS FOR A SEVENTEENTH AFFIRMATIVE DEFENSE

133. Plaintiffs will rely upon any and all defenses which become available during discovery proceedings in this action and hereby specifically reserve the right to amend its answer for the purpose of asserting such additional defenses.

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PRAYER FOR RELIEF

WHEREFORE, based on the foregoing, Plaintiffs pray for relief and judgment as follows:

1. The dismissal of Ronit's amended counterclaims in their entirety and with prejudice;
2. Costs, disbursements, interest, and reasonable attorneys' fees incurred by Plaintiffs in connection with this action; and
3. Any such other and further relief as this Court may deem just and proper.

Dated: New York, New York
August 6, 2020

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