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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 to request a pre-motion conference concerning plaintiffs’ intention to file a motion for summary judgment pursuant to Fed. R. Civ. P. 56 for a judgment on its two causes of action in the complaint.

This suit seeks a declaratory judgment that as a result of the ongoing COVID-19 global pandemic and Governor Andrew Cuomo’s Executive Orders resulting in the mandatory closures of all gyms in the State of New York and the stoppage of all non-essential construction, the purpose of the lease with defendant, Ronit Realty, LLC (“Defendant”) has been 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. Williamsburg’s obligations to Defendant after April 30, 2020 ceased. This claim presents a question of law uniquely appropriate for a Rule 56 motion.

The Williamsburg facility was not going to be a regular gym. Rather the facility was based on a specific 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 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 is in fact a significant part of the appeal. The Williamsburg facility was designed with four studios and with four different studio themes: calisthenic movement, Olympic weightlifting, rock climbing inspired fitness, and general athletic training – 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



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with and approved by the Defendant at the time the lease was entered. Pursuant to the terms of the lease, in fact, Williamsburg was required to obtain Defendant's approval of its 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 resulting social, professional, and economic upheavals were not and could not be reasonably foreseeable at the time the lease was entered into in November 2018, and therefore, as a matter of law, Williamsburg should be excused from performance.

The doctrine of frustration of purpose provides:

Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

Restatement (Second) of Contracts § 265 (1981). Comment (a) of § 265 sets forth three requirements that must be satisfied before courts will find a frustration of purpose. First, the purpose of the agreement that is frustrated must have been a principal purpose of that party in making the agreement. Second, the frustration must be substantial. Third, the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made. Because of the overwhelming effect of the Coronavirus, all three of the requirements are present in this case.

Once the purpose of the contract is frustrated, the contractual obligations end as matter of law. *See City of New York v. Long Island Airports Limousine Serv. Corp.*, 96 A.D.2d 998 (3d Dep't 1983), *aff'd*, 62 N.Y.2d 846 (1984) (holding defendant's payment obligation was discharged because the purpose of the contract had been frustrated); *Arons v. Charpentier*, 36 A.D.3d 636, 637 (2d Dep't 2007) (awarding summary judgment to defendant dismissing complaint alleging breach of contract and holding that "enforcement of the alleged contract [requiring parents to seek fees for an expert in an Individuals with Disabilities Education Act action] is barred by the doctrine of frustration of purpose , as [the subject of the contract] was 'so completely the basis of the contract that ...without it, the transaction would have made little sense.'"

The doctrine of impossibility excuses a party's contract performance when an unforeseen and unanticipated event makes performance objectively impossible. The Coronavirus provides such an unforeseen and unanticipated event. *See Kolodin v. Valenti*, 115 A.D.3d 197 (1st Dep't 2014); *Leisure Time Travel, Inc. v. Villa Roma Resort & Conference Ctr., Inc.*, 55 Misc.3d 780 (Sup. Ct., Queens Co. 2017); *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.



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Neither party to this lease could have foreseen or anticipated this devastating and ongoing pandemic when the lease was signed. Nowhere does the lease allocate the risk of a global pandemic and subsequent Executive Orders that effectively prohibited the construction of the facility and prohibited and still prohibits to this day, the operation of gyms, and more particularly the specified boutique studio type of gym that was being constructed at the premises.

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 due to the pandemic, which are separate and enforceable doctrines.

Williamsburg seeks 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,

/s/

Richard A. Coppola

cc: All counsel of record (via ECF)