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August 20, 2020

VIA ECF
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-02073 (FB) (RML)
Response to Plaintiff's Request for Pre-Motion Conference

Dear Judge Block:

We represent Defendant/Counterclaim-Plaintiff Ronit Realty LLC ("Ronit") and write in response to the letter of Plaintiffs Williamsburg Climbing Gym Company LLC ("Williamsburg Climbing") and its owner/guarantor Fifth Concerto Holdco, Inc. ("Fifth Concerto") (together "Plaintiffs") dated August 14, 2020 (ECF Dkt. No. 20), wherein Plaintiffs request a pre-motion conference for a motion for summary judgment on claims that Williamsburg Climbing properly terminated its lease under the doctrines of frustration of purpose and impossibility of performance.

Defendant has also requested a pre-motion conference for a dispositive motion on these same claims (ECF Dkt. Nos. 13, 17), which it agrees "present[] a question of law uniquely appropriate for a Rule 56 motion." (Pl.'s 8/14/20 Letter at 1). Thus, with the parties in agreement, this case should be determined on cross-motions for summary judgment. *See Thompson v. County of Franklin*, 987. F. Supp. 111, 115 (N.D.N.Y. 1997) ("[A]s the parties agree, the issues presented by these cross-motions are purely legal, this case is ripe for summary judgment.").

Defendant is a family-run entity that made a massive up-front investment in developing its property for the unique needs of a Brooklyn Boulders climbing gym—including approximately $350,000 to customize the property for a gym as well as $1.2MM in incentives to Williamsburg Climbing to complete its build-out. In the weeks prior to its improper termination, Williamsburg Climbing brazenly took Defendant's money, while also failing to pay its own contractors. There are now roughly $1.6MM of liens on the property, which threaten its financial future. Defendant is cognizant of, and likewise faces significant challenges, due to the COVID-19 pandemic. However, Plaintiffs (which are backed by a private equity outfit) have acted completely inappropriately.

Plaintiffs have sought in this action to minimize the elephant-in-the-room—*i.e.*, the fact that Brooklyn Boulders continues to operate gyms elsewhere, while Fifth Concerto is admittedly seeking cheaper space in Brooklyn for a new gym—by claiming that the "Williamsburg facility was not going to be a regular gym." This claim is false and is, in any event, barred by the terms of the Lease, which provides that lessee would use the premises "primarily as an indoor climbing facility, and may also use the Demised Premises for other uses incidental to the primary use. . . ."

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Directly on point is *Colonial Operating Corp. v. Hannan Sales & Service*, 265 A.D. 411 (2d Dep't 1943), where "[t]he lease specified that the premises were 'to be used and occupied only for a showroom for automobiles and automobile accessories." Id. at 412. Following a World War II ban on the sale of *new* automobiles, the lessee claimed that the lease had been frustrated because the showroom had not been intended merely as a regular showroom. The lessee claimed that "the parties intended that the demised premises should be used as a showroom where only *new* automobiles and automobile accessories could be sold." *Id.* at 413 (emphasis added). The Second Department squarely rejected the lessee's attempt to offer parol evidence to fit its frustration theory:

> The use clause was clear and unambiguous. Hence it was not the proper subject of parol evidence to limit or qualify the words "automobiles" and "automobile accessories" therein, by inserting the qualifying or limiting term "new" which the parties did not employ in the writing and which the court may not interpolate.

Id. at 413.

In any event, claims of frustration and impossibility are barred where, as here, "the language of the contract suggests that the frustrated party's obligations will continue even in the face of an unforseen event . . . parties to a contract may bargain for a specific result if an uncontrollable event occurs rendering consideration to one party worthless." *In re Stock Exchs. Options Trading Antitrust Litig.*, No. 99 Civ. 0962(RCC), 2005 U.S. Dist. LEXIS 12734, at *40-41 (S.D.N.Y. 2005); Restatement (Second) of Contracts § 261 cmt.c ("A party may, by appropriate language, agree to perform in spite of impracticability that would otherwise justify his non-performance under the rule stated in this Section. . . . Even absent an express agreement, a court may decide, after considering all the circumstances, that a party impliedly assumed such a greater obligation.").

Thus, a New York Court recently found that a tenant acted improperly by "attempt[ing] to unilaterally terminate[] a lease" due to COVID-19 where "the terms" of the lease "contemplated a scenario in which performance of the lease terms by plaintiffs might become prohibited by a governmental order." *See Backal Hospitality Grp. LLC v. 627 West 42nd Retail LLC*, 2020 N.Y. Misc. LEXIS 4050, at *12-13 (Sup. Ct. N.Y. Cty. Aug. 3, 2020).

Here, there are no fewer than six provisions in the Lease allocating the financial risk of unforeseen governmental orders and catastrophic events outside the parties' control to Plaintiffs.

First, the Lease provides that rent is to be paid "without any offset, set-off, counterclaim or deduction whatsoever." (Lease § 41). Under New York law, this language constitutes an absolute waiver of defenses to the payment of rent. *See, e.g.*, *B. v. D. Co. v. Marine Midland Bank-New York*, 60 A.D.2d 544, 544 (1st Dep't 1977) (term for rent payment "without deduction or set-off, except as permitted by the Leases" was waiver of all defenses and claims); *see also Axginc Corp. v. Plaza Automall, Ltd.*, No. 14-CV-4648(ARR)(VMS), 2017 U.S. Dist. LEXIS 227928 (E.D.N.Y. Feb. 21, 2017), *aff'd*, 759 Fed. Appx. 26 (2d Cir. 2018) ("commercial impracticability and frustration of purpose defenses are barred by the express language of the contract, which, as described above, bars Plaza from bringing any defenses in an action for non-payment of rent").

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Second, the Lease's *force majeure* clause excludes "the payment of Fixed Rent or Additional Rent," from those obligations that may be excused upon "strikes, lockouts, failure of power or other utilities, injunction or other court or administrative order, governmental law or regulations which prevent or substantially interfere with the required performance, condemnations, riots, insurrections, martial law, civil commotion, war, fire, flood, earthquake, or other casualty, acts of God, or other causes not within the control of such party." *See 476 Grand, LLC v. Dodge of Englewood, Inc.*, 2012 N.J. Super Unpub. LEXIS 457, at *9-10 (N.J. App. Div. 2012) ("In accepting an exclusion of rent from the *force majeure* clause, defendant agreed to pay rent regardless of circumstances beyond its control. Courts give effect to defendants' acceptance of this absolute obligation to pay rent in accordance with the contract terms….This is a risk defendant assumed under the [] contract.").

Third, the Lease contains a "No Liability" provision reiterating that "the obligations of Tenant hereunder shall be in no way affected, impaired or excused . . . because Landlord is unable to fulfill, or is delayed in fulfilling, any of its obligations under this Lease by reason of strike, 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 reasonable control***." (Emphasis added).

Fourth, the Lease contains a broad "As Is" provision wherein Williamsburg Climbing "waives any claims or action against Landlord in respect of the condition of the Premises," and concedes that Ronit makes no warranty, representation, or covenant with respect to "**FITNESS FOR USE, DESIGN OR CONDITION FOR ANY PARTICULAR USE OR PURPOSE . . . IT BEING AGREED THAT ALL SUCH RISKS ARE TO BE BORNE BY TENANT**."

Fifth, the Lease contains a provision that Williamsburg Climbing shall "at its sole case and expense . . . promptly comply with all present and future laws and ordinances of all federal, state, county and municipal governments, and appropriate departments, commissions, boards and officers thereof . . . foreseen or unforeseen, ordinary as well as extraordinary, and whether or not the same shall presently be within the contemplation of the parties hereto or shall involve any change of governmental policy . . . which may be applicable to the demised premises including . . . the purposes to which the demised premises are put, or manner of use of the demised premises."

Sixth, the Lease provides that Brooklyn Boulders was to procure "All Risk" business interruption or earnings insurance for a period of not less than twelve (12) months to cover extraordinary losses. *See* Restatement (Second) of Contracts § 261 cmt. c ("A commercial practice under which a party might be expected to insure or otherwise secure himself against a risk also militates against shifting it to the other party.").

The foregoing provisions make abundantly clear that the parties contemplated extraordinary governmental regulations, acts of God, and other unforeseen and extraordinary events outside of their control that might impact Williamsburg Climbing's business. And the Lease provides—again and again—that the parties specifically allocated the financial risk of such events to Plaintiffs.

Since the parties agree that this matter is ripe for resolution, Defendants respectfully request that the Court set a briefing schedule and promptly provide a message to Plaintiffs that they may not abandon their financial obligations. We thank the Court for its consideration of this matter.

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Respectfully Submitted,

Adam J. Stein

cc: All counsel of record (via ECF)