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

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs, Williamsburg Climbing Gym Company LLC ("Williamsburg") and Fifth Concerto Holdco, Inc. ("Fifth Concerto") (collectively, "Plaintiffs"), respectfully submit this memorandum of law in opposition to Defendant Ronit Realty LLC's ("Ronit" or "Defendant") motion for summary judgment on liability ("Ronit's Memo of Law"). Ronit has failed to establish its entitlement to summary judgment. Its motion instead bolsters Williamsburg's right to summary judgment on its frustration of purpose and impossibility of performance claims.

Ronit cites various lease provisions that it claims preclude Williamsburg's assertions of frustration of purpose and impossibility of performance. Ignoring the reality and effects of the unanticipated pandemic, Ronit claims that the lease shifted the burden of "unforeseen financial exigencies" to Williamsburg. It argues that the (1) *force majeure*, (2) no off-set, (3) "As Is," and (4) "no liability" clauses shift all losses to Williamsburg. But these clauses are inapplicable to and fail to trump the doctrines of frustration and impossibility created by this surprise pandemic.

The cases Ronit cites to support its argument are readily distinguishable. These cases either all had particular lease provisions (not present here) allocating the parties' financial risk or had facts leading the decision maker to conclude the incident was foreseeable. That is not the situation presented here.

PRELIMINARY STATEMENT

Williamsburg's and Fifth Concerto's complaint is quite limited and very specific. Because of a once in a century pandemic, as a matter of law, Williamsburg is relieved of its obligations under a lease (the "Lease") for the property located at 58 North 9th Street, Brooklyn, New York (the "Premises"), because it is unable to use the Premises as contracted. New York State and New York City rules and regulations enacted to fight the pandemic have prevented Williamsburg from operating its BKBX business model at the Premises. Under the doctrine of frustration of purpose, the Lease was terminated on May 1, 2020. Alternatively, because it has been legally impossible to operate the intended BKBX business model, the Lease and all of its obligations should be rescinded effective May 1, 2020.[1]

Ronit's motion misses the point of Williamsburg's claims. Ronit cites numerous irrelevant cases and stretches several provisions of the Lease beyond the parties' intentions. Ronit throws everything at the Court. But Ronit's arguments, which are applicable to the vast majority of the pandemic lease cases, are inapplicable here. Rather, like the tenant in *Jack Kelly Partners LLC v. Zegelstein*, 140 A.D.3d 79 (1st Dep't 2016), *lv dismissed* 28 N.Y.3d 1103 (2016), who leased office space in a building zoned only for residential purposes, Williamsburg legally has been unable to operate its BKBX business model at the Premises. The six lease

[1] On March 17, 2021, Governor Cuomo announced that effective March 22, 2021, indoor fitness classes would be permitted to resume statewide at up to 33% capacity with health screening and contact information required at sign-in. This relaxed restriction does not help the BKBX model, which requires the exercise participants to be in close proximity to each other, in front of a live instructor, in order to thrive off the energy of each of the participants in the class. Moreover, this is irrelevant in relation to Plaintiffs claims of frustration of purpose and impossibility of performance since the operative date for this Court to focus on is May 1, 2020 – the date of the lease termination.

provisions Ronit cites do not apply to an unforeseen global pandemic that frustrates the Lease's very purpose and makes it impossible for Williamsburg to perform.

COUNTERSTATEMENT OF FACTS

Plaintiffs refer the Court to its Statement of Facts in Plaintiffs' original motion and incorporate them herein by reference. The following Counterstatement of Facts responds to Defendant's Factual Background on pages 2 through 11 of Ronit's Memo of Law.

Lease Negotiations

During the lease negotiations, Ronit and its attorney, Mitch Troyetsky, Esq., misled Fifth Concerto convincing Lance Pinn, Williamsburg's managing member and Fifth Concerto's then-President to sign a lease that had the rent commencement date starting eight months from the effective date of the Lease (November 1, 2018) instead of eight months from the delivery date (June 2019). Ronit assured Mr. Pinn "not to worry," as Fifth Concerto would still get the agreed upon eight months of free rent from the delivery date, but Landlord needed to show its lender a lease with rent commencing on July 1, 2019. Ultimately, following the delivery date in June 2019, Ronit held Williamsburg and Fifth Concerto to the written language of the Lease and Plaintiffs lost the eight months of the bargained for free rent.

North Castle Partner Investment

Fifth Concerto did not secure "$48 million in funding from a large private equity firm," as Ronit alleges. Rather, North Castle Partners invested approximately $13 million in Fifth Concerto in July 2015.

Problems with Ronit's Delivery

Ronit did not comply with the delivery specifications stated in the Lease. This non-compliance caused Plaintiffs to delay its construction, which began in November 2019. When Landlord tendered delivery of the Premises to Williamsburg in June 2019, there were three

known outstanding issues: (1) water in the basement, (2) electrical service was incomplete, and (3) the elevator did not properly operate. The elevator was needed (1) for Plaintiffs' general contractor, Resolute Design + Construction's ("Resolute") use and (2) to make the Premises compliant with the American with Disabilities Act. Pursuant to Exhibit B of the Lease, entitled "Landlord's Work," Ronit was required to install "an elevator or an approved and compliant lift for handicap accessibility, which shall be approved by the DOB." Williamsburg reluctantly accepted delivery of the Premises when the water issue was resolved, relying on Ronit's express representation that the elevator and electrical issues would soon be corrected. Despite Ronit's representation, the elevator was not repaired until March 19, 2020, when the elevator finally received its certificate of use. Because there was no working elevator, Resolute and its subcontractors were forced to use the stairs, significantly delaying the construction process. Pursuant to Exhibit B of the Lease, Ronit was to "[b]ring electrical panels and plumbing taps to the sub cellar as per landlord's plans." Ronit failed to satisfy this requirement, and, as a result, Plaintiffs were forced to resolve the electrical issue themselves.[2] In addition, the mezzanine that Ronit built to hold Williamsburg's water heaters was not constructed to design specification. Plaintiffs requested that a licensed engineer certify that the altered design could carry the intended load; that certification, however, was never provided. All of these issues delayed the construction of the Williamsburg facility making it more costly and more difficult.

Ronit cites only a portion of the "As Is" Provision, in the Lease. Ronit leaves out the highlighted text, "[s]ubject to *the completion of Landlord's Work*, Tenant accepts possession and occupancy of the Premises on the date hereof in their "**AS-IS"** condition and state of repair, subject to any and all defects therein." (emphasis added). The highlighted text which Ronit fails

[2] Mike Stewart, Vice President of Development for Brooklyn Boulders, fixed the issue by using two separate electrical meters.

to quote relates to "Landlord's Work" and states that Ronit does not warrant, represent, covenant or promise "**THE QUALITY OF THE MATERIAL OR WORKMANSHIP THEREIN**, … [however] Landlord shall be responsible to deliver the vacant and exclusive possession of the Demised Premises with the items set forth on Exhibit B annexed hereto substantially completed (the 'Landlord's Work')." As described below, the "As Is" clause does not affect Plaintiffs' frustration or impossibility claims.

Plaintiffs' Tenant Improvement Requests

On January 3, 2020, Ronit paid Williamsburg $468,949.64. On March 27, 2020, Ronit paid Williamsburg an additional $740,952.12, erroneously withholding $4,215.00 of bank fees on the transaction.

Plaintiffs Were Building a BKBX Facility and not a "Climbing Gym"

The Premises is specifically designed for studio-based classes, a significant part of the new BXBK model. The Lease was drafted approximately one year prior to its signing. At the time the Lease was drafted, Plaintiffs contemplated that the Premises might be used as a BKB Lifestyle facility. Fifth Concerto instead decided shortly before the Lease was signed to use the Premises for its new BKBX business model because the Premises did not have sufficiently high ceilings for rock climbing. Ronit was aware of and approved the change of use.

Renovations May Benefit a New Tenant

At a minimum, there is an issue of fact as to whether the improvements as a result of Plaintiff's construction (i.e. electrical and plumbing upgrades) would benefit another tenant. Moreover, the men's and women's locker rooms and showers are in the basement of the Premises and can be easily removed.

Williamsburg Fully Paid All Rent Due Prior to Lease Termination (Including April 2020)

On April 2, 2020, Fifth Concerto, through its lender Atalaya, wired Ronit $191,284.33, representing payment of all rent through April 30, 2020.

Ronit Falsely Asserts that Williamsburg and Fifth Concerto Commenced This Action "As a Pretext to Shop for Cheaper Rental Space Elsewhere"

Plaintiffs were not looking for cheaper space in Brooklyn. Rather, part of Fifth Concerto's business plan (going back to the North Castle Partners July 2015 investment) was to build more Lifestyle facilities (which require a high ceiling) in Brooklyn. Fifth Concerto had its broker, Terra CRG, look for such space. It typically takes over a year to (1) locate properties that accommodate Fifth Concerto's ordinary business model of rock-climbing and (2) negotiate and execute a lease. That Fifth Concerto was working with a broker to locate other Brooklyn properties with high ceilings in order to open and operate new Lifestyle (rock-climbing) facilities is irrelevant to the legal issues raised here. The Williamsburg facility was designed to be studio-based fitness. Fifth Concerto's continued property search in Brooklyn had nothing to do with Williamsburg or the Premises.

Ronit's Reference to Other Brooklyn Boulders Locations is Irrelevant

All five of Brooklyn Boulders' currently operating facilities (Gowanus, New York, Queensbridge, New York, Somerville, Massachusetts, Lincoln Park, Illinois, and West Loop, Illinois) are all Lifestyle rock-climbing gyms with massive climbing areas. Unlike the Williamsburg facility, these five BKB Lifestyle facilities are not based on studio-based fitness classes and therefore (1) have been able to re-open at reduced capacities as of late summer 2020 and (2) allow for social distancing. The two facilities in New York are operating at limited 33% capacity pursuant to New York State Department of Health guidelines.

Mechanic's Liens

On November 7, 2020, Fifth Concerto and Williamsburg entered into a settlement with Resolute for work performed in the amount of $1,621,642.26, the full amount owed to Resolute. As a part of the settlement, Resolute is required to pay its subcontractors and the subcontractors will remove its mechanic's liens upon final payment to Resolute. The mechanics liens are not relevant to Plaintiffs' frustration or impossibility claims.

ARGUMENT

POINT I

THE PANDEMIC HAS LEGALLY PREVENTED WILLIAMSBURG FROM USING THE PREMISES

Ronit cites cases where an event unexpectedly takes place in an existing lease and the tenant's business, while still legally able to operate, becomes much less profitable. That is not the situation presented here. In *35 East 75th Street Corp. v. Christian Louboutin L.L.C.*, 2020 WL 7315470 (Sup. Ct. N.Y. Cnty. Dec. 9, 2020), plaintiff tenant was in the seventh year of a lease which was operating "on a highly visible and well trafficked retail location on the Upper East Side" of Manhattan. *Id.* at *1. The tenant sought to use frustration of purpose and impossibility of performance to relieve itself from its lease obligations because "the lack of customer traffic [had] decimated the store's revenue." *Id*. The court rejected tenant's argument because the "subject matter of the contract – the physical location of the retail store – [was] still intact and tenant was still "permitted to sell its products." *Id*. at *3.

Similarly, in *Colonial Operating Corp. v. Hannan Sales & Serv. Inc.*, 265 A.D. 411 (2d Dep't 1943), the tenant operated a car dealership at its leasehold for some five years. The production and sale of new automobiles became prohibited because the country's war production efforts shifted to weaponry for World War II. The court properly rejected the tenant's argument

for frustration finding that although new automobiles could not be built and sold, tenant could still use the leasehold to sell used automobiles. Although tenant's revenue might be diminished, the intended use of the leasehold could continue despite the government's wartime restrictions. *Colonial* is further distinguishable from the facts here because the federal mandates were not a complete ban as are the restrictions here.

In *Robitzek Inv. Co., Inc. v. Colonial Beacon Oil Co.*, 265 A.D. 749 (1st Dep't 1943), defendant occupied a gas station from 1939 to 1942 at which point defendant purported to cancel the lease and stopped paying rent. The defendant claimed that as a result of federal wartime regulations, the "use of the demised premises as a gasoline station was prevented and restricted and that it was therefore entitled to cancel the lease." *Id*. at 752. The court determined that "[t]he Federal regulations do not restrict the use of the land demised, but they control the business of the defendant" (i.e. its economics). *Id.* at 753. While its business declined because of the Federal regulations, the defendant could continue to operate the gasoline station there.

In *Dr. Smood New York LLC v. Orchard Houston, LLC*, No. 652812/2020, 2020 WL 6526996 (Sup. Ct. N.Y. Cnty. Nov. 2, 2020), COVID 19 executive orders prevented the plaintiff from operating indoor dining services. The court rejected plaintiff's frustration of purpose argument since the premises remained open as a restaurant for both counter service and takeout of food orders. *Id*. at *4. The evidence showed that plaintiff had been operating its business out of the premises since at least July 2020.

In *RPH Hotels 51st Street Owner, LLC v. HJ Parking LLC*, No. 654938/2020, 2021 WL 291199 (Sup. Ct., N.Y. Cnty. Jan. 28, 2021), the operator of a parking garage had not paid rent since March 2020 even though it continued to operate the garage. As a result of the COVID-19 pandemic, defendant was saddled with decreased revenue and increased costs. The court held

that "a less profitable business is not a basis to find that these equitable doctrines could absolve defendant of its obligation to pay rent." *Id*. at *4.

In *407 E. 61st Garage v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275 (1968), a party attempted to unilaterally void a contract simply because it was financially disadvantageous. Here, it is impossible for Williamsburg to perform under the terms of the Lease because all indoor in person closely configured classes are still prohibited and have been prohibited for over a year.

All of these cases are inapplicable here. Williamsburg's situation is "unique," as Ronit concedes (Ronit Memo at 4). Williamsburg was leasing this Premises, with breathtaking waterfront Manhattan views, to establish its new, innovative BKBX model of 12-24 closely grouped individuals per room (three rooms) with each room committed to a different exercise theme and led by a specially trained, live exercise instructor. Because of pandemic-related state and city regulations that totally preclude such closely packed gatherings, the Williamsburg leasehold as a matter of law cannot be used for its intended purpose. *See Benderson Dev. Co. v. Commenco Corp*., 44 A.D.2d 889 (4th Dep't 1974), *aff'd* 37 N.Y.2d 728 (1975); *Jack Kelly Partners LLC v. Zegelstein*, 140 A.D.3d 79 (1st Dep't 2016), *lv dismissed* 28 N.Y.3d 1103 (2016), cited in Plaintiffs' Memorandum.

POINT II

COVID 19 AND ITS SIGNIFICANT AND LASTING EFFECTS WAS UNFORESEEABLE

To succeed in terminating a commercial lease under the doctrine of frustration of purpose, the supervening event must not be foreseeable to the parties when the lease was entered. Neither party to the Lease could have foreseen this devastating and ongoing pandemic when the Lease was signed. As a result, the cases Ronit cites, *Gander Mountain Co. v. Islip U-Slip LLC*, 923 F. Supp. 2d 351 (N.D.N.Y. 2013), *Axginc Corp. v. Plaza Automall, Ltd*., 14-CV-4648 (ARR)

(VMS) 2017 WL 11504930 (E.D.N.Y. Feb. 21, 2017), *Sage Realty Corp. v. Jugobanka D.D.*, No. 95 Civ. 0323 (RJW), 1998 WL 702272 (S.D.N.Y. Oct. 8, 1998), and *Noble Americas Corp. v. CIT Group/Equip. Fin., Inc.*, No. 602269/2009, 2009 WL 9087853 (Sup. Ct., N.Y. Cnty. Dec. 4, 2009) are inapplicable.

In *Gander Mountain 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 and guarded against the frustrating event. *Gander Mountain Co.*, 923 F. Supp. 2d at 360. A commercial tenant leased premises adjacent to a creek in an area that had flooded at least four times in recent years before the lease was entered. Seven years into the lease, a tropical storm struck, and the premises had to be vacated. The tenant alleged the lease terminated because of the flood and its inability to obtain all risk insurance. The court dismissed plaintiff's cause of action for frustration of purpose because the flooding was easily foreseeable. *Id*. at 362. In contrast, here neither party to the Lease could have fathomed at the time the Lease was entered the coming pandemic and its devastating effects on the world's population.

A similar finding was made in *Axginc Corp*., where the court rejected defendant subtenant's argument that its inability to procure flood insurance for the vehicles it intended to store on leased land constituted a frustration of purpose that would excuse its nonperformance under the sublease. The court reasoned 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 at *9.[3]

[3] On March 17, 2020, Fifth Concerto submitted a business interruption claim to The Hartford**.** The claim was denied on March 30, 2020, because there was no physical damage to the Premises as a result of the COVID-19 pandemic. Ronit's reliance on *Bayou Place Ltd. P'ship v. Alleppo's Grill, Inc.*, No. RDB-18-2855, 2020 WL 1235010 (D. Md. Mar. 13, 2020) and Restatement (Second) of Contracts § 261 cmt. c) is therefore misplaced.

In *Sage Realty Corp*., a Yugoslavian bank entered into a lease in June 1991 for its New York branch. In April 1993, President Clinton issued an Executive Order implementing sanctions against Yugoslavia. In June 1993, agents of the Office of Foreign Assets Control of the United States revoked the bank's license to conduct business in the United States. *Sage Realty Corp.*, 1998 WL 702272 at *1. The bank argued it was not liable for rent because the doctrine of frustration of purpose excused its performance. The court agreed that the Executive Order frustrated the bank's principal purpose for renting the space but held that the bank was not excused from performance because the events were reasonably foreseeable. *Id*. at *5. The court held that "the imposition of sanctions resulting in the freezing of [the bank's] assets and the sealing of the rented premises … was reasonably foreseeable by [the bank's] principals [when the lease was executed] and, therefore, [the bank] is not excused from performance under the lease." *Id*. at 83. Here, there is no issue of foreseeability of the pandemic.

In *Noble Americas Corp*., Noble sought a declaratory judgment to relieve it from making lease payments to CIT for certain railroad tank cars. Noble alleged that it leased the tank cars so it could transport ethanol from two ethanol producing facilities, both of which subsequently went bankrupt and closed. The court found that the doctrine of frustration of purpose was inapplicable because the bankruptcy of the ethanol producers was a reasonably foreseeable risk that Noble should have shifted to CIT during lease negotiations. The court held that "the severe economic downturn of the ethanol industry and consequent bankruptcy of the third-party [ ] facilities are not the types of unforeseeable cataclysmic events recognized by New York's frustration of purpose doctrine." *Noble Americas Corp.*, at *4.

It is undisputed that this once in a century pandemic and the resulting social, professional and economic upheavals were not foreseeable and reasonably could not have been foreseeable at

the time the Lease was entered in 2018. The resulting pandemic restrictions were not foreseeable by either party. Williamsburg's inability to construct and operate its BKBX facility at the Premises was not foreseeable at the time the Lease was signed.

POINT III

THE LEASE'S "AS IS," NO LIABILITY, AND *FORCE MAJEURE* CLAUSES DO NOT PRECLUDE WILLIAMSBURG'S CLAIMS OF FRUSTRATION OF PURPOSE AND IMPOSSIBILITY OF PERFORMANCE

A. As Is

Ronit incorrectly asserts that Williamsburg's frustration and impossibility claims are precluded by the Lease's "As Is" provision. Under the "As Is" clause, Ronit says, "all such risk of the premises not being fit for a particular purpose was allocated to Williamsburg Climbing." (Ronit Memo at 19). The cases Ronit cites involved the economic ramifications of promises made between the two parties, and simply do not apply to a once in 100-year pandemic that no-one could foresee and over which no-one had control.

Ronit specifically cites to three cases, none of which applies New York law or involves a commercial lease. In *Lake Altoona Rehab. and Prot. District v. Jereczek,* 381 Wis.2d 471 (Wis. Ct. App. 2018), the court applied Wisconsin law and held that the frustration of purpose doctrine did not apply because the contract explicitly anticipated that certain sand being sold to defendant might not be usable for the purpose the defendant had planned when entering into the contract. The contract specified that plaintiff seller "'makes no warranty of the sand for any purpose' and [buyer] 'buys sand as is.'" *Id.* at 3. In *In re Cyphermint, Inc.*, 496 B.R. 49 (Bankr. D. Mass. 2013), the court applied Massachusetts law and held that the defense of frustration of purpose did not relieve the Chapter 7 purchaser of debtor assets from performing under the sale agreement. In *Cyphermint*, the risk of loss of the assets was assigned to the buyer, which emphasized that the

assets were sold "as is." The court noted that the buyer had the court's approval to manage debtor's business before entering into the sales agreement, and therefore, had an opportunity to conduct due diligence. Finally, in *MAN Roland Inc. v. Quantum Color Corp.*, 57 F.Supp.2d 576 (N.D. Ill. 1999), the court applied Illinois law and held that Quantum's affirmative defenses of mutual mistake and unilateral mistake failed to state a claim in a contract for the sale of goods in part because of an "as is" provision in the contract. Frustration of purpose and impossibility of performance were not even alleged in the case. None of these cases is binding on this Court and none applies to the issue raised here – an unanticipated global pandemic.

At issue here is an event that neither party could foresee or control. Therefore, the "As Is" provision in Section 42 of the Lease does not (1) preclude Williamsburg from relying on the doctrines of frustration of purpose and impossibility of performance nor (2) waive Williamsburg's right to use the Premises for a particular purpose. *See Aikido of Manhattan v. 111 West 24th Street Assoc.*, 294 A.D.2d 299 (1st Dep't 2002) (holding that tenant was not entitled to damages arising out of unsuitability of the premises since (1) the Civil Court had earlier voided the lease based on the doctrine of impossibility of performance and (2) the tenant had taken the premises "as is"). In *Seoul Garden Bowery Inc. v. Ng*, No. 653635/2018, 2020 WL 3104371 (Sup. Ct., N.Y. Cnty. June 8, 2020), plaintiff alleged that it entered into a lease with defendants "based on representations from the defendants that the defendants would assist plaintiff in obtaining a certificate of occupancy for the premises that would allow plaintiff to operate a restaurant." *Id.* at *1. Plaintiff sought rescission of the lease and a declaration that the lease was void. The fact that there was an "as is" provision in the lease did not preclude tenant from relying on the doctrine of impossibility of performance. The court denied defendants' motion to dismiss plaintiff's rescission cause of action holding that "[t]he lease

expressly limits the plaintiff's use of the premises to the operation of the restaurant. To the extent that it is alleged that such use is not permitted, the plaintiff has made out a valid claim of the impossibility of contractual performance." *Id*. at *2.

Section 42 of the Lease states in pertinent part that the "as is" clause is "[s]ubject to *the completion of Landlord's Work*." The key text of Section 42 (that Ronit fails to quote) relates to "Landlord's Work" and states that Ronit does not warrant, represent, covenant or promise "**THE QUALITY OF THE MATERIAL OR WORKMANSHIP THEREIN**, … [however] Landlord shall be responsible to deliver the vacant and exclusive possession of the Demised Premises with the items set forth on Exhibit B annexed hereto substantially completed (the 'Landlord's Work')." This does not affect frustration or impossibility.

Moreover, because Landlord's Work, set forth in Exhibit B to the Lease, was never fully completed, the "As Is" provision in the Lease is not applicable. The elevator was not repaired until March 19, 2020 (nine months after Landlord delivered possession of the Premises to Williamsburg). Ronit failed to correct the electrical issues, which were only resolved when Mike Stewart fixed the issue by using two separate electrical meters.

B. No Liability

For similar reasons, the Lease's "No Liability" provision also does not apply to the situation here – an unpredictable, worldwide pandemic that is beyond any human control. Like the "As Is" clause, the "No Liability" clause seeks to shift from landlord to tenant any man-made loss associated with the leasehold during the term of the Lease.

The "No Liability" provision in the Lease (Paragraph 49) is not relevant because the facts here have nothing to do with (1) a landlord being exempt from "liability for any damage or injury to person or property" or (2) a landlord's "obligations under [the] Lease." Rather, Williamsburg is prohibited from conducting indoor BKBX studio classes at the facility.

The two cases Ronit cites in support of its reliance on the "No Liability" provision in the Lease are inapplicable. In *One World Trade Ctr. LLC v. Cantor Fitzgerald Sec.*, 6. Misc.3d 382 (Sup. Ct. N.Y. Cnty. 2004), the court relied on a *force majeure* provision different from the one in Lease (not a no liability clause) that protected the landlord to bar defendants' counterclaims for unjust enrichment and rescission. Defendants had agreed to pay an increased, "front-loaded" rent in exchange for certain future benefits and then attempted to recoup those payments after the tragedy of September 11, 2001. The court held that there was no provision in the lease that provided for recoupment of such payments. *Id.* at 386. *Light's Jewelers v. New York Tel. Co.*, 182 A.D.2d 965 (3d Dep't 1992), did not involve a commercial lease but rather a negligence claim brought by a jewelry store against a security company. It is completely inapplicable here since Williamsburg is not seeking to hold Ronit liable for breaching a duty owed to it, but rather a declaratory judgment that the lease obligations were discharged as of May 1, 2020. Here, Ronit seeks to block Williamsburg's equitable remedies by citing to two irrelevant cases.

C. Force Majeure

Ronit's reliance on the Lease's *force majeure* provision is misplaced since (1) it is limited to specifically described conditions, *not including a global pandemic or plague* and social distancing restrictions that are in place and will be for the foreseeable future and (2) it does not waive Williamsburg's claims of frustration of purpose and impossibility of performance, which are separate equitable doctrines. There is no dispute that the *force majeure* clause does not explicitly reference a "pandemic" or a "plague." The subsequent Executive Orders are not the force majeure event but rather the government's response to the event – the pandemic.

Ronit's attorneys drafted the Lease including its *force majeure* provision and Ronit therefore is responsible for having the appropriate triggering event listed in the *force majeure* clause under the fundamental contract interpretation rule of *contra proferentem*. It is well settled

that any ambiguity in a contract will be construed against the party who drafted it. *See 151 W. Assoc. v. Printsiples Fabric Corp.*, 61 N.Y.2d 732 (1984). Any ambiguity here, including the failure to cite a pandemic or plague in its force majeure provision, should be construed against Ronit.

See also Reade v. Stoneybrook Realty, LLC, 63 A.D.3d 433 (1st Dep't 2009) ("Interpretation of force majeure clauses is to be narrowly construed and 'only if the *force majeure* clause specifically includes the event that actually prevents a party's performance will that party be excused.'" (citation omitted)); *In re Cablevision Consumer Litig.*, 864 F. Supp.2d 258 (E.D.N.Y. Mar. 28, 2012) (holding *force majeure* clause did not apply to bar a breach of contract claim where clause did not specifically address the circumstances that caused a service interruption that was the center of plaintiffs' claim (the inability to reach a timely contract renewal)).

Ronit cites to a number of cases holding that as a result of the specific *force majeure* provision in the applicable lease, the doctrines of frustration of purpose and impossibility of performance were held not enforceable. None of these cases applies here.

In *United Artists' Theatre Circuit, Inc. v. Kaufman Bedrock Astoria I LLC*, Index No. 705911/2020, (Sup. Ct. Queens Cnty. December 9, 2020), the operator of a movie theater sought a preliminary injunction excusing its obligations to pay rent and additional rent for the duration of the COVID-19 pandemic. The court held that plaintiff did not establish a likelihood of success on the merits on its claims of impossibility of performance and frustration of purpose and denied the preliminary injunction.

In *Valentino U.S.A., Inc. v. 693 Fifth Owner LLC*, 70 Misc.3d 1218(A) (Sup. Ct., N.Y. Cnty. 2021), unlike here, "the parties expressly allocated the risk that Valentino [tenant] would not be able to operate its busines." *Id*.

Ronit's reliance on *Backal Hospitality Group LLC v. 627 West 42nd Retail LLC*, No. 154141/2020, 2020 WL 4464323 (Sup. Ct. N.Y. Cnty. Aug. 3, 2020) also is misplaced. In *Backal*, the lease provided that if rent was uncollectible as a result of a governmental order or regulation then the parties were required to enter into an "agreement regarding the collection of rent at the conclusion of the governmental restriction." *Id*. at *5. There is no such requirement here.

The cases cited by Ronit in a footnote on page 17 of its Memo are distinguishable. *S. College St., LLC v. Charlotte School of Law, LLC*, 18 CVS 787, 2018 WL 3830008 (N.C. Super. Ct. Mecklenburg Cnty. Aug. 10, 2018) (frustration of purpose doctrine did not excuse tenant's payment obligations under the lease because tenant "could have used the premises for general office operations, or could have sought Plaintiff's approval to use the Premises for another legally permitted use or to assign its interest in the Lease or sublease the Premises."); *Stanley Works v. Halstead New England Corp.*, No. CV010506367S, 2001 WL 651208 (Conn. Super. Ct. May 18, 2001) (affirmative obligation on the part of the defendant to make royalty payments to the plaintiff in the event the license agreement terminated; no reference to frustration of purpose); *LIDC, I, LLC v. Sunrise Mall, LLC*, 46 Misc.3d 885 (Sup. Ct., Nassau Cnty. 2014) (distinguishable because here, Plaintiffs are not relying on the *force majeure* clause); *476 Grand, LLC v. Dodge of Englewood, Inc.*, 2012 WL 670020 (N.J. Super. Ct. App. Div. Mar. 2, 2012) (same); *Northway McGuffey College, Ltd. v. Brown*, No. 14 CV 993 (Ohio Ct. Com. Pl. Jan. 6, 2015) (no reference to frustration of purpose or impossibility of performance).

D. The Additional Lease Provisions On Which Ronit Relies Are Not Applicable

Ronit's statement that Section 41 of the Lease, which provides that all base rent and additional rent must be paid "without any offset, set-off, counterclaim or deduction whatsoever…constitutes a waiver of all defenses," is inaccurate (See Ronit's Memo at 17). *B.V.D. Co. v. Marine Midland Bank-N.Y.*, 60 A.D.2d 544 (1st Dep't 1977) does not stand for the proposition that the presence of a no set-off provision in a lease is a "waiver of all defenses." (See Ronit's Memo at 17). The issue for the court in *Cut-Outs, Inc. v Man Yun Real Estate Corp*., 286 A.D.2d 258 (1st Dep't 2001) was whether a tenant had a valid claim for partial actual eviction or constructive eviction against the landlord, neither of which is alleged here. In *Internet Law Library, Inc. v. Southridge Capital Mgmt., LLC*, No. 01 CIV 6600 (RLC), 2005 WL 3370542 (S.D.N.Y. Dec. 12, 2005), the court stated in dicta that plaintiff waived his right to protest payment of a promissory note since there was language in the note that stated that all payments shall be made without setoff or deduction. *Camofi Master LDC v. College P'ship, Inc.*, 452 F. Supp.2d 462 (S.D.N.Y. 2006) is similarly inapposite as the court stated, again in dicta, that plaintiff waived his right to protest payment of promissory notes by agreeing to make each payment of principal and interest without setoff or counterclaim. *Id*. at 477. None of these cases applies here.

Ronit's argument that Section 44.07 of the Lease is a provision "making clear that the financial risk of governmental action on 'the purposes to which the demised premises are put, or manner of use of the demised premises' are specifically allocated to Williamsburg Climbing alone" (Ronit Memo at 19), is baseless. Section 44.07 of the Lease pertains to Tenant's obligation to comply with "present and future laws and ordinances of all federal, state, county and municipal governments … relating to the operation of the Permitted Uses." Pursuant to the City and State Regulations, indoor group fitness classes with closely situated participants in New

York City are prohibited. Such group fitness classes are the very foundation of the BKBX model and the reason for leasing the Premises.

POINT IV

THE TERMS OF THE LEASE DID NOT ALLOCATE THE RISK OF "UNFORESEEN FINANCIAL EXIGENCIES" TO WILLIAMSBURG

The parties did not allocate the risk of the COVID-19 global pandemic and social distancing requirements when they entered into the lease. Neither party ever envisioned this calamity. As a result, Ronit's reliance on *United States v. Gen. Douglas MacArthur Senior Village, Inc*., 508 F.2d 377 (2d Cir. 1974) and *Louis Scherzer Partners L.P. v. FDIC*, 101 F.3d 705 (9th Cir. 1996) is misplaced. In *United States v. Gen. Douglas MacArthur Senior Village, Inc.*, the lease did not allocate the risk of a global pandemic to either party. In *Louis Scherzer Partners L.P.*, the Ninth Circuit applying Washington State law, held that a purchaser of real property could not rescind the agreement because subsequent events made the land that plaintiff purchased less valuable.

In *Matter of Fontana D'Oro Foods, Inc*., 107 A.D.2d 808 (2d Dep't 1985), *aff'd* 65 N.Y.2d 886 (1985), under a so ordered stipulation, the seller was to execute and deliver at closing an assignment for certain stock and a deed to certain property. Prior to closing, the purchaser took possession and control of the assets and operated the business. Before the closing, a fire destroyed the warehouse and inventory and purchaser refused to close claiming impossibility of performance. The Second Department rejected purchaser's argument holding that "[n]either impossibility of performance, nor frustration of purpose analysis is applicable to the destruction of tangible property, where it can be determined that one of the parties assumed the risk of loss. If the contract is silent, statutory provisions supply the allocation of risk." *Id*. at 809 (citations omitted). There was no allocation of the risk in the agreement and, therefore, the

court relied on sections of the New York General Obligations Law (Section 5-1311) and Uniform Commercial Code Sections 2-709 and 206. Those statutory provisions are not applicable here, and the risk of a fire is a foreseeable event every commercial landlord or tenant anticipates.

In *In re Stock Exchs. Options Trading Antitrust Litig.*, No 99 Civ 0962 (RCC), 2005 WL 1635158 (S.D.N.Y. July 8, 2005) the court held that the doctrine of frustration of purpose discharged defendant Pacific Stock Exchange, Inc.'s remaining payment obligations arising from a global settlement agreement of a class action lawsuit. The court denied preliminary approval of the settlement agreement. *Id.* at *13. As a result, *In re Stock Exchs. Options Trading Antitrust Litigation* is helpful to Williamsburg, not Ronit.

Nowhere does the Lease allocate the risk of a global pandemic and subsequent Executive Orders to combat it that effectively prohibited the construction of the facility and prohibited and still substantially prohibit the boutique studio type of gym that was being constructed at the Premises.

POINT V

IF THE COURT GRANTS PLAINTIFFS' MOTION FIFTH CONCERTO'S GUARANTY IS RENDERED MOOT

Ronit seeks summary judgment on Fifth Concerto's guaranty. If the Court grants Plaintiffs' motion on either frustration or impossibility, then there is no amount due Ronit. Thus, the guaranty will be rendered moot.

CONCLUSION

For the foregoing reasons, Defendant's motion for summary judgment on liability should be denied in its entirety.

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Respectfully Submitted,

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