UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

WILLIAMSBURG CLIMBING GYM COMPANY LLC and FIFTH CONCERTO HOLDCO, INC., Plaintiffs and Counterclaim-Defendants, v. RONIT REALTY LLC, Defendant and Counterclaim-Plaintiff.	Case No. 1:20-cv-02073-FB-RML

DEFENDANT/COUNTERCLAIM-PLAINTIFF RONIT REALTY LLC'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON LIABILITY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

INTRODUCTION

This dispute presents a straightforward question of law: whether the COVID-19 pandemic and resulting governmental orders relieve a tenant from its long-term lease obligations, where the lease expressly allocates the risk of governmental laws, all causes outside the parties' control, and all other unforeseen events to the tenant. Multiple New York courts have already answered this question in the negative, rejecting the identical defenses that Plaintiffs rely on here.

Faced with the overwhelming weight of these similar cases, Plaintiffs struggle mightily to distinguish them, offering incoherent reasons for why they are not dispositive. For example, Plaintiffs argue that the Lease's *force majeure* provision—requiring the payment of rent even in the event of cataclysm, governmental orders, and "other causes not within the control" of the parties—is inapplicable because it does not specifically use the words "pandemic" or "plague." In so arguing, Plaintiffs disregard that none of the nearly identical provisions in the pandemic-lease cases cited by Ronit contain such specific language. Similarly, Plaintiffs nonsensically claim that the parties did not allocate the risk of unforeseen financial exigencies to Williamsburg Climbing despite six risk-shifting provisions in the Lease that are directly to the contrary.

Plaintiffs' claim that their supposedly unique "BKBX" model was frustrated and made impossible by governmental regulations is of no moment, as it is directly contradicted by the *force majeure* clause, the broad Permitted Uses clause, and the fact that Williamsburg Climbing planned to use the Property for a variety of activities which have been legally permissible for months.

In the end, Plaintiffs urge that this Court should depart from the numerous cases that have already considered and rejected the same defenses in the context of substantively identical lease provisions, yet fail to offer any valid reason why it should do so. They have utterly failed to create an issue of fact concerning their liability to Ronit, and the Court should therefore grant the instant motion in its entirety.

ARGUMENT

I. PLAINTIFFS CANNOT OVERCOME THE TERMS OF THE LEASE

Ronit demonstrated in its moving papers that the doctrines of frustration of purpose and impossibility cannot apply, since numerous provisions in the Lease allocate the financial risks of events outside the parties' control to Williamsburg Climbing. In opposition, Plaintiffs concede that Ronit's arguments and the controlling case law "are applicable to the vast majority of pandemic lease cases," but urge that this situation is somehow different from all of the others. (Opp. Br. at p. 2.)

But it is not. The parties' agreement to shift virtually all risks under the Lease to Williamsburg Climbing—including, but not limited to, the risks of governmental mandates and events outside the parties' control—precludes consideration of Plaintiffs' defenses. Courts in this Circuit and New York have rejected identical defenses in light of substantively identical lease provisions, and this Court should do the same.

A. In Exchange for Ronit's Significant Investment, Williamsburg Climbing Agreed to Bear the Risks of Unforeseen Events

Plaintiffs argue that the Lease does not allocate the risk of the COVID-19 pandemic to Williamsburg Climbing. That position is, frankly, absurd.

In exchange for Ronit agreeing to invest literally millions into Williamsburg Climbing's massive build-out for a ten-year Lease, Williamsburg Climbing agreed to pay rent to Ronit during the term of the Lease even if governmental law or regulations, casualties, acts of God, causes not within the control of the parties, or other cataclysmic events made performance under the Lease more difficult or prevented it altogether. (Lease § 59). In addition to waiving any claims or action against Ronit concerning the condition of the Property and expressly acknowledging that all such risks "are to be borne by tenant" (*id.* § 42), Williamsburg Climbing agreed to bear the risk of

unforeseen events by agreeing to (i) pay rent without offset or deduction (*id.* § 41), (ii) comply with all other Lease obligations notwithstanding unforeseen events (*id.* § 49), (iii) comply with all present and future government regulations, foreseen or unforeseen, ordinary or extraordinary, concerning the use of the Property, at its sole cost and expense (*id.* § 44.07), and (iv) procure insurance to protect against extraordinary losses. (*Id.* § 51.02(a)(iv)).

To support their claim that the Lease does not allocate the financial risk of unforeseen events outside the parties' control, Plaintiffs analyze each of the relevant provisions in isolation and claim that they are inapplicable. By doing so, Plaintiffs miss the point entirely. The defenses of frustration of purpose and impossibility do not apply where "the language of the contract suggests that the frustrated party's obligations will continue even in the face of an unforseen event." *In re Stock Exchs. Options Trading Antitrust Litig.*, No. 99 Civ. 0962(RCC), 2005 U.S. Dist. LEXIS 13734, at *40 (S.D.N.Y. July 11, 2005); *see also GE v. Metals Resources Group Ltd.*, 293 A.D.2d 417, 418 (1st Dep't 2002) ("Defendant's performance may have been rendered financially disadvantageous by circumstances unforeseen by the parties at the time of the contract's making. However, financial disadvantage to either of the contracting parties was not only foreseeable but was contemplated by the contract, ***even if the precise causes of such disadvantage were not specified***.") (emphasis added).

The Lease provisions at issue, when viewed together, make unmistakably clear that any potential financial risks of unforeseen events—including the COVID-19 pandemic and resulting governmental regulations—would fall to Williamsburg Climbing, and Plaintiffs fail to reference even a single Lease provision to the contrary.

1. The *Force Majeure* Clause Negates Plaintiffs' Defenses

With respect to the Lease's *force majeure* provision that requires Williamsburg Climbing to continue paying rent even in the event of cataclysm, governmental orders, and "other causes not within the control" of the parties, Plaintiffs now argue that, absent an explicit reference to a "pandemic" or "plague," the provision has no bearing on the parties' allocation of risk. (Opp. Br. at p. 15.) That position is meritless, at best, and frivolous, at worst. Four of the cases that Ronit cited in the COVID-19 context involved nearly identical provisions, and none included the words "pandemic" or "plague." *35 E. 75th St. Corp. v. Christian Louboutin L.L.C.*, Index No. 154883/2020, 2020 N.Y. Misc. LEXIS 10423 (Sup. Ct. N.Y. Cty. Dec. 9, 2020);[1] *United Artists' Theatre Circuit, Inc. v. Kaufman Bedrock Astoria I LLC*, Index No. 705911/2020, Doc No. 96 (Sup. Ct. Queens Cty. Apr. 2, 2011); *Valentino U.S.A., Inc. v. 693 Fifth Owner LLC*, Index No. 652605/2020, Doc. No. 44 (Sup. Ct. N.Y. Cty. Jan. 27, 2021);[2] *Victoria's Secret Stores, LLC v. Herald Sq. Owner LLC*, 70 Misc. 3d 1206[A], 2021 NY Slip Op 50010[U] (Sup. Ct. N.Y. Cty. Jan. 7, 2021).[3]

In fact, the *Valentino* court expressly held that the absence of the word "pandemic" in the *force majeure* provision was inconsequential since "the Lease is drafted broadly and encompasses the present situation by . . . including 'restrictive governmental laws or regulations,' certain cataclysmic events, 'or other reason of a similar or dissimilar nature beyond the reasonable control of the party delayed in performing work or doing acts required.'" *Valentino*, Doc. No. 44 (Sup.

[1] A copy of the lease at issue in *Christian Louboutin* (which includes a similar *force majeure* provision in Section 26(c)), is attached as Exhibit A to the Declaration of Adam J. Stein, Esq., dated April 16, 2021 ("Stein Reply Decl.").

[2] A copy of the lease at issue in *Valentino* (which includes a similar *force majeure* provision in Section 21.11), is attached as Exhibit B to the Stein Reply Declaration.

[3] A copy of the lease at issue in *Victoria's Secret Stores* (which includes a similar provision in Section 26), is attached as Exhibit C to the Stein Reply Declaration.

Ct. N.Y. Cty. Jan. 27, 2021); *see also* *Victoria's Secret,* 70 Misc. 3d 1206[A], 2021 NY Slip Op 50010[U] ("It is of no moment that the specific cause for the government law was not enumerated by the parties because the Lease as drafted is broad and encompasses what happened here — a state law that temporarily caused a closure of the tenant's business.").

Plaintiffs' related argument that the *force majeure* provision is ambiguous and should be construed against Ronit is contrary to the Lease's clause concerning construction of the Lease (*see* Lease § 76)[4] – and also completely nonsensical. Plaintiffs, sophisticated entities that have entered into numerous leases, have general counsel (Mark Seiger), and they were represented by outside counsel, Adam Dash & Associates, that negotiated the Lease on behalf of Plaintiffs. (Weitzman Reply Decl. ¶ 4.)[5] *D'Amato v Five Star Reporting, Inc.*, 80 F. Supp. 3d 395, 412 (E.D.N.Y. 2015) ("[*C*]*ontra proferentem* does not apply in situations where, as here, both parties are represented by counsel and have meaningful opportunities to negotiate contractual terms.").

2. Plaintiffs Cannot Avoid the Lease's Other Risk-Shifting Provisions

Despite Plaintiffs' interpretive gymnastics, they cannot avoid the effect of the remaining Lease provisions explicitly allocating financial risk to Williamsburg Climbing.

Under Second Circuit authority, the Lease's language that rent was payable "without any offset, set-off, counterclaim or deduction whatsoever" (Lease § 41) bars a tenant's claim for an offset of rent for the period of time that a property is unusable. *Axginc Corp. v. Plaza Automall, Ltd.*, 2017 U.S. Dist. LEXIS 227928, at *34, n.8 (E.D.N.Y. 2017), *aff'd*, 759 Fed. Appx. 26, 29

[4] That section provides, in pertinent part, that "[t]his Lease shall be governed by and construed without any presumption or other rule requiring construction against the party causing this Lease to be drafted." *Id.* New York courts honor such provisions. *See, e.g.*, *Reiff v. Reiff*, 40 AD3d 346, 347 (1st Dep't 2007) ("Her argument that defendant and his lawyer drafted the stipulation of settlement is unavailing because the stipulation clearly deems the doctrine of contra proferentem inapplicable to its construction.").

[5] "Weitzman Reply Decl." refers to the Declaration of Jay Weitzman, dated April 16, 2021, filed simultaneously herewith.

(2d Cir. 2018) (stating that a sublease "appears to bar any claim for offset" where the sublease provided that "[a]ll amounts payable by Tenant to Landlord hereunder shall be paid by Tenant . . . without any set-off counterclaim, deduction, defense, abatement, suspension, diminution or reduction of any kind or for any reason.").

Moreover, Plaintiffs portray the "As Is" provision as if it were a mere waiver of objections to defects in work performed by Landlord. But that is not true. The "As Is" clause is far broader and provides that, in addition to any issues concerning the quality of material or workmanship on the Property, Ronit made no representation concerning the "premises or any part thereof, either as to their fitness for use, design or condition for any particular use or purpose…" (Lease § 42.) That acknowledgement is not contingent on or related to the completion of work by Landlord. (In any event, Plaintiffs concede that Williamsburg accepted delivery of the premises and began its build-out.) Moreover, lest there be any doubt, a subsequent provision of the Lease likewise provides that "[t]he statement in this Lease of the nature of the business to be conducted by Tenant shall not be deemed to constitute a representation or guaranty by Landlord that such use is lawful or permissible in the Demised Premises under the certificate of occupancy for the building." (Lease § 62(a).) Because risks concerning the property's fitness for any particular use were allocated to Williamsburg Climbing, Plaintiffs cannot now claim that the purported inability to use the Property for a particular purpose absolves them from their lease and guaranty obligations.

With respect to the "No Liability" (Lease § 49) and cost of governmental compliance (*id.* § 44.07) provisions, Plaintiffs claim that such provisions have no bearing on this dispute. Plaintiffs are incorrect; those provisions further evidence the parties' intent to allocate the financial risks, responsibilities and costs associated with complying with unforeseen events to Williamsburg Climbing, not Ronit.

B. Plaintiffs Fail to Cite Any Analogous Caselaw

Since the COVID-19 pandemic began, many courts have rejected defenses of frustration and impossibility asserted by gyms, movie theaters, restaurants and other tenants who have sought abatements—or even more extremely, like Williamsburg Climbing, to terminate their long-term leases—due to the pandemic. While Ronit cites multiple such cases in its moving papers, Plaintiffs have tellingly failed to cite to any case during the pandemic in which a court has disregarded similar contractual lease provisions and sustained defenses of frustration or impossibility. Plaintiffs' failure is unsurprising, as—to Ronit's knowledge—no such case exists.

Plaintiffs repeatedly come back to only one case in support of their defenses—*Jack Kelly Partners LLC v. Zegelstein*, 140 A.D.3d 79, 81 (1st Dep't 2016)—though it is easily distinguishable. As fully set forth in Ronit's brief in opposition to Plaintiffs' motion for summary judgment, *Jack Kelly* involved a landlord who defrauded a tenant into leasing an office space that was zoned only for residential purposes. Indeed, the landlord "advertised and conveyed to the general public that the premises were suitable for commercial use, and ***the executed lease indicated that only such use was permitted***." *Id.* at 83 (emphasis added). Here, Plaintiffs make no claim that Ronit defrauded Williamsburg Climbing, and the Lease provides that Ronit made no representation concerning the Property's fitness for any particular use. *Jack Kelly* is therefore entirely inapplicable.

II. THE LEASE HAS NOT BEEN FRUSTRATED OR RENDERED IMPOSSIBLE

Plaintiffs attempt in opposition to distinguish nearly every case cited by Ronit—involving retailers, gyms, movie theaters, and other tenants that have been impacted by the pandemic—on the grounds that "Williamsburg legally has been unable to operate its BKBX business model at the Premises." (Opp. Br. at pp. 2-3.) Plaintiffs repeat this theme throughout their brief, claiming

that Williamsburg Climbing was not "legally able to operate" (*id.* at 7), the COVID-19 restrictions were "a complete ban" (*id.* at p. 8), and indoor classes were "prohibited." (*Id.* at p. 9.) Plaintiffs specifically assert that Williamsburg Climbing leased the Property to establish "its new, innovative BKBX model" of group classes and that "[b]ecause 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." (*Id.*)

As an initial matter, these arguments are squarely covered and precluded by the Lease's *force majeure* provision, which (as discussed above) requires Williamsburg Climbing to pay rent even in the event of "governmental law or regulations which prevent or substantially interfere with the required performance . . . or other causes not within the control of such party." (Lease § 59.)

Moreover, as fully set forth in Ronit's Opposition Brief—to which Ronit respectfully refers the Court—Plaintiffs' arguments suffer from several other fundamental flaws.

First, Plaintiffs' claim that operating indoor group fitness classes was the purpose of the Lease is directly contrary to the Lease's broad Permitted Uses clause, which makes no mention whatsoever of such classes, "BKBX" or anything similar. In reality, the parties agreed that the Property could be used for a wide variety of permissible uses—including as an indoor climbing facility, for a fitness center, a juice bar, café, lounge, restaurant or bar, lounges, office space, event space, etc.—all of which have been permitted for many months.

Second, it is clear that Plaintiffs cannot terminate the 10-year Lease by referencing the temporary and already-lifted restrictions on group fitness classes (*see* Opp. Br. at n. 1), since (i) nearly half of the Property was to be used for other recreational activities; and (ii) the partially-constructed Property consisted of large areas which were adaptable to many permissible uses.

As such, Plaintiffs' claim has no basis in fact or law.

III. PLAINTIFFS' IRRELEVANT CLAIMS HAVE NO BEARING ON SUMMARY JUDGMENT

In a desperate attempt to avoid summary judgment, Plaintiffs inject several baseless claims that have no bearing on whether Williamsburg Climbing's termination of the Lease was proper.

First, Plaintiffs demonstrate their sheer indifference to the massive damage they caused to Ronit by claiming that in one of Ronit's large payments of construction contributions to Williamsburg Climbing, Ronit erroneously withheld "$4,215.00 of bank fees on the transaction." (Opp. Br. at p. 5.) Plaintiffs seem believe that they are entitled to take $1.2MM in contributions from Ronit, abandon the Lease in the middle of their build-out, leave the Property riddled with over $1.6MM in mechanic's liens, walk away from their 10-years of Lease obligations and, yet, can simultaneously complain about the purported withholding of $4,000 of bank fees. Plaintiffs' position is not only irrelevant to their liability, it is offensive.

Second, Plaintiffs' claim that Ronit and its attorney misled Fifth Concerto into signing an agreement with a rent commencement date eight months after Lease's effective date instead of delivery is absurd. Plaintiffs—sophisticated private equity-backed entities represented by counsel in the transaction—offer nothing to substantiate that false assertion, which, in any event, is irrelevant to this motion. (Weitzman Reply Decl. ¶ 4.)

Third, Plaintiffs urge that "there is an issue of fact as to whether the improvements as a result of Plaintiff's construction . . . would benefit another tenant." (Opp. Br. at p. 5.) But such an issue relates only to potential mitigation of the damages Ronit has suffered; it has no bearing on Plaintiffs' liability. Furthermore, it is unlikely that another tenant will have a use for the vast majority (or any) of the work performed for Plaintiffs' customized build-out. It is far more likely that Ronit will be required to expend additional substantial sums to demolish the existing space and provide a new space for a new tenant. (Weitzman Reply Decl. ¶ 8.)

Fourth, Plaintiffs assert that they entered into a settlement agreement with Resolute in connection with the work it performed on the Property and that, when the settlement amount is paid at some indeterminate time in the future, the liens will be removed. What Plaintiffs do not say, however, is that the liens remain on the Property to this day, Plaintiffs have failed to bond the liens—Ronit was therefore forced to—and Ronit continues to expend legal fees to defend against them. (Weitzman Reply Decl. ¶ 9.) Plaintiffs are clearly liable to Ronit for breaching the Lease's mechanic's lien provisions. (*See* Lease §§ 43.06, 66(c).)

CONCLUSION

For the foregoing reasons, Ronit respectfully requests that this Court grant its motion for an Order: (i) declaring that the lease between Ronit and Williamsburg Climbing has not been frustrated or rendered impossible and, therefore, Williamsburg Climbing did not lawfully terminate the lease; (ii) declaring that the obligations under the guaranty executed by Fifth Concerto have not been extinguished; and (iii) granting Ronit summary judgment on liability.

Dated: New York, New York
April 16, 2021

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