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 SUPPORT OF THEIR 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 support of Plaintiffs' motion, pursuant to Fed. R. Civ. P. 56, for summary judgment discharging the contractual obligations of (1) Williamsburg, under a lease for the property located at 58 North 9th Street, Brooklyn, New York (the "Premises") entered into with Defendant Ronit Realty LLC ("Landlord") effective November 1, 2018 (the "Lease") and (2) Fifth Concerto, which guaranteed Williamsburg's obligations under the Lease. This discharge is sought under the legal doctrines of (1) frustration of purpose and (2) impossibility of performance, on account of the global COVID-19 pandemic and the resulting Executive Orders rendered by Governor Andrew Cuomo. Plaintiffs' goal in leasing the Premises was to develop the space for studio-based instructor led classes of all sizes. However, since the issuance of the Executive Orders beginning in March 2020, Plaintiffs have been unable, are currently unable,

and for the foreseeable future will remain unable, to use the Premises as agreed. The Plaintiffs' assertion of these questions of law are particularly appropriate for a Rule 56 motion.

PRELIMINARY STATEMENT

The COVID-19 pandemic and Governor Cuomo's Executive Orders resulting initially in the mandatory closure of all gyms, the stoppage of all non-essential construction, and the continuing restriction on the number of individuals gathering in close proximity, frustrated Williamsburg's very purpose for renting the Premises. Frustration of purpose refers to an unforeseen event that destroys the underlying reasons for entering into a contract, thus operating to discharge a party's contractual duties of performance. It is undisputed that this once in a century pandemic and the resulting social, professional, and economic upheavals were not and reasonably could not be foreseeable at the time the Lease was entered into in 2018. Therefore, as a matter of law, Williamsburg should be excused from its performance under the Lease. Alternatively, Williamsburg seeks rescission of the Lease based on impossibility of performance. The doctrine of impossibility of performance will excuse performance of a contract if the performance is rendered impossible by intervening governmental activities. COVID-19 and Governor Cuomo's Executive Orders have now made the parties' performance under the Lease impossible. The continued pandemic-related restrictions limiting the number of individuals in close proximity in commercial establishments and, more importantly, the restriction on the operation of group fitness classes, render Williamsburg's use of the Premises impossible. On May 1, 2020, Plaintiffs lawfully terminated the Lease due to the ongoing COVID-19 pandemic and the Executive Orders. Plaintiffs' obligations to Landlord after April 30, 2020 ceased.

The Williamsburg facility was to house a new type of studio exercise facility, the "BKBX" model, which was different from Brooklyn Boulder's other facilities (except one

located in Allston, Massachusetts), which are all Lifestyle (rock-climbing) gyms. The design was based on the specific "BKBX" model developed within the fitness industry's boutique studio niche. Group fitness studio-style rooms are filled with customers, each assigned to an exercise station and each led by a live instructor. This model presumes the ability to convene classes with 12 to 24 people in a small studio setting. The co-mingling of participants is in fact a significant part of the appeal. BKBX was a new, very important business growth project for Fifth Concerto. Williamsburg expended considerable resources designing this unique studio-based, group exercise facility. The Williamsburg facility design included four studios, each with a different studio theme. The design and construction drawings were discussed with and approved by Landlord both before and at the time the Lease was signed, and the parties' subsequent conduct confirmed this understanding.

The ongoing pandemic and governmental restrictions requiring social distancing and prohibition on group fitness completely destroyed Williamsburg's specialized business plan and Premises use. On September 2, 2020, New York City conditioned traditional gym reopenings on social distancing and other preventative measures to lower the occupancy rate. These restrictions remain in full force today as the pandemic continues to rage on. Regardless of traditional gyms being able to operate under the restricts set by the State of New York and New York City, the very purpose of the Lease continues to be frustrated as of the date of this Memorandum of Law because *all indoor group fitness classes in New York City are prohibited*.[1] Group fitness classes are the very foundation of the BKBX model and the reason for leasing the Premises.

Williamsburg's inability to construct and operate its specialized business at the Premises was not foreseeable at the time the Lease was signed. Nowhere does the Lease allocate the risk of a global pandemic and subsequent Executive Orders that effectively prohibited the

1 *Emergency Executive Order No. 144*, The City of New York Office of the Mayor, Aug. 31, 2020.

construction and use of the specialized BKBX facility.

As a matter of law, the doctrines of frustration of purpose and impossibility of performance permitted Williamsburg to terminate the Lease on May 1, 2020. As a result, Fifth Concerto's obligation to guaranty the Lease also was extinguished.

STATEMENT OF FACTS

Negotiations of the Lease

During lease negotiations, Landlord, through discussions with Lance Pinn ("Pinn), Williamsburg's managing member and Fifth Concerto's then-President, was aware that Williamsburg's specialized business model was instructor led studio-based classes. Moreover, Landlord approved the BKBX plans prior to execution of the Lease in November 2018.

Landlord Was Aware of and Agreed to the Special Use BKBX Model

The core business model of Fifth Concerto, doing business as Brooklyn Boulders, has been the design, construction, and operation of rock-climbing gyms in three cities in the United States. These rock-climbing facilities are known as the "BKB Lifestyle." In a traditional rock-climbing gym, the majority of recreational activity occurs in an unstructured environment such that participants, after an initial orientation, are able to rock climb or utilize exercise equipment independently of others without the guidance of an instructor. There are few designated areas where group exercise occurs. These facilities operate much like a typical gym, where social distancing is possible.

However, at this particular location on the East River waterfront with magnificent views of the Manhattan skyline, Fifth Concerto envisioned a completely different business model. The facility was designed to be studio-based classes which is a new concept model referred to as "BKBX". The Williamsburg BKBX facility was designed with four studios, each with a

specialized theme and purpose, and each built for a large group of individuals who exercise together while being led by a specialty trained instructor.

Prior to entering into the Lease, Williamsburg discussed with Landlord that it planned to use the Premises as a BKBX facility, which was a different use than the BKB Lifestyle discussed the previous year. In an e-mail dated October 4, 2018, Mr. Pinn notified Jay Weitzman, one of Defendant's two members, of Fifth Concerto's plans for the Premises to be a BKBX facility dedicated to studio-based fitness classes. Mr. Pinn wrote to Jay Weitzman and Jon Egan, Plaintiffs' insurance broker, that "… Jay [Weitzman] is the Landlord of 87 Kent [Street], the location of BKB's first NYC location of our newest concept www.bkbx.fit (check out the video, $$$$)." In addition, in an e-mail dated October 22, 2018, with the subject line "Kent – BKBX," Mr. Pinn forwarded to Jay Weitzman an e-mail from Chris Ryan, Design Director of Fifth Concerto, that referenced "… a mediocre/minimal bouldering area." Williamsburg put Landlord on notice before the Lease was entered that the rock-climbing space at the facility was to be "minimal" and the Premises primarily was to house a BKBX fitness center for instructor led studio-based classes.

On or about November 30, 2018, Williamsburg entered into the Lease with an effective date of November 1, 2018. Fifth Concerto signed a written guaranty for Williamsburg's obligations under the Lease. The Premises consisted of approximately 30,598 square feet of indoor space located on three adjacent floors, along with approximately 3,108 square feet of outdoor terrace space. The third floor has a unique unobstructed skyline view of Manhattan. The Lease was to expire on October 31, 2028, unless terminated earlier. Williamsburg paid Landlord a security deposit of $400,000.00.

The Relevant Lease Terms

Section 62(b) of the Lease, entitled "Use and Operation of the Demised Premises,"

provides:

> [Williamsburg] shall operate its business in the Demised Premises during the Term and occupy the Demised Premises primarily as an indoor climbing facility, and may also use the Demised Premises for other uses incidental to the primary use, such as for a fitness center or studios, a juice bar, a café, lounge, restaurant, or bar (including the sale of alcohol and food), lounges, general office space in connection with the conduct of [Williamsburg's] business or for co-working, event space (e.g., birthday parties), for the retail sale of merchandise related to [Williamsburg's] primary use and for collaborative office space, and for no other use or purpose whatsoever (the **"Permitted Uses"**), and for no other purpose, [sic] except as otherwise expressly permitted in accordance with, and subject to, the provisions hereof (emphasis added).[2]

Williamsburg was required to obtain Landlord's prior written consent for any "Alteration," defined in the Lease as "an alteration, decoration, installation, improvement, repair, addition or other physical change in, to or about the Real Property made (or to be made) by Tenant." Section 43.05(b) states in pertinent part:

> Promptly after the substantial completion of each Alteration, Tenant, at its sole cost and expense: …
>
> (i) shall have prepared and delivered to Landlord record drawings (or plans marked with "field changes") or "as built" drawings thereof in hard copy/blueprint format and in the electronic format specified by Landlord's architect or such other system or medium as Landlord may reasonably accept, and copies of balancing reports, operating manuals, maintenance logs, warranties and guaranties, sign-offs and inspection reports with respect to the Alterations in question.

Landlord Approved the Ongoing BKBX Design Changes

Landlord needed to approve all of Plaintiffs' construction plans. As building designs for the Premises progressed, the studio elements for the envisioned BKBX use were highlighted for Landlord.

2 It should be noted that the Lease was drafted approximately one year prior to its signing. At the time the Lease was drafted, it was contemplated that the Premises would be used as a BKB Lifestyle facility. However, a decision was made by Fifth Concerto shortly before the Lease was signed to use the Premises for a BKBK, which Landlord approved.

The parties continued working to create a BKBX model after the Lease was entered. On December 17, 2018, Mr. Pinn e-mailed Jay Weitzman and Michael Weitzman informing Landlord that Williamsburg's team was "meeting today to begin training for the 'BKBX' concept staff (which is the concept we're putting into your space)." On April 14, 2019, Mr. Pinn e-mailed the Weitzmans referencing a proposed lease amendment relating to annual base rent, which once again resulted in putting Landlord on notice that Plaintiffs were building a BKBX gym at the Premises. The April 14 e-mail states in pertinent part:

> You'll note that this proposal is not in line with our previous in person meeting (as I mentioned on the phone with Jay earlier this week), but instead is much more aggressive in the immediate rent deferment ask. The reasoning behind this is, we are putting up a BKBX facility in this location and we need to be realistic about the headwinds that we're going to face as we ramp up revenues here since this is a new industry and will require significant consumer education (although we are confident that the BKBX use, as opposed to the BKB Lifestyle use that I had originally sought to place in this location, will eventually generate the highest revenue/ebitda per sqft and will be the most defensible over time as competition creeps in from the climbing gym industry (emphasis added).

Landlord's Continued Approval of a Studio-Based BKBX Facility

Shortly after delivery of the Premises in June 2019, Williamsburg finalized its design plans (which previously were shared with Landlord on multiple occasions), retained Resolute Design + Construction ("Resolute"), obtained the requisite building permits, and began its buildout in or about November 2019.

On August 15, 2019, Mike Stewart, Vice President of Development for Brooklyn Boulders, e-mailed Jay and Michael Weitzman attaching a set of construction drawings and inquiring as to whether Landlord had any questions. The construction drawings, which also were sent to Landlord's architect for comment, explicitly showed that studio rooms for a BKBX facility were to be constructed along with a locker room in the basement of the facility. The plans

stated that they are "ISSUED FOR LL APPROVAL."

Landlord agreed to modify the purpose of the Lease (for a BKBX facility) and acknowledged in writing receipt of the construction drawings. In an e-mail dated August 16, 2019, Michael Weitzman responded to Mr. Stewart stating in relevant part: "Thanks Mike. We'll review and get back to you next week. We amended the NB Application. It was sent awhile back, attached again for your convenience." In addition, Landlord's architect provided comments on the drawings to Plaintiffs. Landlord reviewed and approved the drawings.

On December 23, 2019, branded vinyl windows were erected on the second floor on the North 9th Street side of the Premises, clearly showing Plaintiffs' intent for this to be a group fitness BKBX facility. Landlord approved the installation of the vinyl windows.

COVID-19 and the Government Shut Down

Beginning in March 2020, the COVID-19 pandemic exploded in New York City. On March 7, 2020, as Resolute was in the process of constructing the Premises, Governor Cuomo issued Executive Order 202 declaring a disaster emergency for the entire State of New York as a result of the COVID-19 outbreak. As construction continued into the third week of March 2020, the COVID-19 pandemic was rapidly spreading throughout New York City and the State of New York, with thousands of people becoming infected with COVID-19. As of February 22, 2021, some 1,578,785 New York residents had tested positive for COVID-19, and 37,851 residents had died from the coronavirus.[3]

As a result of the COVID-19 pandemic, Governor Cuomo issued a number of Executive Orders which by March 29, 2020, completely frustrated the very purpose of the Lease and made it impossible for Williamsburg to perform. Pursuant to Executive Order No. 202.3, all gyms,

3 *NYSDOH COVID-19 Tracker*, New York State Department of Health (Feb. 22 11:07 AM) https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-Map?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n.

fitness centers, and classes were ordered to "cease operation effective at 8 pm on March 16, 2020 until further notice." Pursuant to Executive Order No. 202.13, dated March 29, 2020, all non-essential construction, which included construction at the Premises, was ordered to cease.

On May 1, 2020, during a conference call between the parties and Landlord's counsel, Williamsburg informed Landlord and its counsel that in view of the ongoing global pandemic and Governor Cuomo's Executive Orders shutting down all non-essential construction and gyms as well as the impact that social distancing would have on the operation of the BKBX model being constructed at the Premises, Williamsburg was terminating the Lease effective that day pursuant to the doctrine of frustration of purpose. In response, Mitchell Troyetsky (Landlord's attorney) said that the termination was rejected, and that Landlord will "see us in court." On May 5, 2020, pursuant to Paragraph 73 of the Lease, Williamsburg provided Landlord with written notice that Williamsburg terminated the Lease effective May 1, 2020 due to the doctrines of frustration of purpose and impossibility of performance. At the time of the Lease's termination, Williamsburg had paid Landlord $1,256,178.00 in rent and incurred the cost of $2,260,905 for construction. Williamsburg was not able to open and operate its facility for even one day before the purpose of the Lease was frustrated.

The doors of all gyms in New York City were shuttered for more than five and a half months. On September 2, 2020, gyms located in New York City were finally allowed to partially reopen but only at 33% capacity, which included gym staff and patrons.[4] As a condition of reopening, gyms were required to implement various preventative safety measures. Among them, employees and patrons were required to maintain social distancing and wear face

4 *Emergency Executive Order No. 144*, *supra* note 1.

coverings at all times, and air filtration systems had to meet specific standards.[5] Of critical importance, all indoor fitness group classes, defined as "an activity with two or more participants led by either an in-person instructor or a remote or pre-recorded instructor" were prohibited.[6] These restrictions, which continue to this day, preclude Williamsburg from using the Premises as a BKBX facility.

While gyms (other than studio-based fitness facilities) could and did open on September 2, 2020, Williamsburg could not because of the ban on group fitness, the very essence of the BKBX model. Put simply, groups of 12-24 people exercising in a studio room indoors is (1) prohibited by Mayor Bill de Blasio's Emergency Executive Order No. 144 and New York City's Gym and Fitness Center Reopening Guidelines and (2) clearly does not work in today's social distancing world.

ARGUMENT

POINT I

THE PURPOSE FOR USING THE PREMISES HAS BEEN COMPLETELY FRUSTRATED AS A RESULT OF THE ONGOING GLOBAL PANDEMIC AND EXECUTIVE ORDERS

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). As explained in Comment (a) to Restatement §

5 *Reopening New York: Gym and Fitness Center Guidelines*, New York State (Feb. 22, 2021 3:10 PM), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Gyms_and_Fitness_Centers_Summary_Guidelines.pdf

6 *Reopening New York City: What Gyms and Fitness Center Operators Need to Know*, NYC Health (Feb. 16, 2021, 3:27 PM), https://www1.nyc.gov/assets/doh/downloads/pdf/covid/businesses/covid-19-reopening-gyms.pdf.

265, "[t]his Section deals with the problem that arises when a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract." Restatement (Second) of Contract, § 265, Comment (a). Once the purpose of the contract is frustrated, the contractual obligations end as a matter of law. *See Arons v. Charpentier*, 36 A.D.3d 636 (2d Dep't 2007).

Under Section 265, three requirements must be satisfied before a party's obligations under a contract will be discharged. First, the parties' principal purpose in making the agreement must have been frustrated. Second, the frustration must be substantial. Third, the non-occurrence of the frustrating event must have been a basic assumption on which the agreement was made. Restatement (Second) of Contracts, § 265, Comment (a). All three requirements are established here.

The seminal case on frustration of purpose is the English case, *Krell v. Henry*, 2 K.B. 740 (C.A. 1903). Henry rented a room from Krell for the purpose of viewing the coronation procession of King Edward VII. When the King fell ill, the procession did not take place and the coronation was postponed. As a result, Henry refused to pay the accrued rent for the room. Although the contract did not explicitly refer to the coronation, the court inferred that the principal purpose had been frustrated. *Id*. at 754. The court held that both parties were discharged from performance of the contract and that Krell was not entitled to recover damages from Henry. *Id.* at 754-755.

In *Benderson Dev. Co. v. Commenco Corp*., 44 A.D.2d 889 (4th Dep't 1974), *aff'd* 37 N.Y.2d 728 (1975), defendant entered into a twenty-year lease with plaintiff to use the leased premises as a restaurant. The lease terms required that tenant obtain all necessary licenses and permits and then construct the restaurant at the premises. Landlord warranted in the Lease that

the use of the premises (to prepare, sell, and consume food and beverages) was a permitted use under zoning and local laws. The tenant, however, was unable to use the premises as a restaurant until a public sewer was completed. The sewer was not completed for nearly three years after the lease was executed. The court held that since the purpose of the lease – to use the premises as a restaurant – "was defeated, the defendant properly cancelled it under the warranty provision." *Id*. at 889.

In *Jack Kelly Partners LLC v. Zegelstein*, 140 A.D.3d 79 (1st Dep't 2016), *lv dismissed* 28 N.Y.3d (2016), a tenant leased office space. The lease stated that "'[t]enant shall use and occupy the demised premises for general offices of an executive recruiting firm' and 'no other purpose.'" *Id.* at 80. Nine months after the lease was entered, tenant discovered that the building's certificate of occupancy required the leased premises to be used for residential purposes only. *Id*. Three years into the lease tenant commenced an action asserting, *inter alia,* a cause of action for rescission and a declaratory judgment that the lease was invalid. The court held the inability to use the premises as an office constituted a frustration of purpose entitling the tenant to terminate the lease. *Id.* at 85 (citations omitted).

In *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), the City sued a limousine service ("LIALS") seeking recovery of payments allegedly owed under a franchise contract that called for LIALS to transport passengers to and from New York City and its airports. When the contract was entered into, a statute required the City's consent to operate the transportation route. Later, that law was amended, no longer requiring the City's consent. The parties' contract required LIALS to pay the City for its consent to operate the route. On reargument, the Third Department granted LIALS motion for summary judgment dismissing the complaint, holding LIALS' payment

obligations were discharged because the purpose of the contract had been frustrated. The court stated in relevant part:

> The only possible reason for the franchise contract between LIALS and the city was that the city's consent was required by statute before LIALS was entitled to operate on the city streets. Consequently, LIALS entered into a contract with the city to secure such consent, and consideration for LIALS' payments to the city under the contract was the grant by the city to LIALS of a franchise to operate its omnibus route…. [T]he statutory changes have made the contract worthless to LIALS and also made performance of the contract vastly different from what could reasonably have been within the contemplation of the parties when the contract was made. Given these altered circumstances, it is clear that reasonable men would not have made the subject contract, and that the contract has been rendered worthless to LIALS. Therefore, the consideration supporting the contract has failed, and LIALS' performance thereof is excused.

Id. at 999 (citations omitted).

On appeal, the City argued that because LIALS was still operating its omnibus route, the contract required continued payments even though the term of the contract had expired. *City of New York v. Long Island Airports Limousine Serv. Corp.*, 62 N.Y.2d 846 (1984). The Court of Appeals determined the contract's language requiring continued payments only applied when the City's consent was required for LIALS to operate its business. The contract's payment provisions were inapplicable where the City's consent was not required. *Id*. at 848. The court affirmed the Third Department's decision discharging LIALS of its obligation to further pay the City based on frustration of the contract. *Id*.

In *Arons v. Charpentier*, 36 A.D.3d 636 (2d Dep't 2007), an expert witness who testified in an Individuals with Disabilities Education Act ("IDEA") action sued the parents of the subject student for breach of contract. The contract required the parents to seek the recovery of the expert's witness fees in the underlying IDEA lawsuit. *Id.* at 637. The complaint was dismissed

after a nonjury trial. While the appeal of that dismissal was pending, the United States Supreme Court issued a decision in a separate matter voiding the fee-shifting provision in the IDEA, ruling it ["did] not authorize prevailing parents to recover fees for services rendered by experts in IDEA actions." *Id*. (citation omitted). In light of the United States Supreme Court's holding, the court determined the defendants:

> complied with the alleged contract and sought to recover the plaintiff's expert witness fee from the relevant school district in their underlying IDEA action, they would have been unsuccessful. Thus, enforcement of the alleged contract is barred by the doctrine of frustration of purpose, as the ultimate recovery of the fees was "completely the basis of the contract that … without it, the transaction would have made little sense."

Id. The court dismissed the complaint seeking damages for breach of contract.

Here, the purpose of the Lease, to operate a facility with group fitness classes filled with 12-24 customers per studio room, has been completely frustrated. Williamsburg cannot perform as intended because of government restrictions and social distancing rules and regulations that will remain in place for the foreseeable future. Williamsburg therefore properly canceled the Lease as of April 30, 2020, based on frustration of purpose.

POINT II

PERFORMANCE UNDER THE LEASE IS EXCUSED WHERE AN UNFORESEEABLE GLOBAL PANDEMIC AND GOVERNMENTAL ORDERS MAKE SUCH PERFORMANCE OBJECTIVELY IMPOSSIBLE

The doctrine of impossibility of performance excuses a party's contract performance when an unforeseen and unanticipated event makes performance objectively impossible. *See Two Catherine St. Mgt. Co. v. Yam Keung Yeung*, 153 A.D.2d 678 (2d Dep't 1989); *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). COVID-19 and its significant and lasting effects provides such an unforeseen and unanticipated event.

In Two Catherine St. Mgt. Co., landlord sued a commercial tenant to recover damages for breach of a lease. The parties intended for the premises to be used as a restaurant. As a result, the lease called for certain required changes in the premises that had to comply with local rules and regulations. Due to the inactivity of the building department relating to tenant's applications, it became impossible to make the changes to the leased premises. The court ruled that "[s]ince the intended purpose of the lease may have become impossible to effectuate through no fault of the defendant tenant, he may have been entitled to terminate the lease." *Two Catherine St. Mgt. Co.*, 153 A.D.2d at 678 (citations omitted).

In *Kolodin*, a professional singer sued the corporation that managed her career, seeking rescission of certain recording and management contracts. *Kolodin*, 115 A.D.3d at 199. The court granted the singer's motion for partial summary judgment declaring the contracts terminated because of impossibility of performance. The court held that performance of the contracts was "rendered objectively impossible by law" as a result of a stipulation prohibiting the singer and corporation's president from having any contact except through counsel. *Id.* at 200. The court concluded that "in undertaking to perform recording and management contracts, the eventuality that the parties would subsequently stipulate to forbid contact with one another could not have been foreseen or guarded against." *Id*. at 203.

In *Leisure Time Travel, Inc.*, a travel company sued a Catskills resort alleging breach of a contract to use its facilities. Approximately five years into the ten-year term, a fire destroyed the main building of the hotel which prevented the company's annual event from taking place. The resort refused (1) to return the $220,000.00 down payment and (2) after reopening two years

after the fire, to permit plaintiff to hold the events contemplated by the contract for the duration of the contract term (2009-2011). *Leisure Time Travel, Inc.*, 55 Misc.3d at 782. The court granted plaintiff's motion for summary judgment seeking return of its deposit but denied that part of the motion seeking damages for defendant resort's refusal to host the events in years 2009 through 2011. *Id.* The court applied impossibility of performance ruling that

> the contract was rescinded at the time of the fire. Although the condition of impossibility ultimately proved to be temporary, it was of a long duration. Moreover, at the time of the fire, it was unclear whether the hotel would ever be rebuilt. Certainly, it would have been unfair to require plaintiff, whose business model depends on repeat customers, to return after using an alternate location in 2007 and 2008. Thus, there was no mutuality of obligation and the contract was rendered unenforceable.

Id.

In *Moyer*, the plaintiff was the successful bidder for a five-year sanitation contract with defendant City of Little Falls (the "City"). At the time the contract was formed, the rate for dumping at the City's landfill was $1.50 per cubic yard. *Moyer*, 134 Misc.2d at 299. The next year, the New York State Department of Environmental Conservation closed the landfill. From January 1 through November 1, 1986, the only other available landfill increased its rate from $2.50 to $10 per cubic yard. Plaintiff asserted that he should be discharged from his obligations under his contract with the city because of impossibility of performance. Specifically, at issue was whether "such an unforeseeable factor [could] be an excuse for nonperformance and … discharge … plaintiff from his obligations." *Id*. at 300. The court held the subsequent governmental action created a "situation totally outside contemplation of the parties." *Id*. at 301. The court determined the 666% price increase was "'excessive' as a matter of law and future performance by plaintiff [was] excused," based on impossibility of performance. *Id*. at 302.

Here, an unprecedented and unforeseeable global pandemic resulting in governmental

restrictions including social distancing restrictions have rendered Williamsburg's performance impossible. The resulting restrictions were unforeseen at the time the Lease was entered and cannot be attributed to either party. The COVID-19 pandemic has simply made it impossible to operate a BXBK facility premised on instructor led group exercise classes at the Premises. This Court should alternatively rescind the Lease based on the doctrine of impossibility of performance.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgment based on frustration of purpose and impossibility of performance should be granted in its entirety.

Dated: New York, New York
February 23, 2021

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