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 MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS/COUNTERCLAIM-DEFENDANTS WILLIAMSBURG CLIMBING GYM COMPANY LLC AND FIFTH CONCERTO HOLDCO, INC.'S MOTION FOR SUMMARY JUDGMENT

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March 23, 2021

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Defendant/Counterclaim-Plaintiff Ronit Realty LLC ("Ronit") respectfully submits this memorandum of law in opposition to the motion of Plaintiffs/Counterclaim-Defendants Williamsburg Climbing Gym Company LLC ("Williamsburg Climbing") and Fifth Concerto Holdco, Inc. ("Fifth Concerto") for summary judgment.[1]

INTRODUCTION

Williamsburg Climbing asks this Court to bless its abandonment of a ten-year Lease on the grounds that temporary (and now lifted) prohibitions on group fitness classes frustrated the purpose of the Lease. But Williamsburg Climbing does not (because it cannot) explain why the Court should disregard the multiple provisions of the Lease in which the parties expressly allocated the financial risk of governmental regulations and unforeseen events outside the parties' control to Williamsburg Climbing. Courts in this State and Circuit have repeatedly held—including in the context of the COVID-19 pandemic—that similar provisions preclude consideration of the doctrines of frustration of purpose and impossibility.

The substance of Williamsburg Climbing's position fares no better. It offers vague and impermissible parol evidence in a desperate effort to support a manufactured claim that operating group fitness classes was the primary purpose of the Lease, even though the Lease says nothing of the sort, and the broad Permitted Uses clause of the Lease is directly to the contrary. Indeed, the Permitted Uses clause says nothing about group fitness classes and expressly provides that Williamsburg Climbing would be free to utilize the space for a variety of uses, all of which are permitted by government regulations (and have been permitted) for months. Under New York law, this precludes claims of frustration and impossibility.

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[1] Terms not otherwise defined herein shall have the same meanings ascribed to them in Ronit's Memorandum of Law in support of its motion for summary judgment on liability, dated February 23, 2021 ("Def. Br."). Ronit incorporates into this memorandum the statement of facts and arguments set forth therein.

In any event, there can be no question of fact as to whether the Lease was frustrated or rendered impossible due to the now-lifted restrictions on group fitness classes. Though Williamsburg Climbing conveniently fails to make any mention in its papers, the plans it has submitted to the Court demonstrate that approximately half of the Property was to be used for a traditional open-style gym, a "bouldering" area, a café, bar and communal area. And while Williamsburg Climbing misleadingly refers to its expansive fitness spaces as "studios," those unfinished areas are thousands of square feet, were months away from completion, and adaptable to a wide variety of uses expressly permitted under the Lease.

In sum, Williamsburg Climbing has not come close to establishing that the Lease has been totally (or even substantially frustrated), and the Court should therefore deny its instant motion for summary judgment, and should also grant Ronit's motion for summary judgment on liability.

ARGUMENT

I. THE DOCTRINES OF FRUSTRATION OF PURPOSE AND IMPOSSIBILITY DO NOT APPLY

A. Williamsburg Climbing Expressly Assumed the Risk of Unforeseen Exigencies

Williamsburg Climbing's motion must be denied for the simple reason that the doctrines of frustration of purpose and impossibility do not apply where, as here, the contract at issue allocates the risk of unforeseen exigencies to the allegedly frustrated party.

The Court is respectfully referred to Ronit's previously filed motion for summary judgment setting forth a long line of cases where courts in New York and this Circuit have, including in the context of the COVID-19 pandemic, held that the doctrines of frustration of purposes 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* Ronit Br. at 11-21).

As set forth in Ronit's prior brief, given Ronit's substantial up-front investment on behalf of Williamsburg Climbing, the Lease contains at least six different provisions allocating the risk of unforeseen events—even those outside of the parties' control—to Williamsburg Climbing:

(i) A *force majeure* provision that requires Williamsburg Climbing to continue paying rent despite acts of God, causes not within the control of the parties, or governmental law or regulations that substantially interfere with its ability to perform under the Lease. (Lease § 59).

(ii) A requirement that rent is to be paid "without any offset, set-off, counterclaim or deduction whatsoever," which, under New York law, constitutes a waiver of all defenses. (*Id.* § 41).

(iii) A broad "No Liability" clause that explicitly precludes Williamsburg Climbing from avoiding its obligations based upon happenings outside of Ronit's control. (*Id.* § 49).

(iv) A broad "As Is" provision where Williamsburg Climbing "waives any claims or action against Landlord in respect of the condition of the Premises," and concedes that Ronit makes no warranty, representation, or covenant with respect to the fitness of the premises for any particular purpose. (*Id.* § 42).

(v) 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 allocated to Williamsburg Climbing. (*Id.* § 44.07).

(vi) A requirement that Williamsburg Climbing was to procure "All Risk" business interruption or earnings insurance for a period of not less than twelve months to cover extraordinary losses. (*Id.* § 51.02(a)(iv)).

In their totality, the foregoing provisions make clear that the parties specifically allocated to Williamsburg Climbing the financial risk of extraordinary governmental regulations, acts of God, and other unforeseen and extraordinary events outside the parties' control that might impact Williamsburg Climbing's ability to do business and its profitability. The Lease thus precludes further consideration of the common law doctrines of impossibility and frustration of purpose.

B. Williamsburg Climbing's Cases Actually Support Ronit's Motion

In support of its defenses of frustration of purpose and impossibility, Ronit cites to a series of inapposite cases—none arising in the context of the COVID-19 pandemic—where the agreements at issue did ***not*** allocate the risk of events outside the parties' control to the party seeking relief. Indeed, Williamsburg Climbing's cases actually support Ronit, as each court painstakingly reviewed the terms of the parties' agreements in an effort to ascertain their agreed-upon allocation of risk even in the face of extraordinary events and hardship.

First, *Benderson Dev. Co. v. Commenco Corp.*, 44 A.D.2d 889 (4th Dep't 1974), *aff'd,* 37 N.Y.2d 728 (1975) held that a tenant properly cancelled a lease under a "***warranty provision*** . . . intended by the parties as protection for [the lessee] against encountering difficulties with local ordinances." *Id.* (emphasis added). Thus, contrary to the instant matter, the lease at issue in *Benderson* contained ***a warranty provision*** expressly protecting the tenant and allocating the risk of zoning laws ***to the landlord***.

Here, unlike in *Benderson*, Ronit made no warranties concerning the fitness of the Property for any particular use. Just the opposite is true; the Lease's "As Is" clause expressly provides that all risks concerning the use or purpose of the Property are to be borne by Williamsburg Climbing:

> **NEITHER LANDLORD, NOR ANY OF LANDLORD'S AGENTS, HAS MADE OR MAKES, ANY WARRANTY, REPRESENTATION, COVENANT OR PROMISE, EXPRESS OR IMPLIED, IN RESPECT OF TIIE PREMISES OR ANY PART TIIEREOF, EITHER AS TO THEIR FITNESS FOR USE, DESIGN OR CONDIDON FOR ANY PARTICULAR USE OR PURPOSE ORO IHERWISE AS TO THE QUALITY OF THE MATERIAL OR WORKMANSHIP THEREIN, LATENT OR PATENT, IT BEING AGREED THAT ALL SUCH RISKS ARE TO BE BORNE BY TENANT.**

(Lease § 42 (emphasis in original)).

Second, in *Jack Kelly Partners LLC v. Zegelstein*, 140 A.D.3d 79, 81 (1st Dep't 2016), an unscrupulous landlord defrauded a tenant by leasing it office space when, it actuality, the premises was zoned residential. Indeed, the landlord had "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). The First Department looked to the language of the lease, which "specifically stated that use of the space ***as an office*** is 'deemed to be a material inducement to the Landlord to enter into this Lease' and that tenant shall use the space for '***no other purpose***.'" *Id.* at 84 (emphasis added).

Here, unlike in *Jack Kelly Partners*, there is no allegation of fraud in the inducement. Neither Ronit nor the Lease make any representation concerning the fitness of the Property for any particular use. To the contrary, the Lease provides Williamsburg Climbing with a broad array of permitted uses for the Property, all of which it can lawfully conduct.

Third, *City of New York v. Long Island Airports Limousine Services Corp.*, 96 A.D.2d 998, 998 (3d Dep't 1983) involved a license between the City of New York and a bus company to

operate routes. The license became pointless once a change in law permitted such routes to be operated without a licensing fee, with the Third Department holding that "the consideration supporting the contract has failed, and LIALS' performance thereof is excused." *Id.* at 999.

While it affirmed in *Long Island Airports*, the New York Court of Appeals went to great lengths to determine that the parties' agreement "does not address the situation here, where operation of the transportation service without the City's consent became lawful." *New York v. Long Island Airports Limousine Service Corp.*, 62 N.Y.2d 846, 848 (1984). The direct implication of *Long Island Airports* is that the parties' contract could have allocated risk in such a harsh way—but it did not. Thus, the Court of Appeals decision in *Long Island Airports* directly supports Ronit's position that in evaluating defenses of impossibility and frustration—even where the result is harsh—a court is obliged to first determine whether the parties' agreement allocated the risk. In *Long Island Airports*, it had not.

Here, by contrast, and as set forth *supra*, the parties' Lease expressly allocates the financial risk of changes in law to Williamsburg Climbing given Ronit's substantial up-front investment.

Finally, illustrating the extent to which it must go to cite any caselaw applying the doctrine of frustration of purpose, Williamsburg Climbing cites to *Arons v. Charpentier*, 36 A.D.3d 636, 637 (2d Dep't 2007), where an expert witness sued an attorney and two parents who had prevailed in an Individuals with Disabilities Education Act ("IDEA") action. The expert witness alleged that the defendants had breached a contract to seek recovery of the expert's fees from the non-prevailing party. However, due to an intervening decision of the United States Supreme Court holding that fees were unavailable as a matter of law, the parents had no obligation to file a frivolous motion for fees—the actual "ultimate recovery of the fees was 'so completely the basis of the contract that . . . without it, the transaction would have made little sense.'" *See* id. at 637.

Arons arises in a completely different context and bears absolutely no resemblance to the case at bar. Ronit is not asking Williamsburg Climbing to file a frivolous motion, but instead, just simply to pay the overdue rent it promised. The parties expressly contemplated the possibility of business interruptions due to changes in law and agreed that Williamsburg Climbing would have to continue paying rent, which remains perfectly legal.[2]

In sum, Williamsburg Climbing has failed to cite even a single case holding that a court may disregard a clear contractual allocation of financial risk on the basis of the doctrines of frustration of purpose and impossibility, and the law in this State and Circuit are squarely to the contrary. Because Williamsburg Climbing offers no other argument in support of summary judgment, the Court should deny its motion and grant summary judgment to Ronit on liability.

II. THE LEASE HAS NOT BEEN FRUSTRATED OR RENDERED IMPOSSIBLE

Williamsburg Climbing argues that "[t]he ongoing pandemic and governmental restrictions requiring social distancing and prohibition on group fitness completely destroyed Williamsburg's specialized business plan and Premises use[,]" which it claims was "the very purpose of the Lease."

[2] Similarly, every case that Williamsburg Climbing cites in the impossibility context is far afield; none upsets a contractually agreed-upon allocation of financial risk. *See* *Two Catherine St. Mgmt. Co. v. Yam Keung Yeung*, 153 A.D.2d 678, 679 (2d Dep't 1989) merely vacated a four-day default and permitted the defendant to interpose an answer where "***[t]he lease contemplated*** [] certain changes" that "may have become impossible." (Emphasis added). The remaining cases involve contracts that were objectively impossible to perform. *See* *Kolodin v. Valenti*, 115 A.D.3d 197, 201 (1st Dep't 2014) (terminating recording and management contract since the parties entered into a so-ordered stipulation precluding them from having direct contact due to domestic abuse, thereby making contract "for personal services" impossible); *Leisure Time Travel, Inc. v. Villa Roma Resort & Conference Ctr., Inc.*, 55 Misc. 3d 780 (Sup. Ct. Queens Cty. 2017) (ruling against hotel that "incredibly" tried to keep deposit for Passover celebration scheduled after hotel burned down, sought damages for Passover celebrations in next two years when hotel was non-operational, and for subsequent years when hotel finally reopened); *Moyer v. Little Falls*, 134 Misc. 2d 299, 300 (Sup. Ct. Herkimer Cty. 1986) (finding impossibility where costs of performance by individual trash hauler increased by 666% due to state-created monopoly and parties stipulated that "[s]uch a dramatic increase in the cost . . . could not have been foreseen").

Pl. Br. at 3. This argument is barred by the Lease's Permitted Use clause, which is unrebutted, as well as undisputed evidence demonstrating that Williamsburg Climbing can still lawfully utilize the space for the purposes set forth in the Lease.

A. Williamsburg Climbing May Not Offer Parol Evidence to Vary the Purpose of the Lease Set Forth in Its Permitted Use Clause

The Lease's broad Permitted Use clause bars Williamsburg Climbing's manufactured claim that a temporary prohibition on "group fitness classes" – which was lifted on March 22, 2021 (*see* Weitzman Opp. Decl. ¶ 8)[3] – has frustrated the Lease.

The Lease's Permitted Use clause provides that Williamsburg Climbing:

> 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 Tenant's business or for coworking, event space (e.g., birthday parties), for the retail sale of merchandise related to Tenant's primary use and for collaborative office space.

(Lease § 62(b)).

Accordingly, under Section 62 of the Lease, Williamsburg Climbing is permitted to use the Premises for a variety of purposes, *all* of which are currently permitted. Nothing in the Lease indicates that Williamsburg Climbing would be operating the Premises solely, or even primarily, for "group fitness classes," as it now conveniently claims. Other than the brief and singular mention to "studios," there is nothing in the Permitted Use clause that would even remotely suggest as much.

[3] "Weitzman Opp. Decl." refers to the Declaration of Jay Weitzman, dated March 23, 2021, filed simultaneously herewith.

A permitted use clause is significant insofar as it "makes the tenant's intent known to the building owner so that both parties go into the leasehold transaction with their eyes wide open." Williston on Contracts § 77:97. Thus, in rejecting a frustration of purpose defense, the Second Department has held that extrinsic evidence concerning the alleged purpose of a lease is improper parol evidence to the extent offered to narrow the scope of uses. *See* *Colonial Operating Corp. v. Hannan Sales & Service*, 265 A.D. 411 (2d Dep't 1943),

In *Colonial Operating Corp.*, the "lease specif[ied] that the premises were 'to be used and occupied only for a showroom for automobiles and automobile accessories." *Id.* at 412. Following a World War II bar on the sale of ***new*** automobiles, the lessee claimed that the lease had been frustrated because "the parties intended that the demised premises should be used as a showroom where only ***new*** automobiles and automobile accessories could be sold." *Id.* at 413 (emphasis added). The Second Department rejected the lessee's attempt to offer parol evidence to narrow the lease's permitted use clause in a way that would buttress its frustration claim:

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

Id. at 413 (emphasis added).

More recently, in *Lithe Method LLC v. YHD LLC*, No. 650759/2013, 2014 N.Y. Misc. LEXIS 5336 (Sup. Ct. N.Y. Cty. Dec. 3, 2014), a New York court rejected very similar arguments by a high-end gym, where the permitted use clause provided as follows:

> 4.1.1 Tenant ... may use the Premises solely for the following use (the "Permitted Use") and for no other use or purpose: Fitness studio (i.e. yoga, Pilates and aerobics) including the sale of previously prepared foods and beverages for consumption on and off the Premises and for no other purpose. [emphasis original].

Id. at *7.

There, the tenant "intended to use the Premises as a boutique fitness studio for [its] 'innovative and proprietary blend of cardiovascular, aerobic and strength training exercising system, using loud music and specialized equipment such as [its] signature Higher Power Band System® suspended from the ceilings." *Id.* at *1. When it ran into issues with its unique build-out and need for soundproofing, the high-end gym terminated its ten-year lease, claiming that "at the time of contracting, the parties 'understood' that Plaintiff would be able to operate its Lithe Method fitness studio on the Premises, including the installation of the Higher Power Band System®." *Id.* at *10. The court rejected the gym's attempt to impute knowledge of its very specialized intentions to the landlord, noting that the tenant could still "use the Premises as a fitness studio for 'yoga, Pilates, and aerobics' pursuant to Section 4.1 of the Lease Agreement." The Court found that summary judgment was appropriate in favor of the landlord:

> [T]he four corners of the Lease Agreement do not contain any reference to Plaintiffs Higher Power Band System®. Nor does the Lease Agreement mention Plaintiffs proprietary fitness technique as a specific Permitted Use. In light of the Lease Agreement's merger clause, therefore, Tenant's pre-contractual documents are insufficient to raise a triable issue of fact.

Id. at *13-14.

In *South College St., LLC v. Charlotte School of Law*, 2018 NCBC 80 (N.C. Super. Ct. Mecklenburg Cty. 2018), a case where the tenant's primary use was much more obvious, a court rejected the tenant's claim that its commercial lease was frustrated when certain regulatory and governmental actions rendered it unable to operate a law school, which the tenant claimed was an implied condition of the lease. The Court disagreed, reasoning, *inter alia*, that the Lease allowed tenant to use the property for many uses, only one of which was for an educational institution:

> The Lease, however, expressly contemplates use of the Premises other than as an educational institution. The Lease provides that [tenant] "shall use the Premises only for the Permitted Use." (Lease § 7.1.) The Lease defines "Permitted Use" as an "[e]ducational institution," "general office space," "uses ancillary to its

> business," and "other legally permitted uses" consistent with the operation of first class office space. (Lease § 1.13.).

Id. at 27.

The court in *Charlotte School of Law* held that "the express language of the Lease does not support [tenant]'s position that there is an implied condition in the Lease that [tenant] be able to operate a law school on the Premises and that [tenant]'s inability to do so should excuse performance." *Id.*

The same is true here. Williamsburg Climbing quotes from the Permitted Use clause in its brief, yet fails to address how, given the array of permissible uses, the Lease has been frustrated or rendered impossible.

Accordingly, the Court should reject Williamsburg Climbing's claims regarding the purported purpose of the Lease as a matter of law and without resort to parol evidence, as such claims are contrary to the Lease's plain terms.

B. Williamsburg Climbing's Parol Evidence Does Not Create an Issue of Fact Concerning the Purpose of the Lease

Even were this Court were to look beyond the four corners of the Lease, Williamsburg Climbing comes nowhere close to creating a genuine issue of fact that the operation of group fitness classes was the principal purpose and basic assumption of ***both parties*** in contracting.

For the doctrine of frustration of purpose to apply, "the purpose that is frustrated must have been a principal purpose of that party in making the contract. The object must be so completely the basis of the contract that, ***as both parties understand***, without it the transaction would make little sense." *Gander Mt. Co. v. Islip U-Slip LLC*, 923 F. Supp. 2d 351, 359 (N.D.N.Y. Feb. 11, 2013) (emphasis added) (quoting Restatement (Second) of Contracts 265 cmt. a).

There is perhaps no better example of this principle than the seminal case cited by Williamsburg Climbing, *Krell v. Henry*, 2 K.B. 740 (C.A. 1903), dealing with the rental of a room overlooking the route of a cancelled coronation procession. As stated therein: "The price agreed to be paid must be regarded: it is equivalent to many thousands a year. What explanation can be given of that, except that it was agreed to be paid for the purpose of enabling the defendant to see the procession? ***It was the absolute assumption of both parties when entering into the contract that the procession would pass***." *Id.* at 745-46 (emphasis added).

The logic of *Krell v. Henry* does not apply where a landlord simply rents office, retail, or a gym space at standard market rates and has no particular concern regarding the nature of business to be conducted therein. In a recent pandemic-related matter, a plaintiff claimed that the pandemic impacted its unique office business. The New York court rejected this argument: "[A] reduction in potential revenue is not the same as completely frustrating the purpose of the contract. After all, the contract was to lease an office space and the Tenant chose to run a particular business. It is not the landlord's concern how the Tenant tried to turn a profit from the premises." *MEPT 757 Third Ave. LLC v. Grant*, 2021 NY Slip Op 30592[U], *4-5 (Sup. Ct. N.Y. Cty. 2021); *see also ITS Soho LLC v. 598 Broadway Realty Assoc. Inc.*, 2020 NY Slip Op 34300[U], *4-5 (Sup. Ct. N.Y. Cty. 2020) ("[P]laintiff intended to build out the space so that it could become a gym. In other words, ***the lease was for a commercial space and defendant delivered the space***. That plaintiff's preferred use of the premises might not be profitable for a few months is not a basis for this Court to intervene and rip up the contract.") (emphasis added).

As set forth *supra*, had the unique operation of group fitness classes truly been the principal purpose of the parties in contracting, then it surely would have been mentioned in the sixty-six

(66) page Lease. It was not.[4] As set forth in the accompanying Declaration of Jay Weitzman, Ronit's concern was instead in delivering a space that would fit Williamsburg Climbing's plans for a multi-purpose facility. Like the landlord in *Lithe Method*, Ronit had no special interest in the programmatics of the latest fitness fads to be implemented therein. (Weitzman Opp. Decl. ¶ 6).

Desperately trying to create an issue of fact, Williamsburg Climbing submits a self-serving Declaration and a handful of emails that it claims put Ronit on notice that the principal purpose of the Lease was to operate group fitness classes. However, these emails merely demonstrate several references to the "BKBX concept," whatever that means. (Pinn Decl. Exs. A, D, E).[5] These after-the-fact emails simply cannot transform the purpose of the Lease.

Williamsburg Climbing also submits its build-out plans for its facility (which was never completed) in an attempt to misleadingly suggest that the facility consists of small "studios" only useful for group fitness classes. (Pinn Decl. Ex. F). Williamsburg Climbing is apparently hoping that no one will actually look at these plans. Indeed, it does not take an architect to see that these plans depict a traditional gym with large open spaces. To the extent Williamsburg Climbing refers to "studios," this is a misnomer since the space consists of large open spaces similar to what one would find at most New York City gyms. (Weitzman Opp. Decl. ¶¶ 9, 12, Exs. C-G). Here, the large spaces are adaptable to the multitude of Permitted Uses set forth in the Lease. (*Id.*)

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[4] Indeed, it bears noting that *Krell v. Henry*, 2 K.B. 740 (C.A. 1903), involved the exchange of several paragraphs of correspondence that could fit onto a single page, which supported a conclusion that not every assumption of the parties was included therein. The logic of *Krell v. Henry*, regarding the rental of a room, simply does not apply with equal force to a lengthy modern, extensively negotiated long-term lease wherein the parties include representations, warranties, and *force majeure* clauses extensively spelling out their assumptions and responsibilities.

[5] "Pinn Decl." refers to the Declaration of Lance Pinn, dated February 23, 2021, filed by Plaintiffs in support of their motion for summary judgment.

In sum, even were this Court to consider Williamsburg Climbing's improper parol evidence—it should not—the evidence does not suffice to create triable issues of fact as to the parties' basic assumptions in contracting, which is set forth in the clear language of the Lease.

C. The Purposes of the Lease Have Not Been Frustrated or Rendered Impossible

Williamsburg Climbing also comes nowhere close to demonstrating that the Lease has been totally or substantially frustrated.

As an initial matter, it bears noting that since the outset of the pandemic, virtually every assertion of frustration or impossibility by a commercial tenant in New York City has failed. *See Gap Inc. v. Ponte Gadea N.Y. L.L.C.*, No. 20 CV 4541-LTS-KHP, 2021 U.S. Dist. LEXIS 42694, at *23 (S.D.N.Y. Mar. 8, 2021) (collecting cases).

This includes cases involving gyms. See *ITS Soho LLC v. 598 Broadway Realty Assoc. Inc.*, 2020 NY Slip Op 34300[U] (Sup. Ct. N.Y. Cty. 2020); *Cab Bedford LLC v. Equinox Bedford Ave, Inc.*, 2020 NY Slip Op 34296[U], *3-5 (Sup. Ct. N.Y. Cty. 2020) ("There is no doubt that defendants would not have entered into the lease if they knew there would be a pandemic that would shut down gyms for most of 2020. But that is not sufficient to invoke the frustration of purpose doctrine. . . . A gym being forced to shut down for a few months does not invalidate obligations in a fifteen-year lease.").

Landlords have prevailed in these cases because for the doctrines of frustration or impossibility to apply, "[t]he frustration must be total or nearly total – in more modern terminology the principal purpose of the promisor (the one seeking to use to the defense) must be either totally or substantially frustrated." *Noble Am. Corp. v. CIT Group/Equip. Fin., Inc.*, 2009 NY Slip Op 33315(U), at *5 (Sup. Ct. N.Y. Cty. Dec. 8, 2009) (quoting Calamari and Perillo on Contracts § 13.12 (5th ed. 2003)).

Robitzek Investing. Co. v. Colonial Beacon Oil Co., 265 A.D. 749, 751 (1st Dep't 1943) is illustrative. There, a gas station claimed that its lease was frustrated by wartime measures that limited it to twelve-hour days and prohibited the sale of rubber tires, casings, and tubes. *Id.* at 751-53. The First Department rejected the frustration defense, explaining: "Here there is not complete frustration. Defendant could have continued to operate the gasoline station at the demised premises within the terms of the lease though the volume of its business might have suffered substantial diminution because of the Federal regulatory measures." *Id.*; *see also* *Dr. Smood N.Y. LLC v. Orchard Houston, LLC*, No. 652812/2020, 2020 N.Y. Misc. LEXIS 10087, at *6 (Sup. Ct. N.Y. Cty. Nov. 2, 2020) (restaurant lease not frustrated due to pandemic-related closure orders since "the premises remain open for both counter service and pickup of orders submitted online").

At the time Williamsburg Climbing abandoned the Property in May 2020, the space consisted of large, unfinished, open spaces that could be used in any of the ways set forth in the Lease's broad Permitted Use clause. *See, e.g.*, *Byrnes v. Balcom*, 265 A.D. 268, 270 (3d Dep't 1942) ("Undoubtedly the lease contemplated the sale of new cars on the premises but the lessee is not restricted to the exclusive sale of such cars but may devote the property to other legal uses specified in the lease.").[6]

[6] *See* Restatement (Second) of Property: Landlord and Tenant 9.3 cmt. b ("If the tenant is free to turn to other uses of the leased property when the use intended by the parties is undermined by governmental action, the use intended by the parties will not be frustrated because the finding of extreme hardship on the tenant by what has occurred could not be made. Only when the tenant does not have this freedom, which may be because the lease does not permit other uses or because the governmental action is so pervasive that the same obstacles would be encountered if other available uses of the leased property were made, is it possible for a determination to be made that the use of the leased property intended by the parties is frustrated."); 49 Am. Jur. 2d Landlord & Tenant § 531, at 442-43 (1995) ("[A] valid police regulation which forbids the use of rented property for certain purposes, but leaves the tenant free to devote the property to other legal uses not forbidden or restricted by the terms of the lease, does not invalidate the lease or affect the rights and liabilities of the parties to the lease. And, even though the lease by its terms restricts the tenant's use of the premises to certain specified purposes, but not to a single purpose, the prevailing

Given the temporary (but now lifted) restrictions on "group fitness classes," Williamsburg Climbing would have this Court believe that the space was to be devoted wholly to such use, but this is merely a convenient litigation tactic. Williamsburg Climbing conveniently omits from its papers that nearly half the premises was dedicated to operating a traditional fitness center (with treadmills, ellipticals, spin bikes, and a weight training area), a "bouldering area" in which its patrons would climb walls, two large outdoor terrace spaces, which could be used for any permitted activities, a café and bar, and communal space. (*See* Weitzman Opp. Decl. ¶ 9, 12, Exs. C-G; Pinn Decl. Ex. F). The Brooklyn Boulders website actually touts that, unlike "many studios" where "you can only work out when there's a class that fits your schedule[,] [o]ur gym gives you the flexibility to get after it before class, after class, on Sunday nights, whenever!" (*Id.* ¶ 10, Ex. A). The website further states that the space was to include a "recovery studio" which included, among other amenities, "cryotherapy," an "infrared sauna," and "treatment tables + chairs." (*Id.*) A standing sign that Williamsburg Climbing left behind in the space prior to abandoning the Property advertised that the space would contain, among other things, an "open gym," a "community space," a "recovery space," a "café" and "so much more!" (*Id.* ¶ 11, Ex. B).

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view is that the subsequent enactment of the legislation prohibiting the use of the premises for one, or less than all, of the several purposes specified does not invalidate the lease or justify the tenant in abandoning the property, even though the legislation may render its use less valuable. If there is a serviceable use for which the property is still available consistent with the limitations of the demise, the tenant is not in a position to assert that it is totally deprived of the benefit of the tenancy."'); Andrew A. Schwartz, *A "Standard Clause Analysis" of the Frustration Doctrine and Material Adverse Change Clause*, 57 UCLA L. Rev. 789, 807 (Feb. 2010) ("Prohibition-era cases involving saloon leases illustrate the rule. If the terms of the lease required that the premises be used solely for serving alcohol, the tenant was generally excused from the lease because the value of the lease was totally destroyed by Prohibition. But if the lease permitted other uses unaffected by Prohibition - the sale of cigars, for instance - the tenant was held to the lease because the change in the law merely decimated, but did not destroy, the value of the lease. Thus the frustration doctrine only provides relief if the destruction in contract value is total or near-total.").

In sum, given the plethora of uses that Brooklyn Boulders intended for the Property—all of which are currently permissible under the Lease and New York law—the Lease has not been completely frustrated or rendered impossible. The Court should, therefore, deny Williamsburg Climbing's motion for summary judgment and grant summary judgment in favor of Ronit.

CONCLUSION

For the foregoing reasons, Ronit respectfully requests that this Court deny Plaintiffs/Counterclaim-Defendants' motion for summary judgment, and should also grant Ronit's motion for summary judgment on liability.

Dated: New York, New York
March 23, 2021

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