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' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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PLAINTIFFS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

PRELIMINARY STATEMENT

Plaintiffs submit this memorandum of law in reply to Ronit's opposition to Plaintiffs' motion for summary judgment on their claims for frustration of purpose and impossibility of performance.[1] In its opposition, Ronit continues to ignore the specific issues and limited facts and legal points involved in Plaintiffs' frustration and impossibility claims. Ronit still tries to wedge Plaintiffs' claims into the legion of ordinary lease complaints that have been made and largely rejected in the days of COVID (Ronit Memo at 14-17). They are not. Instead, Plaintiffs' arguments here succeed as a matter of law because (1) Ronit agreed that Plaintiffs would exclusively use the Premises for its new studio-based BKBX facility, (2) the restrictions implemented to combat the unforeseen and unforeseeable pandemic prevented at the time Plaintiffs invoked these doctrines (and continue to prevent) Plaintiffs' use of the Premises as a

[1] Plaintiffs incorporate the statements of facts and arguments contained in their previous submissions to the Court. The definitions from the previous submissions are used herein.

studio-based BKBX exercise facility, and (3) nothing in the Lease or the parties' relationship precludes the application of these doctrines to the unique situation presented here.

ARGUMENT

POINT I

THE PARTIES AGREED THAT THE PREMISES WAS TO BE USED AS A STUDIO-BASED BKBX EXERCISE FACILITY

Ronit's new argument is that Plaintiffs' motion should be denied because it seeks to introduce "parol evidence" to alter the terms of the Lease (Ronit Memo at 8-14).[2] That is not the case. Plaintiffs are merely following the parties' intent--that Plaintiffs would use the Premises as a studio-based BKBX fitness center. In doing so, Plaintiffs rely on long-settled New York law which holds that the parties' subsequent conduct can amend a lease's provisions, even where, as here, the lease contains a no waiver clause. *See* e.g.. *Ray & Cut, Inc. v. 240 W 37 LLC,* 2008 WL 5448997 *3 (Sup. Ct. New York Co. December 22, 2008) (holding "[c]ontrary to defendant's assertion, neither the parol evidence rule nor the statute of frauds precludes plaintiff from relying on an oral modification to the lease."); *Dice v. Inwood Hills Condominium*, 237 A.D.2d 403, 404 (2d Dep't 1997) ("the existence of a nonwaiver clause does not in itself preclude waiver of a contract clause.")

The evidence reveals that after the Lease was executed in November 2018, the parties worked together to plan and begin to construct a studio-based BKBX exercise facility at the Premises. This type of facility was a major new expansion of the Brooklyn Boulders brand. The Premises was chosen for this type of facility in part because of its spectacular waterfront

[2] Apparently realizing the weakness of its position, Ronit begins its opposition brief by regurgitating the arguments it made in its opening brief supporting its motion for summary judgment (Ronit Memo at 2-4). Plaintiffs fully addressed these arguments in their opposition brief and will not do so again here.

Manhattan views. This was not surprising as the Lease provides (contrary to Ronit's representation) that a use for the Premises includes fitness "studios."

Ronit's assertion that it did not know about BKBX is not credible and is flatly contradicted by the evidence. Prior to the Lease's execution, Williamsburg specifically advised Ronit that it planned to use the Premises as a new studio-based BKBX facility. Mr. Pinn advised Mr. Weitzman of Williamsburg's intention in an October 4, 2018 e-mail. (*See* Pinn Dec. Exhibit A). The parties subsequently worked together to plan constructing this new facility. In a December 17, 2018 e-mail, Mr. Pinn advised Ronit that the Williamsburg team was "meeting today to begin training for the 'BKBX' concept staff (which is the concept we're putting into your space)." (*See* Pinn Dec. Exhibit D).

On April 14, 2019, Williamsburg again e-mailed Weitzman about the BKBX facility and the expectation it would bring in significant revenues (*See* Pinn Dec. Exhibit E). Subsequently, in late 2019 and early 2020, Williamsburg sought Ronit's permission for the signage to use at the Premises which announced the BKBX facility. Ronit's own exhibits reflect a sign trumpeting "4 Boutique Style Studios." (*See* Weitzman Dec. Exhibit B). Ronit's papers also include a copy of a website for the BKBX facility which promotes studio-based (1) "60-minute circuit classes" and (2) "60 minute classes… Yoga, pilates, and other focus and movement based workouts." (*See* Weitzman Dec. Exhibit A).

New York law is clear that parties to an executed lease, by their words or conduct, can modify terms of the lease. For instance, in *TSS-Seedman's Inc. v. Elota Reality Co*., 72 N.Y.2d 1024, 1027 (1988), the New York Court of Appeals held that the landlord's conduct (accepting late rent payments) constituted a waiver of the default provision in the lease – despite the presence of a non-waiver clause in the lease. *See also, Franpearl, LLC v. Orenstein*, 59 Misc.3d

130(A) (1st Dep't 2018) (parties to lease modified its terms by mutual conduct, despite the non-waiver clause in the lease); *Schneider v. Greenberg*, 146 N.Y.S.2d 636 (Mun. Ct., Bronx Co. 1955) (holding that landlord's conduct in failing to object to tenant's use of the Premises as a residence, as opposed to a dental office as required in the lease, constituted a waiver of that lease term); *Sol Apfel, Inc. v. Kocher*, 61 N.Y.S.2d 508 (Sup. Ct. New York Co. 1946) (landlord's observation that tenant was using the leasehold to conduct manufacturing, and not objecting to such use, constituted waiver of landlord's subsequent ability to object).

Ronit argues that the use of the Premises was not limited to a studio-based BKBX group exercise facility. But Ronit's conduct by (1) working with Williamsburg to plan and construct such a studio-based BKBX facility and (2) failing to object to Williamsburg's stated intent to use the Premises exclusively as a studio-based facility, preclude Ronit from now arguing the Premises was to be used for some other purpose. Ronit's own conduct has waived its objection to Williamsburg's position.

POINT II

ALTERNATIVELY, THERE EXISTS A QUESTION OF FACT ABOUT THE USE OF THE PREMISES

Should the Court determine Plaintiffs have not established as a matter of law that the parties had agreed the Premises was to be used solely as a studio-based BKBX facility, the Court should deny both parties' motions for summary judgment and order the parties to conduct discovery on the issue. *See, Dice*, supra, 237 A.D.2d at 404 (finding a question of fact existed whether landlord waived a "no pets" lease provision); *Pantote Big Alpha Foods, Inc. v. Schefman*, 121 A.D.2d 295, 296 (1st Dep't 1986) (triable issue of fact existed whether landlord had, by words or conduct, agreed to permit the premises to be used by a commercial artist).

POINT III

UNDER THE DOCTRINES OF FRUSTRATION OF PURPOSE OR IMPOSSIBILITY OF PERFORMANCE, THE LEASE WAS CANCELED AT THE TIME THE LEASE WAS FRUSTRATED OR BECAME IMPOSSIBLE TO PERFORM

Under the doctrine of frustration of purpose, once the event causes the frustration to occur, the lease is canceled because it is unable to be performed. Here, after the pandemic made clear that the Premises could not be used for the specialized BKBX facility, Plaintiffs gave notice of frustration of purpose and terminated the Lease on May 1, 2020. Plaintiffs terminated the Lease at a time when there can be no question that there was a frustration of purpose or impossibility of performance. Those restrictions continued for one year and in fact continue to this day (i.e., groups of tightly packed exercise participants with a live instructor still are not permitted in the COVID – partial vaccine phase in which we are presently living).

Ronit suggests that it would be easy for Williamsburg to now turn the Premises into a different type of exercise facility. It is not. The Premises is not adaptable to a wide variety of uses. Plaintiffs' business, operating under the name Brooklyn Boulders, maintains only two types of facilities: the traditional rock-climbing Lifestyle gym and the new BKBX model for group exercise. Plaintiffs initially planned to install a Lifestyle rock-climbing gym at the Premises. However, because of the relatively low ceilings, it was determined that the Premises could not be used for a rock-climbing gym. Plaintiffs decided instead to use the Premises for a BKBX facility. With its magnificent waterfront Manhattan views, the Premises provided a perfect setting to install Plaintiffs' new concept studio-based BKBX exercise facility.

Once the decision was made, Plaintiffs commenced preparing the drawings and construction blueprints to build a BKBX facility. The two different types of exercise facilities used in Plaintiffs' business, (1) Lifestyle rock-climbing and (2) studio-based group exercise, are

completely distinct. Ronit has conceded as such. In fact, Ronit's own architect reviewed, made changes to, and signed off on Plaintiffs' building plans for the BKBX facility (*See* Response to Plaintiffs' Rule 56.1 Statement, ¶ 46).

Once the decision was made and the plans were being drawn up, it was impossible to turn the facility into a rock-climbing gym (putting aside the low ceilings). The two types of facilities are as distinct as a McDonald's fast-food restaurant and Peter Luger Steak House. Once the plans were made and materials purchased for a BKBX facility, changing its use and installing a Lifestyle rock-climbing gym was not possible.

To date, the pandemic-forced restrictions have continued to frustrate Williamsburg's purpose of establishing and running the BKBX facility. It has now been over one year of continuous frustration. The frustration is of a substantial period of time justifying the cancellation of the Lease. *See Gardiner Properties v. Samuel Leider & Son*, 279 A.D. 470, 471-72 (1st Dep't 1952) (noting frustration of purpose would be found where government order prohibited construction of theatres for an unclear period of time when tenant intended to build a theatre and had a 99-year lease).

Therefore, those cases where a court has held that the COVID restrictions were only temporary and therefore not sufficient to support complete frustration do not apply to this case. *See BKNY1, Inc. v. 132 Capulet Holdings*, LLC, 2020 WL 5745631 (Sup. Ct., Kings Co.) (temporary closure of business for two months was insufficient to constitute complete frustration or impossibility).

For the same reasons, because the events rendering the contract impossible to perform are now over one year old, the impossibility is sufficiently long to support Plaintiffs invoking impossibility of performance and causing the discharge of the parties' obligations under the

Lease. *See Leisure Time Travel, Inc. v. Villa Roma Resort and Conference Center, Inc.*, 55 Misc.3d 780, 783 (Sup. Ct. Queens Co. 2017) (although the impossibility was only temporary, it was of a sufficiently substantial duration to support the discharge of the parties' obligations under the contract).[3]

CONCLUSION

Based on the foregoing and on Plaintiffs' prior submissions, the Court should grant Plaintiffs' motion for summary judgment on the grounds of frustration of purpose or impossibility of performance.

Dated: New York, New York
April 16, 2021

Respectfully Submitted,

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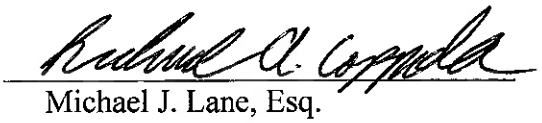
By: 

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[3] The cases Ronit cites in its opposition are distinguishable. *See Lithe Method, LLC v. YHD 18 LLC*, 650759/2013 (Sup Ct. New York Co. December 3, 2014) (no discussion of frustration or impossibility and merger clause present); *Mept 757 Third Avenue LLC v. Grant*, No. 653267/2020, 2021 WL 781321 (Sup. Ct. New York Co. March 1, 2021) (lease was not completely frustrated as the floors in a commercial office building were in fact open through 2020); *The Gap Inc v. Pointe Gadea New York LLC*, No. CV 4541-LTS-KHP, 2021 WL 861121 (S.D.N.Y. March 8, 2021) (stores remained open for some business); *Soho LLC v. 598 Broadway Realty Associates Inc.*, No. 653648/2020, 2020 WL 7629588 (Sup. Ct. New York Co. December 22, 2020) (lease at issue was entered into after the pandemic began); *CAB Bedford LLC v. Equinox Bedford Ave, Inc.*, No. 652535/2020, 2020 WL 7629593 (Sup. Ct., New York Co. December 22, 2020) (subject gym was not a specialized studio-based group fitness facility); *Byrnes v. Balcom*, 265 A.D. 268 (3d Dep't 1942) (government orders at issue did not result in a complete ban of tenant's business).