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STATE OF ILLINOIS)
) SS:
COUNTY OF DU PAGE)

IN THE CIRCUIT COURT OF THE 18TH JUDICIAL CIRCUIT
DU PAGE COUNTY, ILLINOIS

BRIXMOR SPE 5, LLC, a)
Delaware limited)
liability company and)
BRE RETAIL RESIDUAL)
OWNER 3, LLC, a Delaware)
limited liability) No. 2021 L 103
company,)
)
Plaintiffs,)
)
-vs-)
)
FITNESS INTERNATIONAL,)
LLC, a California)
limited liability)
company,)
)
Defendant.)

REPORT OF VIDEOCONFERENCE PROCEEDINGS had and
testimony taken at the hearing of the above-entitled
cause, before the **HONORABLE BRYAN S. CHAPMAN**, Judge of
said court, recorded on the DuPage County
Computer-Based Digital Recording System, DuPage County,
Illinois, and transcribed by TARA N. KOMPERDA,
Certified Shorthand Official Court Reporter, commencing
on the 6th day of July A.D., 2021.

1 PRESENT:

2

 BARACK FERRAZZANO KIRSCHBAUM NAGELBERG LLP, by:
3 **MR. ROGER H. STETSON**

 appeared on behalf of the Plaintiff;

4

 SCHOENBERG FINKEL BEEDERMAN BELL GLAZER LLC, by:
5 **MR. WILLIAM R. KLEIN,**

 appeared on behalf of the Defendant.

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21 The Court has -- I'm going to rule today, and
22 what I'd like to do is read a ruling into the record.
23 Okay. So if the parties are ready, what I'd like to
24 first do is address the applicability of the

1 force majeure provision.

2 The force majeure clause -- let me just say
3 this -- I'm going to address the force majeure clause.
4 I'm then going to address the affirmative defenses and
5 the counterclaims one-by-one.

6 The force majeure clause specifically
7 states -- and actually, let me back up one more time.
8 This is a 2-615 motion. The motion challenges the
9 legal sufficiency of the complaint on the basis of
10 defects appearing on its face. In ruling on such a
11 motion, only those facts apparent from the face of the
12 pleadings, matters of which the Court can take judicial
13 notice, and judicial admissions in the record may be
14 considered.

15 Affirmative matters such as affidavits or
16 depositions are not considered. The Court reviews the
17 allegations of the complaint in the light most
18 favorable to the plaintiff to determine if they are
19 sufficient to establish a cause of action upon which
20 relief may be granted. In this case, it's
21 counter-plaintiff and their counterclaim. The Court
22 will consider all facts apparent from the face of the
23 pleadings, including the exhibits attached thereto.

24 Turning to the force majeure clause in the

1 policy -- in the contract, I should say, the
2 force majeure clause specifically states, in
3 Section 22.3, that a failure to perform resulting from
4 the lack of funds or which may be cured by the payment
5 of money "shall not be force majeure events."

6 Fitness maintains that it is claiming neither
7 the lack of money nor the financial inability as its
8 reason for being excused from paying rent. Instead,
9 Fitness argues that the government closure orders make
10 it illegal to use the premises, which constituted the
11 force majeure event, excusing its obligation.

12 But its obligation at issue here is the
13 payment of rent. The failure to perform the payment of
14 rent can be cured by the payment of money. As a
15 result, the force majeure clause does not apply to
16 tenants' obligation to pay rent.

17 Whether the pandemic itself or the governor's
18 orders constitute force majeure events is not
19 determinative of this issue because the force majeure
20 clause does not apply to failures to perform that can
21 be cured by the payment of money, i.e., Fitness's
22 payment of rent.

23 Turning specifically to the affirmative
24 defenses. Breach of lease, Affirmative Defense

1 Number 1. Counter-plaintiff's first affirmative
2 defense fails to plead facts as to how landlord
3 interfered with Fitness's quiet enjoyment of the
4 premises. Further, the lease cannot be read to contain
5 an obligation for the landlord here to ensure that the
6 government does not establish regulations prohibiting
7 the operation of Fitness's business.

8 See *Spela Fitness*, 2020 Westlaw 8116171.

9 So the Court will strike the first
10 affirmative defense.

11 Second affirmative defense, force majeure,
12 Number 2, for the reasons already stated, the Court
13 dismisses or strikes Fitness's second affirmative
14 defense based on the force majeure clause within the
15 lease agreement. It does not apply to the failure to
16 pay rent.

17 Affirmative Defenses 4, 5 and 6, for
18 frustration of purpose, impossibility, and
19 impracticality. For frustration of purpose to apply,
20 the frustrating event must not be reasonably
21 foreseeable. Thus foreseeability is key. Here, the
22 issue of foreseeability is a question of law and the
23 Court finds neither the pandemic itself nor the
24 government mandated shutdowns were unforeseeable when

1 the parties entered into the lease. The lease itself
2 contemplates restrictive laws and pursuant to *Phelps v.*
3 *School District No. 109*, 302 IL 193 (1922), a pandemic
4 is not so unforeseeable as to excuse contractual
5 obligations.

6 With respect to impossibility or
7 impracticability, an affirmative defense of
8 impossibility should be narrowly applied due in part to
9 judicial recognition that the purpose of contract law
10 is to allocate risks that might affect performance and
11 performance should be excused only in extreme
12 circumstances.

13 First, tenant was required to purchase an
14 all risk property policy and the lease specifically
15 contemplates the business income and extra expense
16 coverage, suggesting that allocation of risk for
17 purposes of impossibility or impracticability
18 affirmative defenses was placed squarely on the tenant,
19 Fitness.

20 Second, and moreover, under the objectively
21 impossible standard, Fitness has failed to plead or
22 establish that rent payment was objectively impossible.

23 Failure of consideration. This is
24 Affirmative Defense Number 3. Failure of consideration

1 occurs when anticipated consideration in a transaction
2 is never tendered.

3 First, for the reasons stated above, there
4 was no breach of the landlord's quiet enjoyment
5 coverage.

6 Second, tenant remained in possession of the
7 premises at all times, houses its equipment at the
8 premises, and has not abandoned nor been evicted from
9 the premises.

10 As a result, the Court will strike the
11 failure of consideration and the Court finds that there
12 is no failure of consideration, or to the extent there
13 is, nothing sufficient that would somehow mitigate
14 obligations or negate obligations under the contract.

15 Affirmative Defense Number 7, casualty event,
16 the government shutdown orders and the pandemic itself
17 do not constitute "damage and destruction to the
18 premises, pursuant to Section 15.4 of the lease, which
19 is contained in the lease within a section focused on
20 "fire and other casualty" suggesting physical damage to
21 property, which is not what Fitness alleges here.

22 Affirmative Defense Number 8, setoff, here at
23 least so far and for the reasons already stated,
24 Fitness has not stated a valid claim for recovery

1 against the landlord, and thus there is nothing to
2 set off against the amounts landlord seeks to recover.

3 That addresses all of the affirmative
4 defenses. I know want to turn to the counterclaims.

5 Count 1 of the counterclaim, of Fitness's
6 counterclaim is for breach of lease and Count 2 is for
7 monies had and received. Both are premised on the
8 legal conclusion that Fitness's payment of rent was
9 excused for one of the multiple reasons argued in its
10 affirmative defenses, a conclusion which the Court
11 rejects for the reasons already stated.

12 Because Fitness has not effectively stated
13 any affirmative defense which excuses its obligation to
14 pay rent as the result of the pandemic or the
15 government order or for any other reason, so too has it
16 failed to state a claim for breach of contract or
17 monies had and received.

18 Counterclaims Count 1 and 2 are stricken --
19 are dismissed, I should say, in this case.

20 Count 3, declaratory relief, a declaratory
21 judgment should be brought to address a controversy
22 after a dispute should not be brought after -- I'm
23 sorry -- it should be brought after a dispute has
24 arisen but before claims for relief or damages arise.

1 Fitness's failure to pay rent has already
2 occurred. The parties' dispute is now in the realm of
3 breach of contract.

4 Defendant/Counter-Plaintiff's Affirmative
5 Defenses 1 through 8, Counterclaims 1 through 3 are
6 stricken and are stricken with prejudice.

7 Those are the Court's rulings.

8 Where are we at on this one as a result?
9 Mr. Klein, if your client seeks any kind of leave to
10 replead, I'd ask that there be some kind of motion for
11 leave.

12 Maybe there's a scenario under which you'd be
13 entitled to bring some other kind of affirmative
14 defense or conceivable counterclaim, but at this point,
15 I'd ask that you seek leave to do so. I'm not
16 precluding that by any means.

17 MR. STETSON: Your Honor --

18 THE COURT: Go ahead.

19 MR. STETSON: From our perspective, I guess we'll
20 wait for Mr. Klein to decide one way or another to file
21 that motion.

22 If they elect not to, from our perspective,
23 then we would move forward and probably seek judgment
24 on our own claims.

1 THE COURT: All right. Very good.

2 And obviously we're dealing with
3 counterclaims today, but as I said at the beginning of
4 the hearing, counterclaims and affirmative defenses,
5 that are in a large sense going to be a big part of
6 what this case is about.

7 My thought would be let's take 28 days --
8 August 4th -- why don't we come back on August 11th at
9 9:00 a.m.

10 And the order today -- Mr. Stetson, if you
11 can prepare it, the order today should indicate that
12 for the reasons stated on the record, Plaintiff's 2-615
13 motion to dismiss defendant's counterclaims and strike
14 its affirmative defenses is granted with prejudice.

15 MR. STETSON: I will prepare the order, your
16 Honor.

17 THE COURT: Okay. Thank you both for your
18 thoughtful briefing and arguments today. I do
19 appreciate it.

20 MR. KLEIN: Thank you.

21 THE COURT: It is -- and I understand this is a
22 challenging issue and an issue that is presenting some
23 fairly interesting questions, but it is always a
24 pleasure to see quality lawyering and both of you

1 demonstrated that. Thank you very much.

2 MR. KLEIN: Thank you.

3 MR. STETSON: Thank you, your Honor. Thank you,
4 Mr. Klein.

5 THE COURT: Thank you. One moment. Hang on real
6 quick. I'm sorry. Let's strike -- in the order today,
7 strike the July 14th date.

8 MR. STETSON: I will include that in the order.

9 Mr. Klein, I will circulate to you a draft of
10 the order before circulating to the Court.

11 MR. KLEIN: Thank you.

12 THE COURT: If you all can get it in before
13 1:00 o'clock, that would be great.

14 MR. STETSON: Yes.

15 THE COURT: Okay. Thanks very much.

16 MR. KLEIN: Thank you.

17 THE COURT: All right.

18 (Which were all the proceedings
19 had in the above-entitled cause
20 this date.)

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1 STATE OF ILLINOIS)
2 COUNTY OF DU PAGE) SS:
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4 I, TARA N. KOMPERDA, hereby certify that
5 I am a Certified Shorthand Official Court Reporter
6 assigned to transcribe the computer based digital
7 recording of proceedings had of the above-entitled
8 cause, Administrative Order No. 99-12, and Local
9 Rule 1.01(d). I further certify that the foregoing,
10 consisting of Pages 1 to 44, inclusive, is a true and
11 accurate transcript hereinabove set forth.

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Tara N. Komperda

Official Court Reporter
Eighteenth Judicial Circuit of Illinois
DuPage County
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