STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF ANOKA **TENTH JUDICIAL DISTRICT**

SVAP III RIVERDALE COMMONS, LLC, a Delaware limited liability company,

Plaintiff,

vs.

COON RAPIDS GYMS, LLC, dba XPERIENCE FITNESS, a Minnesota limited liability company,

Defendant.

ORDER

Court File No.: 02-CV-20-3652

The above-captioned matter came remotely before the Honorable Nancy J. Logering, Judge of District Court, at the Anoka County District Courthouse on November 20, 2020. Plaintiff was represented by Nicholas H. Callahan, Esq., and Jack O. Snyder, Jr., Esq. Defendant was represented by Kevin D. Hofman, Esq.

This matter came before the Court pursuant to motions for summary judgment brought by each party regarding this eviction action. Prior to the hearing, the Court received submissions by both parties, including written argument and a stipulation of uncontested facts. The parties made oral argument at the hearing and this matter was thereafter taken under advisement by the Court.

NOW THEREFORE, the Court after considering all the files, records, and proceedings herein, now issues the following:

FINDINGS OF FACT

1. Plaintiff (hereafter referred to as "Landlord") filed an eviction action pursuant to Minn. Stat. 504B.291 for Defendant's (hereafter referred to as "Tenant") nonpayment of rent. As

Filed in District Court
State of Minnesota
12/4/2020 3:48 PM

indicated below, Tenant concedes it has not paid the unpaid rent amounts alleged by Landlord.

2. The relevant facts in this matter are undisputed based upon the parties' Stipulation of Uncontested Facts. The parties stipulated to these facts only for the purpose of their current motions for summary judgment.

3. The Stipulation of Uncontested Facts specifically states the following:

    1. SVAP III Riverdale Commons, LLC, a Delaware limited liability company ("Landlord"), is the owner of a shopping center on 124th Avenue NW in Coon Rapids, Anoka County, Minnesota, commonly known as Riverdale Commons (the "Shopping Center"). Landlord is the proper plaintiff in this action.

    2. Coon Rapids Gyms, LLC dba Xperience Fitness, a Minnesota limited liability company ("Tenant"), leases a portion of the Shopping Center known as Space No. 002, with an address of 3340 124th Avenue NW, Coon Rapids, MN 55433 (the "Premises"). The parties' lease places certain restrictions on Tenant's use of the Premises. Tenant is the proper defendant in this action.

    3. Tenant's lease of the Premises is governed by a written Shopping Center Lease Agreement, dated December 27, 2017, with an amendment dated March 21, 2018 (collectively, the "Lease"). A true and correct copy of the Lease is attached as Exhibit A to the Complaint filed by Landlord in this action. IRC Riverdale Commons, L.L.C., a Delaware limited liability company, was the original landlord under the Lease. SVAP III Riverdale Commons, LLC subsequently acquired the Shopping Center and became the landlord under the Lease.

    4. On March 16, 2020, Governor Walz issued Executive Order 20-04. A true and correct copy of such order is attached as Exhibit 1 hereto. According to such order, effective March 17, 2020 all gymnasiums, fitness centers, indoor exercise facilities, and exercise studios (among other categories of establishments) were ordered to be closed.

    5. Governor Walz extended the closure of gymnasiums, fitness centers, indoor exercise facilities, and exercise studios by subsequent executive orders, the last of which was Executive Order 20-63, issued May 27, 2020. Executive Order 20-63 technically rescinded Executive Order 20-04, but put in place the same order closing gymnasiums, fitness centers, indoor exercise facilities, and exercise studios. A true and correct copy of Executive Order 20-63 is attached as Exhibit 2 hereto.

Filed in District Court
State of Minnesota
12/4/2020 3:48 PM

6. By Executive Order 20-74, Governor Walz rescinded Executive Order 20-63 effective at 11:59 p.m. on June 9, 2020. A true and correct copy of Executive Order 20-74 is attached as Exhibit 3 hereto. Executive Order 20-74 permitted gymnasiums, fitness centers, indoor exercise facilities, and exercise studios to reopen as of June 10, 2020, but restricted such operations to 25 percent of their full capacities. A true and correct copy of the Industry Guidance for Gyms and Fitness Centers cited in Executive Order 20-74 is attached as Exhibit 4 hereto. Tenant ceased operating its fitness center and closed the Premises on March 17, 2020. On March 18, 2020, Tenant sent a letter to Landlord regarding such closure. A true and correct copy of such March 18, 2020 letter is attached as Exhibit 5 hereto.

7. On June 10, 2020, Tenant reopened its fitness center, but limited its use of the Premises to 25 percent of its operating capacity to comply with Executive Order 20-74. The Premises have been open to customers since June 10, 2020 at 25 percent capacity, and through the date of this Stipulation of Uncontested Facts remain open at 25 percent capacity.

8. Tenant's furniture, equipment, and other property remained at the Premises during the time period from March 17, 2020 through June 9, 2020. Throughout such time, Tenant had access to the Premises, but the Premises were not open to the public as a fitness center.

9. The Lease requires Tenant to make certain monthly payments, including Minimum Rent and Additional Rent. Additional Rent includes Tenant's share of the estimated operating expenses and real estate taxes for the Shopping Center.

10. The Minimum Rent for April, May, June, and July 2020 is $41,743.17 per month. The Additional Rent for April, May, June, and July 2020 is $21,288.08 per month. The Minimum Rent and Additional Rent, combined, for April, May, June, and July 2020 is $63,031.25 per month. The total Minimum Rent and Additional Rent for the months of April, May, June and July 2020 combined is $252,125.00 before any late fees or interest is taken into account.

11. The Lease provides that the Landlord is entitled to interest and late fees on payments that are overdue from the Tenant. Such interest accrues, from the date when the payment is due, at the rate of 10 percent per annum or the maximum rate permitted by law. For payments that are ten or more days late, the Tenant incurs a late fee equal to the greater of $150 or 10 percent of the amount originally due.

12. Section 1.6 The Lease provides that "Tenant shall use the Premises for only the operation of a fitness center and workout facility with amenities and services consistent with a typical gym operation including, but not limited

Filed in District Court
State of Minnesota
12/4/2020 3:48 PM

to, the following: aerobics, health and fitness consultants, chiropractic care, cryotherapy, physical therapy care and incidentally for the retail sale of gym and athletic wear, the sale of non-alcoholic beverages (including the operation of a juice bar and/or coffee bar), power bars, protein bars, health, nutrition and muscle supplements, nutrition advisory services, sports medicine services and providers, and kick boxing, martial arts and self defense, and the operation of tanning salons or booths and for no other purposes whatsoever." These limitations apply unless, pursuant to Section 7.1 of the Lease, Tenant obtains Landlord's consent to operate the Premises for some other purpose.

13. Section 1.6 of the Lease also defines certain "Use Restrictions," and states in part that Landlord "represents and warrants to Tenant the Use Restrictions are the only restrictions affecting Tenant's use" of the Premises.

14. Tenant has not paid either Minimum Rent or Additional Rent for April, May, June, or July 2020.

15. On July 29, 2020, Landlord (through its counsel) sent a letter to Tenant to provide notice of Tenant's non-payment of Minimum Rent or Additional Rent for April, May, June, or July 2020. A true and correct copy of that letter, the "Notice of Default," is attached as Exhibit B to the Complaint filed in this action. Tenant received the Notice of Default on July 30, 2020.

16. Tenant is in possession of the Premises, but is restricted to using only 25 percent of its operating capacity.

17. Tenant has paid Minimum Rent and Additional Rent for the months of August, September, and October 2020. Such payments are not for any portion of the Minimum Rent or Additional Rent for April, May, June, or July 2020. Landlord has a written agreement with Tenant that partial payment of rent in arrears which is accepted by the Landlord prior to issuance of the order granting restitution of the premises pursuant to Minn. Stat. § 504B.345 may be applied to the balance due and does not waive the Landlord's action to recover possession of the premises for nonpayment of rent.

4. The foregoing stipulated facts are adopted by the Court herein.

5. It is undisputed that Tenant did not pay rent for four months, and failed to make up the payments after receiving a default notice. Tenant has at all times remained in the leased Premises and wishes to remain there for the remainder of the ten year Lease.

6. Landlord seeks to have this matter handled as a straightforward commercial eviction case and requests Judgment in Landlord's favor and an order for writ of possession.

Filed in District Court
State of Minnesota
12/4/2020 3:48 PM

7. Tenant argues that two legal doctrines, impossibility and frustration, are applicable to this matter and would excuse its obligation to pay rent.

8. It is important to note in this matter that Landlord is not seeking to evict based on a failure to operate, but rather a failure to pay rent. Additionally, it is significant that the Lease does not contain a force majeure provision.

9. It is undisputed that Tenant has had access to the Premises throughout the months in which Tenant was not paying rent, April, May, June, and July 2020.

10. Despite the Executive Orders 20-04, 20-63, and 20-74 (collectively referred to as "Executive Orders"), Landlord has continually upheld its end of the Lease by providing possession of the Premises to Tenant.

11. There is no evidence that Tenant made any significant efforts to alter its business model to generate income using the leased Premises. In addition to the other permitted uses in the Lease, Section 7.1 of the Lease also allows Tenant to seek Landlord's consent to operate the Premises for some other purpose.

12. It is apparent that Tenant wishes to remain in possession of the Premises and wait out the effects of any executive orders, while paying significantly reduced rent or no rent at all.

13. In support of such an outcome, Tenant asserts the doctrines of impossibility and frustration as a defense to paying any rent from April, May, June, and July 2020 and in support of their request for a rent abatement.

14. Although the Executive Orders may have made it difficult for Tenant to generate income to pay the required rent, there is nothing that made the act of paying for rent objectively impossible.

15. There is no indication that Tenant was precluded from seeking assistance in the form of loans, fundraisers, investors or by reallocating funds between its 14 affiliated locations, 12 of which apparently reached a rent abatement agreement with their respective landlords.

16. Additionally, there is no indication that Tenant seriously attempted any adaptive or innovative measures to keep its members.[1] For instance, Tenant could have offered current or prospective members various deals, such as pre-paying a discounted price for memberships for future months.

17. Where there are ways in which rent could have possibly been paid, the defense of impossibility does not apply to this eviction action.

[1] The only such effort that has been alleged is an attempt by one trainer to send videos to clients from his garage. There is no indication that Tenant made any serious commitment to providing virtual training sessions.

Filed in District Court
State of Minnesota
12/4/2020 3:48 PM

18. Furthermore, even if Tenant was able to prove that it was impossible to pay rent, which it has not, this is a wholly subjective problem for Tenant.[2]

19. The defense of frustration is similarly misapplied. The Executive Orders may have interfered with Tenant's business model, but it did not frustrate the purpose of the lease.

20. Under the terms of the Lease, Landlord was to provide the Premises for Tenant. In exchange for the use of the Premises, Tenant was to pay the agreed upon rent. At all times, Tenant has had access to and possession of the Premises.

21. Pursuant to Section 7.3(B)(1) of the Lease, Tenant was obligated to "comply with *any and all* requirements of any public authority, and with the terms of any State or Federal law, statute or local ordinance or regulation applicable to Tenant for its use, safety, cleanliness or occupation of the Premises."

22. While the COVID-19 pandemic may have been unforeseeable, gyms and other similar facilities are undoubtedly subject to closures or restrictions on occasion due to actions by a public authority for various reasons. While it may not be the fault of either party, the possibility of a closure or restriction is an implied risk that is contemplated under the terms of the Lease.

23. Tenant has failed to establish that either impossibility or frustration are applicable defenses in the *eviction* action.

24. Perhaps Tenant may be able to apply these defenses in a separate action for the recovery of rent, if such an action is commenced; however, that issue is not before the Court in this eviction action.

25. Tenant, through no fault of Landlord, has failed to meet its rent obligations for April, May, June and July 2020. During that time and continuing today, Landlord has upheld its obligation under the Lease by providing possession of the Premises to Tenant.

26. Effective November 20, 2020, Executive Order 20-99 closed gyms and fitness centers to the public once again for a four week period.[3] While this does not change the fact that rent is still owed by Tenant for April, May, June and July 2020, it does illustrate the need for a resolution in this matter as the same issues that began this eviction action may continue to occur in the coming months.

27. Tenant has provided no convincing authority to support the outcome it is requesting in which Tenant would be allowed to continue to occupy and retain possession of the Premises without paying rent obligations.

[2] There is no argument that the act of paying rent was objectively impossible. Rather, Tenant alleges an inability to pay rent due to its own financial hardship.

[3] Executive Order 20-99 allows for specific limited uses of such facilities and does not preclude access by owners or employees.

Filed in District Court
State of Minnesota
12/4/2020 3:48 PM

28. Even if frustration was an applicable defense here, Tenant may be allowed to terminate the lease as opposed to forcing Landlord to continue its obligation.

29. The case law cited by Tenant is either plainly distinguishable from the matter at hand or does not advance Tenant's position that impossibility or frustration should apply to this eviction action.

30. Nothing in Minnesota law supports the outcome sought by Tenant and it would be patently unfair to force Landlord to uphold its obligations under the Lease, while excusing Tenant's obligation to pay rent.

31. Furthermore, it is not the Court's role to rewrite the Lease as Tenant has requested.

32. Based on the parties' Stipulation of Uncontested Facts, it is evident that there is no genuine issue as to any material fact in this matter. Accordingly, summary judgment is appropriate and the only outcome in this matter must be eviction.

CONCLUSIONS OF LAW

1. Under Rule 56.01 of the Minnesota Rules of Civil Procedure, a party seeking to recover on a claim may, "at any time after expiration of 20 days from the service of the summons" move for summary judgment.

2. If there is no genuine issue as to any material fact, then summary judgment in favor of the moving party is to be rendered and the party is entitled to judgment as a matter of law. Minn. R. Civ. Pro. 56.03.

3. Partial payment of rent in arrears which is accepted by the landlord does not waive the landlord's action to recover possession of the premises for nonpayment of rent. *See* Minn. Stat. § 504B.291.

4. "It is a long-standing rule that an unlawful detainer action provides a summary proceeding to quickly determine present possessory rights." *Eagan E. Ltd. P'ship v. Powers Investigations, Inc.*, 554 N.W.2d 621, 622 (Minn. Ct. App. 1996).

5. "[E]viction proceedings are limited to adjudicating the right to present possession of property." *Deutsche Bank Nat. Tr. Co. v. Hanson*, 841 N.W.2d 161, 166 (Minn. Ct. App. 2014).

6. "A landlord's right of action for unlawful detainer is complete upon a tenant's violation of a lease condition." *Minneapolis Cmty. Dev. Agency v. Smallwood*, 379 N.W.2d 554, 556 (Minn. Ct. App. 1985).

Filed in District Court
State of Minnesota
12/4/2020 3:48 PM

7. The doctrine of frustration of purpose is not applicable where an event was clearly contemplated by the parties as expressed in the agreement. *Metro. Sports Facilities Comm'n v. Gen. Mills, Inc.*, 460 N.W.2d 625, 630 (Minn. Ct. App. 1990), aff'd, 470 N.W.2d 118 (Minn. 1991).

8. A total frustration of the use of the premises would entitle the party to *terminate* the lease under the doctrine of complete frustration. *Orme v. Atlas Gas & Oil Co.*, 217 Minn. 27, 37, 13 N.W.2d 757, 763–64 (1944).

9. The distinction between objective and subjective impossibility is not to be overlooked. *Powers v. Siats*, 244 Minn. 515, 521, 70 N.W.2d 344, 348 (1955).

10. A duty created by a contract is not discharged where the impossibility or impracticability of performance is wholly attributable to the subjective inability of the promisor. *See Powers v. Siats*, 244 Minn. 515, 520, 70 N.W.2d 344, 348 (1955).

ORDER

1. Tenant's Motion for Summary Judgment is DENIED.

2. Landlord's Motion for Summary Judgment is GRANTED.

3. Judgement shall be entered for Landlord for:
   (i) recovery of the premises, and
   (ii) allowable costs and disbursements to Landlord.

4. A Writ of Recovery and Order to Vacate shall be issued immediately upon request and payment of fee.

5. This order shall not prejudice any right of Landlord to recover, in a subsequent court action or otherwise, any amounts owed by Tenant under the parties' lease, including but not limited to attorneys' fees.

SO ORDERED. LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated December 3, 2020

BY THE COURT:

Logering, Nancy (Anoka Judge)
2020.12.03 17:33:38 -06'00'

Nancy J. Logering
Judge of District Court