SUMMARY
January 19, 2023

2023COA5

No. 21CA1735, *Highlands Broadway v. Barre Boss, LLC* — Landlords and Tenants — Commercial Leases — Breach — Force-Majeure — Affirmative Defenses — Impossibility of Performance — Frustration of Purpose

A division of the court of appeals considers whether a commercial tenant that prematurely terminated its lease as a consequence of the financial impact of the COVID-19 pandemic and the Governor's related shutdown order may avoid liability for breach of its lease by asserting the affirmative defenses of impossibility and frustration of purpose. The division holds that such affirmative defenses do not relieve the tenant of its contractual duties because the force-majeure clause of its lease allocated the risk of acts of God and restrictive governmental regulations to the tenant, and the shutdown did not make the tenant's performance under the lease illegal. The division also holds that the record supports the trial

court's factual determination that the landlord undertook reasonable efforts to mitigate its damages. Accordingly, the division affirms the trial court's judgment in favor of the landlord, and against the tenant and its guarantors, and remands for determination and award of the landlord's attorney fees and costs incurred on appeal.

COLORADO COURT OF APPEALS **2023COA5**

Court of Appeals No. 21CA1735
Douglas County District Court No. 21CV30047
Honorable Jeffrey K. Holmes, Judge

Highlands Broadway OPCO, LLC,

Plaintiff-Appellee,

v.

Barre Boss LLC, Suzanne Dipentino, and Daniel Dipentino,

Defendants-Appellants.

JUDGMENT AFFIRMED AND CASE REMANDED WITH DIRECTIONS

Division IV
Opinion by JUDGE LIPINSKY
Fox and Schock, JJ., concur

Announced January 19, 2023

Murray Wilkening, P.C., Murray Wilkening, Littleton, Colorado, for Plaintiff-Appellee

City Park Law Group, LLC, Wayne E. Vaden, Denver, Colorado, for Defendants-Appellants

¶ 1 "It is difficult to overstate the adverse economic effects of the COVID-19 pandemic." *Buzzell v. Walz*, 974 N.W.2d 256, 258 (Minn. 2022). The public's concerns about the spread of the virus in public settings, coupled with governmental shutdown orders, exacted a particular economic toll on small businesses. *See 640 Tenth, LP v. Newsom*, 294 Cal. Rptr. 3d 123, 127 (Ct. App. 2022) ("We fully appreciate that the adverse effects of the present pandemic have not fallen equally on all segments of society, and that some small business owners are among those who have borne an especially heavy burden.").

¶ 2 As a consequence of the financial impact of the pandemic, including "government orders restricting consumer access," numerous businesses that leased space fell behind on their rental obligations or stopped paying rent altogether. *See A/R Retail LLC v. Hugo Boss Retail, Inc.*, 149 N.Y.S.3d 808, 813 (Sup. Ct. 2021). Tenants' legal efforts to obtain relief from their contractual duties to their landlords flooded the courts. *See id.*

¶ 3 In this case, we consider the argument of defendant, Barre Boss LLC (tenant), that it should be relieved from its lease obligations because of the financial impact of the pandemic and the

Governor's related shutdown order on its fitness business. Specifically, tenant and the guarantors of its lease obligations, defendants Suzanne Dipentino and Daniel Dipentino, argue that they are not liable to the tenant's landlord, plaintiff Highlands Broadway OPCO, LLC (landlord), because the COVID-19 pandemic and the executive order were unanticipated events that made it illegal, and thus impossible, for the business to operate. (We refer to the defendants collectively as "the Barre Boss parties," and we spell the individual defendants' last name "Dipentino," as it appears in the notice of appeal and briefs, although their last name is spelled "DiPentino" in parts of the record.) We disagree with this interpretation of the lease and therefore affirm the trial court's judgment in favor of landlord.

I. Background

¶ 4 In May 2017, tenant and landlord entered into an agreement (the lease) for tenant's lease of commercial property (the premises), at which Barre Boss planned to operate a fitness facility. The lease term was eighty-four months. The individual defendants personally guaranteed tenant's obligations to landlord. (Vanessa Dipentino, who signed the original lease on behalf of tenant and also

personally guaranteed tenant's obligations to landlord, sought protection under the Bankruptcy Code and is not a party to this appeal.)

¶ 5 The lease contains a force majeure clause, which excuses a party's delay in performing under the lease

> by reason of acts of God, . . . restrictive governmental laws or regulations[,] or by other cause without fault and beyond the control of the party obligated (financial inability excepted) . . . provided, however, [that] nothing contained in this Section . . . shall excuse Tenant from the prompt payment of any Rent or other charge required of Tenant hereunder . . . nor shall Tenant's inability to obtain governmental approval for Tenant's Permitted Use or for its occupation of the Premises excuse any of Tenant's obligations hereunder.

¶ 6 On March 25, 2020, in response to the COVID-19 pandemic, the Governor of Colorado issued an executive order, effective March 26, 2020, requiring "all businesses other than those qualified as 'Critical Businesses' . . . to close temporarily, except as necessary to engage in minimum basic operations needed to protect assets and maintain personnel functions." Colo. Exec. Order No. D 2020 017, at 2 (Mar. 25, 2020), https://perma.cc/V25Z-TRDD. Tenant's business was not deemed "critical."

¶ 7 Tenant subsequently requested rent relief from landlord in light of the forced closure of its business. In May 2020, the parties signed a letter agreement that landlord would defer tenant's obligation to pay the minimum rent due for April and May 2020. The letter agreement specified that tenant would repay the two months of deferred rent in twelve equal monthly installments from September 2020 through August 2021, "in addition to and together with the regularly scheduled monthly rent then due." The letter agreement further stated that landlord's consent to the rent relief was "a specific concession given only to Tenant for Tenant's agreement to continue the full performance of all [its] Lease obligations (as affected hereby)."

¶ 8 In addition, on May 27, 2020, the parties signed an amendment to the lease. Among other things, the lease amendment granted landlord the right to market the premises to prospective new tenants and to terminate the lease for any reason upon thirty days' advance written notice to tenant. The lease amendment further allowed tenant to "close its business operations at the Premises for any period of time, so long as Tenant continue[d] to pay" all rent and other payments due to landlord under the lease

through an "early termination date" — the date specified in any notice of landlord's election to terminate the lease early. Additionally, tenant acknowledged that, as of the date of the lease amendment, it had "no existing claims, defenses (personal or otherwise), or rights of set-off whatsoever with respect to the lease."

¶ 9 Tenant continued to pay rent to landlord through November 2020. In December 2020, however, tenant provided landlord with notice of its "immediate surrender of possession of the premises." Tenant asserted in the notice that its business "ha[d] ceased to operate since the March 16, 2020 government mandated shut down associated with the Coronavirus outbreak"; that it had "sought, without success, to obtain a viable tenant for potential assignment and/or transfer of the lease"; and that, although it had obtained an "Economic Injury Disaster Loan," it had depleted the proceeds of that loan. For these reasons, tenant said it was "no longer able to remit monthly payments in accordance with the provisions of the Lease Term."

¶ 10 After tenant stopped making payments under the lease, landlord filed suit against the Barre Boss parties for breach of contract. In their answer, the Barre Boss parties pleaded, among

other affirmative defenses, impossibility, frustration of purpose, and failure to mitigate damages. The trial in this case focused on those affirmative defenses and the amount of landlord's damages. (The Barre Boss parties do not appeal the amount of damages awarded to landlord.) After a one-day bench trial, the court held that the affirmative defenses were unsupported, adjudicated the amount of landlord's damages, and entered judgment against the Barre Boss parties.

II. Analysis

¶ 11 On appeal, the Barre Boss parties argue that the trial court erred by holding that (1) the Barre Boss parties' defenses of impossibility and frustration of purpose fail because tenant's performance under the lease was not impossible for an unforeseeable and indefinite period of time; and (2) landlord took reasonable steps to mitigate its damages.

A. The Affirmative Defenses of Impossibility and Frustration of Purpose

¶ 12 The Barre Boss parties contend that tenant was not liable to landlord because the COVID-19 pandemic was not foreseeable and

the executive order made tenant's performance under the lease "illegal," and thus impossible. We disagree.

1. Applicable Law and Standard of Review

¶ 13 Impossibility or impracticability of performance is a defense to a breach of contract claim when "an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract." *City of Littleton v. Emps. Fire Ins. Co.*, 169 Colo. 104, 108, 453 P.2d 810, 812 (1969) (quoting 6 Samuel Williston & George J. Thompson, *A Treatise on the Law of Contracts* § 1931 (rev. ed. 1938)). Similarly, a party may be excused from performance under a contract when the "party's principal purpose is substantially frustrated without his fault by a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made." *Town of Fraser v. Davis*, 644 P.2d 100, 101 (Colo. App. 1982) (quoting Restatement (Second) of Conts. § 266(2) (Am. L. Inst. 1981)).

¶ 14 Because the affirmative defenses of impossibility and frustration of purpose are premised on the occurrence of an unanticipated event, neither defense applies when, through their

contract, the parties allocated the risk of such an event. *See City of Littleton*, 169 Colo. at 113, 453 P.2d at 814; *Town of Fraser*, 644 P.2d at 101. A force-majeure clause can manifest such an intent. *See* Black's Law Dictionary 788 (11th ed. 2019) (defining a force-majeure clause as a "contractual provision allocating the risk of loss if performance becomes impossible or impracticable, [especially] as a result of an event or effect that the parties could not have anticipated or controlled"); *1600 Walnut Corp. v. Cole Haan Co. Store*, 530 F. Supp. 3d 555, 558-59 (E.D. Pa. 2021) (holding that, because the "COVID-19 pandemic is an event covered in the [parties'] force majeure clause[,] . . . the common law doctrines of frustration of purpose [and] impossibility/impracticability of performance . . . are inapplicable").

¶ 15 "The interpretation of a contract is a question of law that we review de novo," but we "defer to the trial court's factual findings unless they are clearly erroneous." *French v. Centura Health Corp.*, 2022 CO 20, ¶ 24, 509 P.3d 443, 449. "[A]n unambiguous agreement must be enforced according to its express terms." *Magnetic Copy Servs., Inc. v. Seismic Specialists, Inc.*, 805 P.2d 1161, 1163 (Colo. App. 1990).

2. Analysis

¶ 16 The force-majeure clause in the lease manifested a clear intent to allocate to tenant the economic risks associated with the payment of rent and related sums due under the lease, notwithstanding "acts of God, . . . restrictive governmental laws or regulations[,] or . . . other cause without fault and beyond the control of the party obligated." In light of this language, the Barre Boss parties' defenses of impossibility and frustration of purpose cannot defeat landlord's claims. Tenant and landlord expressly agreed in the lease that no such event would excuse tenant from "the prompt payment of any Rent or other charge required." Moreover, tenant and landlord entered into the letter agreement and the lease amendment in response to the financial impact of the COVID-19 pandemic and the executive order on tenant's business. The pandemic and the executive order were thus not "unforeseeable" at the time tenant and landlord entered into those agreements, which reiterated the parties' understanding that tenant remained liable to landlord for its duties under the lease despite the financial impact of the pandemic on tenant, and even if tenant's business closed its doors. Because the letter agreement and the

lease amendment are unambiguous, we enforce them "according to [their] express terms." *Magnetic Copy Servs., Inc.*, 805 P.2d at 1163.

¶ 17 Finally, the executive order did not make it illegal for the Barre Boss parties to pay rent, which is the only contractual duty that landlord alleged tenant breached. *Cf. Fitness Int'l, LLC v. DDRM Hill Top Plaza L.P.*, No. SACV 21-00142CJC(ADSx), 2021 WL 5456666, at *5 (C.D. Cal. Oct. 20, 2021) (unpublished order granting summary judgment) ("Tenant's performance obligation under the Lease was to pay rent, not to operate a fitness club. And the government closure orders did not make it illegal for Tenant to pay rent.").

¶ 18 We hold parties to the terms of their bargains "to encourage parties to confidently allocate risks and costs during their bargaining without fear that unanticipated [events] may . . . effectively negat[e] the parties' efforts to build these cost considerations into the contract." *Town of Alma v. AZCO Constr., Inc.*, 10 P.3d 1256, 1262 (Colo. 2000).

¶ 19 Our holding that the impossibility and frustration of purpose affirmative defenses do not relieve tenant of its contractual duties to landlord is consistent with decisions in similar cases from other

jurisdictions. *See Gap Inc. v. Ponte Gadea N.Y. LLC*, 524 F. Supp. 3d 224, 234 (S.D.N.Y. 2021) (rejecting frustration of purpose and impossibility defenses arising from the state's blanket prohibition of nonessential business at the beginning of the pandemic because the force-majeure clause in the parties' lease agreement demonstrated that the parties foresaw that the government might enact "controls in connection with a national or other public emergency") (emphasis omitted); *AGW Sono Partners, LLC v. Downtown Soho, LLC*, 273 A.3d 186, 201, 204 (Conn. 2022) (holding that the defendants did not establish the defenses of impossibility or frustration of purpose based on executive orders barring indoor dining because "the language of the lease agreement suggests that events of the magnitude of the COVID-19 pandemic were not entirely unforeseeable"); *Simon Prop. Grp., L.P. v. Brighton Collectibles, LLC*, No. N21C-01-258 MMJ CCLD, 2021 WL 6058522, at *7 (Del. Super. Ct. Dec. 21, 2021) (unpublished opinion) (holding that the doctrines of frustration of purposes, impossibility, and impracticability could not survive a motion to dismiss where the parties' leases contained broad force-majeure provisions because the "COVID-19 Pandemic is not an event that excuses the Plaintiff

from obligations under the Leases"); *Fitness Int'l, LLC v. Nat'l Retail Props. Ltd. P'ship*, Nos. 358680 & 358983, 2022 WL 7723954, at *7 (Mich. Ct. App. Oct. 13, 2022) (unpublished opinion) ("Plaintiff's inability to use the premises as a health and fitness club does not support plaintiff's position [that the impossibility defense applies] because plaintiff assumed the risk of the government shutdown."); *9795 Perry Highway Mgmt., LLC v. Bernard*, 273 A.3d 1098, 1105 (Pa. Super. Ct. 2022) ("While Pennsylvania recognizes the doctrines of frustration of purpose and/or impossibility/impracticability, and even recognizing that the COVID-19 pandemic was unprecedented, Appellants have presented no legal authority to persuade us that application of the doctrines is proper.").

¶ 20 In sum, the court correctly held, based on the unambiguous language of tenant's agreements with landlord, that the Barre Boss parties' affirmative defenses of impossibility and frustration of purpose do not relieve them of their contractual obligations to landlord.

B. The Affirmative Defense of Failure to Mitigate Damages

¶ 21 The Barre Boss parties contend that landlord did not mitigate its damages because it failed to take reasonable steps to find a new

tenant for the premises. Specifically, the Barre Boss parties allege that landlord failed to pursue a potential subtenant that tenant brought to its attention, failed to post signage advertising the premises for re-lease, and only advertised the premises on a platform with limited exposure. We disagree.

1. Applicable Law and Standard of Review

¶ 22 As in other contract cases, while a landlord may recover damages for a tenant's breach of its duty to pay rent, the landlord also has a duty to mitigate its damages. *Schneiker v. Gordon*, 732 P.2d 603, 611 (Colo. 1987). A party raising the affirmative defense of failure to mitigate damages bears the burden of proving that the injured party failed to take reasonable steps to minimize the damages resulting from the breach. *Fair v. Red Lion Inn*, 943 P.2d 431, 437 (Colo. 1997). "[W]hether a party made reasonable efforts to mitigate its damages is a determination of fact, which will not be disturbed on appeal unless it is clearly erroneous." *Westec Constr. Mgmt. Co. v. Postle Enters. I, Inc.*, 68 P.3d 529, 532 (Colo. App. 2002).

2. Analysis

¶ 23 The record supports the trial court's factual determination that landlord undertook reasonable efforts to mitigate its damages.

¶ 24 The Barre Boss parties rely on *Pomeranz v. McDonald's Corp.* for the proposition that a landlord fails to mitigate damages when it does not take "some affirmative steps to secure a new tenant." 821 P.2d 843, 847 (Colo. App. 1991) (determining that plaintiffs failed to mitigate because they "initiated no actions to put a replacement tenant in the vacated premises" but, rather, "merely accepted calls from parties expressing an interest in the property"), *aff'd in part and rev'd in part on other grounds*, 843 P.2d 1378 (Colo. 1993). But in contrast to the landlord's failure to act in *Pomeranz*, the record here indicates that the landlord did take such affirmative steps.

¶ 25 Although the parties dispute the reasonableness of the steps that landlord took to advertise the premises for re-lease, landlord's expert witness — its real estate broker — testified that he did what every real estate broker in Colorado would do to re-lease the premises. As the court noted, the broker "update[ed] the [marketing] brochure [for the premises], [sent] an e-mail blast to the brokerage community, update[ed] web sites, and, at least at some

point, plac[ed] a sign on the property." The Barre Boss parties did not call their own expert witness to offer an opinion that landlord's efforts to find a new tenant for the premises were unreasonable.

¶ 26 The trial court said it found landlord's expert credible. Because "the credibility of witnesses, and the effect and weight of conflicting and contradictory evidence, are all questions of fact," we will not disturb the trial court's findings, which the record supports. *Scholle v. Ehrichs*, 2022 COA 87M, ¶ 50, 519 P.3d 1093, 1105.

¶ 27 Additionally, although the Barre Boss parties argue that tenant negotiated a sublease of the premises with another business, and that the business was "ready, willing and able to rent the space," the trial court found that the potential tenant never followed up or made a "solid offer." The testimony of landlord's expert supports this finding.

¶ 28 In sum, the trial court did not err by finding that landlord took reasonable steps to mitigate its damages and, thus, that the Barre Boss parties failed to prove their affirmative defense of failure to mitigate damages.

C. Attorney Fees and Costs

¶ 29 Landlord requests an award of reasonable attorney fees and costs incurred on appeal pursuant to Section 31.6 of the lease. That provision says that, "[i]n the event of any litigation between Landlord and Tenant to enforce or interpret any provision of this Lease or any right of either party hereto, the unsuccessful party to such litigation shall pay the successful or prevailing party's reasonable attorney's fees and . . . costs and expenses," including "any post-judgment attorney's fees and . . . costs and expenses incurred by such [successful or prevailing] party in enforcing and/or collecting upon the judgment." Such an award is appropriate because this appeal constitutes litigation "to enforce or interpret any provision of [the] Lease or any right of either party," and landlord is the prevailing party. *See In re Estate of Gattis*, 2013 COA 145, ¶ 45, 318 P.3d 549, 559. Pursuant to C.A.R. 39.1, we remand for the trial court to determine and award landlord its reasonable attorney fees and costs incurred on appeal.

III. Conclusion

¶ 30 The judgment is affirmed and the case is remanded for the determination and award of landlord's reasonable attorney fees and costs incurred on appeal.

JUDGE FOX and JUDGE SCHOCK concur.