STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

NATIONAL RETAIL PROPERTIES, LP,
a foreign limited partnership,

Plaintiff / Counter-Defendant,

Case No. 20-014449-CB

Hon. Muriel D. Hughes

-v-

FITNESS INTERNATIONAL, LLC,
a foreign limited liability company,

Defendant / Counter-Plaintiff.

OPINION AND ORDER

At a session of said Court held in the Coleman A. Young Municipal Center, Detroit, Wayne County, Michigan,
on this: 2/3/2022

PRESENT: Muriel D. Hughes
Circuit Judge

This civil matter is before the Court on a motion for summary disposition filed by Plaintiff / Counter-Defendant National Retail Properties LP ("NRP"). Also before the Court is a counter-motion filed by Defendant / Counter-Plaintiff Fitness International, LLC ("Fitness"). For the reasons stated below, the Court grants in part and denies in part National's motion. The Court also grants in part and denies in part Fitness' counter-motion.

I. BACKGROUND

Plaintiff NRP is a Delaware limited partnership which is engaged in the business of leasing commercial properties. Defendant Fitness is a limited liability company that operates fitness facilities in Michigan, which are known as LA Fitness.

On June 30, 2015, the parties entered into a lease agreement. Under this agreement Fitness agreed to lease from the landlord, NRP, a property located at 41 128 Ann Arbor Rd., Plymouth, Michigan, 48170 (the "Plymouth Lease"). The parties entered into another lease on August 25, 2017 for a property located at 29659 Seven Mile Road, Livonia Michigan, 48152 (the "Livonia Lease"). According to NRP, Fitness failed to pay rent on the Livonia lease and is in default through December 8, 2020 in the amount of $183,102.02. This amount includes interest and late charges under the lease. NRP claims it had sent a notice of default providing an opportunity to cure the default on October 28, 2020. It further claims that Fitness failed to cure the default.

Although the dates differ in each lease, both the Livonia and Plymouth leases are essentially the identical. Under the leases, Fitness is responsible for payment of property taxes and all utilities. The relevant provisions in each lease are as follows:

> **5.2. Base Monthly Rent**
>
> Tenant shall pay to Landlord as monthly rent an amount equal to one-twelfth (1/12th) of the sum of Owner's Total Investment (as such term is defined in the Development Procedure Agreement) multiplied by the rate of SIX AND 75/100 PERCENT (6.75%) ("Base Monthly Rent"). Base Monthly Rent shall be payable by Tenant to Landlord in advance in equal monthly installments on the first day of each calendar month, without prior notice, invoice, demand, deduction, or offset whatsoever. The payment of Base Monthly Rent shall commence on the date (the "Rent Commencement Date") that is chosen by Tenant at any time after Tenant opens its health club and fitness facility for work outs to the general public on the Premises, but in no event later than 365 days following the Commencement Date. … Base Monthly Rent payable in the Primary Term shall be adjusted on the fifth (5th), tenth (10th), and fifteenth (15th) anniversary of the Commencement Date ("Adjustment Dates" or singly an "Adjustment Date"). …
>
> **9.1. Use of the Premises**
>
> Tenant may use the Premises (**"Initial Use"**) for the operation of a health club and fitness facility which may include, without

limitation, weight and aerobic training, group exercise_classes, exercise dancing such as Zumba, yoga, Pilates, racquetball/squash, personal training, aerobics, health and fitness related programs, free weights, spinning/cycling, circuit training, boxing, basketball, swimming pool, instruction in sports or other physical activities (e.g., swim lessons, racquetball/squash/tennis lessons, martial arts, dance, and youth sports instruction), and sauna and whirlpool facilities. As part of the health club and fitness facility operated within the Building, Tenant may use portions of the Building for use ancillary to a health club and fitness facility (hereinafter, the **"Ancillary Uses"**) for members and non-members except as specifically set forth below, including, but not limited to, a health club and fitness facility related pro shop selling apparel and other fitness related items, services designed to improve personal wellbeing … or for such other use as Tenant may determine in Tenant's reasonable business judgment, provided that such use: (i) is lawful; (ii) is in compliance with applicable environmental, zoning and land use laws and requirements; (iii) does not violate matters of record or restrictions affecting the Premises; (iv) does not conflict with any other agreement to which Landlord is bound, of which agreement Tenant has received written notice, where such conflict would materially adversely affect Landlord; (v) would not have a material adverse effect on the value of the Premises; and (vi) would not result in or give rise to any material environmental deterioration or degradation of the Premises. …

[Bold type in original; internal underlining added].

9.2. Compliance[1]

Tenant, at Tenant's sole expense, promptly shall comply with all applicable statutes, ordinances, rules, regulations, orders, covenants and restrictions of record including, without limitation, the Permitted Encumbrances, and requirements in effect during the term or any part of the term hereof, regulating the use by Tenant of the Premises, including, without limitation, the obligation at Tenant's cost, to alter, maintain, or restore the Premises in compliance and conformity with all laws relating to the condition, use or occupancy of the Premises during the term (including,

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[1] Because the Plymouth property is part of a condominium development, this subsection in the Plymouth lease differs somewhat from the Livonia lease. The Plymouth lease provides in relevant part:

> Tenant, at Tenant's sole expense, promptly shall comply with all applicable statutes, ordinances, rules, regulations, orders, covenants and' restrictions of record (including, but not limited to the Master Deed, Consent Judgment, Declaration of Restrictions and Development Agreement), and requirements in effect during the term or any part of the term hereof, regulating the use by Tenant of the Premises, …

without limitation, any and all requirements as set forth in the Americans with Disabilities Act) and regardless of (i) whether such laws require structural or non-structural improvements, (ii) whether the improvements were foreseen or unforeseen, and (iii) the period of time remaining in the term. Tenant shall be named as Landlord's representative with respect to all matters of governance under the Permitted Encumbrances. …

14.4. Minimum Acceptable Insurance Coverage Requirements

…

(e) Tenant shall also obtain and keep in force during the term of this Lease a policy of Business Interruption insurance covering a period of one (1) year. This insurance shall cover all Taxes and insurance costs for the same period in addition to one (1) year's lease rent amount.

14.5. Additional Insureds

Tenant shall name as additional insureds (by way of a CG 20 26 endorsement or similar endorsement) and loss payees on all insurance, Landlord, Landlord's successor(s), assignee(s), nominee(s), nominator(s), and agents with an insurable interest as follows:

> National Retail Properties, LP, a Delaware limited partnership, its officers, directors, and all successor(s), assigneds), subsidiaries, corporations, partnerships, proprietorships, joint ventures, firms, and individuals as heretofore, now, or hereafter constituted on which the named insured has the responsibility for placing insurance and for which similar coverage is not otherwise more specifically provided.

15. PARTIAL AND TOTAL DESTRUCTION OF THE PREMISES

In the event any part or all of the Premises shall at any time during the term of this Lease be damaged or destroyed, regardless of cause, Tenant shall give prompt notice to Landlord. Tenant shall repair and restore the Premises to their original condition, including buildings and all other improvements, as soon as circumstances permit. Tenant shall hold Landlord free and harmless from any and all liability resulting from such repairs and restoration; provided, however, that in the event the damage or destruction to the Premises results in the payment of insurance proceeds to Landlord, Landlord will make such insurance proceeds

immediately available for Tenant's use for Tenant's repair and restoration of the Premises. Tenant shall pay for any cost of repair or restoration in excess of available insurance proceeds. Tenant is not entitled to any rent abatement during or resulting from any disturbance on or partial or total destruction of the Premises.

18.1. Event of Default

The occurrence of any of the following events (each an "Event of Default") shall constitute a default by Tenant:

(a) Failure by Tenant to pay rent within five (5) days after Tenant's receipt of written notice from Landlord that rent is past due, provided that Landlord shall not be required to send notice more than two (2) times in any period of twelve (12) consecutive months, and when Landlord is not required to send a notice, Tenant shall have no cure or grace period.

18.2. Landlord's Remedies

...

(e) In all events, Tenant is liable for all damages of whatever kind of nature, direct or indirect, suffered by Landlord as a result of the occurrence of an Event of Default. If Tenant fails to pay Landlord in a prompt manner for the damages suffered, Landlord may pursue a monetary recovery from Tenant. Included among these damages arc all expenses incurred by Landlord in repossessing the Premises (including, but not limited to, increased insurance premiums resulting from Tenant's vacancy), all expenses incurred by Landlord in reletting the Premises (including, but not limited to, those incurred for advertisements, brokerage fees, repairs, remodeling to the Premises raw shell, and replacements), all concessions granted to a new tenant on a reletting, "all losses incurred by Landlord as a result of Tenant's default (including, but not limited to, any unamortized commissions paid in connection with this Lease), a reasonable allowance for Landlord's administrative costs attributable to Tenant's default, and all attorneys' fees incurred by Landlord in enforcing any of Landlord's rights or remedies against Tenant.

25.1. Recovery of Attorneys' Fees and Costs of Suit

Tenant shall reimburse Landlord, upon demand, for any costs or expenses incurred by Landlord in connection with any breach or default under this Lease, whether or not suit is commenced or judgment entered. Such costs shall include legal fees and costs incurred for the negotiation of a settlement, enforcement of rights,

or otherwise. Furthermore, if any action for breach of or to enforce the provisions of this Lease is commenced, the court in such action shall award to the party in whose favor a judgment is entered, a reasonable sum as attorneys' fees and costs. Such attorneys' fees and costs shall be paid by the losing party in such action.

27.2. Quiet Enjoyment

Landlord covenants and warrants that Tenant shall have and enjoy full, quiet, and peaceful possession of the Premises, its appurtenances and all lights and privileges incidental thereto during the term, subject to the provisions of this Lease and any title exceptions or defects in existence at the time of the conveyance of the Premises to Landlord by Tenant.

29.15. Waiver of Jury Trial

TENANT AND LANDLORD HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVE THE RIGHT EITHER OF THEM OR THEIR HEIRS, PERSONAL REPRESENTATIVES, SUCCESSORS OR ASSIGNS MAY HAVE TO A TRIAL BY JURY IN RESPECT TO ANY LITIGATION ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS LEASE OR ANY AGREEMENT CONTEMPLATED TO BE EXECUTED IN CONJUNCTION HEREWITH, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PARTY. THIS PROVISION IS A MATERIAL INDUCEMENT TO LANDLORD AND TENANT ACCEPTING THIS LEASE.

[Bold type in original][Internal underlining added].

Hence, pursuant to the lease, the initial use of the premises is "for the operation of a health club and fitness facility… and for "use ancillary to a health club and fitness facility …including, but not limited to, a health club and fitness facility related pro shop selling apparel and other fitness related items, services designed to improve personal wellbeing." [Lease, Subsection 9.1].

The leases also included site plans in Exhibit A of the leases for development of the properties. In addition to the leases, the parties entered into Development Procedure Agreements, which is attached to the leases as Exhibit H. In these agreements, NRP is the "Owner" and

Fitness is the "Developer." These agreements allocated the costs of development of the properties and include site signage plans depicting development of the properties for use as "LA Fitness" facilities. Under the agreements, the parties express their desires for the use of the properties. The agreements state in relevant part:

> **1.1 The Premises**
>
> Owner desires to have Developer cause the general development of a health and fitness facility, including the construction of certain site and building improvements (the "Improvements"), on that certain real property (the "Premises")…
>
> [Emphasis added].

The two properties operated as LA Fitness facilities without any problem until Michigan was affected by the COVID-19 virus, which quickly became a pandemic. Due to the pandemic, Governor Whitmer issued an executive order ("EO") declaring a state of emergency. EO 2020-04. As a result, Fitness was unable to conduct its business at either the Livonia or Plymouth location and to use the premises as a fitness and health facilities between March 17, 2020 and September 8, 2020. The Governor issued numerous executive orders in connection with the COVID-19 pandemic. The Michigan Department of Health and Human Services also issued orders.

With respect to fitness facilities, EO 2020-09 closed fitness facilities to the public. EO 2020-09 was rescinded by EO 2020-20 on March 22, 2020. EO 2020-20 continued the closure of fitness facilities until April 13, 2020. Thereafter, EO 2020-43 extended the closure until April 30, 2020. The closure of fitness facilities was again extended to May 28, 2020 by EO 2020-69. EO 2020-69 was extended to June 12, 2020 by EO 2020-100. EO 2020-110 continued the restriction. On September 9, 2020, EO 2020-175 opened fitness centers, but limited capacity to 25% of state or local fire marshals' limited occupancies. The MDHHS issued an order on March 19, 2021 whereby capacity was increased to 30% and which took effect on March 22, 2021. On June 1,

2021, capacity was increased to 50%. The 50% restriction continued until June 22, 2021 when the Governor opened the state to full capacity.

In an affidavit, Diann D. Alexander, Esquire, Director of Lease Administration, Vice President, and Senior Real Estate Counsel to Fitness, stated that Fitness sent a letter to NRP on March 17, 2020 notifying NRP that the government mandated restrictions "frustrated the purpose of the Leases and rendered performance impossible and impracticable." The notice informed NRP that, due to the government restrictions, Fitness was excused from its rent obligations. Ms. Alexander also explained that "National Retail is the landlord in approximately thirty (30) leases in which Fitness is the tenant." In each of the premises, "Fitness only uses the premises for the operation of full service indoor health clubs and fitness centers." She also stated:

> 26. Fitness paid rent timely for March 2020 under the Livonia Lease prior to the government-mandated closures. As a result of the government-mandated closures, Fitness is entitled to a credit, in the amount of $29,889.66, for rent it paid for the period March 17 through March 31, 2020, when it was illegal for it to use the Livonia Premises.
>
> 27. Fitness also timely paid 100% rent under the Livonia Lease for the months following the Closure Period, from October 2020 to the present.
> ...
>
> 33. The sole basis for Landlord's filing suit under the Plymouth Lease is a $2,356.68 late charge, purportedly incurred by Fitness in October 2020. Fitness was not late in paying Landlord any amount due and owing under the Plymouth Lease.

NRP also provides an affidavit executed by Kristin Furniss, Senior Vice President of Asset Management for NRP. Ms. Furniss stated:

> 6. These commercial Leases are both triple net leases and therefore, in addition to rent, Defendant is obligated to pay utilities, taxes and insurance. In exchange, and at all relevant times, Plaintiff has always provided Defendant with unobstructed and peaceful possession of both the Plymouth Property and the Livonia Property.

> 7. Nowhere in either Lease is Defendant entitled to any abatement, credit or reduction of rent for any reason, let alone for a government shutdown affecting these commercial properties.
>
> 8. For the months of August 2020 through September, 2020, Defendant failed to pay rent to Plaintiff as required under the Livonia Lease. A total of $137,032.21 in rent was outstanding.
> ...
>
> 12. Despite the Notice of Default under the Livonia Lease, Defendant failed to pay the outstanding rent due.
>
> 13. Following the Notice of Default under the Plymouth Lease, Defendant paid all the rent then due except for $2,356.68 representing a portion of the late fees and interest still due and owing.
>
> 14. Currently, under the Livonia Lease, Defendant owes the amount of $188,737.26, plus accruing interest (Exhibit C).
>
> 15. Currently, under the Plymouth Lease, Defendant owes the amount of $2,356.68, plus accruing interest (Exhibit D).
>
> [Emphasis added].

Thus, Ms. Furniss' affidavit states NRP's intent to provide "unobstructed and peaceful possession" to Fitness during the duration of the leases. Her affidavit reiterates NRP's claim that Fitness is not entitled to any abatement of rent. The remainder of the affidavit is a reflection of NRP's money damage claims in its amended complaint. These competing affidavits are confirmations and expressions of the parties' positions as stated in NRP's amended complaint and Fitness' counterclaim.

NRP filed its original complaint on November 3, 2020, which included a claim of breach of contract on the Livonia lease and a claim of breach of contract on the Plymouth lease. Since the date of the filing of the original complaint, Fitness almost completely cured its default on the Plymouth lease, but paid rent under protest. On December 18, 2020, NRP filed an amended complaint. The amended complaint includes two claims, breach of contract for the Livonia lease and breach of contract for the Plymouth lease. The amended complaint reflects the fact that

Fitness essentially cured its default on the Plymouth lease, but still currently owes late fees and interest. Hence, NRP now claims that Fitness currently owes late fees and interest in the amount of $2,356.68 on the Plymouth lease.

Fitness filed its answer and affirmative defenses of frustration of purpose, impossibility or impracticability, and NRP's breach of the covenant of quiet enjoyment. Fitness then filed a counter-claim on January 18, 2021, which includes five counts: (1) breach of the Livonia lease; (2) return / reimbursement of money paid under mistake of fact for the Livonia lease; (3) breach of the Plymouth lease; (4) reimbursement of money paid under mistake of fact for the Plymouth lease; and (5) declaratory judgment requesting that the Court find that Fitness is excused from paying under the lease and rent should be abated in a proportional amount corresponding to the Michigan Governor's closure orders and restrictions on fitness facilities.

On August 17, 2021, NRP filed a motion for summary disposition. Fitness' counter-motion was filed on December 1, 2021. Both motions are now before the Court.

II. STANDARDS FOR DETERMINING MOTIONS FOR SUMMARY DISPOSITION

National bases its motion on MCR 2.116(C)(10) and Fitness bases its counter-motion on MCR 2.116(I)(2). In reviewing a motion under MCR 2.116(C)(10), a court must consider the pleadings, admissions, affidavits, and other relevant documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). If no genuine issue of material fact is established, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "'Courts are liberal in finding a factual dispute sufficient to withstand summary disposition.'" *Patrick v Turkelson*, 322

Mich App 595, 605; 913 NW2d 369 (2018), quoting *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009).

The moving party has the initial burden of supporting its position through documentary evidence. *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the opposing party to establish the existence of a genuine issue of material fact. *Id.* The non-moving party ". . . may not rest on the mere allegations or denials of his or her pleadings, but must, by affidavit or otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116 (G)(4). If the opposing party fails to do so, the motion for summary disposition is properly granted. Id; *Quinto, supra* at 363. Finally, a "reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules." *Maiden, supra* at 121.

"MCR 2.116(I)(2) specifically authorizes the court to render summary disposition in favor of the party opposing the motion if it appears that such party is entitled to judgment. MCR 2.116(I)(2) is subject to MCR 2.116(G)(5) and 2.119(E)(2) concerning the materials that the court may consider in granting summary disposition. Thus, although a motion is not necessary for summary disposition in favor of the party opposing an opponent's motion for summary disposition, all those matters that would have been necessary to support a motion, if it had been made, are required to grant relief to the non-moving party under MCR 2.116(I)(2). § 2116.15 Procedure on Motions for Summary Disposition - Summary Disposition for the Party Opposing the Motion, 1 Mich Ct Rules Prac, Text § 2116.15 (7th ed) "If, after careful review of the evidence, it appears to the trial court that there is no genuine issue of material fact and the opposing party is entitled to judgment as a matter of law, then summary disposition is properly

granted under MCR 2.116(I)(2)." *Lockwood v Ellington Twp*, 323 Mich App 392, 401; 917 NW2d 413 (2018)[Citations omitted].

III. DISCUSSION

In support of its motion, NRP essentially makes three arguments: (1) under the leases or pursuant to law, Fitness is not entitled to an abatement of rent, reimbursement for rent, or credit for rent paid; (2) the leases clearly show that the parties intended that Fitness' rent obligations would continue despite unanticipated events; and (3) the damages suffered by Fitness, were not the result of NRP's action, but were the result of the actions of government agencies and the government agencies did not excuse commercial tenants from their obligations.

In its response and counter-motion, Fitness makes four arguments: (1) NRP has breached the leases by failing to abate rent during the shutdown period because Fitness was denied use and enjoyment of the premises as promised by NRP; (2) NRP's breaches excuse Fitness from performing under the leases; (3) "frustration of purpose" precludes summary disposition in favor of NRP and warrants judgment in favor of Fitness; and (4) Fitness' obligations to pay rent is excused under the doctrines of "temporary impossibility" or "impracticability."

A. Breach of the Contracts

Initially, the parties' arguments involve contract interpretation. "The primary goal of contract interpretation is to honor the parties' intent. When the contract is unambiguous, the parties' intent is gleaned from the actual language used." *Prentis Family Found v Barbara Ann Karmanos Cancer Inst*, 266 Mich App 39, 57; 698 NW2d 900 (2005) [Citations omitted]. "A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written.*" *Rory v Continental Ins Co,* 473 Mich 457, 468; 703 NW2d 23 (2005) [Emphasis in original]. "In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a

reader of the instrument." *Id* at 464. "[U]nless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written." *Id* at 461.

A contract will be susceptible to only one interpretation if it is clear and unambiguous, however inartfully worded or clumsily arranged. *Farm Bureau Mut Ins Co,* 460 Mich 558, 566; 596 NW2d 915 (2003).On the other hand, a contract is ambiguous if its words may reasonably be understood in different ways. "When contractual language is unambiguous reasonable people cannot differ concerning the application of disputed terms to certain material facts, and summary disposition should be awarded to the proper party." *Island Lake Arbors Condo Ass'n v Meisner & Assoc, PC*, 301 Mich App 384, 393; 837 NW2d 439 (2013) [Citations and quotation marks omitted]. However, "[i]f the language of a contract is ambiguous, testimony may be taken to explain the ambiguity." *Bronson Health Care Group, Inc v USAA Cas Ins Co*, 335 Mich App 25, 32; 966 NW2d 393 (2020).

In support of its contract arguments, NRP cites subsection 9.2 of the leases. As indicated above, this subsection provides:

> Tenant, at Tenant's sole expense, promptly shall comply with all applicable statutes, ordinances, rules, regulations, orders, covenants and restrictions of record including, without limitation…

Under subsection 9.2, Fitness must both comply with orders and restrictions and assume the costs of such orders and restrictions.

NRP also cites section 15 of the leases, which provide that, if the premises are partially or totally destroyed, Fitness must repair and restore the premises to their original condition. The section also provides that Fitness holds NRP free and harmless from any liability for repairs and restoration of the premises. It also argues that, under this section, Fitness "is not entitled to any

rent abatement during or resulting from any disturbance on or partial or total destruction of the Premises."

In the Court's view, this section is inapplicable to the circumstances at issue in this case because the premises were not damaged, disturbed, or destroyed such that repairs were required. Rather, the premises were closed by government order.

Although subsection 9.2 provides that Fitness bears the cost associated with orders or restrictions, Fitness argues that its affirmative defenses of frustration of purpose and impossibility and/or impracticability override this assumption of risk. This subsection and these defenses will be discussed in further detail below.

Fitness also argues that, rather than its own breach, NRP breached its own obligation to provide Fitness with its use and quiet enjoyment of the premises. "[T]he covenant for quiet enjoyment protects lessees from dispossession by lessors…" *Elia Companies, LLC v Univ of Michigan Regents*, 335 Mich App 439, 453; 966 NW2d 755, 764 (2021). The covenant of quiet enjoyment is breached only "when the landlord obstructs, interferes with, or takes away from the tenant in a substantial degree the beneficial use of the leasehold." *Slatterly v Madiol*, 257 Mich App 242, 258; 668 NW2d 154 (2003)[Footnote omitted].

In the instant case, the landlord, NRP, has done nothing to obstruct, interfere with, or to take away from Fitness the "beneficial use of the leasehold." *Id.* Rather, it was the Governor and the MDHHS that obstructed or interfered with the use of the premises. Thus, Fitness has failed to establish that NRP breached the covenant of quiet enjoyment. Therefore, there is no genuine issue of material fact that NRP breached the Livonia lease (Count I of counter-claim) and breached the Plymouth lease (Count III of the counter-claim) and both claims fail as a matter of law. MCR 2.116(C)(10); *West, supra; Maiden, supra.* Accordingly, the Court grants NRP's motion as to Count I and Count III of Fitness' counter-claim.

B. Doctrines of Frustration of Purpose and Impossibility and/or Impracticability

1. Frustration of Purpose

NRP next argues that Fitness' assertion of frustration of purpose as an affirmative defense fails as a matter of law. It avers that, during the 20-year leases, it was unaware that the purpose of the lease was solely for use of the premises as health and fitness centers. In response, Fitness maintains that the leases clearly demonstrate that the principle use of the properties was for the operation of health and fitness centers.

To support its response, Fitness cites *Bay City Realty, LLC v. Mattress Firm, Inc.*, (U.S. Dist Ct, ED Mich); 2021 WL 1295261. In *Bay City Realty*, the court held that, during the pandemic shutdown, "[t]he purpose of the lease, the retail sale of bedding products, was substantially frustrated during the shutdown." *Id* at 7. NRP maintains that Fitness' reliance on the *Bay City Realty* case is misplaced because the disputed lease language in that case, which referred to "hazardous materials," was not the same as in the case before this Court. Although NRP's characterization of the *Bay City Realty* case is imprecise, the Court need not resolve this dispute because the case is not binding on this Court. "Although state courts are bound by the decisions of the United States Supreme Court construing federal law, there is no similar obligation with respect to decisions of the lower federal courts." *Abela v General Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004).

"Under Michigan law, the doctrines of frustration of purpose and supervening impossibility/impracticability are related excuses for nonperformance of contractual obligations and are governed by similar principles. Generally, the frustration of purpose doctrine is asserted where a change in circumstances makes one party's performance virtually worthless to the other, frustrating his or her purpose in making the contract…" 5A Mich Civ Jur Contracts § 193 [Footnote omitted].

Before a party may avail itself of the doctrine of frustration of purpose, the following conditions must be present: (1) the contract must be at least partially executory; (2) the frustrated party's purpose in making the contract must have been known to both parties when the contract was made; (3) this purpose must have been basically frustrated by an event not reasonably foreseeable at time the contract was made, the occurrence of which has not been due to the fault of the frustrated party and of which was not assumed by him. *Liggett Restaurant Group, Inc v City of Pontiac,* 260 Mich App 127, 134 -135; 676 NW2d 633 (2003). "'The frustration must be so severe that it is not fairly to be regarded as within the risks that he assumed under the contract.'" *Id* at 135, quoting Second Restatement of Contracts, § 265, comment a, p. 335 [Footnote omitted].

If the parties have not "expressly accounted for the instant situation in their contract," a party may make a claim for relief under the doctrine of frustration of purpose. *Id* at 136. This is not to say that the party will always prevail. See also *City of Flint v Chrisdom Properties, Ltd*, 283 Mich App 494; 770 NW2d 888 (2009)(The City's delayed issuance of a building permit by more than a year after the Board of Appeals determined that the buildings were actually in compliance, which prevented the defendant from proceeding in a timely fashion to meet the contract's time requirements frustrated the purpose of the contract.).

Under the *Liggett* factors above, the parties do not dispute that the contracts were at least partially executory. However, NRP avers that Fitness meets the above factors (2) and (3) which are challenged by Fitness. The Court finds that Fitness' purpose in making the contract was known to both parties when the contract was made. Although the property could have been used for some other purpose during the state shutdown, the primary purpose of the contracts, as expressed in subsection 9.1 and in the subsection 1.1 of the Development Procedure Agreements, was, in fact, known by NRP.

In addition, the Court finds that the primary purpose of operation of fitness facilities had been frustrated by "an event not reasonably foreseeable" at the time the contract was made and has not been the fault of Fitness. The extraordinary circumstances of a pandemic causing a complete shutdown of nonessential services were not reasonably foreseeable.

The temporary, but complete, shutdown by the government frustrated Fitness' purpose of using the premises for the operation of health club and fitness facilities. Fitness, the tenant, did not receive the benefit of its original and continued bargain to use the property as intended in exchange for the payment of rent.

During the time of the total shutdown, the change of circumstance, made the contracts "virtually worthless" to Fitness. *Liggett, supra* at 133-134; *City of Flint, supra* at 499. However, once the state allowed reopening of fitness centers at 25% capacity, the purpose of the parties' leases was no longer frustrated and was no longer "virtually worthless." *Id.* Hence, the only the time period during which the shutdown of fitness centers was total is applicable to the doctrine of frustration of purpose as it relates to the instant case.

Therefore, the Court holds that Fitness may avail itself of the doctrine of frustration of purpose for the period of total shutdown. Accordingly, the Court denies NRP's motion as it relates to the complete closure period, but grants the motion as to the reopening periods. In addition, the Court grants Fitness' motion as it relates to the complete closure period, but denies the motion for the reopening periods. This determination relates to return / reimbursement of money paid under mistake of fact for the Livonia lease (Count II) and return / reimbursement of money paid under mistake of fact for the Plymouth lease (Count IV) of Fitness' counter-claim.

2. <u>Impossibility and/or Impracticability</u>

NRP also contends that the defense of impossibility and/or impracticability fails as a matter of law. NRP argues that, under Michigan law, economic unprofitableness is not

equivalent to impossibility of performance, citing *Karl Wendi Farm Equip Co v Int'l Harvester Co*, 931 F2d 1112, 1116 (6th Cir 1991) (applying Michigan law).

Fitness argues that it should be excused from paying rent or is entitled to an abatement of rent because, during the government mandated closure periods, it was impossible to operate its health clubs and fitness centers in the premises when such operations were illegal. Fitness also maintains that the defense of impracticability applies because "a part, but not all, of the contract cannot be performed due to an unforeseeable intervening event or set of circumstances," citing *Bissell v L W Edison Co*, 9 Mich App 276, 283; 56 NW2d 623 (1967).

"A promisor's liability may be extinguished in the event his or her contractual promise becomes objectively impossible to perform. There are two kinds of impossibility: original and supervening; supervening impossibility develops after the contract in question is formed. Although absolute impossibility is not required, there must be a showing of impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved." *Roberts v Farmers Ins Exch*, 275 Mich App 58, 73–74; 737 NW2d 332 (2007)[Citations and internal quotation marks omitted]. The question of whether a promisor's liability is extinguished in the event that his or her contractual promise becomes objectively impossible to perform depends upon whether the supervening event producing impossibility was or was not reasonably foreseeable when he or she entered into the contract. *Id* at 74. "Where there is conflicting evidence on the question of impossibility, it is a question of fact for the trier of fact to resolve. *Roberts, supra* at 74. Here, there is no evidence to contradict the fact that operation of fitness facilities was impossible during the time of the total shutdown.

As indicated above, the complete shutdown of nonessential services due to a pandemic was not a reasonably foreseeable supervening event at the time the contract was made. Indeed, it was impossible for Fitness to uses the properties as intended during the shutdown period because

the government deemed the use illegal. Neither of the parties is at fault for the supervening event and the event was due to forces outside of the parties. Neither party disputes the fact that the premises were unusable for use as fitness facilities during the complete shutdown period. The Court finds there has been a "showing of impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved." *Id.* The Court also finds that "a part, but not all, of the contract [could not] be performed due to an unforeseeable intervening event." *Bissell, supra.* Like the excuse from performance due to a frustration of purpose, during the complete closure, operation as fitness facilities was objectively impossible and/or impracticable. However, once open to 25% capacity, the leases were not impossible or impracticable to perform. Thus, the Court denies NRP's motion only as to the complete closure period. This determination relates to the return / reimbursement of money paid under mistake of fact for the Livonia lease (Count II) and the return / reimbursement of money paid under mistake of fact for the Plymouth lease (Count IV) of Fitness' counter-claim.

IV. CONCLUSION

There is no genuine issue of material fact that NRP breached the Livonia lease (Count I of counter-claim) and breached the Plymouth lease (Count III of the counter-claim) and both claims fail as a matter of law. MCR 2.116(C)(10); *West, supra; Maiden, supra.* Accordingly, the Court grants NRP's motion as to Count I and Count III of Fitness' counter-claim and denies Fitness' counter-motion as to these claims.

Only the time period during which the shutdown of fitness centers was total is applicable to the doctrine of frustration of purpose. The Court denies NRP's motion as it relates to the complete closure period, but grants the motion as to the reopening periods. In addition, the Court grants Fitness' motion as it relates to the complete closure period, but denies the motion for the reopening periods. This determination relates to return / reimbursement of money paid under

mistake of fact for the Livonia lease (Count II) and return / reimbursement of money paid under mistake of fact for the Plymouth lease (Count IV) of Fitness' counter-claim.

During the complete closure, operation as fitness facilities was objectively impossible and/or impracticable. However, once open to 25% capacity, the leases were not impossible to perform. Thus, the Court denies NRP's motion and grants Fitness' motion only as to the complete closure period. This determination relates to the return / reimbursement of money paid under mistake of fact for the Livonia lease (Count II) and the return / reimbursement of money paid under mistake of fact for the Plymouth lease (Count IV) of Fitness' counter-claim.

Finally, as to Fitness' declaratory judgment claim (Count V), the Court has determined that Fitness is entitled to an abatement of rent for the period of total government closure, from March 17, 2020 to September 9, 2020, of its Livonia and Plymouth facilities. Thereafter, Fitness must pay the rent owed or due on each of those leases. For the reasons stated in the foregoing Opinion,

IT IS ORDERED that the motion for summary disposition filed by National Retail Properties is **DENIED IN PART** as to the complete closure time period of March 17, 2020 to September 9. 2020 for Fitness International LLC's claims for return / reimbursement of money paid under mistake of fact for the Livonia lease (Count II) and return / reimbursement of money paid under mistake of fact for the Plymouth lease (Count IV) of Fitness' counter-claim;

IT IS FURTHER ORDERED that National Retail Properties LP's motion is GRANTED as to the time period after September 9, 2020 for Fitness' International LLC's claims for return / reimbursement of money paid under mistake of fact for the Livonia lease (Count II) and return / reimbursement of money paid under mistake of fact for the Plymouth lease (Count IV) of Fitness' counter-claim;

IT IS FURTHER ORDERED that National Retail Properties LP's motion is **GRANTED** as to the time period after September 9, 202 on its breach of contract claims in its amended complaint (Count I and Count II);

IT IS FURTHER ORDERED that Fitness International LLC's motion as to its declaratory judgment claim (Count V) is hereby **GRANTED IN PART** as the Court has determined that Fitness International LLC is entitled to an abatement of rent for the period of total government closure, from March 17, 2020 to September 9, 2020 and **DENIED IN PART** as the Court has determined that Fitness International LLC must pay the rent owed or due on the Livonia and Plymouth lease after September 9, 2020;

IT IS FURTHER ORDERED that this **DOES NOT** resolve the last pending claim and **DOES NOT CLOSE** the case.

SO ORDERED.

DATED: /s/ Muriel D. Hughes 2/3/2022
Circuit Judge