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| EWAN 77, LLC,<br><br>Plaintiff,<br><br>v.<br><br>KENNEDY MEDICAL GROUP PRACTICE, P.C. and KENNEDY HEALTH SYSTEM, INC.,<br><br>Defendants. | SUPERIOR COURT OF NEW JERSEY<br>GLOUCESTER COUNTY<br>LAW DIVISION<br>DOCKET NO. GLO-L-337-21<br><br>Civil Action<br><br>**ORDER** |

THIS MATTER, having come before the Court on Plaintiff Ewan 77, LLC's Motion for Renewed Summary Judgment, the Court having considered the moving papers and Defendants' opposition thereto, after oral argument and for good cause having been shown,

IT IS on this 13 day of May, 2022, **ORDERED** that Plaintiff's Renewed Motion for Summary Judgment is **GRANTED**;

IT IS FURTHER ORDERED that judgment is entered in favor of Plaintiff and against Defendants for liability only;

IT IS FURTHER ORDERED that a damages hearing will be held on August 12, 2022 at 9 a.m.; and

IT IS FURTHERED ORDERED that a copy of this Order shall be served upon all parties within seven (7) days of the date herein.

/s/ Timothy W. Chell, P.J.Cv.

HON. TIMOTHY W. CHELL

This Motion was:

_____ Unopposed
X_____ Opposed

In Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995), the New Jersey Supreme Court explained the summary judgment standard as follows:

> a determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.

It should be kept in mind that the mere existence of issues of fact does not preclude summary judgment unless a view of those facts most favorable to the opposing party adequately grounds some claim for relief. Bilotti v. Acurate Forming Corp., 39 N.J. 184 (1963). The New Jersey Courts have also found "conclusory and self-serving assertions by one of the parties are insufficient to overcome the motion." Puder v. Buechel, 183 N.J. 428, 440-41 (2005).

The Brill Court instructed the motion judge to engage in an analytical process essentially the same as that necessary to rule on a motion for directed verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Brill, 142 N.J. at 536. The Brill Court emphasized that the thrust of its decision is "to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves." Id. at 541.

Contractual interpretation is an issue for the court unless there's ambiguity, uncertainty, or parole evidence. "[W]hether a contract provision is clear or ambiguous is a question of law." Township of White v. Castle Ridge Development Corp., 419 N.J. Super. 68, 74 (2011) (citing Grow Co. v. Chokshi, 403 N.J. Super. 443, 476 (App. Div. 2008)). Where the language of a contract is clear and unambiguous, "that language alone must determine the agreement's force and effect." Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 118 (2014) (citing Twp. of White v. Castle Ridge Dev. Corp., 419 N.J. Super. 68, 74-75 (App. Div. 2011). A Court cannot rewrite a contract merely because it might have been more desirable to draft it differently. Homann v. Torchinsky, 296 N.J. Super. 326, 336 (App. Div. 1997). The Court must also refrain from revising a contract to make it better than the parties themselves saw fit when they entered into the agreement or alter the contract for the benefit of one party to the detriment of the other. Id. New Jersey case

law also supports the long-standing principal that "where ambiguities exist, they are to be taken most strongly against the draftsman." Terminal Construction Corp. v. Bergen County Hackensack River Sanitary Sewer District Authority, 18 N.J. 294, 302 (1955).

Even if a contract seems clear and unambiguous the court must interpret the intent of the parties and may utilize the language used as well as the situation of the parties, the attendant circumstances, and the parties' objective in making the contract. Atlantic Northern Airlines, Inc. v. Schwimmer, 12 N.J. 293, 301 (1953). To aid in the interpretation of the agreement the Court may use evidence of the circumstances surrounding the making of the contract. However, "the admission of evidence of extrinsic facts is not for the purpose of changing the writing, but to secure light by which to measure its actual significance. Such evidence is adducible only for the purpose of interpreting the writing -- not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the meaning of what has been said." Id. at 302. (See also Casriel v. King, 2 N.J. 45 (1949)). The parol evidence rule generally prohibits the introduction of evidence that may alter an integrated written document; however, it does not exclude evidence offered for the purpose of interpreting the terms in the contract. Atlantic Northern Airlines, Inc. v. Schwimmer, 12 N.J. 293, 302 (1953).

Frustration of purpose is not granted often because "the evidence must be clear, convincing, and adequate." A-Leet Leasing Corp. v. Kingshead Corp., 150 N.J. Super. 384, 397 (1977). This may be used "when the obligor's performance can still be carried out, but the supervening event fundamentally has changed the nature of the parties' overall bargain." Capparelli v. Lopatin, 459 N.J. Super. 584, 606 (2019). To sustain this defense, it must be "their common object that [is] frustrated, not merely the individual advantage which one party or the other might have achieved from the contract." Edwards v. Leopoldi, 20 N.J. Super. 43, 55 (1952). Impossibility or impracticability of performance excuses a party "from having to perform his contract obligations where performance has become literally impossible, or at least inordinately more difficult, because of the occurrence of a supervening event that was not within the original contemplation of the contracting parties." Capparelli v. Lopatin, 459 N.J. Super. 584, 607 (2019).

Our Courts reference the Restatement often when discussing these theories which states:

> In order for a supervening event to discharge a duty under this Section, the non-occurrence of that event must have been a basic assumption on which both parties made the contract… The continuation of existing market conditions and of the financial situation of the parties are ordinarily not such assumptions, so that mere market shifts or financial inability do not usually effect discharge under the rule stated in this Section. See Restat. 2d of Contracts, 261.

Here, the Court considers a renewed motion for summary judgment submitted by Plaintiff's. In its Order denying summary judgment in favor of Plaintiff on July 1, 2021, this Court found the following:

> The Court finds that the parties' 2020 Lease included a force majeure clause which states that:

> Any **prevention, delay or stoppage** due to strikes, lockouts, labor disputes, acts of God, inability to obtain labor or materials or reasonable substitutes therefor, governmental restrictions, governmental regulations, governmental controls, enemy or hostile governmental action, civil commotion, fire or other casualty, and **other causes beyond the reasonable control of the party obligated to perform** any term, covenant or condition of this Lease, shall excuse the performance by such party for a period equal to any such prevention, delay or stoppage **except the obligations imposed with regard to rental and other charges to by paid by Tenant pursuant to this Lease.**
> See Pl. Complaint, Exhibit A, 33.10.

The Court finds that Defendant's Counterclaim alleges that "the Covid-19 pandemic has **frustrated** the purpose of the Replacement Lease and Guaranty" and Kennedy's "performance was made **impractical** by the pandemic, the rise in telehealth, and the decrease in in-person medical visits." See Def. Counterclaim. The Court finds Defendant asserts that this purpose was "for Kennedy Medical to expand its services at that location to include primary-care office visits." See Def. Counterclaim. The Court finds that the use of the premises as described in the 2020 Lease was "medical services." See Pl. Complaint, Exhibit A, 1(f).

The Court finds that the force majeure clause in the Lease Agreement provided that the Tenant would continue to be obligated to pay rent in certain circumstances, even following happenings beyond their reasonable control. The Court finds that the COVID-19 pandemic was an event outside the reasonable control of Kennedy. The Court finds that the Lease stated that prevention, delay, or stoppage caused by an event such as the pandemic would not end the obligation of Tenant to pay rent. The Court finds that Defendant's Counterclaim does not state that performance was prevented, delayed, or stopped by the pandemic. Rather, the Court finds that Defendant has alleged that performance was frustrated and made impractical by the pandemic. The Court finds that there is a genuine issue of material fact regarding whether Defendant's performance under the Lease was frustrated or made impracticable, while not being prevented, delayed, or stopped as described by the force majeure clause. The Court finds that there is a genuine issue of material fact as to whether the alleged frustration or impracticability of Kennedy's "medical services" during the pandemic excused them from the obligation to pay rent. As such, the Court finds that there is also a genuine issue of material fact regarding Defendant's liability in this matter.

See July 1, 2021 Order.

The Court's findings in this Order were written in the midst of the global pandemic when New Jersey case law was still being developed as to this unique, at the time, scenario. The Court finds now, case law has been developed and the Court has more jurisprudence to rely on and reference. The Court also finds the record in this specific matter has been developed more fully since the July 1, 2021 Order.

First, the Court does not give a large amount of weight to the Dr. Hummel email Counsel disagrees on in this decision. The Court also does not consider the new certification of Ms. Kimmel attached to the opposition brief here, as discovery is over. The Court simply applies the definitions of frustration of purpose and impossibility or impracticability of performance and its ability to consider parol evidence. The Court also highlights the newly developed New Jersey case law on this issue of the COVID-19 pandemic and non-payment on a lease. The Court finds the force majeure clause is not applicable here, as the contract clearly states tenant must still pay rent and Counsel does not address it here. The Court must look at the evidential materials presented in the light most favorable to the non-moving party and determine whether a rational factfinder could resolve the alleged disputed issue in favor of the non-moving party. Here, the arguments are for frustration of purpose and impracticability of performance.

The Court finds frustration of purpose and impracticability of performance are not met here. A key point to apply these excuses is that the common object is frustrated, not merely an individual advantage that one party to the contract may have achieved from the contract at issue. In addition, performance has become literally impossible due to a supervening event not in the contemplation of either party. Clearly, COVID-19 was not in the contemplation of either party. However, the Defendant tenant here is Kennedy Health System, a healthcare provider. The Court finds healthcare providers were deemed essential in New Jersey and were not shut down. The Court finds the Lease does not state in-person PCP would be conducted, just that the building was for "medical services."

The Court finds the inability of a tenant to turn a profit at a leased location (i.e., market conditions) has never been a valid excuse to failure to pay rent. The fact that a business did not turn a profit due to COVID-19 shutdowns is looked at in a similar way – it is not an excuse to failure to pay rent. Similarly, the Court finds the fact that Kennedy's market contemplation of primary-care physicians ended up being incorrect is not an excuse to failure to pay rent.

> Both doctrines are concerned with "[a]n extraordinary circumstance [that] may make performance [of a contract] so vitally different from what was reasonably to be expected as to alter the essential nature of that performance." JB Pool Management, LLC v. Four Seasons at Smithville Homeowners Ass'n, Inc., 431 N.J. Super. 233, 245 (2013). For example, where a seller agrees to deliver goods to a buyer by a specific date, at a designated port, but the port is subsequently closed by quarantine regulations, the seller's duty to deliver the goods is discharged See Restat. 2d of Contracts, 261 cmt. b, illus. 1. That said, the doctrine of impossibility or impracticability is not applicable where the difficulty is based on market shifts or the financial inability to perform. Id. Bussel Realty Corp. v. Joseph Franco, 2021 N.J. Super. Unpub. LEXIS 1083, *13, 2021 WL 2326402.

Defendant tenant here agrees they entered into a lease on January 9, 2020, before the COVID-19 pandemic. In their interrogatories, Defendant states "Kennedy Medical entered into the 2020 Lease in order to expand its services at the Mullica Hill location to include primary-care office visits." See Answer to Interrogatories, no. 8. Defendant also stated the cover email states it was the "proposal for expanding pcp into the area." See Answer to Interrogatories, no. 20. Defendant states that "Kennedy Medical has had a drastic increase in telehealth visits and a

decline in in-person patient visits due to the COVID-19 pandemic. The dramatic rise in telehealth decreases the use of and need for physical space to treat patients, particularly in the primary-care setting." See Answer to Interrogatories, no. 19.

However, the Lease at issue here clearly states the use of the premises as described in the 2020 Lease was "medical services." See Complaint, Exhibit A, 1(f). In Article 5, Section 5.1, the Lease states "Tenant shall use the demised premises solely for the purpose specified as 'use' in Section 1 hereof." See Complaint, Exhibit A, 5. Article 22 states "any failure by Tenant to pay the rental or make any other payment required to be made by the Tenant hereunder when due" constitutes a material default and breach of the Lease. See Complaint, Exhibit A, 22. Article 33 states:

> It is understood that here are no oral agreements or representations between the parties hereto affecting this Lease, and the Lease supersedes representations and cancels any and all previous negotiations, arrangements, brochures, agreements or representations and understandings, if any, between the parties hereto or displayed by Landlord to Tenant with respect to the subject matter thereof, and none thereof shall be used to interpret or construe this Lease. There are no other representations or warranties between the parties and all reliance with respect to representations is solely upon the representations and agreements contained in this document."
> See Complaint, Exhibit A, 33.5.

The Court finds the contract at issue controls. The Court finds the other evidential materials presented by Defendant tenant would change the substance of the written document, which is not permitted by the parol evidence rule. The Court finds the use as defined in the lease was for medical services and the Court fails to find any contingency language applicable. For example, the Lease does not specify Kennedy wanting this premises to expand primary care provision only in person. The Court finds no rational fact finder could resolve this dispute in favor of Defendant tenants. The Court finds our caselaw is clear – the referenced excuses require literal impossibility of performance or a performance that is made inordinately more difficult due to an unforeseeable circumstance. The Court finds there is an unforeseeable circumstance here, but the lease agreement's required performance of Defendant tenant was not made literally impossible or inordinately more difficult. No rational fact finder could find that the performance here was literally impossible or made inordinately more difficult by COVID-19, as the only performance required by Defendant tenant was to pay their rent. The COVID-19 pandemic does not excuse payment on a 10-year signed lease that did not have its use frustrated or made impracticable.

## ORDER OF THE COURT

Therefore, the Motion for Summary Judgement is GRANTED.