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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

Edgewater Holding Corporation, Plaintiff and Respondent, v. Anthurium, LLC et al., Defendants and Appellants.	A171760 (San Mateo County Super. Ct. No. 21-UDU-00232)

In 2017, defendant Anthurium, LLC (Anthurium) entered a five-year commercial lease with landlord Edgewater Holding Corporation (Edgewater) in order to operate a yoga and fitness studio. Defendant Ekaterina Akhanova personally guaranteed Anthurium's performance. Starting in March 2020, COVID-19 closure orders intermittently restricted Anthurium from operating its business, and, according to defendants, Anthurium's revenue declined such that they were financially incapable of paying rent. Anthurium stopped paying rent in April 2020, but it did not surrender possession of the premises until August or September 2021, after Edgewater filed an unlawful detainer action.

Defendants asserted defenses under the doctrine of impossibility, Civil Code section 1511,[1] and force majeure, arguing that they were excused from their contractual obligation to pay rent because of the government restrictions or because of their alleged pandemic-related financial incapacity. The trial court disagreed, granting Edgewater's motion for summary adjudication of those defenses. The parties then stipulated to entry of judgment, preserving the right to appeal. We agree summary adjudication was proper and affirm the judgment for the reasons explained below.

BACKGROUND

Edgewater owns a shopping center in San Mateo County where Anthurium leased space. The parties entered the lease in March 2017. Akhanova, along with another person who has settled Edgewater's claims against her, signed the lease on Anthurium's behalf and also executed personal guaranties of Anthurium's performance.

The lease had a five-year term. Anthurium agreed to use the premises "solely for a Yoga studio, similar fitness and related services and related retail" unless it received prior written consent from Edgewater. Rent and other charges were due monthly "without notice, demand or right of offset," and if Anthurium failed to pay it would be in default. Edgewater had two options if Anthurium defaulted: It could continue the lease so long as it did not terminate Anthurium's right to possession, or it could terminate Anthurium's possession at any time and collect all unpaid rent and other charges.

A force majeure clause allowed Edgewater to delay its performance if Edgewater was "delayed or prevented from performing the act required by

[1] All further statutory references are to the Civil Code unless otherwise indicated.

reason of acts of God, strikes, lockouts, labor troubles, inability to procure materials, restrictive laws, or any other cause beyond [Edgewater's] reasonable control." The lease did not contain a force majeure provision applicable to Anthurium's performance.

Beginning in March 2020 and lasting until June 2021, Anthurium and other San Mateo County businesses were subject to a series of total or partial government shutdown orders. There were periods during which Anthurium could not operate as a fitness studio at all and periods during which it could operate only at partial capacities. Defendants assert that Anthurium's revenue declined such that it was financially unable to pay rent.

In April 2020, defendants stopped paying rent and related expenses due under the lease. Defendants do not contend that Anthurium tried to rescind the lease. Instead, Anthurium remained in possession of the premises until August or September 2021. It surrendered possession after Edgewater filed an unlawful detainer action.

Once Anthurium returned the keys, Edgewater filed its First Amended and Supplemental Complaint (complaint), alleging that defendants had breached the lease and Akhanova had breached her personal guaranty of Anthurium's performance. In response, defendants pled 14 affirmative defenses. Among them, defendants alleged any nonperformance was excused under the doctrines of impossibility, impracticability, and frustration of purpose, as well as section 1511 and force majeure.

The trial court granted Edgewater's motion for summary adjudication as to those defenses, which defendants describe as "primary" and their "strongest." Soon after, the parties agreed to a stipulated judgment in Edgewater's favor, which the trial court entered. The stipulated judgment states that it is appealable. (See *Norgart v. Upjohn Co.* (1999) 21 Cal.4th

383, 399–403 [a stipulated judgment is appealable if the record shows consent was given to expedite an appeal following an adverse determination on a critical issue].)

DISCUSSION

Summary adjudication is appropriate only when there is no triable issue of material fact and the moving party is entitled to adjudication as a matter of law. (*Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 972.) We review a grant of summary adjudication de novo, considering the evidence in the light most favorable to the losing party. (*Dameron Hospital Assn. v. AAA Northern California, Nevada & Utah Ins. Exchange* (2022) 77 Cal.App.5th 971, 983.) " 'We are not bound by the trial court's reasons for granting summary [adjudication] because we review the trial court's ruling, not its rationale.' " (*Ibid.*)

I.

Defendants argue the trial court erred in granting summary adjudication of their impossibility and impracticability defenses. We disagree.

A.

As an initial matter, defendants have not shown that impossibility and impracticability defenses are available to a tenant who failed to pay rent while remaining in possession. In a Prohibition case, the California Supreme Court suggested that the Court of Appeal's decision allowing a defense where the tenant's alcohol business became illegal would not extend to a case in which the tenant failed to vacate the premises. (*Industrial Development & Land Co. v. Goldschmidt* (1922) (*Industrial Development*) 56 Cal.App. 507, 512 [appended Supreme Ct. opinion denying hearing].) Relying on that opinion, the Court of Appeal in *Grace v. Croninger* (1936) 12 Cal.App.2d 603,

606, explained, "even where the sole business to which premises are restricted by the terms of a lease becomes unlawful . . . liability under the lease continues as long as the lessee continues in possession."

A recent decision applied this principle in a case similar to this one. (See *SVAP III Poway Crossings, LLC v. Fitness Internat., LLC* (2023) 87 Cal.App.5th 882 (*SVAP III*).) There, the court held that the doctrine of impossibility could not excuse nonpayment of rent when the tenant had not vacated the premises, observing that " '[t]here is no impossibility of performance where one party has rendered services as agreed and nothing remains for the other party to do but pay the agreed compensation.' " (*Id.* at pp. 893–894.) Defendants have not identified any authority to the contrary.

Here, Anthurium retained possession for more than a year after it stopped paying rent and vacated only after Edgewater filed an unlawful detainer action. Because Anthurium elected to stay, thus benefitting from Edgewater's continued performance, defendants cannot invoke the defenses of impossibility and impracticability.

B.

Even assuming the defenses were not foreclosed by Anthurium's decision to remain in possession, we conclude that they are unavailable on the record here. California law treats impossibility and impracticability as a single doctrine under the umbrella term "impossibility." (See, e.g., *Autry v. Republic Productions, Inc.* (1947) 30 Cal.2d 144, 148–149 [citing Rest., Contracts, § 462].) The doctrine can excuse a promisor's performance when an intervening event renders the performance either strictly impossible or

impracticable.[2] (*Ibid.*) Performance is impracticable when it requires excessive and unreasonable cost. (*Ibid*; *Mineral Park Land Co. v. Howard* (1916) 172 Cal. 289, 293 (*Mineral Park Land Co.*).) The intervening event may be a government order rendering performance illegal. (*County of Yuba v. Mattoon* (1958) 160 Cal.App.2d 456, 458–459.)

Defendants contend the trial court misunderstood the "object of the lease" when evaluating their impossibility and impracticability defenses. According to defendants, the object was the operation of a yoga and fitness studio. Therefore, defendants argue, the trial court should have analyzed whether the COVID-19 pandemic and related shutdown orders caused operating such a business to become impossible or impracticable.

The idea of a contract's "purpose" or "object," however, is central to the defense of frustration of purpose, not impossibility. Frustration of purpose discharges a contracting party's remaining duties to perform—even though performance remains possible—when an unforeseen event frustrates the contract's principal purpose. (*Dorn v. Goetz* (1948) 85 Cal.App.2d 407, 410–411; *Autry v. Republic Productions, Inc., supra*, 30 Cal.2d at pp. 148–149.) In this appeal, however, defendants do not challenge the trial court's summary adjudication of their frustration-of-purpose defense.

Impossibility is different. It asks not whether a contract becomes inoperative because its purpose has been eviscerated, but rather whether a party is excused from a contractual obligation because the party's performance of that obligation has become impossible or impracticable. (*SVAP III, supra,* 87 Cal.App.5th at p. 893; Rest.2d Contracts, ch. 11 intro.

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[2] We do not agree with defendants' assertion that the trial court improperly "conflated impracticability with impossibility." As the trial court recognized, the doctrine of impossibility covers both technical impossibility and impracticability.

note ¶ 3, p. 310, §§ 261, 265.) As noted in *KB Salt Lake III, LLC v. Fitness Internat., LLC* (2023) 95 Cal.App.5th 1032, 1051 (*KB Salt Lake III*), "[p]arties do not typically 'perform' purposes of a contract . . . ."

Here, the trial court correctly identified payment of rent as the contractual obligation at issue. Edgewater's complaint alleges breach of the lease based on Anthurium's failure to pay rent. It does not allege a breach based on Anthurium's failure to operate a yoga and fitness studio. Moreover, defendants' counsel agreed with the trial court at the hearing that, although Anthurium was not entitled to use the premises for other purposes, it had no contractual obligation to operate such a studio: "You are right, my clients could have sat at home and done nothing and still paid rent if they were making money sitting home doing nothing. They are not obligated to run a yoga studio by the terms of the lease."

We agree with *SVAP III* that the doctrine of impossibility does not apply in these circumstances. (*SVAP III, supra*, 87 Cal.App.5th at p. 893.) Like the present case, *SVAP III* involved a tenant whose fitness business was subject to closure orders during the COVID-19 pandemic. (*Id.* at p. 886.) The tenant argued that the doctrine of impossibility discharged it from paying rent for some of those months. (*Id.* at p. 890.) The court disagreed. First it determined, as we have here, that the impossibility doctrine focuses on performance of a contractual obligation, not the "object" of the contract. (*Id.* at p. 893.) Then it held that "[n]othing about the pandemic or resulting closure orders has made [the tenant's] performance of its obligation to [the landlord]—paying rent—impossible." (*Ibid.*)

Defendants attempt to distinguish *SVAP III* on the ground that, unlike the tenant there, they did not have the financial capacity to continue paying rent. We are not persuaded. While there is a statement in the court's

summary of the trial court proceedings that the landlord "contended it was undisputed" that the tenant's "failure to pay was not due to lack of funds," the court did not address that claim in its analysis or otherwise indicate that it was relevant to its holding. (*SVAP III, supra*, 87 Cal.App.5th at pp. 887, 893.)

Other courts have expressly recognized that a contracting party's financial incapacity or hardship is not a sufficient ground for invoking the doctrine of impossibility. (See, e.g., *Kashmiri v. Regents of University of California* (2007) 156 Cal.App.4th 809, 839; *Majestic Asset Management LLC v. The Colony at California Oaks Homeowners Assn.* (2024) 107 Cal.App.5th 413, 427–428; *Walker v. Ticor Title Co. of California* (2012) 204 Cal.App.4th 363, 372 & fn. 10.) "Facts which may make performance more difficult or costly than contemplated when the agreement was executed do not constitute impossibility." (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 154.) Rather, the impossibility doctrine "applies only when the performance itself is made impracticable, without regard to the particular party who is to perform." (Rest.2d Contracts, § 261, com. e, p. 318.) "The impossibility must consist in the nature of the thing to be done and not in the inability of the obligor to do it." (*El Rio Oils v. Pacific Coast Asphalt Co.* (1949) 95 Cal.App.2d 186, 197 (*El Rio Oils*); see *Walker,* at p. 372, fn. 10.) Based on these principles, we conclude that, even assuming defendants raised a triable dispute about their financial circumstances, that fact is not material to a legally viable defense.

SVAP III thus cannot be distinguished even assuming it *did* involve a "large, financially robust tenant[ ] who could continue paying rent even when unable to operate." Nor can that ground serve a basis for distinguishing *KB Salt Lake III, supra,* 95 Cal.App.5th 1032 or *West Pueblo Partners, LLC v.*

Stone Brewing Co., LLC (2023) 90 Cal.App.5th 1179 (*West Pueblo Partners*), two other decisions holding that the COVID-19 pandemic and related closure orders did not excuse commercial tenants from paying rent.

We also do not find persuasive defendants' attempt to distinguish those cases on the theory that longer lease terms lessened the financial impact of COVID-19 on those defendants' ability to pay rent. None of the cited decisions addresses the length of the lease term as a factor in determining improbability or impracticability. *SVAP III, supra*, 87 Cal.App.5th at page 895, mentions the lease term's long duration in concluding the pandemic did not frustrate the purpose of the lease, but defendants here do not argue frustration of purpose on appeal.

The decisions cited by defendants in support of their impossibility defense do not alter our conclusion.

First, defendants' reliance on *In re Hitz Restaurant Group* (Bankr. N.D. Ill. 2020) 616 B.R. 374, is misplaced. There, the bankruptcy court interpreted a force majeure clause under Illinois law. (*Id.* at p. 377.) It expressly did not rely on the common law doctrine of impossibility, explaining that the doctrine was "superseded" in that case by the text of the force majeure clause. (*Ibid.*)

Second, the trial court here correctly distinguished *Mineral Park Land Co., supra,* 172 Cal. 289. There, a construction contract required the defendant to obtain all necessary earth and gravel from the plaintiff's property. (*Id.* at p. 290.) While the property contained sufficient material, about half of it was, contrary to the parties' assumption, submerged. (*Id.* at p. 291.) Because dredging it would have cost defendants 10 to 12 times more than expected, the court held further performance was impracticable such that the defendant was justified in finding earth and gravel from another source. (*Id.* at pp. 291, 293.) The court did not address the defendant's

particular financial condition. (*Id.* at pp. 290–293.) Unlike in the present case, the unbargained-for, excessive cost in *Mineral Park Land Co.* would have been the same for any defendant who was a party to a like contract. Here, the cost bargained for by the parties in the lease did not change. Instead, defendants argue it became excessive based on their own financial circumstances.

Third, as we discussed at the outset, *Industrial Development, supra*, 56 Cal.App. 507, was limited by the Supreme Court to cases in which the tenant surrenders possession. Moreover, the case has subsequently been construed as applying the frustration-of-purpose doctrine. (See, e.g., *Lloyd v. Murphy* (1944) 25 Cal.2d 48, 53; *KB Salt Lake III, supra,* 95 Cal.App.5th at p. 1058.) As to impossibility, we are persuaded by the case law discussed above holding that a party's inability to pay as a result of a change in its financial condition is insufficient.

II.

Defendants also contest the trial court's grant of summary adjudication of their defenses under subdivisions (1) and (2) of section 1511. Subdivision (1) excuses a party's performance of an obligation "[w]hen such performance or offer is prevented or delayed by . . . operation of law." Subdivision (2) excuses performance of an obligation "[w]hen it is prevented or delayed by an irresistible, superhuman cause . . . ." The trial court correctly determined that neither applies in this case.

Under both subdivisions, defendants argue that Anthurium was "prevented or delayed" from operating a yoga and fitness studio. *SVAP III, supra*, 87 Cal.App.5th at page 894, rejected a similar argument, and we agree. Like the impossibility doctrine, section 1511 applies to "an obligation," not to the purpose or object of a contract. (§ 1511; see *SVAP III,* at p. 894.)

Defendants have identified no authority suggesting that the phrase "prevented or delayed by" in section 1511 is broader than the concept of "made impossible or impracticable by" under the doctrine of impossibility, and would excuse their failure to pay rent even though the impossibility doctrine does not. Accordingly, like the courts in *SVAP III* and *KB Salt Lake III,* we will not reach a different result under section 1511. (See *SVAP III*, at p. 894; *KB Salt Lake III, supra*, 95 Cal.App.5th. at p. 1060.)

III.

Defendants lastly argue that the trial court erred in granting summary adjudication of their "common law" force majeure defense. Defendants cite no decision, however, in which a court has entertained a "common law" force majeure defense—i.e., in the absence of an applicable force majeure clause in the contract—and we are aware of none. (See, e.g., *SVAP III, supra*, 87 Cal.App.5th at p. 892 [analyzing force majeure clause in lease to address force majeure defense]; *West Pueblo Partners, supra*, 90 Cal.App.5th at pp. 1186–1192) [same]; *KB Salt Lake III*, *supra*, 95 Cal.App.5th at pp. 1050–1055) [same].) Here, the lease contains a force majeure clause that applies to Edgewater's performance, but defendants concede there is no such provision that applies to Anthurium's. They offer no theory under which we should infer one, or what the scope of such a provision would be. (Cf. *El Rio Oils, supra*, 95 Cal.App.2d at pp. 197–198 [absent impossibility, a promisor's obligation to perform is not excused even by causes beyond its control "since [it] might have provided against them in [its] contract"].) Nor do they show that they could invoke it notwithstanding Anthurium's decision to remain in possession. Having concluded that the common law and statutory doctrines discussed above do not afford defendants relief, we will not insert into the parties' lease or guaranty a provision that offers them greater protection.

(See *Vons Companies, Inc. v. United States Fire Ins. Co.* (2000) 78 Cal.App.4th 52, 59 ["We do not have the power to create for the parties a contract that they did not make and cannot insert language that one party now wishes were there"].)

DISPOSITION

The judgment is affirmed. Respondent is entitled to recover its costs on appeal.

GOLDMAN, J.

WE CONCUR:

BROWN, P. J.
MOORMAN, J. *

*Judge of the Mendocino Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.