No. 102997-7

SUPREME COURT
OF THE STATE OF WASHINGTON

FITNESS INTERNATIONAL, LLC, a California limited liability company,

Petitioner,

v.

135th AND AURORA, LLC, a Washington limited liability company; and 3922 SW ALASKA, LLC, a Washington limited liability company,

Respondents.

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

In *Fitness Int'l, LLC v. Nat'l Retail Props., LP,* 1 Wn.3d 1020 (2023), this Court denied review last year where the petition for review (1) raised the same issue as the petition in the present case, (2) involved essentially the same lease terms, and (3) involved the same tenant (petitioner Fitness International, LLC, or "Fitness"). Review was unnecessary then and is unnecessary now.

This case arises from a 15-year lease between Fitness and respondent 135th and Aurora, LLC and a 20-year lease between Fitness and respondent 3922 SW Alaska, LLC (collectively "landlords"). The leases *permitted* but did not *require* Fitness to operate a health club on the premises, which could be used for any lawful purpose. In March 2020, well into the term of both leases, Governor Inslee issued a series of emergency COVID-19 orders requiring fitness facilities to shut down or imposing capacity restrictions on such facilities. Fitness complied with these orders and paid rent during this

time period; the landlords voluntarily agreed to defer some of the rental payments. Governor Inslee lifted all such use restrictions in June 2021.

As it did in *Nat'l Retail,* Fitness asks this Court to determine whether the doctrine of temporary frustration of purpose applies in this State to excuse the payment of rent during the COVID-19 restrictions. But just as in *Nat'l Retail*, the Court of Appeals here held that there was no frustration of purpose—temporary or otherwise—because the leases allowed Fitness to use their facilities for a host of lawful purposes while the COVID-19 restrictions were in place. The purpose of the leases was to allow Fitness to use the premises in exchange for the payment of rent. That did not change during the COVID-19 restrictions. Moreover, Fitness waived any excuse to paying rent when the landlords agreed to defer some of the rental payments. Fitness's petition presents no cognizable grounds for review under RAP 13.4(b) and should therefore be denied.

STATEMENT OF FACTS

The essential facts of this case are undisputed and are in accord with the Court of Appeals' opinion.

1. The Leases Between Fitness and Landlords.

In May 2005, Fitness entered into a 15-year lease of the commercial property located at 132244 Aurora Avenue North in Seattle with 135th and Aurora LLC (the Aurora Lease). In June 2012, Fitness entered into a 20-year lease of the commercial property located at 3900 SW Alaska Street in Seattle with 3922 SW Alaska, LLC (the Alaska Lease). CP 916.[1]

The Aurora Lease provided that Fitness's "initial uses" of the premises "shall be for the operation of a health club and fitness facility," together with "ancillary" uses such as "selling apparel and fitness related items . . . vitamin and nutritional supplement sales, [and] food and beverage service for

[1] Record references are to the Court of Appeals record.

members." CP 415 [p. 3, § 1.9]. Fitness was only obligated to put the premises to this "initial use" for a single day, which Fitness had done as of 2005. CP 425 [§ 8.1].

The Alaska Lease similarly provided that the "Primary Uses" of the premises "shall be for the operation of a health club and fitness facility," together with "ancillary" uses such as apparel, food and beverage, and vitamin and nutritional supplement sales. CP 613 [§ 1.9]. Under the Alaska Lease, Fitness was obligated to operate the premises "for the Primary Uses," for a period of 60 consecutive months, defined as the "Required Operating Period." The 60-month period expired in June 2917. Just like the Aurora Lease, Fitness was free after the end of the Required Operating Period, subject to some restrictions, to put the premises to any other lawful alternate use. CP 627-628 [§§ 8.1-8.2].

Both leases contained "force majeure" clauses, which provided in pertinent part:

> If either party is delayed or hindered in or prevented from the performance of any act required hereunder because of . . . restrictive laws . . . or other reason of a similar or dissimilar nature beyond the reasonable control of the party delayed, financial inability excepted (each, a "Force Majeure Event") … performance of such act shall be excused for the period of delay caused by the Force Majeure Event and the period for the performance of such act shall be extended for an equivalent period …. Delays or failures to perform resulting from lack of funds or which can be cured by the payment of money shall not be Force Majeure Events.

CR 918 [quoting § 22.3].

2. <u>The Pandemic Causes Fitness to Temporarily Shut Down or Curtail Its Health Club Operations, But Fitness Obtains Significant Rent Concessions After Promising it Would Keep Paying Rent as it Came Due Under the Lease</u>.

Starting in March 2020, Governor Inslee issued a series of emergency executive orders requiring gyms and fitness facilities to shut down, or imposing capacity restrictions on gyms and fitness facilities. Fitness complied with the Governor's orders by closing, or restricting capacity at, the

fitness facility it operates at the premises. During this time period, Fitness paid over $500,000 in rent to the landlords under each Lease. Governor Inslee lifted all restrictions on gyms and fitness facilities in June 2021. CP 916-917.

On June 3, 2020, a few months after the government first imposed pandemic restrictions, Fitness and the landlords entered into amendments of the Aurora and Alaska Leases. In each case, the landlords agreed to defer rent that Fitness owed for April and May 2020, allowing Fitness to pay those deferred amounts in equal monthly installments over the remaining term of the Leases. The landlords also agreed to abate half of the rent owed by Fitness under each Lease for August and September 2020. As the trial court found:

"Landlords provided these significant concessions in exchange for [Fitness's] promise that it would thereafter "*shall* continue to pay all obligations under the Lease as and when due.' (emphasis added). The only consideration provided to the Landlords was [Fitness's] promise to pay using the mandatory

language shall. Further, the June 3, 2020 Lease Addendums specifically provide in section 6 that 'Except as amended by this Agreement, the terms of the Lease shall remain in full force and effect.' The Lease Addendums modified the lease terms with [Fitness's] express promise to pay." CP 917.

3. Fitness Sues to Claw Back Rent Payments.

After obtaining these rent concessions from the landlords, Fitness reneged on its promise to pay and filed its complaints in this consolidated action in January 2021. In both complaints, Fitness asserted causes of action for breach of contract and declaratory judgment. Fitness's breach of contract claim was premised upon its contention that the landlords breached the leases by failing to provide a credit to Fitness for rent paid during the "Closure Periods," and for demanding rent and late fees during the "Closure Periods." Fitness also alleged that the State's passage of COVID-19 restrictions led the landlords to breach various provision of the leases. All of Fitness's causes of action hinged on its contention that it was

excused from paying rent due to pandemic restrictions. See CP 919-920.

4. The Trial Court Grants Summary Judgment in Favor of the Landlords.

Fitness moved for partial summary judgment and the landlords moved for summary judgment on Fitness's complaint. The trial court (Judge Tanya L. Thorp) granted the landlords' motion and denied Fitness's motion. The court first held that Fitness waived its right to any future defenses to payment of all rent owed due to any future pandemic related restrictions by entering into the amendments to the leases, which conditioned rent concessions in exchange for "an express contractual promise to Landlords to 'shall continue to pay all obligations under the Lease as and when due.'" CP 917.

Next, the trial court rejected Fitness's attempt to rely on the force majeure clauses of the leases: "[T]he Lease does not affirmatively require [Fitness] to operate a fitness center at the premises during the COVID restrictions time periods, so

[Fitness] cannot establish that those restrictions prevented it from performing an 'act required,' under the Leases. [¶] The obligation that [Fitness] seeks to have excused under the Force Majeure Clause is payment of rent. However, [Fitness] paid rent to [the landlords] during time periods of pandemic restrictions, … [¶] The Force Majeure Clause expressly states that financial inability is excepted as a force majeure event. The Force Majeure Clause plainly and expressly states that if a failure to perform can be cured by the payment of money, then the failure to perform does not constitute a Force Majeure Event. Here, the failure to pay rent is an obligation that can be cured by the payment of money, so the Force Majeure Clause does not operate to excuse [Fitness's] obligation to pay rent under the Leases for this additional reason." CP 919-920.

The trial court also rejected Fitness's "frustration of purpose" defense, holding that Fitness did not "present a genuine issue of material fact that establishes that pandemic restrictions were unforeseeable, because the plain language of

the parties' Leases contain express Force Majeure Clauses which address and provide remedies in the event that 'restrictive laws' interfere with a party's ability to perform acts required under the Leases. [Citation.] Second, [Fitness] reaffirmed its contractual obligation to pay rent in the Lease Amendments, which [Fitness] executed after the enactment of pandemic restrictions. [Fitness] therefore has not established that the continuation of pandemic restrictions after [Fitness] reaffirmed its monetary obligations under the Leases was unforeseeable." CP 920.

The trial court then held that Fitness failed to present a triable issue of fact that the value of the leases was entirely destroyed by the pandemic restrictions: "The Leases permitted [Fitness] to pursue a variety of alternate and ancillary uses of the premises, so there was not, as a matter of fact per the express permissive language contained in the Lease, a total

destruction of the value of the Leases." CP 921.[2]

5. The Court of Appeals Affirms in an Unpublished Opinion.

On March 25, 2024, Division One of the Court of Appeals affirmed in an unpublished opinion. As is relevant here, the Court of Appeals first held that the Force Majeure Clauses in the leases did not apply "[b]ecause Fitness was not required to operate a health club and fitness center during the second COVID-19 closure, and because the force majeure event did not make it illegal or impossible to pay rent …." Ct. Apps. opn. at 9.

The Court of Appeals further held that Fitness could not avail itself of the doctrine of frustration of purpose. The opinion set forth established law that "[p]erformance is not excused

[2] The trial court also rejected Fitness's other arguments: (1) the obligation to pay rent was excused by the doctrines of impossibility or impracticability; (2) the landlords breached the leases; and (3) the landlords breached the covenant of quiet enjoyment" CP 920-922. Fitness does not seek review of these issues.

unless the purpose is 'substantially frustrated'" and "[i]t is not enough that the transaction has become less profitable for the affected party or even that [it] will sustain a loss." Ct. Apps. opn. at 12, citing *Felt v. McCarthy*, 130 Wn.2d 203, 207-208, 922 P.2d 90 (1996). It then held:

> While we agree that Fitness could not operate a traditional health and fitness center during the second COVID-19 closure, the 2-month closure did not substantially frustrate the primary purpose of the 15 to 20-year leases. Moreover, as we explained in our review of an almost identical lease in Fitness I, Fitness remained in possession of the leased premises and use of the premises for ancillary purposes was left broadly to Fitness's business judgment.

Ct. Apps. opn. at 12.

Finally, in a footnote, the Court of Appeals stated: "Fitness asks us to adopt the doctrine of temporary frustration under Restatement (Second) of Contracts § 269. We decline to do so." Ct. Apps. opn. at 13 n.6.[3]

[3] As a rule, this Court does not grant review under RAP 13.4(b)(4) of an issue that not addressed substantively by the Court of Appeals.

REASONS WHY REVIEW SHOULD BE DENIED

1. There is No Issue of Substantial Public Interest; Temporary Frustration of Purpose Does Not Apply as a Matter of Law Here Because The Leases Allocated The Risk of Enactment of Restrictive Laws to Fitness.

Fitness briefly cites to RAP 13.4(b)(4) in its petition (at 1) but never explains why review is warranted under that provision. Fitness is required to show that its petition "involves an issue of substantial public interest that should be determined" by this Court. Fitness fails to make such a showing.[4]

According to Fitness, review is necessary because the Court of Appeals' opinion "puts commercial tenants who assert that the purpose of their leases was *temporarily* frustrated in an impossible bind: they cannot withhold their rent and raise frustration as a defense against an eviction action; if they pay rent to preserve their interests and then seek to recover it in a

[4] Fitness does not even attempt to argue that review is warranted under RAP 13.4(b)(1), (2), or (3).

separate action, their claims are barred because they remained in possession of leased premises." Petn. at 15, italics in original.[5]

Fitness placed itself in whatever "bind" may theoretically exist because, as a sophisticated tenant, it knowingly signed the leases at issue here. Equitable defenses in a contractual dispute are only available where the contract is silent regarding the scenario in question. As this Court has held: "Equity, like it does in all other express contracts in which the terms of the contract are clear and plain, follows the law, and the courts have no authority on any equitable principle to rewrite the contract for the parties." *Pac. Fin. Corp. v. Snohomish County*, 160 Wash. 384, 389, 295 P. 110 (1931).

[5] Fitness also ignores federal and state programs designed to ameliorate the economic hardships occasioned by the Covid-19 pandemic, such as the Paycheck Protection Program of the CARES Act (Pub. L. 116-136, as amended by Pub. L. 116-260) and Governor Inslee's Proclamations 20-05 and 20-19, et seq. Fitness presumably availed itself of these programs.

This case does not raise the issue Fitness presents for review. As the Court of Appeals recognized, the leases allow the premises to be used for a wide variety of purposes in addition to a health club. Moreover, a "force majeure" event does not include "[d]elays or failures to perform resulting from lack of funds or which can be cured by the payment of money." The equitable doctrine of frustration—temporary or permanent—does not override the parties' express agreements allocating risks in the event of "restrictive laws."

In seeking review, Fitness is essentially asking this Court to rewrite the leases. Fitness is not a small business. It is fully capable of negotiating protective lease provisions for contingencies like the Covid-19 pandemic. The fact that the leases had force majeure provisions evidences that. The fact that what it negotiated with our folks didn't fully protect Fitness is not a matter for the Court. It's on Fitness.

Moreover, to establish frustration, Fitness was required to show that the principal purpose of the leases was for Fitness

to operate a fitness center at all times during the respective 15- and 20-year terms of the Aurora and Alaska Leases. *See Felt v. McCarthy*, 130 Wn.2d 203, 208 (1996); *see also Thornton v. Interstate Sec. Co*., 35 Wn.App. 19, 31 (1983) (commercial frustration requires total or nearly total destruction of the value of the leased premises). Here, the leases did *not* require Fitness to operate a health club throughout the full term of each lease. This is consistent with section 2.1 of the leases, which reflect that the mutual purpose of both parties was to lease a parcel of real property to Fitness, subject to certain terms and conditions. CP 417, 616 [§ 2.1]. Accordingly, Fitness's frustration argument—temporary or otherwise—fails because Fitness cannot establish the principal purpose of *both* parties for entering into the leases was frustrated. Therefore, even if the equitable defense of temporary frustration of

purpose were to be recognized in theory, it would not apply to this case as a matter of law.[6]

These same considerations may have led this Court to deny review in *Fitness Int'l, LLC v. Nat'l Retail Props., LP*, 25 Wn.App.2d 606, 524 P.3d 1057 (2023). *Nat'l Retail* involved a lease that was in all material respects identical to the leases

[6] Courts throughout the country have rejected Fitness's theory of temporary frustration of purpose. *See, e.g., KB Salt Lake III, LLC v. Fitness International, LLC,* 95 Cal.App.5th 1032, 1057, 313 Cal.Rptr.3d 820, 841 (Cal.App. 2023) ("Fitness International did not show the COVID-19 pandemic or closure orders destroyed, even temporarily, the whole value of the performance"); *SVAP II Pasadena Crossroads LLC v. Fitness Int'l LLC,* 260 Md.App. 77, 99, 306 A.3d 748, 761 (Md.App. 2023) (frustration of purpose defense failed as a matter of law); *VEREIT Real Estate, LP v. Fitness International, LLC*, 365 So.3d 442, 447 (Fla.App. 2023) (no frustration of purpose as a matter of law because parties agreed that Fitness's "rent obligations would not be excused even if government adopted 'restrictive laws'"); *Vereit Real Est., LP v. Fitness Int'l, LLC*, 529 P.3d 83, 90-91 (Ariz. App. 2023) (frustration doctrine inapplicable because value of lease not destroyed and force majeure clause allocated risk to Fitness); *Fitness Int'l, LLC v. Nat'l Retail Props. Ltd. P'ship,* 2022 Mich. App. Lexis 6151, at 12-13 (Mich.App. 2022) (no frustration of purpose where Fitness "retained possession of the property and had exclusive use of that property").

here. *See id.* at 610-611 (lease allowed the premises to be used for many other activities in addition to a health club, and a force majeure event did not include "financial inability"). The Court of Appeals rejected Fitness's argument that payment of rent was excused during the COVID-19 closure due to frustration of purpose:

> While we agree that Fitness International could not fully operate a traditional fitness facility during the limited months of the public health orders, the purpose of the lease was not substantially frustrated. Section 9.1 of the lease describes the initial and ancillary authorized uses of the premises. Initial uses include a lengthy list of traditional health and fitness facility uses…. Section 9.1 also lists more than a dozen possible ancillary uses that Fitness International can conduct, including selling apparel, well-being services, vitamins, and food and beverages. Use of the premises for ancillary purposes is left broadly to Fitness International's business judgment …. [T]he lease in this case … allows Fitness International flexibility in its use of the premises. Fitness International's lease was not substantially frustrated.

25 Wn.App.2d at 619-620.

Fitness filed a petition for review in *Nat'l Retail*. The first issue presented was:

> Whether this Court should accept review of the Decision under RAP 13.4(b)(4), because review provides an opportunity for this Court to modernize application of equitable doctrines, including adoption of Restatement (Second) of Contracts §§ 269, 270, and 272 (1981), which concern temporary frustration of purpose, the adoption of which will properly equip Washington courts with a full set of tools to answer continued questions due to the COVID-19 global pandemic and likely future challenges based on any new global pandemic or, for example, inevitable disruptions as a result of climate change.

Petn. for review in *Fitness Int'l, LLC v. National Retail Properties LP,* No. 1018321, filed March 23, 2023, at 1-2.

This is virtually the same issue as that presented here. This Court summarily denied review. *Fitness Int'l, LLC v. Nat'l Retail Props., LP, supra,* 1 Wn.3d 1020 (2023). Fitness fails to show that *anything* has changed in the last year that would warrant review. It has not, and the petition for review should therefore be denied.[7]

[7] The trial court held that, by entering into the post-COVID amendments to the leases, Fitness "waived its right to any future defenses to payment of all rent owed due to any

CONCLUSION

Fitness presents no persuasive reason for this Court to grant review. The petition should therefore be denied.

RESPECTFULLY SUBMITTED on May 21, 2024.

BUCHALTER

Pursuant to RAP 18.17, I certify this answer contains 2,963 words.

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future pandemic related restrictions." CP 917. Although the Court of Appeals did not reach this issue (see Ct. Apps. opn. at 14 n.7), this alternative ground further demonstrates that this case provides a poor vehicle to address any broad legal issue. Although review is not warranted here, the issue of waiver should be addressed if review is granted. *Lewis River Golf, Inc. v. O.M. Scott & Sons*, 120 Wn.2d 712, 725; 2 WSBA, Wash. Appellate Prac. Deskbook, § 18.2(6) at 18-9.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 21, 2024, a true and correct copy of the foregoing **Answer to Petition for Review** was served by electronic mail on:

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