

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

1800 Baxter County Road LLC,

Plaintiff,

vs.

Portillo's Hot Dogs, LLC,

Defendant.

Court File No.: 62-CV-20-3818

Case Type: Contract

ORDER & MEMORANDUM

This matter came before the undersigned on January 21, 2021, upon Plaintiff's motion for summary judgment. Plaintiff was represented by Attorney Philip Kaplan. Defendant was represented by Attorney Mark Vyvan.

Based on the files, records, and proceedings herein, **IT IS HEREBY ORDERED:**

1. Plaintiff's motion for summary judgment is hereby **GRANTED**.
2. The attached Memorandum shall be incorporated into this Order.

LET JUDGMENT BE ENTERED ACCORDINGLY

BY THE COURT:

Dated: March 30, 2021

THOMAS A. GILLIGAN, JR.
JUDGE OF DISTRICT COURT

MEMORANDUM

This matter arises out of a breach of contract dispute. Defendant Portillo's Hot Dogs, LLC ("Portillo's") has not paid rent to its landlord, Plaintiff 1800 Baxter County Road LLC ("1800 Baxter"), since 1800 Baxter assumed the lease (the "Lease") and the first rental payment came due in June 2020. 1800 Baxter contends that since Portillo's is in breach and Section 35 of the Lease ("Section 35" or "force majeure clause") supersedes Portillo's common law defenses, the court should enter summary judgment in favor of 1800 Baxter. Portillo's contends that Section 35 does not apply here, and even if it does, it does not supersede Portillo's common law defenses of frustration of purpose, impossibility, and impracticability.

FACTUAL BACKGROUND

Portillo's is a restaurant located at 1800 Baxter County Road, Roseville, Minnesota. (ECF No. 17.) Portillo's first entered the Lease for its premises with non-party Rosedale Retail LLC ("Rosedale Retail") on April 30, 2018 for a term of 240 months. (ECF No. 18.) Section 1(E) of the Lease states:

The Premises will be for the operation of a typical Portillo's restaurant with a double-lane, drive-through . . . selling [food]. Landlord acknowledges that Tenant's Use shall include . . . the preparation and sale of the above items . . . all for in-store consumption, take-out or delivery (including catering). . . . Tenant may use the sidewalks and/or patios on the Premises as an exclusive outdoor seating area

Section 35 states:

UNAVOIDABLE DELAYS. The time within which either party shall be required to perform any of its obligations hereunder shall be extended if and to the extent that the performance . . . shall be prevented due to . . . act of God . . . riots . . . or other reason of like nature beyond the reasonable control of the party delayed in such performance (each a "**Force Majeure Event**"). The provisions of this Section shall not: (a) operate to excuse Landlord or Tenant from prompt payment of Rent

The COVID-19 pandemic arrived in Minnesota in early 2020. In response, Governor Walz issued Executive Orders (the “Executive Orders”) closing all Minnesota restaurants for dine-in service March 17, 2020 through June 10, and again November 20 through December 18. Portillo’s continued drive-through and takeout services as allowed while the Executive Orders were in effect. (ECF No. 17.)

On March 26, 2020 Portillo’s requested rent relief of Rosedale Retail LLC, its then-Landlord. (ECF No. 20.) On April 17, 2020 Rosedale Retail and Portillo’s executed a lease amendment (the “Amendment”) providing rent abatement for April and May. (ECF No. 20.)

On April 24, 2020 1800 Baxter purchased the premises from Rosedale Retail and accepted an assignment of the Lease. (ECF No. 21.) In connection with the sale of the property, Portillo’s signed an estoppel certificate (“the Estoppel Certificate”) which provides: “The Lease is unmodified and in full force and effect, and has not been amended, modified, supplemented or superseded” except as set forth in the Amendment. Portillo’s has not made a rental payment to 1800 Baxter since it first came due on June 1. (ECF No. 17.) On June 15, 2020 1800 Baxter sent Portillo’s a notice of default in which it demanded immediate payment of rent. (ECF No. 20.) On June 24, 2020 1800 Baxter filed this lawsuit against Portillo’s and alleged claims for breach of lease and unjust enrichment.

STANDARD OF REVIEW

Rule 56 of the Minnesota Rules of Civil Procedure is designed to secure a just, speedy, and inexpensive determination of an action by allowing a court to dispose of an action on the merits if there is no genuine dispute regarding the material facts, and a party is entitled to judgment under the law applicable to such facts. *DLH, Inc. v. Russ*, 566 N.W.2d 60 (Minn. 1997) (quoted source omitted). Thus, Rule 56 provides that summary

judgment is proper when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, submitted show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law. Minn. R. Civ. P. 56.03. When a motion for summary judgment is made and supported, the nonmoving party must present specific facts showing that there is a genuine issue for trial. Minn. R. Civ. P. 56.05. If the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. *Id.*

The district court's function on a motion for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist. *See Nord v. Herreid*, 305 N.W.2d 337, 339 (Minn. 1981) (citation omitted). The court must not weigh the evidence on a motion for summary judgment. *Fairview Hosp. & Health Care Servs. v. St. Paul Fire & Marine Ins. Co.*, 535 N.W.2d 337, 341 (Minn. 1995). That said, a court must view the evidence in a light most favorable to the nonmoving party. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

ANALYSIS

A commercial real estate lease is a contract. *See, e.g., Pettit Grain & Potato Co. v. N. Pac. Ry. Co.*, 35 N.W.2d 127, 130–31 (Minn. 1948). “A contract consists of a binding promise or set of promises. A breach of contract is a failure, without legal excuse, to perform any promise that forms the whole or part of the contract.” *Lyon Financial Services, Inc. v. Illinois Paper and Copier Co.*, 848 N.W.2d 539, 543 (Minn. 2014) (cleaned up). The elements of a breach of contract claim are: “(1) formation of a contract, (2) performance by plaintiff of any conditions precedent to his right to demand performance by the

defendant, and (3) breach of the contract by defendant.” *Park Nicollet Clinic v. Hamann*, 808 N.W.2d 828, 833 (Minn. 2011).¹

Interpretation of a contract is a question of law for the court to decide. *Johnson Brothers Corp. v. Rapidan Redevelopment Ltd.*, 423 N.W.2d 725, 728 (Minn. Ct. App. 1988). Accordingly, this court must decide whether the Lease foreclosed Portillo’s common law defenses to paying rent during the COVID-19 pandemic.

1800 Baxter contends Portillo’s breached the Lease by failing to pay rent. Portillo’s contends its performance, i.e., payment of rent, is excused by the impacts of the COVID-19 pandemic, including the Executive Orders’ temporary closure of indoor dining services. 1800 Baxter counters that the force majeure clause of the Lease, Section 35, allocated the risk of the pandemic’s occurrence to Portillo’s, and excuses a delay in payment, but not performance by payment entirely. This court’s analysis turns first to Portillo’s contention that Section 35 is inapplicable here.

SECTION 35 APPLIES TO THIS CASE

Portillo’s contends that Section 35 does not apply to this case because it concerns only the timing of performance, not whether either party is required to perform. Section 35 is titled “UNAVOIDABLE DELAYS,” and extends the time for performance “to the extent that the performance . . . shall be prevented” due to myriad external events, including “any moratorium or other governmental” restriction.

When interpreting a contract, the district court “look[s] to its language to determine the parties’ intent.” *Savelle v. City of Duluth*, 806 N.W.2d 793, 796 (Minn. 2011). Section

¹ 1800 Baxter also brings a claim for unjust enrichment. A claim for unjust enrichment is available for quasi-contracts “in which the defendant received a benefit of value that unjustly enriched the defendant in a manner that is illegal or unlawful.” *Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 838 (Minn. 2012). Unjust enrichment “does not apply when there is an enforceable contract” *Id.* This analysis will not reach the unjust enrichment claim because this court finds there is an enforceable contract, thereby resolving the unjust enrichment claim.

38(G) of the Lease indicates headings “do not alter, amend, explain or otherwise affect the terms and conditions of this Lease and shall not affect its interpretation.” Setting aside Section 35’s heading, by the unambiguous text of the section, timing of performance is not an issue mutually exclusive of performance itself as Portillo’s contends. Instead of excusing performance entirely, Section 35 excuses unavoidable delays. Put another way, the force majeure clause requires payment even in extraordinary circumstances—albeit unavoidably delayed.

Minnesota law permits the parties freedom to contract, including allocating “rights, duties, and risks.” *Lyon Financial Services, Inc. v. Illinois Paper and Copier Co.*, 848 N.W.2d 539, 545 (Minn. 2014). Thus, “[o]ne may contract to do what is impossible, as well as what is difficult, and be liable for failure to perform.” *Standard Const. Co. v. National Tea Co.*, 62 N.W.2d 201, 206 (Minn. 1953). Portillo’s not only freely contracted with Rosedale Retail in 2018 on the original Lease, with Section 35 therein. Portillo’s signed an Estoppel Certificate with 1800 Baxter in 2020, agreeing the Lease was “in full force and effect” during the pandemic, and when the Governor’s Executive Order limiting indoor dining was in effect. Under the principal of freedom to contract, Portillo’s may not now escape the Lease and Estoppel Certificate, to which it effectively agreed on two different occasions.

COMMON LAW DEFENSES DO NOT EXCUSE PERFORMANCE

Portillo’s contends that even if Section 35 applies, its common law defenses of impossibility, impracticability, and frustration of purpose excuse performance. 1800 Baxter contends Sections 35, 38(I), and 38(J) of the Lease preclude Portillo’s’ asserted defenses. Section 38(J) states: “The provisions of this Lease shall extend to the parties and their respective assigns.” *Id.* (cleaned up). Section 38(I) states: “This Lease contains the entire agreement of the parties with respect to the subject matter.” Merger clauses such as

this one serve to limit parol and other extrinsic evidence “beyond the four corners of a contract.” *Trebelhorn v. Agrwal*, 905 N.W.2d 237, 243 (Minn. Ct. App. 2017).

The common law defenses of impracticability and impossibility are available “[e]xcept where a contrary intent is manifest.” *Powers v. Siats*, 70 N.W.2d 344, 348 (Minn. 1955); *see also UMN V 205-207 Newbury, LLC v. Caffè Nero Americas, Inc.*, 2084CV091493, at *9 (Mass. Super. Ct. Feb. 8, 2021) (concluding language of force majeure clause foreclosed impossibility defense to café’s non-payment of rent during COVID-19 governmental shutdown). Whether and how a force majeure clause bears on common law defenses requires a case-by-case analysis. *See Rembrandt Enterprises, Inc. v. Dahmes Stainless, Inc.*, 2017 WL 3929308 (N.D. Iowa Sept. 7, 2017) (applying Minnesota law, finding force majeure clause did not preclude frustration of purpose defense). As previously discussed, Portillo’s expressly agreed in the force majeure clause to perform in spite of circumstances rendering performance impossible or impracticable that would otherwise justify nonperformance. Accordingly, impossibility and impracticability are defenses not available to Portillo’s. But, as in *UMNV*, the force majeure clause does not allocate the risk of frustration of purpose to either party. 2084CV091493, at *9. This court’s analysis turns to the frustration of purpose defense.

Portillo’s contends the impact of the COVID-19 pandemic and Governor Walz’s Executive Orders frustrated Portillo’s purpose in leasing the Roseville location: to allow Portillo’s to provide dine-in service. The frustration of purpose defense requires: “1. The party’s principal purpose in making the contract is frustrated; 2. without that party’s fault; 3. by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made.” *City of Savage v. Formanek*, 459 N.W.2d 173, 176 (Minn. App. 1990). A principal purpose is “so completely the basis of the contract that, as both parties

understand, without it the transaction would make little sense.” *Id.* (citation omitted). Frustration does not rise to the level of impossibility. *Formanek*, 459 N.W.2d at 177. “It is not enough that the transaction has become less profitable for the affected party. The frustration must be so severe that it is not fairly to be regarded as within the risks assumed under the contract.” *Id.* at 176 (cleaned up). Frustration of purpose is not available where parties are aware of the frustrating event when the contract is executed. *See Lounsbury v. City of Savage*, 1998 WL 426555, at *3 (Minn. Ct. App. 1998).

The parties do not dispute that the purpose of the Lease is contained within Section 1(E). Portillo’s contends that its principal purpose is to provide indoor dining because the location is a two-story building, approximately 7,500 square feet, with 108 parking spaces. 1800 Baxter contends, under Section 1(E), the principal purpose also includes take-out and delivery services.

The language of 1(E) plainly contemplates a purpose of providing a restaurant premises with the capacity for indoor, drive-through, and take-out dining services: “Landlord acknowledges Tenant’s Use shall include the preparation and sale of [food] for in-store consumption, take-out or delivery (including catering).” *Id.* (cleaned up). The question remains whether indoor dining constitutes the principal purpose of the Lease, such that the Executive Orders frustrated its purpose. Portillo’s points to the size of its building and number of parking spaces as evidence that it was principally intended as an indoor dining restaurant. Minnesota courts have considered extrinsic evidence to determine a contract’s principal purpose. *See Nat’l Recruiters, Inc. v. Toro Co.*, 343 N.W.2d 704, 708 (Minn. Ct. App. 1984). But here, Section 38(I) precludes this court from considering extrinsic evidence to divine the purpose of the Lease beyond its four corners. There is nothing in the Lease to indicate the drive-through and take-out services were

intended to be less central to Portillo's' business than dine-in services. This court concludes the principal purpose of the Lease is to provide premises for a restaurant offering indoor, drive-through, and take-out services. Two out of the three services were not restricted by the Executive Orders, therefore the purpose of the Lease was not substantially frustrated. The first element of the defense is not met.

Additionally, Portillo's' argument fails on the third element of the frustration of purpose defense. Portillo's signed the Estoppel Certificate, effective on April 20, 2020, recognizing "the Lease is unmodified and in full force and effect," in the middle of the Executive Orders' effect. Portillo's cannot now claim its purpose was frustrated by circumstances of the COVID-19 pandemic because it expressly agreed to be bound during the pandemic. It is illogical for Portillo's to argue the impacts of the pandemic or Executive Orders were not fairly within its contemplation for a certificate it signed, which incorporated the Lease, during the pandemic.

CONCLUSION

In sum, 1800 Baxter is entitled to summary judgment because there is no genuine issue of material fact on its breach of contract claim against Portillo's. Section 35 applies to the circumstances of this case because it binds the parties to perform even if forces majeures create unavoidable delays. Section 35 forecloses the impossibility and impracticability common law defenses. Moreover, Portillo's has not met the three elements of the frustration of purpose common law defense. Accordingly, Portillo's breach of the Lease is not excused.

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