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SJC-13269

LE FORT ENTERPRISES, INC. vs. LANTERN 18, LLC, & others.[1]

Middlesex. October 3, 2022. - January 3, 2023.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Contract, Franchise agreement, Impossibility of performance. Jurisdiction, Equitable.

Civil action commenced in the Superior Court Department on May 21, 2020.

The case was heard by Valerie A. Yarashus, J., on a motion for summary judgment, and a motion for reconsideration was considered by her.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Seth H. Salinger (Stuti Venkat also present) for the defendants.
Stewart A. Engel for the plaintiff.

[1] Samuel E. Bergman and Marcia Bergman.

WENDLANDT, J. Pacta sunt servanda -- promises must be kept -- is the fundamental premise of contract law.[2] This case presents the question whether, during the economic disruption resulting from the COVID-19 pandemic, the doctrines of impracticability of performance or frustration of purpose temporarily excused the purchaser of a cleaning services franchise, and the purchaser's coowners, from their obligation to pay the outstanding portion of the franchise purchase price. The purchaser and coowners contend that the franchise was unable to perform cleaning services because of the pandemic, triggering the applicability of the two equitable doctrines. Because the summary judgment record does not support a rational finding that the pandemic caused the continued payment of the franchise purchase price to be impracticable or frustrated the principal purpose of the contract, and because the parties' contractual provisions showcase their intent that the obligation to pay would not be conditioned on the franchise's financial performance beyond the first six months following the 2015 sale, we affirm summary judgment in favor of the seller.

1. Background. The material facts in the summary judgment record are largely undisputed. See HSBC Bank, USA, N.A. v.

[2] See T. Murray, Corbin on Contracts: Force Majeure and Impossibility of Performance Resulting from COVID-19 § 1.02[2][A], at 1-7 (2021).

Morris, 490 Mass. 322, 326 (2022) (HSBC Bank) ("Summary judgment is appropriate where there is no material issue of fact in dispute and the moving party is entitled to judgment as a matter of law").

a. Asset purchase agreement and initial promissory note. In May 2015, the defendant Lantern 18, LLC (Lantern 18), purchased a "Merry Maids of Boston" cleaning franchise from the plaintiff, Le Fort Enterprises, Inc. (Le Fort), pursuant to an asset purchase agreement. The purchase price was payable in three parts. First, Lantern 18 paid a nonrefundable deposit; second, Lantern 18 paid a lump sum at the closing of the agreement; and third, Lantern 18 and one of Lantern 18's coowners, the defendant Samuel Bergman, as co-obligors, were to pay the remainder through consecutive monthly payments together with a balloon payment in May 2018. The remainder payment was evidenced by an initial promissory note, setting forth the parties' agreed terms.[3]

In addition, the asset purchase agreement set forth that "in the event that six months after the closing date . . . [Lantern 18's] sale[s] are less than [a threshold amount] that [Lantern 18] will be credited with the sum of $15,000.00 which sum shall be deducted at that time from the principal balance of

[3] The initial promissory note was not provided in the record on appeal.

the [p]romissory [n]ote."[4] The asset purchase agreement contained no other financial contingency clause conditioning, or otherwise altering, the obligation to pay the purchase price on the franchise's performance; and the agreement did not contain a force majeure clause.[5]

b. Amended promissory note. In May 2018, the month that the initial promissory note was due and long after the six-month purchase price adjustment period had expired, Lantern 18 and Samuel Bergman apparently had not completed payment of the remainder amount owed to Le Fort for the purchase of the franchise. They requested an extension of time to complete

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[4] Lantern 18 brought a counterclaim in this action, asserting that Le Fort committed a breach of the asset purchase agreement by failing to credit Lantern 18 with the $15,000. Le Fort denied the allegations, and the parties stipulated to a dismissal of the counterclaim.

[5] A force majeure clause is "[a] contractual provision allocating the risk of loss if performance becomes impossible or impracticable, esp[ecially] as a result of an event or effect that the parties could not have anticipated or controlled." Black's Law Dictionary 788 (11th ed. 2019). Such clauses, which are common in contracts, see Annot., COVID-19 Related Litigation: Effect of Pandemic on Contractual Obligations, 73 A.L.R. 7th Art. 2 § 2 (2022), excuse a party's performance for "an event or effect that can be neither anticipated nor controlled; especially an unexpected event that prevents someone from doing or completing something that a person had agreed or officially planned to do." 30 R.A. Lord, Williston on Contracts § 77:31, at 358 (4th ed. 2004). Events often covered by a force majeure clause include, inter alia, acts of nature like floods and hurricanes, and acts of people like riots, strikes, and wars. Id.

their repayment obligation and a modification to the initial promissory note. Le Fort agreed.

Accordingly, in August 2018, the defendants (Lantern 18, Samuel Bergman, individually, and Lantern 18's other coowner, the defendant Marcia Bergman, individually), as co-obligors, and Le Fort executed an amended promissory note, granting the co-obligors an additional four years to pay the outstanding portion of the original franchise purchase price through monthly installment payments and a final balloon payment in May 2022. Under the amended promissory note, the co-obligors were "jointly and severally" liable.[6] The amended promissory note made the occurrence of any of several listed conditions an event of default, including failure to make monthly payments within ten days of their due date and failure to timely provide the co-obligors' financial information to Le Fort. Under the note, an

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[6] Specifically, the co-obligors jointly and severally promised to pay the outstanding purchase price

> "with interest thereon at 5.5% per annum, to be amortized over 8 years, such principal and interest to be payable in equal consecutive [monthly] payments . . . , which amount includes both principal and accrued interest, payable in arrears, beginning September 1, 2018 and on the same day of each month thereafter with a final payment of the entire remaining principal balance and all accrued interest and other charges in connection herewith on May 17, 2022."

In November 2018, the parties agreed to reduce the monthly installment payment to $3,243, in consideration for two payments of $12,500 made to Le Fort in November and December.

event of default triggered Le Fort's option to demand immediate payment of all outstanding sums pursuant to an acceleration clause.[7] The amended promissory note also required the co-obligors to pay late payment charges after fifteen days of a missed monthly due date. Other relevant provisions of the amended promissory note are discussed infra.

c. The COVID-19 pandemic. Unbeknownst to the parties, approximately nineteen months after they executed the amended promissory note, the Commonwealth would be engulfed by the COVID-19 pandemic, which was "spread[ing] alarmingly, rapidly, and at an increasing rate, both in Massachusetts and throughout the world." Committee for Pub. Counsel Servs. v. Chief Justice of the Trial Court, 484 Mass. 431, 433-434, S.C., 484 Mass. 1029 (2020). "On March 10, 2020, the Governor declared a state of emergency to support the Commonwealth's response to the threat of COVID-19." Id. at 433. The next day, "the World Health Organization formally declared the expanding spread of the COVID-19 virus a global pandemic." Id.

"The 2020 COVID-19 pandemic . . . created enormous challenges for every aspect of our communities." Id.

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[7] Section 2.2 of the amended promissory note provided that "[u]pon the occurrence of an [e]vent of [d]efault, or at any time thereafter, at the option of [Le Fort], all [o]bligations of the [co-obligors] [would] become immediately due and payable without notice or demand."

Communities struggled to "reduce the number of cases the beleaguered health care system [would] treat at any one time." Id. Starting in March 2020, and until June 2020, the Governor issued executive orders affecting nonessential businesses that, in effect, shut down the co-obligors' franchise.

Thereafter, when the pertinent executive orders had been lifted, the franchise continued to struggle because a "high percentage" of its customers were unwilling to allow cleaning crews into their homes. The franchise also experienced pandemic-related interruptions because whenever one member of a cleaning crew tested positive for COVID-19, the remaining one to two crew members were required to quarantine. As a result, the franchise's revenue "precipitous[ly] decline[d]."

d. Default. The co-obligors failed to make the monthly installment payment due on April 1, 2020. More than fifteen days later, on April 22, 2020, counsel for Le Fort notified the co-obligors by letter of their "continuing material breach and default" of payment terms of the amended promissory note. In the same letter, counsel notified the co-obligors that Le Fort was exercising its rights under the acceleration clause, and further notified them that they would be liable for the expenses, including attorney's fees, incurred by Le Fort in connection with its enforcement efforts. Counsel "advised" the co-obligors that, unless they paid the April and May payments,

and Le Fort's attorney's fees, by May 1, 2020, Le Fort would commence a civil action.

That same day, counsel for Le Fort also sent a financial records demand letter to the co-obligors, seeking their "business, professional and personal financial records." This second letter advised the co-obligors that failure to timely comply with the request would be an event of default under the parties' agreements, which would also trigger Le Fort's rights under the acceleration clause.

In late May 2020, following a second missed monthly payment and with no apparent response from the co-obligors to counsel's letters, Le Fort commenced the present action, alleging that the co-obligors committed a breach of the amended promissory note. In response, the co-obligors raised, inter alia, the affirmative defense that the pandemic excused temporarily their obligations to make monthly payments under the amended promissory note.[8]

In October 2020, by which time the co-obligors had failed to make six monthly installment payments, Le Fort moved for summary judgment. Following a hearing, a Superior Court judge

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[8] Specifically, the co-obligors stated that Le Fort "has used the unprecedented circumstance of the COVID-19 [p]andemic to take advantage of the fact that the [co-obligors'] business was legally shut down by the mandatory orders of the Commonwealth of Massachusetts leading to the failure to pay certain monthly payments which had prior thereto been paid in a timely manner for almost five years."

allowed Le Fort's motion. The co-obligors filed a motion for reconsideration, which the judge denied. The co-obligors timely appealed, and this court transferred the case sua sponte.

2. Discussion. a. Standard of review. "Summary judgment is appropriate where there is no material issue of fact in dispute and the moving party is entitled to judgment as a matter of law." HSBC Bank, 490 Mass. at 326. "Our review of a decision on a motion for summary judgment is de novo." Id., quoting Berry v. Commerce Ins. Co., 488 Mass. 633, 636 (2021). "We review the evidence in the light most favorable to the party against whom summary judgment entered." HSBC Bank, supra at 326-327. While the nonmoving party is "'not required to set forth [its] entire defense to the [movant's] claims to defeat a motion for summary judgment, . . . [the nonmovant is], of course, required to produce evidence sufficient to create a genuine dispute of material fact." Haverty v. Commissioner of Correction, 437 Mass. 737, 759 n.28 (2002), S.C., 440 Mass. 1 (2003). Otherwise, "summary judgment, if appropriate, shall be entered against [it]." Mass. R. Civ. P. 56 (e), 365 Mass. 824 (1974).

In general, the applicability of the doctrines of impracticability and frustration of purposes is a jury question. See Mishara Constr. Co. v. Transit-Mixed Concrete Corp., 365 Mass. 122, 126 (1974) (determination of applicability of

doctrines of impossibility or impracticability and frustration of purpose "depended on the facts and circumstances which were for the jury to decide"). However, where the material facts are not in dispute and "no rational view of the evidence" permits a finding of impracticability or frustration of purpose, summary judgment is proper. Petrell v. Shaw, 453 Mass. 377, 381 (2009), citing Mullins v. Pine Manor College, 389 Mass. 47, 56 (1983).

b. Equitable defenses against breach of contract due to the pandemic. The COVID-19 pandemic has disrupted many aspects of daily life and has had an impact on the economic well-being of many businesses. "Thankfully, the vast majority of businesspersons [have sought] amicable resolutions of their [pandemic-related] disputes." T. Murray, Corbin on Contracts: Force Majeure and Impossibility of Performance Resulting from COVID-19 § 1.01, at 1-5 (2021) (Corbin, COVID-19). Regrettably, the parties in the present case have been unable to do so;[9]

[9] The parties apparently engaged in settlement negotiations, which are confidential and generally inadmissible. See Mass. G. Evid. § 408 (2022). Nonetheless, Samuel Bergman averred that, after Lantern 18 sought and received a pandemic-related loan from the Small Business Administration, it offered to apply these funds "to bring [Le Fort] current in [sic] all payments owed" through July 2020; it is undisputed that the amounts tendered, at that time, comprised amounts to cover the past-due monthly installment payments and not any additional amounts owed under the amended promissory note. The co-obligors apparently have placed these funds in escrow; however, no payments have been made to Le Fort since March 2020.

instead, "we are left with the resolutions that parties have bargained for in their contracts, or, [when] appropriate, the equitable remedies that [the] common law has fashioned." AGW Sono Partners, LLC v. Downtown Soho, LLC, 343 Conn. 309, 323 (2022), quoting In re Cinemex USA Real Estate Holdings, Inc., 627 B.R. 693, 701 (Bankr. S.D. Fla. 2021). See Automile Holdings, LLC v. McGovern, 483 Mass. 797, 817 (2020), quoting National Med. Care, Inc. v. Zigelbaum, 18 Mass. App. Ct. 570, 575-576 (1984) ("We cannot rewrite the contract to cure an oversight or relieve a party from the consequences of the failure to adhere to its plain terms").

In the present action, the co-obligors admit that they failed to keep their promise, i.e., to make payments due under the amended promissory note and as required by the asset purchase agreement. They assert that their obligation to pay was excused, at least temporarily, under the doctrine of impracticability or the doctrine of frustration of purpose in light of the economic repercussions on the franchise's operations during the COVID-19 pandemic. Accordingly, they contend that during this period, their payment obligations were excused, and Le Fort was precluded from exercising its rights under the parties' agreements, including its rights under the acceleration clause.

To determine whether the co-obligors' payment obligations were in fact excused, we begin with the fundamental principle of contract law that

> "one who has bound himself by an absolute agreement for the performance of something not in itself unlawful is not released from his obligation by the mere fact that in consequence of unforeseen accidents the performance of his contract has become impossible; he must respond in damages for the breach of his agreement."

Boston Plate & Window Glass Co. v. John Bowen Co., 335 Mass. 697, 699-700 (1957) (Boston Plate). "The theories excusing contractual performance are exceptions to this rule and are not lightly applied." Corbin, COVID-19, supra at § 1.02[2][A].

Performance under a contract may be excused in limited situations where unanticipated supervening events require it. See Chase Precast Corp. v. John J. Paonessa Co., 409 Mass. 371, 373-375 (1991); Boston Plate, 335 Mass. at 700. The doctrines excusing performance are "given . . . narrow construction so as to preserve the certainty of contracts." 17A Am. Jur. 2d Contracts § 641 (2022). See Corbin, COVID-19, supra at § 5.01[4], at 5-6 ("Courts have applied both commercial impracticability and frustration of purpose 'sparingly'").

The burden of establishing the "nature, extent and causative effect" of impracticability or frustrated purpose lies with the party asserting the defense. Commonwealth v. Bautista,

459 Mass. 306, 313 (2011), quoting 30 R.A. Lord, Williston on Contracts § 77:51 (4th ed. 2004).

i. Impossibility of performance. Both doctrines asserted by the co-obligors to discharge their obligations under the amended promissory note -- the doctrines of impracticability and frustration of purpose -- are rooted in the doctrine of impossibility, which in turn informs their scope. See Mishara Constr. Co., 365 Mass. at 127-129 (describing evolution from impossibility to impracticability and noting that frustration of purpose is "companion rule" of impossibility). We have "long recognized and applied the doctrine of impossibility as a defense to an action for breach of contract." Chase Precast Corp., 409 Mass. at 373.

The doctrine of impossibility harkens back to Taylor v. Caldwell, 3 B. & S. 826 (1863), an English case concerning a license to use a music hall; after the parties executed the contract, and through no fault of either party, the music hall burned down. The court, acknowledging the principle that one is bound to carry out one's contract despite unforeseen accidents, recognized that some contracts are subject to "implied condition[s]." Corbin, COVID-19, supra at § 1.02[2][A], citing Taylor, supra. Applying this principle, the court concluded that the parties had an implied understanding at the time the contract was formed that if the music hall perished prior to its

use, the parties would be excused from performing under the license. See Corbin, COVID-19, supra, citing Taylor, supra.

The modern impossibility doctrine provides:

> "[W]here from the nature of the contract it appears that the parties must from the beginning have contemplated the continued existence of some particular specified thing as the foundation of what was to be done, then, in the absence of any warranty that the thing shall exist, the contract is to be construed not as a positive contract, but as subject to an implied condition that the parties shall be excused in case before breach performance becomes impossible from the accidental perishing of the thing without the fault of either party. . . . The misfortune which has occurred releases both parties from further performance of the contract and gives no right to either to claim damages from the other" (ellipses in original).

Boston Plate, 335 Mass. at 700, quoting Hawkes v. Kehoe, 193 Mass. 419, 423-424 (1907). See Baetjer v. New England Alcohol Co., 319 Mass. 592, 600 (1946), quoting Canadian Indus. Alcohol Co. v. Dunbar Molasses Co., 258 N.Y. 194, 198 (1932) ("The inquiry is merely this, whether the continuance of a special group of circumstances appears from the terms of the contract, interpreted in the setting of the occasion, to have been a tacit or implied presupposition in the minds of the contracting parties, conditioning their belief in a continued obligation" [citations omitted]).[10]

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[10] See, e.g., Boston Plate, 335 Mass. at 700-701 (impossibility excused general contractor from subcontract for labor to be employed in building municipal hospital when underlying contract to construct hospital was deemed invalid because "there [was] no indication that the parties even contemplated the possibility that the [hospital] contract was

ii. Impracticability of performance. We have expanded, albeit narrowly, the doctrine of impossibility to excuse performance that is not strictly impossible but has become impracticable due to the unanticipated occurrence of an extreme event. See Mishara Constr. Co., 365 Mass. at 127-128, quoting Williston on Contracts § 1931 (Rev. ed. 1938). Because it is rooted in the narrow impossibility doctrine, impracticability applies only to risks that "are so unusual and have such severe consequences that they must have been beyond the scope of the assignment of risks inherent in the contract." Mishara Constr. Co., supra at 129. "The important question is whether an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract. If so, the risk should not fairly be thrown upon the

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invalid," validity of hospital contract was essential to performance of subcontract, and invalidation occurred through no fault of subcontracting parties). Compare Baetjer, 319 Mass. at 600-601 (where United States had been engaged in World War II for four months when Puerto Rican molasses seller and Massachusetts buyer signed contract, buyer was not excused from paying for molasses that seller made available but buyer could not ship due to shortage of tankers, because parties did not condition contract on sea transportation in Caribbean remaining uninterrupted), with Butterfield v. Byron, 153 Mass. 517, 520 (1891) (destruction of nearly-completed house by fire discharged contractor from contributing "labor and materials towards the erection of a house" because "undertaking and duty to go on and finish the work was upon an implied condition that the house . . . should remain in existence").

[party seeking to be excused]." Id., quoting Williston on Contracts, supra.

Consistent with its narrow underpinnings, where the impracticability of performance is only temporary, it suspends the promisor's obligation to perform only temporarily. The party's performance is excused only "while the impracticability . . . exists but does not discharge his duty or prevent it from arising unless his performance after the cessation of the impracticability . . . would be materially more burdensome than had there been no impracticability." Restatement (Second) of Contracts § 269 (1981). See Fauci v. Denehy, 332 Mass. 691, 696-697 (1955) (temporary impossibility of performance "would not discharge a promisor's duty to perform unless his performance, after the impossibility had ceased, would have subjected him to a substantially greater burden than would have been imposed had there been no impossibility"); Corbin, COVID-19, supra at § 5.06 ("temporary impracticability or impossibility does not discharge a duty; it suspends the duty").[11]

[11] See, e.g., Center Garment Co. v. United Refrigerator Co., 369 Mass. 633, 636 (1976) ("general shortage of plastics including acetate at the time" excused performance temporarily because "the materials would not have reached the plaintiff until more than two months after it had submitted its order").

To warrant application of impracticability, the party seeking to be excused must establish three elements. 14 J.P. Nehf, Corbin on Contracts § 74.1, at 2 n.3 (J.M. Perillo ed., rev. ed. 2001), citing Restatement (Second) of Contracts § 261. First, a supervening, extreme event caused the party's performance to become impracticable. See 14 Corbin on Contracts, supra, citing Restatement (Second) of Contracts, supra ("the event made the performance impracticable"); Corbin, COVID-19, supra at § 1.03[2] ("Performance is excused only to the extent that the supervening event caused it"). "Performance may be impracticable because extreme and unreasonable difficulty, expense, injury, or loss to one of the parties will be involved." Restatement (Second) of Contracts § 261 comment d.

Second, "the nonoccurrence of the event was a basic assumption on which the contract was made," 14 Corbin on Contracts, supra at § 74.1, at 2 n.3, citing Restatement (Second) of Contracts § 261, and the occurrence of the event was not a risk that the parties were tacitly assigning to the promisor by their failure to provide for it explicitly, Mishara Constr. Co., 365 Mass. at 129. The element requires consideration of the following:

> "[G]iven the commercial circumstances in which the parties dealt: Was the contingency which developed one which the parties could reasonably be thought to have foreseen as a

> real possibility which could affect performance? Was it one of that variety of risks which the parties were tacitly assigning to the promisor by their failure to provide for it explicitly? If it was, performance will be required. If it could not be so considered, performance is excused. The contract cannot be reasonably thought to govern in these circumstances, and the parties are both thrown upon the resources of the open market without the benefit of their contract."[12]

Id.

Third, "the impracticability resulted without the fault of the party seeking to be excused." 14 Corbin on Contracts, supra at § 74.1, at 2 n.3, citing Restatement (Second) of Contracts § 261.

To determine whether any rational view of the summary judgment record in the present action permits a finding of impracticability, see Petrell, 453 Mass. at 381, we need focus only on the first two elements of impracticability, as it is beyond dispute that the co-obligors are not at fault for the financial impact of the COVID-19 pandemic and government-ordered

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[12] See, e.g., Mishara Constr. Co., 365 Mass. at 130-131 (recognizing that impracticability doctrine would not excuse performance in industry with long history of labor difficulties, but might apply to industry where probability of labor dispute was "practically nil," or presented "unusual difficulty"); Transatlantic Fin. Corp. v. United States, 363 F.2d 312, 318 (D.C. Cir. 1966) (impracticability defense unavailable to shipping company where closure of Suez Canal due to international invasion, while unexpected, was not unforeseen in view of tenuous nature of canal at time of contracting, and where safe alternative route was available even if more expensive).

shutdown of nonessential businesses on the franchise's operations.

Thus, we consider whether the summary judgment record could sustain the co-obligors' burden to show that their performance was rendered impracticable because of the financial impact of the pandemic and government orders on the franchise's operations, see Mishara Constr. Co., 365 Mass. at 127-128. To support their burden, the co-obligors rely on Samuel Bergman's affidavit, averring that the franchise's revenue declined precipitously in the pandemic because the franchise was forced to close in March 2020, in compliance with the Governor's executive order, and that even when it could open in June 2020, customers were not willing to permit the cleaning crews into their homes and establishments. In addition, he averred that when a cleaning crew member tested positive for COVID-19, the entire crew was required to quarantine.

Such a record is insufficient to meet the co-obligors' burden. See, e.g., Bautista, 459 Mass. at 313, quoting 30 Williston on Contracts, supra at § 77:50 ("the burden of establishing the nature, extent and causative effect of the alleged impracticability is invariably held to be upon the party asserting it"). At best, the record supports a rational finding that, in light of the financial impact on the franchise of the pandemic and government-ordered shutdown, the co-obligors could

not draw upon the franchise's revenue to fund the payments required under the amended promissory note. The co-obligors have marshalled no evidence regarding their own ability to make the payments required; nothing in the record shows the effect on the co-obligors' financial condition of the pandemic, the government-ordered shutdown, or the franchise's decline in revenue. In other words, the record is devoid of any evidence from which a fact finder could conclude rationally that the pandemic caused the co-obligors to be unable to perform under the amended promissory note. See 14 Corbin on Contracts, supra at § 74.1, at 2 n.3, citing Restatement (Second) of Contracts § 261 (extreme event must have caused performance to become impracticable).

The absence of a causal link is fatal to the co-obligors' claim of impracticability. Accord United States Sec. & Exch. Comm'n vs. Equitybuild, Inc., U.S. Dist. Ct., No. 18 C 5587, slip op. at 2 (N.D. Ill. Aug. 13, 2021) (impracticability defense did not excuse buyer from payment terms of purchase and sale where buyer "has not presented any evidence that it was objectively impossible for it to marshal its existing assets to pay the contract price"); Palm Springs Mile Assocs. vs. Kirkland's Stores, Inc., U.S. Dist. Ct., No. 20-21724-Civ-Scola, slip op. at 2 (S.D. Fla. Sept. 9, 2020) ("The restrictions on non-essential activities and business operations must directly

affect [promisor's] ability to pay rent"); Premier Valet, LLC vs. Premier Valet Servs., LLC, Mo. Ct. App., No. ED110242, slip op. at 2 (August 9, 2022) (despite COVID-19 pandemic's effect on nonessential businesses, impossibility defense did not excuse valet services business's repayment obligations under promissory note where, inter alia, it "did not specify any efforts to pay the [n]ote . . . from sources other than the revenues from valet services business"). The contract promised repayment -- not repayment from franchise revenue specifically -- and even if payment from the franchise revenue was made impracticable by the pandemic, the promise to repay was not.

We recognize, of course, that the pandemic possibly also affected the financial condition of the co-obligors themselves. Generally, however, "[p]erformance of a contractual duty is not impracticable merely because it has become inconvenient or more expensive; mere difficulty of performance is not enough." 30 Williston on Contracts, supra at § 77:40. "The fact that one is unable to perform a contract because of the inability to obtain money . . . will not ordinarily excuse nonperformance in the absence of a contract provision in that regard." Id. Reviewing the disposition of similar claims of impracticability during the COVID-19 pandemic in other jurisdictions, a leading treatise has concluded, "[s]imply positing two facts -- that the pandemic has occurred, and that a party finds it very difficult or even

impossible to perform its contractual obligations -- is not enough."[13] Corbin, COVID-19, supra § 1.03[2].

Even if the co-obligors could marshal the evidence to meet their burden under the first element of impracticability, the record does not support a rational finding in their favor under the second -- that, at the time of the contracting, the nonoccurrence of the event was a basic, essential assumption of the contract and that the co-obligors did not assume the risk of occurrence, either expressly or impliedly, see Mishara Constr. Co., 365 Mass. at 127. To the contrary, the record shows that, at the time of the contracting, the franchise's financial condition was not an essential assumption and the parties'

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[13] None of the cases on which the co-obligors rely supports the proposition that the inability to pay due to changed market conditions caused by unanticipated events, such as war, excuses an obligation to make timely payments due on a promissory note. See, e.g., Eastern Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 988, 998 (5th Cir. 1976) (where airline sued manufacturer for breach of contract after manufacturer delivered planes long after agreed deadline, delay was excused because government's Vietnam War policies that delayed manufacturer's performance fell within contract's excusable delay clause which exempted manufacturer from liability for delays "due to causes beyond [manufacturer's] control and not occasioned by its fault or negligence"); United States ex rel. Caldwell Foundry & Mach. Co. v. Texas Constr. Co., 224 F.2d 289, 290-293 (5th Cir. 1955) (impossibility shown where Korean War made critical materials unavailable); Bush v. ProTravel Int'l, Inc., 192 Misc. 2d 743, 748-754 (N.Y. Civ. Ct. 2002) (impossibility could be shown where communications disruptions related to September 11, 2001, terrorist attacks interfered with ability to timely cancel planned safari).

contractual provisions place the risk of changing financial conditions squarely on the co-obligors.

The only evidence tying the co-obligors' obligations to pay the remaining amount of the purchase price to the franchise's revenue is the provision of the asset purchase agreement pursuant to which the parties agreed that the purchase price would be reduced by $15,000 if the franchise failed to meet certain revenue thresholds in the first six months following the sale. Thereafter, the record shows, the co-obligors' payment obligations would not be affected by the franchise's financial performance. Indeed, nothing in the record suggests that it was an essential assumption of the amended promissory note that the franchise's revenue was intended by the parties to be the source, let alone the sole source, of funds from which the co-obligors would draw to pay the outstanding balance of the franchise purchase price.[14]

To the contrary, at the time they executed the amended promissory note, the parties expressly considered a change in the parties' financial conditions and provided that such a

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[14] T. Butera Auburn, LLC v. Williams, 83 Mass. App. Ct. 496 (2013), a case upon which the co-obligors rely, is inapposite. There, the court explained that the borrower "could demonstrate that the damaged business itself was supposed to generate the income from which the debt to [the seller] was to be repaid." Id. at 506. Here, the co-obligors did not put forth any facts suggesting that the promissory note was to be paid from the business's revenue.

change would enhance Le Fort's rights, not those of the co-obligors. Specifically, the amended promissory note provided that a "change in the [co-obligors'] condition or affairs (financial or otherwise)" that would impair Le Fort's security or increase its risk, if it remained uncured for thirty days, would cause an "[e]vent of [d]efault,"[15] which would permit Le Fort to trigger the acceleration clause, see note 7, supra. To police this right, the amended promissory note required the co-obligors to permit Le Fort access to each of the co-obligors' financial books and records, and made the failure to provide such access an additional "[e]vent of [d]efault," which would itself permit Le Fort to trigger acceleration.[16]

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[15] Section 2.1(g) of the amended promissory note provided that the "change in the condition or affairs (financial or otherwise) of any [o]bligor or in the value or condition of any collateral securing th[e] [n]ote, which in the opinion of [Le Fort] w[ould] impair its security or increase its risk and not cured within thirty (30 days) after written notice of the same from [Le Fort] to [the o]bligor" would constitute an "[e]vent of [d]efault."

[16] Section 2.1(d) of the amended promissory note provided that "failure to furnish [Le Fort] within thirty (30) days upon request by [Le Fort] with financial information about, or to permit inspection by [Le Fort] of any books, records and properties of the [co-obligors]" would constitute an "[e]vent of [d]efault."

Section 4.5 of the amended promissory note required the co-obligors to "furnish [Le Fort] from time to time with such financial statements and other information relating to any [o]bligor or any collateral securing th[e] [n]ote as [Le Fort] may require."

Additional provisions of the amended promissory note belie the co-obligors' position that the franchise's stable financial condition was a basic assumption of the contract, without which they were excused from their obligation to pay the remaining purchase price of the franchise, confirming instead that the parties placed the risk of changing market conditions on the co-obligors. For example, the note provided that each of the co-obligors "jointly and severally promise[d]" to pay the outstanding amounts of the franchise purchase price; Samuel and Marcia Bergman signed in their individual capacities, evincing an intent that the risk of decreasing revenue would fall on the co-obligors. Similarly, the note provided that the co-obligors had ten days to cure any missed payments;[17] that any late payments were subject to additional interest;[18] that any missed

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[17] Section 2.1(a) of the amended promissory note provided that "failure to pay regularly schedule periodic installments of principal and interest in or within ten (10) days of the date when due under th[e] [n]ote" constituted an "[e]vent of [d]efault."

Section 2.1(e) of the amended promissory note provided that "any [o]bligor generally not paying its debts as they become due and curing the same with such period of time as required to avoid an event of default in connection with such debt(s)" also constituted an "[e]vent of [d]efault."

[18] Section 1.3 of the amended promissory note provided:

> "To the extent permitted by applicable law, upon and after the occurrence of an [e]vent of [d]efault (whether or not [Le Fort] has accelerated payment of th[e] [n]ote), or in the event of a failure to pay the entire balance due

payments together with any additional interest not paid within fifteen days were subject to additional late payment charges;[19] and that the co-obligors would be responsible for any expenses, including attorney's fees, incurred by Le Fort in connection with its efforts to enforce the payment obligations.[20] And, as set forth supra, any "[e]vent of [d]efault" (including missed monthly payments not cured within ten days and failure to timely provide the co-obligors' financial information, see note 17, supra) triggered the ability of Le Fort to accelerate all remaining payments. These provisions confirm that the obligation to pay the purchase price was not contingent on

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hereunder at the [m]aturity [d]ate, interest on principal and overdue interest [would], at the option of [Le Fort], be payable on demand at a rate per annum (the '[d]efault [r]ate') equal to 5.00% per annum above the rate of interest otherwise payable hereunder."

[19] Section 1.4 of the amended promissory note provided:

"Without limitation of the foregoing [s]ection 1.3, if a payment of principal or interest hereunder is not made in or within fifteen (15) days of its due date, the [co-obligors] w[ould] pay on demand a late payment charge equal to 3.00% of the amount of such payment. Nothing in the preceding sentence [would] affect [Le Fort's] right to accelerate the maturity of th[e] [n]ote in the event of any default in the payment of th[e] [n]ote."

[20] Section 4.3 of the amended promissory note provided that the co-obligors would "pay on demand all expenses of [Le Fort] in connection with the preparation, administration, default, collection or enforcement of th[e] [n]ote . . . including, without limitation, attorneys' fees of outside legal counsel."

market conditions, regardless of the cause of any upset of those conditions.

Finally, the parties did not include a force majeure clause, further suggesting that the co-obligors' payment obligations were not conditioned on the financial success of the franchise. See, e.g., AGW Sono Partners, LLC, 343 Conn. at 331-333 (failure to include force majeure clause supported conclusion that restaurant owners were not excused by impossibility defense from rental payments owed to landlord despite closures required during COVID-19 pandemic).

In sum, Le Fort completed its performance under the parties' agreements in 2015 when it delivered a cleaning services franchise to Lantern 18. The agreements are not neutral in their risk allocation; to the contrary, the contractual provisions, which, inter alia, strictly required the co-obligors to make payments in a timely fashion and provided severe consequences when payments were not so made, evince the parties' tacit intent to place that risk squarely on the co-obligors. Thus, although the pandemic itself was not contemplated by the parties, they clearly provided that any lapse in the franchise's financial condition, regardless of its source, would not affect the co-

obligors' obligation to make payments when due as part of the consideration for the franchise Lantern 18 received in 2015.[21]

ii. Frustrated purpose due to the pandemic. The co-obligors' attempt to invoke the doctrine of frustration of purpose fares no better. The doctrine of frustration of purpose is a "'companion rule' to the doctrine of impossibility." Chase Precast Corp., 409 Mass. at 374, citing Mishara Constr. Co., 365 Mass. at 129. It provides:

> "Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged,

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[21] In general, "[b]ecause the continuation of existing market conditions and of the financial situation of the parties ordinarily are not basic assumptions, these contingencies do not effect a discharge" under the impracticability rule. 30 Williston on Contracts, supra at § 77:26. Accord 407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp., 23 N.Y.2d 275, 281 (1968) ("where impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused"). Even during the pandemic, other jurisdictions have not applied the doctrine to excuse payments due on a promissory note or similar financial instrument. See, e.g., Lantino vs. Clay LLC, U.S. Dist. Ct., No. 1:18-cv-12247 (SDA), slip op. at 5 (S.D.N.Y. May 8, 2020) ("At best, Defendants have established financial difficulties arising out of the COVID-19 pandemic and the PAUSE Executive Order that adversely affected their ability to make the payments called for under the Settlement Agreement. As such, Defendants' performance under the Settlement Agreement is not excused"); City Nat'l Bank v. Baby Blue Distribs., 199 A.D.3d 559, 560 (N.Y. 2021) (clothing store could not avoid payment obligation under promissory note despite economic impact of COVID-19 regulations where "repayment obligation was not conditioned upon the store remaining a viable concern").

> unless the language or the circumstances indicate the contrary."

Chase Precast Corp., supra at 375, quoting Restatement (Second) of Contracts § 265.[22] The purpose relevant to the analysis is the "party's principal purpose as understood by both parties at the time the contract is made." Corbin, COVID-19, supra at § 5.01[4]. Further, "the purpose that is frustrated must have been a principal purpose of that party in making the contract. It is not enough that [the party seeking to be excused] had in mind some specific object without which he would not have made the contract. The object must be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense." Restatement (Second) of Contracts § 265 comment a.

Under the frustration of purpose defense, "[i]nstead of performance becoming impracticable, the supervening event requires a party's principal purpose as understood by both parties at the time of the contract is made to be substantially frustrated." Corbin, COVID-19, supra at § 5.01[4]. The

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[22] Other jurisdictions define the doctrine of frustration of purpose as follows: "when an event neither anticipated nor caused by either party, the risk of which was not allocated by the contract, destroys the object or purpose of the contract, thus destroying the value of performance, the parties are excused from further performance." Chase Precast Corp., 409 Mass. at 374, citing Lloyd v. Murphy, 25 Cal. 2d 48, 53 (1944); Perry v. Champlain Oil Co., 101 N.H. 97, 98-99 (1957); Howard v. Nicholson, 556 S.W.2d 477, 482 (Mo. Ct. App. 1977).

doctrine "focuses on the parties' purpose in making their contract and has nothing to do with a party's inability to perform." Id. at § 1.02[2][B]. Like impracticability, the frustration of purpose defense can be temporary; the defense will suspend, rather than discharge, a duty to perform unless the party's "performance after the cessation of the . . . frustration would be materially more burdensome than had there been no . . . frustration." Restatement (Second) of Contracts § 269.

The English "coronation cases" showcase the difference between impossibility and impracticability, on the one hand, and frustration of purpose, on the other. In Krell v. Henry [1903] 2 KB 740 (AC), the defendant rented an apartment, at a steep cost, from which he planned to watch the king's coronation. Id. at 740. When the king-to-be fell ill, the defendant argued that his principal purpose in entering the rental contract -- namely, to gain access to a vantage point from which to watch the coronation -- was "frustrated" when the procession was canceled; accordingly, he maintained that he should be refunded his deposit and excused from paying the balance of the rent. Id. at 740, 745.

The court noted that, in contrast to the Taylor decision, the music hall case discussed supra, where performance was impossible because of the "physical extinction or the not coming

into existence of the subject-matter of the contract," Krell, supra at 742, in the Krell case, performance was "quite possible" -- that is, the defendant could rent the apartment, id. at 743. Nevertheless, the defendant's performance was excused because "the taking place of those processions on the days proclaimed along the proclaimed route . . . was regarded by both contracting parties as the foundation of the contract." Id. at 750.[23]

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[23] Our decision in Chase Precast Corp., 409 Mass. at 374, also is illustrative of the frustration of purpose doctrine. There, we affirmed the trial judge's determination, following a bench trial, that the doctrine applied to excuse a general contractor from continued performance on a subcontract to purchase concrete barriers. Id. at 372. As both parties understood, the general contractor's principal purpose in entering the subcontract was to obtain concrete barriers required under the general contractor's contract with the Department of Public Works (department) for highway resurfacing projects. Id. After the parties executed the subcontract, the department entered into a settlement agreement with a citizens' group, pursuant to which it agreed to cease installation of concrete barriers on the subject highways. Id. at 373. Acknowledging that the general contractor's performance under the subcontract -- acceptance of and payment for concrete barriers -- was not rendered strictly impossible because of the department's settlement, id. at 374 n.3, we nevertheless upheld the judge's application of the doctrine of frustration of purpose because the general contractor bore no responsibility for the elimination of the concrete barriers from the underlying public works projects, the general contractor's principal purpose in entering into the subcontract -- to obtain the concrete barriers it needed to perform the underlying public works projects -- was frustrated, and, while elimination of items by the department was not entirely unanticipated, as a general matter, the judge could reasonably conclude that the parties did not anticipate the elimination of such widely used items like concrete barriers, which comprised a major portion of the department's projects. Id. at 377. Cf. Karaa v. Yim, 86

To determine whether any rational view of the summary judgment record would permit a finding of frustration of purpose, see Petrell, 453 Mass. at 381, we consider whether the record suggests that the pandemic substantially frustrated the co-obligors' principal purpose in entering into the asset purchase agreement and amended promissory note, see Chase Precast Corp., 409 Mass. at 375. It would not.

Just as nothing in the record would suggest that the contracts were made with a basic assumption that the co-obligors would pay the note with the proceeds from the franchise, as discussed supra, nothing in the record would permit a fact finder to rationally conclude that the principal purpose of either the asset purchase agreement or the amended promissory note was to pay the franchise purchase price exclusively from the franchise's subsequent revenue.[24] Indeed, the parties had contemplated and provided that financial performance of the franchise only affected the purchase price if the franchise failed to meet certain sales milestones in the first six months.

Mass. App. Ct. 714, 718 (2014) (tenant voluntarily undertook risk of renting apartment knowing her visa status might change, so purpose was not frustrated).

[24] Cf. Weyerhaeuser Real Estate Co. v. Stoneway Concrete, Inc., 96 Wash. 2d 558, 562-565 (1981) (party's undisputed primary purpose, to obtain aggregates by strip mining leased premises, was frustrated when it was unable to obtain necessary permits).

The only rational view of the record as it regards the principal purpose was that the parties intended for the co-obligors to purchase the franchise, and to permit the co-obligors to spread the purchase price payment over a predefined time. The parties did not provide that the franchise was to be the source of those payments; to the contrary, the Bergmans were "jointly and severally" liable, in their individual capacities, for payments due. The provisions of the note, appearing supra, each confirm that the purpose was not to tie repayment to the financial performance of the franchise. The repayment of the outstanding portion of the purchase price was the parties' driving purpose, irrespective of the source of the repayment.

Our decision does not foreclose parties from raising the impracticability or frustration of purpose defenses to breach of contract claims arising from the COVID-19 pandemic, which, we acknowledge, "created enormous challenges for every aspect of our communities," see Committee for Pub. Counsel Servs., 484 Mass. at 433. In this case, the co-obligors failed to meet their burden to marshal evidence needed to show their performance was excused.

c. Court's equitable power. The co-obligors alternatively ask this court to use its equitable power pursuant to G. L. c. 214, § 1, to amend the amended promissory note to permit the co-obligors to cure their breach lest the co-obligors be

"grossly prejudiced" and Le Fort receive a "windfall."[25] This court generally reserves its equitable powers to intervene in parties' contractual obligations to circumstances involving "fraud, mistake, accident, or illegality," none of which are at issue in this case. Beaton v. Land Court, 367 Mass. 385, 392 (1975).

The claim by the co-obligors that they are being grossly prejudiced and that Le Fort is receiving a windfall is unsupported. Le Fort sold the franchise to Lantern 18 in 2015 for an agreed sum; at that time, Le Fort's obligations under the asset purchase agreement were complete. In 2015, Lantern 18 received the business and commenced operation of the franchise, having paid only a partial amount of the full purchase price and having agreed to pay the remainder over time. There is no evidence -- or even a suggestion -- that the price or attendant interest rates were predatory,[26] a windfall, or otherwise a

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[25] General Laws c. 214, § 1, provides:

> "The supreme judicial and superior courts shall have original and concurrent jurisdiction of all cases and matters of equity cognizable under the general principles of equity jurisprudence and, with reference thereto, shall be courts of general equity jurisdiction . . . ."

[26] Accordingly, the co-obligors' reliance on HSBC Bank, 490 Mass. 322; Commonwealth v. Fremont Inv. & Loan, 452 Mass. 733 (2008); and Commonwealth vs. Fremont Inv. & Loan, Mass. Super. Ct., No. 07-4373 BLS1 (Suffolk County February 25, 2008), concerning home mortgage loans alleged to be predatory, is misplaced.

product of duress. Neither was the acceleration clause, which merely required the co-obligors to pay the agreed-upon remaining amount of the purchase price for the business they received in 2015, otherwise inequitable. Once the co-obligors committed a material breach of the amended promissory note by failing to pay the monthly instalments, failing to cure within the cure period, and failing to provide their financial records, the acceleration clause was triggered just as the parties anticipated it would be when then entered into their contractual arrangement. Contrast Neuro-Rehab Assocs., Inc. vs. AMRESCO Commercial Fin., L.L.C., U.S. Dist. Ct., No. CIVA 05-12338-GAO, slip op. at 2, 4 (D. Mass. June 19, 2006) (applying Idaho law to conclude that enforcement of acceleration clause likely violated covenant of good faith and fair dealing where breach was of technical, not material, aspect of parties' contract, and breaching party promptly offered to cure). On this record, we conclude that equity does not demand that this court modify the parties' negotiated contractual promises.

Judgment affirmed.