

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

KERSTIN TEBBE,	:	Case No. 2020 SC3 002240
d/b/a Collective Mind LLC	:	
<i>Plaintiff,</i>	:	
	:	
v.	:	Judge Heidi M. Pasichow
	:	
WASHINGTON PARKS & PEOPLE,	:	
<i>Defendant.</i>	:	

ORDER ENTERING JUDGMENT FOR PLAINTIFF

This matter is before the Court following a bench trial of this Small Claims Branch matter on November 23, 2021 and continuing on December 8, 2021. All parties are represented by counsel. The Court finds and concludes that Plaintiff is entitled to Judgment for the reasons below and therefore enters Judgment for Plaintiff and against Defendant.

I. *Procedural History*

On September 1, 2020, Plaintiff filed a Complaint, which was transferred from Debt Collection Judge to a Small Claims Judge, seeking the return of her deposit for the rental of a venue location for an event. Defendant did not assert a set-off, counterclaim, or other affirmative claim against Plaintiff, and therefore was not required to file a responsive pleading. Super. Ct. Small Claims R. 5. On December 1, 2020, the Plaintiff filed a Motion to Amend. On January 26, 2021, a hearing was set for April 14, 2021 for the Motion to Amend Complaint. On April 14, 2021, the parties came before Judge Ebony M. Scott where Plaintiff's Motion to Amend Complaint was granted and Mediation was set for May 7, 2021. Post Mediation hearing was also scheduled for June 1, 2021. On May 7, 2021, the parties went to Mediation but no agreement was reached. On June 1, 2021, the parties convened before Magistrate Judge Scott, where a trial was set for September 22, 2021 with Exhibits to be exchanged by September 8, 2021. On September 22, 2021, the parties came before Magistrate Judge Tanya Jones Bosier for trial and both parties were sworn in. Plaintiff's case in chief commenced; however, during the trial the Court determined that the Plaintiff had made a contract as a business entity. Plaintiff's testimony was stricken and Plaintiff's Motion for Leave to file an Amended Complaint was granted. Plaintiff stated that she

intended to find counsel and the trial was continued to November 23, 2021 with Exhibits to be exchanged on November 16, 2021. On October 4, 2021, a Praecipe to enter the appearance of Mohaimina Haque on behalf of Plaintiff was filed. On November 20, 2021, Plaintiff filed a Motion for Declaratory Judgment and Defendant filed an Opposition on November 22, 2021. A motion hearing was scheduled for November 23, 2021 for the same day of trial. On November 23, 2021, Judge Heidi M. Pasichow, as a back-up judge, presided in this case. The Court first heard arguments regarding the Motion for Declaratory Judgment as well as Plaintiff's Motion to Strike Defendant's Expert Witness. Both motions were denied. Trial proceeded as scheduled on November 23, 2021 and December 8, 2021. Ms. Makenzie Dolmotte, Defendant's Expert Witness, was unable to attend the December 8, 2021 date for trial and Defendant decided to exclude her testimony. Plaintiff's counsel called Ms. Kerstin Tebbe, representative for Collective Mind LLC and Defendant called Mr. Steve Coleman, representative for Washington Parks and People, to testify.

II. Findings of Fact

Plaintiff Collective Mind LLC ("Collective Mind") and Defendant Washington Parks & People ("Parks Center") both testified through their representatives that this dispute arose out of a rental agreement ("Contract") between the parties to rent the facility owned by Washington Parks & People and located at 2437 15th Street, NW Washington, D.C. 20009. Collective Mind rented the entire facility to host an event for approximately two hundred fifty (250) people scheduled for June 23-25, 2020. The parties further testified that the agreement was signed on December 23, 2019, and that Collective Mind had paid a non-refundable deposit of \$7,800. The issue in the instant case is whether under 1(a) and 3(a) of the Contract, the Parks Center should have returned the non-refundable deposit of \$7,800 to the Plaintiff due to Mayor Muriel Bowser's Orders regarding the COVID-19 pandemic. The relevant parts of the Contract are as follows:

1.(a). The User shall make a non-refundable down payment deposit (the "Deposit") to the Parks Center, in the amount of \$7,800, (amended 12/23/2019) on or before 12/25/2019, in order to reserve the Event Space. The Down Payment becomes non-refundable upon payment and the Parks Center will retain the Deposit in the case of forfeiture by the User except as noted in paragraph 3 (a and c).

3.(a). Notwithstanding any other provision of this Agreement, the Parks Center may cancel this agreement without liability to the User as a result of acts of God or other unanticipated events which make it impossible, illegal, or inadvisable to materially perform its obligations hereunder. Such acts of God and events shall include (but are not limited to) government regulation, terrorism, war, and civil disorder.

Contract at 3.

Ms. Kerstin Tebbe, who testified on behalf of Collective Mind, stated that Collective Mind planned to hold a large, three-day launch event with up to 250 guests coming from around the country and world (“Event”). Ms. Tebbe stated that the Event had multiple functions planned throughout the three days, including large group sessions. Ms. Tebbe also testified that Ms. Malina Eaglin was Ms. Tebbe’s point of contact at the Parks Center, and they communicated about renting the facilities for the Event. Ms. Tebbe alleges that she relayed to Ms. Eaglin that the Event was to foster the building of relationships and networks and if she could not hold the Event as contracted, it would defeat the purpose of the Event. Ms. Tebbe testified that she signed the contract without any modifications and without an attorney and paid the \$7,800 deposit in December 2019.

Mr. Steve Coleman, co-founder and executive Director of the Parks Center, testified as its representative. Mr. Coleman testified that the Parks Center was a charity, and with the help of the D.C. pro bono bar, developed their standard rental contract that was used with Ms. Tebbe and for other events throughout the years. Testimony of Defendant, 11/23/2021 at 3:45. Mr. Coleman stated that the contract required the User to put down half of the payment as a non-refundable deposit to reserve the space for their event. Testimony of Defendant, 11/23/2021 at 3:46. That payment is non-refundable to protect the Parks Center because it would be taking those reserved days off the market. *Id.* The User was also supposed to pay an additional payment of \$7,775 and a damage deposit of \$2,000 in March 2020.

On March 11, 2020, Mayor Bowser issued an Order declaring a public health emergency in the District of Columbia due to the COVID-19 pandemic. Consequently, Ms. Tebbe stated that she contacted Ms. Eaglin about the possibility of rescheduling her event to the following year, specifically in June 2021. Allegedly, Ms. Eaglin told Ms. Tebbe that in order to reschedule to this date, she would need to pay an additional 50% of the total contract price. Testimony of Plaintiff, 11/23/2021 at 3:36. Ms. Tebbe testified

that this conversation took place over the phone, so there was nothing written to confirm the statement. *Id.* She also testified that she spoke with Mr. Coleman about the possibility of rescheduling, and she was told that she could only reschedule within 2020 for the same price. Testimony of Plaintiff, 11/23/2021 at 3:30. Ms. Tebbe did not pursue this arrangement under the assumption that the Parks Center was price gouging.

On March 16, 2020, Mayor Bowser issued an Order prohibiting mass gatherings of over 50 people. On March 24, 2020, Mayor Bowser issued an Order prohibiting mass gatherings of over 10 people, which made it impossible to hold the Collective Mind event. This limit was in effect until June 22, 2020. On May 27, 2020, Ms. Tebbe emailed Mr. Coleman acknowledging that the Parks Center cannot fulfill the contract per the Mayor's regulations and requested a refund of the initial \$7,800 deposit. Ms. Tebbe had extensive email correspondence with Mr. Coleman from May into June 2020. Plaintiff's Ex. 6(a)-(s). In the emails, Ms. Tebbe continued to request a refund while Mr. Coleman rejected the idea of cancelling the Event and instead continued to offer rescheduling her event to a later date. *Id.* However, Ms. Tebbe alleges that rescheduling to a date past November 2020 would amount to a 50% increase in price. Mayor Bowser issued an Order on June 19, 2020 that would take effect June 22, 2020 titled, "Phase Two of Washington, DC Reopening" that expanded the mass gathering limit to 50 people from the previous limit of 10. Plaintiff's Ex. 3. On June 17, 2020, Mr. Coleman offered Ms. Tebbe an alternative method of holding the Event on the originally scheduled dates pursuant to the new Order. On June 19, 2020, Mr. Coleman offered further details of this plan, specifically, having the guests mingle in separate groups of 50 throughout distinct areas of the venue space, with intermingling being extremely limited. Plaintiff's Ex. 6.k. Although Mr. Coleman did reach out to Ms. Tebbe explaining all the steps that the Center would take to accommodate the Event, the email was sent just a few days before the actual Event was scheduled to take place on June 23-25, 2020.

III. Legal Standard

The party asserting the existence of the contract has the burden of proof on that issue. *Jack Baker, Inc. v. Office Space Development Corp.*, 664 A.2d 1236, 1238 (D.C. 1995). Moreover, the party asserting the doctrine of impossibility has the burden to prove these three factors "First, a contingency -- something

unexpected -- must have occurred. Second, the risk of the unexpected occurrence must not have been allocated either by agreement or by custom. Finally, occurrence of the contingency must have rendered performance commercially impracticable.” *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 315 (D.C. 1966).

Furthermore, any unexcused deviation in a party’s performance of the terms of a contract, unless the deviation is trivial, constitutes a breach of the contract. Restatement (Second) of Contracts § 235 (1981). Also, “fail[ing] to exactly and fully perform a contractual duty constitutes a breach entitling the non-breaching party to damages.” *Fowler v. A & A Company*, 262 A.2d 344, 347 (D.C. 1970).

If the performance of a duty is made impracticable by having to comply with domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made. Restatement (Second) of Contracts § 264 (1981). A party whose duty of performance does not arise or is discharged as a result of impracticability of performance, frustration of purpose, non-occurrence of a condition or disclaimer by a beneficiary is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance. Restatement (Second) of Contracts § 377 (1981).

As to attorney’s fees, according to D.C. Superior Court Small Claims Rule 18, unless the Plaintiff’s Attorney can “provide[] to the court the instrument or agreement on which the claim for attorney’s fees is based; certifies in writing that the fee claimed is payable only and entirely to him or her; and certifies in writing that he or she has no agreement with the plaintiff and will not enter one that will make any part of the attorney’s fees payable to anyone other than the attorney” attorney’s fees are generally not awarded in the Small Claims Branch. D.C. Sup. Ct S.C. R 18.

IV. Analysis

It is undisputed that the parties entered into a Contract on December 23, 2019. Plaintiff’s Ex. 1 and Defendant’s Ex. A. It is also undisputed that the Defendant had contracted to host an event of up to 250 people for the Plaintiff’s launch party for June 23-25, 2020 (“Event”). Contract at 3. The Court finds

that Plaintiff is owed her deposit pursuant to Section 3(a) of the parties' contract because fulfilling the contract became legally impossible and impractical.

The Court of Appeals found in *Transatlantic Financing Corp v. U.S.* that "when performance of a contract is deemed impossible it is a nullity." 363 F.2d at 320. Additionally, Section 3(a) of the contract establishes that cancellation of an agreement without liability to the User may be the result of unanticipated events that make the obligations under the contract illegal. Contract at 3. Here, the contract's obligations were illegal at the time of the scheduled Event, making the contract impossible to perform.

Starting in March 2020, the Mayor issued a series of Orders that prohibited large gatherings of over 10 people and other Orders limiting 50 people. The Event, scheduled for June 23-25, 2020, was subject to the mass gathering limitation of 50 people pursuant to the Mayor's Order issued on June 22, 2020. Mot. at 8. Additionally, the limit of 10 people was in effect for approximately two months preceding that date. Because the Event was contracted to include approximately 200-250 people, the contract was illegal due to the unanticipated pandemic and government regulations. Accordingly, this nulls the contract, which amounts to a cancellation under Section 3(a) of the contract. Thus, Plaintiff is owed her deposit.

Defendants argue that the contract was not illegal and that Mr. Coleman's suggested alternative fulfilled the contract while still complying with government regulations. Opp. at 5. The Court finds that hosting guests in groups of 50 people does not constitute performance of the contract. Altering the event to comply with CDC guidelines, including Defendant's proposed alternative of separating 250 people into groups of 50 people, would not fulfill the terms of the contract because the stipulated agreement was for Defendant to host a large in-person gathering of up to 250 people, not five separate gatherings of 50 people. Contract at 3. Moreover, Parks Center had conceded that it was unable to host the Event as originally contracted in its email to Ms. Tebbe on May 29, 2020. Plaintiff's Ex. 6.b. Specifically, Mr. Coleman wrote: "We . . . empathize with your frustration and disappointment about not being able to hold your event as originally planned." *Id.* Refusing to cancel the event due to illegality and impossibility as

per Section 3(a) and then disguising this alternative plan as complying with the original contract's terms constitutes a breach, since Defendant pursued its obligations and failed to perform all parts of what was promised in the contract. *Fowler v. A & A Co.*, 262 A.2d 344, 347 (D.C. 1970) (holding that a breach is an 'unjustified failure to perform all or any part of what is promised in a contract'").

Furthermore, Defendant's proposed alternative would have been impracticable to execute. A prohibition on mass gatherings larger than 10 people was in effect from March 24, 2020 to June 22, 2020, one day before Plaintiff's scheduled event. On June 17, 2020, Mr. Coleman offered its alternative plan to Ms. Tebbe after informing her that Mayor Bowser planned to raise the mass gathering limit to 50 people on June 22, 2020. Plaintiff's Ex. 6.j. Furthermore, because many of the guests were from around the country and the world, the guests would have had to book hotels and travel arrangements at unreasonably short notice, which is especially unfeasible amid the strains the COVID-19 pandemic caused on travel and lodging. Testimony of Plaintiff, 11/23/2021 at 1:07. The Court finds it unreasonable to conclude that such an Event would be able to proceed without much discussion just a few days before it was scheduled when many variables were still not finalized.

Up until May 8, 2020, the Parks Center was still unwilling or unable to reschedule the Collective Mind event without additional cost. In the FAQ that was sent to Ms. Tebbe on May 8, 2020, it states that that "[r]escheduling for any date before March 31, 2021 (with options after that)" would be done at no extra charge. Although, this option of rescheduling was offered about a month and a half before the event, the dates of June 23-25, 2021, which Ms. Tebbe had suggested back in March, were not expressly offered. At that point, with the mass gathering limit at 10 people, it was impossible for the Event to move forward. As much as the Defendant claims that alternative options were given and available to the Plaintiff, the timeline of the availability of these options made it impossible for the Defendant to fulfill its end of the contract.

Noting that from March 24, 2020 to June 22, 2020, the Mayor's Order limited gatherings to 10 people or fewer, the Court concludes that the contract was indeed impossible to fulfill and without assent from both parties, modification of a material fact, such as the date of the event, cannot be changed.

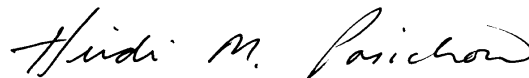
Accordingly, the Court concludes that Plaintiff is entitled to the return of the deposit in the amount of \$7,800, plus the interest accrued.

As to attorney's fees, in the absence of a contract or statute directing the payment of such fees and costs, the Court abides by the American Rule. D.C. Sup. Ct S.C. R 18. Although Plaintiff made an oral motion for attorney's fees, Plaintiff was not able to direct the Court to a provision or statute stating that attorney's fees can be sought. As such, both parties will be responsible for their own attorney's fees and costs.

For the aforementioned reasons, it is this 4th day of April 2022,

ORDERED that Judgment is entered **FOR PLAINTIFF** and **AGAINST DEFENDANT** in the amount of **\$7,800 plus interest accrued** and it is,

FURTHER ORDERED that this case is **CLOSED**.



Heidi M. Pasichow
Associate Judge
(Signed in Chambers)

Copies e-served to:

Mohaimina Haque
Counsel for Plaintiff

Hannah Bingham
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