

Real Estate Law: Pandemic impacts are not a defense to paying rent



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As we have seen for much of the past year, the COVID-19 pandemic has presented the commercial real estate industry with several unique challenges. As a result, commercial tenants have asserted various legal arguments in an attempt to defer or avoid paying rent. An increasing number

of reported decisions from New York courts show that tenants aren't faring well in such disputes.

In *1140 Broadway LLC v. Bold Food LLC*, 2020 NYLJ LEXIS 1810 (Sup. Ct. NY Cty. 12/3/20), the court denied a restaurant consulting firm's attempt to avoid paying rent for its office space due to reduced revenue from its restaurant clients. In *35 E. 75th St. Corp. v. Christian Louboutin L.L.C.*, 2020 N.Y. Misc LEXIS 10423 (Sup. Ct. NY Cty. 12/9/20), the court rejected a tenant's effort to avoid paying rent for its retail store. In *BKNY1, Inc. d/b/a 132 Lounge v. 132 Capulet Holdings, LLC*, NYSCEF Doc. No 871 (Sup. Ct. Kings Cty. 9/23/20), the court found that the "... mandatory closure of plaintiff's restaurant business ... did not relieve it of its contractual obligation to pay rent." In *Cab Bedford LLC v. Equinox Bedford Ave., Inc.*, 2020 N.Y. Misc LEXIS 10861 (Sup. Ct. NY Cty. 12/22/20), the court required an upscale gym to pay rent regardless of the forced temporary shutdown of its business.

While these decisions certainly could be modified or overturned on appeal, and while many more reported decisions involving pandemic-related lease

defaults are likely to follow, they exhibit a trend that New York courts are rejecting tenants' creative attempts to justify such lease defaults.

In these cases, the courts rejected tenants' claims that the legal defenses of frustration of purpose and *impossibility of performance* freed them from their lease obligations. The courts found the frustration of purpose defense is available only if the frustrated purpose is so inherently critical to the lease that it would make no sense without it. For instance, while such defense might be available if the premises was destroyed and no longer existed, it is not applicable when performance is frustrated by a loss of revenue, a loss of market, or pandemic-related operating restrictions. The courts also found that the *impossibility of performance* defense is available only if the subject matter of the lease is destroyed or if the tenant's ability to perform is rendered impossible under circumstances that were not foreseeable or able to be protected against. Financial hardship, operating restrictions, and/or temporary closure experienced by an office tenant, retail store, restaurant, and gym were found not sufficient to implicate the *impossibility of performance* defense. In rejecting these defenses, the courts also took into account the fact that the impact related to a portion of the lease term and not the entire lease term.

In one of the cases, the tenant sought to characterize the pandemic as a "casualty," thus implicating certain remedies available in the lease if the premises were damaged by a casualty. The court rejected this argument citing that "casualty" implies a physical casualty, not a pandemic. Similarly, the courts in a few

cases rejected tenants' claimed defense of *lack of consideration*. In rejecting tenants' arguments, a few of the cases also relied upon the inclusion of a typical force majeure clause in the lease that forgave only non-payment defaults outside of a party's control.

In all of these cases, the courts ruled in favor of the landlord on a motion for summary judgment instead of requiring a trial. By doing so, commercial landlords may take satisfaction knowing that not only will courts enforce their leases, but they will most likely also permit enforcement prior to incurring the cost of a trial.

While many more court decisions involving pandemic-related commercial lease defaults are likely to be issued in the coming months and years, at first glance it appears that New York courts are rejecting tenants' creative legal attempts to justify lease defaults. These decisions provide insight as to how New York courts are likely to view future lease defaults resulting from unanticipated circumstances and will no doubt cause landlords, tenants and attorneys to reconsider whether standard commercial lease forms properly allocate risk for unexpected events that are outside of a party's control.

Pandemic-related challenges and circumstances are sure to cause many businesses to look at changes in how they operate. While it is impossible to know what the future will bring, the recent court decisions mentioned above may provide an important glimpse for those in commercial real estate.

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