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Force Majeure Clauses in Commercial Leases

By
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Although—hopefully—New York is long past the COVID-related lockdowns that we saw two years ago, cases involving disputes over unpaid rent accruing during the spring and summer of 2020 are still winding their way through the court system. In that regard, commercial landlord-tenant litigators are by now well aware that the defenses of impossibility of performance and frustration of purpose are largely unavailable to commercial tenants whose businesses were negatively affected by COVID-19 (*see e.g.* "The 'COVID Defenses': An Appellate Update," April 6, 2022; "Is It the Beginning of the End of the 'COVID Defenses?,'" June 1, 2021).

However, as stated in this column in April, "a COVID-related defense to non-payment of rent stands on firmer legal footing if the defense is based on the lease's language" ("The 'COVID Defenses': An Appellate Update," April 6, 2022). One such possible defense is the "force majeure" clause, a clause commonly found in commercial leases and other commercial contracts.

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"A force majeure event is an event beyond the control of the parties that prevents performance under a contract and may excuse nonperformance" (*Beardslee v. Inflection Energy, LLC*, 25 NY3d 150, 154 [2015]). However, a force majeure clause is not an automatic "get out of jail free" card for the obligated party; the clause's wording is crucial. "[C]ontractual force majeure clauses…under the common law provide a…narrow defense. Ordinarily, only if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused" (*Kel Kim Corp. v. Cent. Markets, Inc.*, 70 NY2d 900, 902-03 [1987]; *see Reade v. Stoneybrook Realty, LLC*, 63 AD3d 433, 434 [1st Dept. 2009]).

Moreover, where a force majeure provision contains a catchall provision such as "or other similar causes beyond the control of such party," "the general words are not to be given expansive meaning; they are confined to things of the same kind or nature as the particular matters mentioned" (*Kel Kim Corp.*, 70 NY2d at 903).

Thus, for example, where a lease for an off-track betting parlor contained a force majeure clause excusing performance due to, *inter alia*, "governmental action or inaction," and the town's zoning ordinance was amended to prevent the subject premises from being utilized in the manner contemplated by the lease, the Appellate Division held that the tenant's obligation to pay rent did not arise and the lease was invalid (*see Burnside 711, LLC v. Nassau Regional Off-Track Betting Corp.*, 67 AD3d 718, 720 [2d Dept. 2009]; *see also Reade*, 63 AD3d at 434 [judicially-imposed temporary restraining order was a "governmental prohibition" under force majeure clause, and landlord's obligations were therefore suspended during period order was in effect]).

On the other hand, where the specific matters in the force majeure clause related to the tenant's ability to conduct day-to-day operations at the premises, the tenant's inability to procure and maintain insurance was insufficiently similar and therefore did not fall under the catch-all "or other similar causes beyond the control of such party;" as a result, the tenant's obligation to maintain insurance under the lease was not excused and the owner validly terminated the lease based on the tenant's violation of such obligation (*see Kel Kim Corp.*, 70 NY2d at 902-903).

In recent weeks, the Appellate Division, First Department has twice considered the issue of whether a force majeure

clause can excuse the obligation to pay rent under a commercial lease.

In *Fives 160th, LLC v. Zhao* (164 NYS3d 427, 2022 NY Slip Op 02339 [App Div 1st Dept. 2022]), decided in April, the Appellate Division held that a commercial landlord stated a valid claim for unpaid rent and additional rent due, and, further, reiterated its recent holding that "the COVID–19 pandemic…cannot serve to excuse a party's lease obligations on the grounds of frustration of purpose or impossibility" (*id.*). Notably, however, the court further stated: "Nor did the lease contain a force majeure clause, and this court may not add or imply such a clause" (*id.*). Such statement implied that had the parties' commercial lease contained a force majeure clause, the outcome could have been different and the tenant's obligations could have been excused.

A few weeks later, the Appellate Division grappled with a dispute relating to a commercial lease that did contain such a clause—and it held that the outcome could indeed be different than in *Zhou*. In *850 Third Ave. Owner, LLC v. Discovery Communications, LLC* (2022 NY Slip Op 03171 [App Div 1st Dept. May 12, 2022]), the owner moved for summary judgment on its claims for unpaid rent and holdover rent under an expired lease and argued, *inter alia*, that the tenant violated a lease provision requiring the removal of its personal property from the subject premises within five days after the lease's expiration (*id.*). Among the tenant's defenses was that the COVID-19 pandemic inhibited its ability to timely vacate the premises after the lease's expiration (*id.*).

The Appellate Division held that in light of the lease's force majeure clause excusing the performance of obligations due to, *inter alia*, "other causes beyond the reasonable control of the performing party," the lower court properly denied the owner's summary judgment motion:

> Nevertheless, plaintiff's summary judgment motion was properly denied on the merits. Assuming, arguendo, that lease section 25, which requires the defendant to remove its property within five days of lease termination, applies to the expiration (as opposed to the termination) of the lease, defendant has a colorable defense that section 26.03 (the force majeure provision) extended its time to remove its property. That section includes 'other causes beyond the reasonable control of the performing party.'
> (*id.*).

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In support of its holding, the Appellate Division relied on the March 2022 ruling in *JN Contemporary Art LLC v. Phillips Auctioneers LLC* (29 F4th 118 [2d Cir 2022]), where the U.S. Court of Appeals for the Second Circuit held that "the COVID–19 pandemic and the orders issued by New York's governor that restricted how nonessential businesses could conduct their affairs during the pandemic" fell within a similarly-worded contractual force majeure clause excusing an auction house's obligation to sell a certain painting due to "circumstances beyond our or your reasonable control" (*id.* at 123-124).

Although not spelled out in the *850 Third Ave.* decision, a review of the underlying Supreme Court file reveals the full text of the force majeure provision:

> Whenever a period of time is prescribed for the taking of an action by Landlord or Tenant (other than the payment of the Security Deposit or Rent), the period of time for the performance of such action shall be extended by the number of days that the performance is actually delayed *due to strikes, acts of God, shortages of labor or materials, war, terrorist acts, civil disturbances and other causes beyond the reasonable control of the performing party* ("Force Majeure").

Accordingly, given the Court of Appeals' instruction in *Kel Kim* that the reach of catchall provisions in force majeure clauses is limited to items of the same kind as the specific matters mentioned, the Appellate Division in effect held that the tenant raised an issue of fact as to whether the COVID-19 pandemic is of the same nature as "strikes, acts of God, shortages of labor or materials, war, terrorist acts, [or] civil disturbances."

As indicated above, practitioners representing commercial clients involved in COVID-19-related rent disputes should consult the lease to determine whether it contains a force majeure clause and, if it does, the scope of the clause and whether the language applies to the facts at hand. The answer to the question may be dispositive and could determine the fate of the commercial tenancy at issue.

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