

### LANDLORD-TENANT LAW

# COVID-19 and Rent Related Issues



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**W**e are of course saddened to write this column concerning the potential issues that will likely arise as tenants start failing to pay rent as a result of the unprecedented situation we all find ourselves in with the current pandemic. We of course extend our thoughts and prayers to everyone as we try to stay safe and secure at this time.

Needless to say, as non-essential businesses remain shut down and offices are empty, we are already hearing that owners are being asked for rent deferrals or abatements during the current crisis. We write this column to address some of the legal issues that will ultimately be raised and, at some point, probably litigated.

**Force Majeure.** Landlords should be looking at their leases now to examine any force majeure provisions that are included. The

general concept of force majeure is that performance under a contract may be excused based upon certain events that are beyond the parties' control, such as "acts of god," wars, natural disasters, and government actions. However, in order to understand how the doctrine applies, if at all, one must examine the applicable lease clause carefully, if one exists.

The Court of Appeals had held that "contractual force majeure clauses—or clauses excusing nonperformance due to circumstances beyond the control of the parties," provide a "narrow defense" to contractual obligations, and that "[o]rdinarily, 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. Central Markets, Inc.*, 70 NY2d 900, 902-03. Thus, whether the instant pandemic and government ordered shutdown constitutes a force majeure event excusing the tenant's obligation to pay rent will depend on the specific

language of the lease provision at issue. In fact, it is entirely possible that such clauses may be written so as to protect the landlord, by making it clear that a force majeure event does not excuse the tenant's obligations. Again, now is the time to be reviewing these clauses to determine how it might apply in the present circumstances.

**Frustration of Purpose.** The doctrine of frustration of purpose is summarized as follows:

[F]rustration of purpose refers to a situation where an unforeseen event has occurred, which, in the context of the entire transaction, destroys the underlying reasons for performing the contract, even though performance is possible, thus operating to discharge a party's duties of performance.' Stated differently, the general principle underlying the doctrine is that 'where the purpose of a contract is completely frustrated and rendered impossible of performance by a supervening event or circumstance which was not within the contemplation of the parties and

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which could not have been anticipated and guarded against, the contract is discharged. But where the purpose of the contract is not completely frustrated and performance is not rendered impossible, or where the supervening event or circumstance was within the contemplation of the parties and might have been anticipated and guarded against, the contract is not discharged (Matter of Kramer & Uchitelle, Inc., 288 NY 467,472; Robitzek Investing Co. v. Colonial Beacon Oil Co., 265 App Div 749, 753, 40 N.Y.S.2d 819, motion for leave to appeal denied 291 NY 830; Raner v. Goldberg, 244 N.Y. 438, 441-442, 155 N.E. 733; Canadian 11 A. Co. v. Dunbar M. Co., 258 N.Y. 194, 198-199, 179 N.E. 383; State Mut. Life Assur. Co. v. Gruber, 269 App Div 170, 172-173, 54 N.Y.S.2d 729; Farlou Realty Corp. v. Woodsam Associates, 49 N.Y.S.2d 367, affd 268 App Div 975, 52 N.Y.S.2d 575, affd 294 N.Y. 846, 62 N.E.2d 396; 6 Williston on Contracts [Rev. ed.], §§ 1938, 1939, 1955; Restatement, Contracts, §§ 288, 458).

*Moreira v Faltz*, 2007 WL 4372814, at \* 5 (Sup Ct Kings Cty 2007).

For a party to avail itself of the frustration of purpose defense, there must be complete destruction of the basis for the underlying contract; partial frustration such as a diminution in business is insufficient to establish the defense as a matter of law. See *Robitzek Inv. Co. v Colonial Beacon Oil Co.*, 265 AD 749, 753 (1st Dept 1943) (“Here there is not complete frustration. Defendant could have continued to operate the gasoline station at the

demised premises within the terms of the lease though the volume of its business might have suffered substantial diminution...”) (internal citations omitted).

An example of the application of this doctrine is *Two P’s Inc. v. El Cohen Dental Lab, Inc.*, 2019 WL 2746062 (Sup Ct NY County 2019). In this case, the lease provided that the tenant could use the premises only for a “dental lab and dental office” and that the premises could not be used in violation of the certificate of occupancy. After the lease was executed, the tenant learned that the certificate of occupancy did not permit the use of the space as a dental lab. The tenant thereafter sought to rescind the lease on the ground of, *inter alia*, frustration of purpose. In denying both the landlord and tenant’s motion for summary judgment and finding an issue of fact on the frustration of purpose claim, the court held:

There is...an issue of fact as to whether the lease should be terminated on the ground of impossibility, misrepresentation and frustration of purpose. In the present case, without the ability to use the premises as a dental lab, the transaction makes no sense and the inability to lawfully use the premises in that manner may create frustration of purpose or impossibility and may enable the defendant to terminate the lease.

There is no doubt that tenants which have been unable to use their premises as a result of the state government’s directive will

attempt to rely on the frustration of purpose doctrine to try to excuse the obligation to pay rent or as a basis to terminate the lease. We will have to wait and see how effective such arguments will be.

**Possible Legislation.** We are aware that the New York State Legislature is considering proposed legislation regarding both residential and commercial tenants’ rent obligations during the pendency of this crisis. We have seen consideration of a bill which would provide a 90-day waiver of commercial rent for certain small businesses who have been forced to close their businesses, and for residential tenants who have lost income. We will have to wait and see what steps the legislature, and Governor Cuomo, takes in the coming days and weeks to address this ongoing crisis.

## Conclusion

We are all in uncharted waters at this time. We remain focused on this crisis as we all try to do our best to navigate through this unprecedented situation. Let us all hope that our next column in June of this year will have much better news to report.