

New Decision Shows the Importance of Strongly Drafted Force Majeure Provisions

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Over the course of the last year, commercial landlords have become all too familiar with the legal principles wielded by tenants to excuse the payment of rent. Impossibility, impracticability, and frustration of purpose have been widely cited by tenants who have argued that the COVID-19 pandemic has made it impossible for them to run their business and, as a result, to make their rental payments.

The success of these arguments has hinged, in large part, on the language of the force majeure provisions in their leases. A force majeure provision excuses a party from their obligations under a contract if they are unable to perform due to an unforeseeable event which is outside of the reasonable control of the parties.

While a force majeure provision typically does not apply to tenant's monetary obligations, a recent decision by the United States Bankruptcy Court for the Southern District of Florida has once again reinforced the importance of clear, concise and accurate drafting when it comes to lease provisions.

In *In Re Cinemex*, a movie theater operator argued that its obligation to pay rent should be excused from March 20, 2020, when Florida Governor Ron DeSantis closed movie theaters, until such time as the tenant elected to reopen its business. Further, Cinemex sought reduced rent for the time in which state regulations required them to operate at 50% capacity. While the Court held that it was impossible for Cinemex to operate its business during the shutdown, the landlord argued that the force majeure provision did not excuse tenant's obligation to pay rent, even in light of a force majeure event. The force majeure provision in the lease provided, in part:

If either party to this Lease, as a result of any ... (iv) acts of God, governmental action, or (v) other conditions similar to those enumerated in this Section beyond the reasonable control of the party obligated to perform **(other than failure to timely pay monies required to be paid under this Lease)**, fails punctually to perform any obligation on its part to be performed under this Lease, then such failure shall be excused.

The Court held that this provision was ineffective to carve out the tenant's monetary obligation from being excused by the occurrence of a force majeure event. The Court reasoned that the parenthetical "(other than the failure to timely pay monies required to be paid under this Lease)" is part of romanette (v) – and thus applied to the "other conditions" phrase. The Court further reasoned, were the failure to pay money not an obligation to be excused, that parenthetical would have appeared in the latter part of the sentence probably after "fails punctually to perform any obligation." Thus, a more effective force majeure provision would be:

If either party to this Lease, as a result of any . . . (iv) acts of God, governmental action, or (v) other conditions similar to those enumerated in this Section beyond the reasonable control of the party obligated to perform, fails punctually to perform any obligation **(other than failure to timely pay monies required to be paid under this Lease)** on its part to be performed under this Lease, then such failure shall be excused.

While this was a bankruptcy decision, the Court applied Florida common law to interpret this lease, thus this decision should serve as a cautionary tale to all commercial landlords. Not only is it important to strategically negotiate the allocation of risk in a force majeure provision, but it is equally as important to carefully craft such provisions to ensure that the language of the lease makes the intent of the parties clear.