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Recent Bankruptcy Court Case the First to Provide Pandemic-Related Rent Relief to a Tenant Under a *Force Majeure* Clause

by the Real Estate Development and Transactions Group

The United States Bankruptcy Court for the Northern District of Illinois – Eastern Division recently held that a lease’s *force majeure* clause sustained a claim for rent abatement arising out of the COVID-19 pandemic. Both landlords and tenants are closely monitoring such cases and are very interested in how this issue will be decided by the courts.

In *In re Hitz Restaurant Group (2020 Bankr. LEXIS 1470 (N.D. Ill. June 2, 2020))*, the debtor, a restaurant and tenant under its lease, filed for Chapter 11 protection on February 24, 2020, and argued that its obligation to pay post-petition rent for the months of March through June was excused by the lease’s *force majeure* clause.

The clause provided:

Landlord and Tenant shall each be excused from performing its obligations or undertakings provided in this Lease, in the event, but only so long as the performance of any obligations are prevented or delayed, retarded or hindered by . . . laws, governmental action or inaction, orders of government Lack of money shall not be grounds for *Force Majeure*.

The debtor asserted that Illinois Governor J. B. Pritzker’s March 16, 2020 executive order limiting the operation of restaurants to carry-out, pick-up, and delivery service only triggered the *force majeure* clause under the debtor’s lease.

The court agreed, holding that the executive order triggered both the “governmental action” and “orders of government” provisions of the clause. The court further held that the executive order “was unquestionably the proximate cause of Debtor’s inability to pay rent, at least in part, because it prevented Debtor from operating normally and restricted its business to take-out, curbside pick-up, and delivery.” The court allowed a 75 percent rent abatement, based on the percentage of the restaurant’s square footage rendered unusable by the executive order.

The landlord creditor presented several arguments for why the payment of rent should not be excused, all of which were rejected by the court. Notably, the court found the creditor's argument that the executive order did not make payment impossible because it did not shut down the banking system or post offices as "specious" and "lacking any foundation in the actual language of the *force majeure* clause of the lease." Additionally, the court rejected the creditor's argument that the debtor could have relied on sources of funds other than its operating revenues to pay the rent, noting that the *force majeure* provision in the lease did not require such efforts.

This is the first case that has been widely reported in which a court has granted rent relief under a *force majeure* clause as a result of the COVID-19 pandemic. It may represent the beginning of a trend of courts stretching the traditional parameters of *force majeure* clauses to provide some relief to tenants from the enormous economic impacts of the pandemic. However, there are several reasons to think that this result may not be repeated in other cases. First, the *force majeure* language at issue – stating that "Lack of money shall not be grounds for *Force Majeure*" – is an unusual formulation. More commonly, commercial leases will expressly state that rent or monetary obligations are excluded from the scope of obligations that may be excused by *force majeure* events, and a court would likely have a more difficult time reaching a result contrary to this formulation. Second, it is noteworthy that the case was decided by a federal bankruptcy court, while most claims for *force majeure* rent abatements will be decided by state courts. The ruling is not directly binding on state courts, although they may take it as persuasive authority.

Nonetheless, this case represents the first court ruling on the subject and we expect that tenants will begin to cite it as grounds for pandemic-related rent abatements. We will be closely monitoring this issue as similar cases continue working their way through the courts.