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9:30 AM - 10:45 AM

General Session 3

The COVID Litigation Update: Emerging Issues, Themes, and Lessons

Derek Domian
Counsel
Goulston & Storrs
400 Atlantic Avenue
Boston, MA 02110-3333
[ddomian@goulstonstorrs.com](mailto:dodomian@goulstonstorrs.com)

Michael Geibelson
Partner
Robins Kaplan LLP
2049 Century Park East, Suite 3400
Los Angeles, CA 90067
mgeibelson@robinskaplan.com

1. **“Casualty” Cases**

a. **No, It’s Not a Casualty:**

i. *A/R Retail LLC v. Hugo Boss Retail, Inc.*, 2021 WL 2020879 (Sup. Ct., NY County, May 19, 2021)

b. **Yes, It’s a Casualty:**

i. *188 Ave. A Take Out Food Corp. v. Lucky Jab Realty Corp.* (Sup. Ct., NY County, Nov. 6, 2020, Kelley, J., index no. 653967/2020)

2. **Government Orders requiring closures and “physical loss”**

a. *T & E Chicago LLC v. Cincinnati Ins. Co.*, --- F.Supp.3d ----, 2020 WL 6801845 (N.D. Ill. Nov. 19, 2020).

b. *North State Deli, et al. v. The Cincinnati Ins. Co.*, No. 20-CVS-02569, 2020 WL 6281507 (N.C. Super. Ct. Oct. 9, 2020) (granting partial summary judgment).

c. *JGB Vegas*

d. *Backal Hospitality Group LLC v. 627 West 42nd Retail LLC*, No. 154141/2020, 2020 WL 4464323 (Sup. Ct., NY County, Aug. 03, 2020)

e. *B & JCM Doral Development LLC vs. Tutto Foods Doral Corp et al.* (Miami-Dade Cnty., Fla., Cir. Ct., 11CA, Case No. 2020-014953-CA-01, 10/12/2020)

3. **COVID-19 droplets at or nearby the premises and “physical loss”**

a. *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.* (Nev. Dist. Ct., Case No. A-20-816628-B, Nov. 30, 2020)

4. **Frustration of Purpose, Impracticability, Impossibility, and Force Majeure Clauses**

a. *In re Hitz Restaurant Group*, 616 B.R. 374 (Bankr. N.D. Ill. June 3, 2020).

b. *Chuck E. Cheese Bankruptcy, In re CEC Entertainment Inc.*, 2020 WL 7356380 (Bankr. S.D. Tex. Dec. 14, 2020).

c. *Palm Springs Mile Associates, Ltd. v. Kirkland’s Stores, Inc.*, 2020 WL 5411353 (Case No. 20-21724, S.D. Fla. 9/9/20).

d. *Bay City Realty, LLC v. Mattress Firm, Inc.*, 2021 WL 1295261, *8-9 (E.D. Mich, Apr. 7, 2021)

e. *UMNV 205–207 Newbury, LLC v. Caffé Nero Americas Inc.*, 2021 WL 956069 at *5-7 (Sup. Ct. Mass., Feb. 8, 2021)

f. *Thomas BV Glendora, LLC v. Plesnik*, 2020 WL 7866020 at *6 (L.A. Sup. Ct., Nov. 5, 2020)

g. *Playa Retail Investments, LLC vs. Gap Inc.*, Case No. 2020-013082-CA-01 (11th Jud. Cir. Miami-Dade County, Florida, April 15, 2021);

- h. *The Gap, Inc. v. Old Orchard Urban Ltd. P'ship*, Case No. 2019 L 13069 (Cir. Ct. of Cook County, Ill., Dec. 18, 2020).
- i. *1877 Webster Ave. Inc. v. Tremont Center, LLC*, --- N.Y.S.3d ----, 2021 WL 1621431 at *3 (2021)
- j. *HWA 1290 III LLC v. Gkny1 Inc.*, 2021 WL 1943198 at *2 (Sup. Ct. N.Y., N.Y. Cnty., May 12, 2021)
- k. *The Gap Inc. v. Ponte Gadea New York LLC*, (S.D.N.Y. Case No. 20 CV 4541-LTS-KHP, Mar. 8, 2021)
- l. *CAB Bedford v Equinox*, 2020 NY Slip Op 34296(U) (Sup. Ct., NY County, 2020)
- m. *35 E. 75th St. Corp. v Christian Louboutin L.L.C.* 2020 NY Slip Op 34063(U) (Sup. Ct., NY County, 2020)
- n. *Victoria's Secret Stores, LLC, etc. v. Herald Square Owner LLC*, (Sup Ct., NY County N.Y., Borrok, J., 1/7/21, index no. 651833/2020)
- o. *The Gap, Inc. v. 170 Broadway Retail Owner, LLC*, (Sup. Ct., NY County, Oct. 30, 2020, James, J., index no. 652732/2020)
- p. *The Gap, Inc. v. Old Orchard Urban Ltd. Ptrnshp*, (Circuit Ct., Cook County, Brennan, J., Dec. 18, 2020, Case No. 2019 L 13069)
- q. *In Re: Cinemex USA Real Estate Holdings, Inc, et al.*, (S.D. Fla. Bankr., Jan. 27, 2021)

5. **Injunctive Relief Requiring Operation of Retail Stores**

- a. *Simon Prop. Grp., L.P. v. Starbucks Corp.*, 2017 WL 6452028 (Ind. Superior Ct. Nov. 27, 2017)
- b. *Hamilton W. Dev., Ltd. v. Hills Stores, Co.*, 959 F.Supp. 434, 439 (N.D. Oh. 1997)
- c. *Massachusetts Mut. Life Ins. Co. v. Associated Dry Goods Corp.*, 786 F.Supp. 1403, 1424 (N.D. Ind. 1992)
- d. *Simon Property Group, L.P. v. Pacific Sunwear Stores LLC*, 2020 WL 5984297 (2020)
- e. **Other states:** *Lorch, Inc. v. Bessemer Mall Shopping Ctr., Inc.*, 310 So.2d 872, 876 (**Ala.** 1975) (“Special knowledge, skill and judgment is necessarily involved in ... day-to-day business decisions. No case has been cited where this court has ever required continuous, affirmative acts of the type requested here.”); *Mayor's Jewelers, Inc. v. State of Cal. Pub. Emp's Ret. Sys.*, 685 So.2d 904, 904-06 (**Fla.** Ct. App. 1996) (adopting “majority view” against “injunctive relief requiring a tenant to specifically perform a lease”); *CBL & Assocs., Inc. v. McCrory Corp.*, 761 F. Supp. 807, 809 (M.D. **Ga.** 1991) (declining to “spend the next nine years making certain that the store remains open”); *W. & S. Life Ins. Co. v. Crown Am. Corp.*, 877 F. Supp. 1041, 1044 (E.D. **Ky.** 1993) (“[T]he operating covenant is unenforceable primarily because the relief would involve the court in continuous supervision of the operations of the store to make sure that it was being operated in good faith as a going concern.”); *8600 Assocs., Ltd. v. Wearguard Corp.*, 737 F. Supp. 44, 46 (E.D. **Mich.** 1990) (“The court determines that the decisions denying injunctive relief reflect the modern trend and the majority rule. The court ... declines to extend its supervision over a commercial tenant by means of an injunction.”); *New Park Forest Assocs. II v. Rogers Enters.*, 552 N.E.2d 1215, 1220 (**Ill.** App. Ct. 1990) (“Illinois courts will not specifically enforce a long term lease of this nature.”); *Grossman v. Wegman's Food Markets, Inc.*, 43 A.D.2d 813, 813 (**N.Y.** App. Div. 1973) (“courts of equity are reluctant to grant specific performance in situations where such performance would require judicial supervision over a long period of time”); *Summit Town Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1004 n.12 (**Pa.** 2003) (noting “persuasive authority from other jurisdictions concerning injunctions sought by shopping center lessors to compel store proprietors to continue their operations”).

6. **Conclusion**