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Workshop 24

The Covid Dilemma in Landlord/Tenant Disputes

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Covid-19. The Dilemma

With the onset of the COVID-19 Pandemic (the “Pandemic”) in late 2019, the commercial real estate and shopping center communities have seen an unprecedented level of adversity and challenges. As a consequence of the substantial, in some cases complete, loss of revenues for many tenants, commercial landlords have generally taken a pragmatic approach, which has been driven by limited or no access to the Courts and a perception that Courts will not be sympathetic to any attempt to evict tenants based on Pandemic-related defaults. Another factor for landlords is the belief that it will be quite difficult to replace an existing tenant in this environment.

Many challenges to the shopping center industry were imposed by the Federal, State, and local government. To that end, many jurisdictions instituted early on in the Pandemic executive orders, ordinances, rules, and other mandates to try to stem the tide of the spreading Pandemic. These restrictions were placed not only on individuals, but also on landlords and tenants in commercial shopping arenas, including malls, shopping centers, and out-parcel owners. These restrictions had serious consequences for landlords, tenants, and the lending community serving both landlords and tenants.

The foregoing begs the question, how are tenants expected to pay rent to their landlords when there are governmental orders and restrictions limiting the tenant’s ability to operate its business, and even to permit customers from entering their establishments. Likewise, if tenants are unable to generate income due to the fact that their customers are prohibited from entering their stores, and thus are unable to make enough money to pay their employees or to pay their rent, how are landlords expected to pay their mortgages to their lenders? The materials contained in this paper will examine some of the creative ways that commercial landlords have devised to help not only themselves, but also their tenants and the industry as a whole.

Covid-19. How To Weather The Storm

Because of the unique quandary that the Pandemic has created for the shopping center industry, landlords have adopted many new tools with which to adapt to and to move beyond the Pandemic. Many commercial landlords and tenants have agreed to modify the terms of their leases in order to provide short-term relief to tenants, especially those in the retail sector. Among other things, parties have agreed to (i) short-term rent deferrals, with deferred rent is to be repaid either in lump sums or in installments with varying repayment terms, (ii) short-term rent reductions, (iii) lease extensions coupled with free or abated rent to commence on a date certain, (iv) lease terminations for up-front payment, and (v) some combination of the foregoing. Landlords typically prefer to defer rent (even if forgiven at a later date) rather than grant free rent to preserve the landlord's claim in a future bankruptcy case filed by the tenant. An example of such an agreement is attached as Exhibit "A".

A common example of a tenant affected by the Pandemic is a tenant whose "use" requires a multitude of people to gather or to congregate in a space such as a restaurant, grocery store (which were often exempt as a necessary business) or a department store. Because of the governmental orders instituted at the outset of the Pandemic, tenants were unable to operate due to their inability to open their doors to a profitable level of business invitees. Interestingly, many restaurants successfully shifted to delivery and pick up which kept them open. As a result, the tenants in such a situation could not generate sufficient revenue, and thus were unable to pay their operating expenses much less their monthly rent.

Instead of offering tenants affected by the Pandemic forbearance agreements or rent deferral agreements, many shopping center landlords were forced to resort to more extreme measures to protect their properties and their investments. Instead of initially filing eviction actions to regain possession of the premises of a defaulting tenant, many landlords filed suit against their defaulting tenants for the rent that became past due as a result of the Pandemic. Unfortunately, with many Courts extending answer dates in many jurisdictions, often little pressure was imposed on Tenants. These lawsuits sometimes resulted in consent agreements that mimicked the general terms of the forbearance agreements and rent deferral agreements discussed above, but with one major difference. Because these agreements were entered in a filed judicial proceeding, landlords were afforded the power of the courts to enforce such agreements. If a defaulting tenant failed to cure a breach of such a consent agreement or consent order filed in the pending lawsuit, the results could be as punitive as the landlord taking a money judgment against the tenant for the then unpaid past due rent.

During the Pandemic, those landlords who did not wish to expend the time or legal fees, to file a suit for monetary damages against a defaulting tenant chose to go straight to the eviction process. In most jurisdictions, an eviction action is a summary statutory proceeding with truncated statutory timelines that permit landlords to quickly evict a defaulting tenant in order to regain possession of the landlord's premises. See for example O.C.G.A. §44-7-1, *et seq.* In these instances, the landlords would be able to regain possession of their premises so that they could re-let the premises. Unfortunately, in most jurisdictions, commercial eviction cases were stayed as they were for residential evictions.

Equally as important to a landlord is its relationship with its lender. Other than the payment of rent by their tenants that permits landlords to pay their mortgages, there are also non-monetary obligations or covenants that

could be affected by the Pandemic. In a landlord's loan documents, these could relate to the continued viability of leases, and may for example require notice to the lender when tenants fail to meet lease obligations such as payment of rent or operating requirements. There may be more complicated and very serious covenants such as requirements to maintain a certain debt-to-income ratio and covenants regarding loan reserves and occupancy levels, especially if there existed a more complicated loan structure. In the retail context, often leases will impose occupancy-level and co-tenancy requirements, meaning that closures in a shopping center, or even a single "anchor tenant" closure, could be a default by a landlord and could trigger remedies such as reduced rent or even a termination right for the tenant. Obviously, in these instances, the landlord's ability to honor its loan documents becomes even more perilous.

Many, perhaps most, of the above-specified defaults will lead to arguments over whether non-performance was excused as a "force majeure" event outside the non-performing party's control. The starting points for evaluation of such controversies will be the force majeure provision of the lease in question which will be examined later in this presentation.

Fortunately, although the Covid-19 Pandemic forced commercial landlords and shopping center owners to think outside of the box and to consider alternatives to traditional lease enforcement tools, Landlords and Tenants worked together in many cases to come up with an agreement to provide for the survival of both.

COVID-19: From the Tenant's Perspective

Nationwide, the COVID-19 pandemic caused many, if not most, commercial landlords and tenants to reexamine and refocus their business relationship to figure out a path forward, whether together or separately. For many commercial tenants, the pandemic and government mandates made it financially impossible for them to pay rent and they were left with the question: what to do next? Depending on the situation, most tenants were wise to have an open dialogue with their landlord to determine what could be done, what could be financially feasible. In an ideal world, the tenant would be able to present a plan to the landlord to allow the business to continue in the space, without the added cost of terminating the tenancy and vacating the premises.

For many tenants, a lease forbearance agreement is and was an ideal solution, to acknowledge the time they were financially strapped but recognize that business would be up and running again. With regard to forbearance, this could be done within the lease, i.e. by amendment, or outside of the lease as a separate agreement. In the case of an amendment, the parties could use this document to re-set the terms. The amendment might want to be rescinded once the economy returns full-force. As for a separate agreement, these are also useful in the same way that they can be rescinded when no longer relevant. In the case of either amendment or separate agreement, the forbearance agreement would likely provide that if the tenant defaults at any point after the agreement is in place, all deferred rent is automatically accelerated and becomes immediately due and payable with interest. This default keeps the pressure on the tenant to pay when they are able, giving this acceleration protection to the landlord is a good incentive and might give tenant a bargaining chip in an otherwise one-side negotiation. In some jurisdictions, a separate forbearance agreement could also be attached to a judgment which could automatically be entered upon default, saving landlord the added step of having to file for breach of contract.

Again, this is a provision that tenants may want to offer as an incentive for negotiation, even though the later risk is extreme for the tenant.

In either an amendment or separate agreement, the parties can decide whether to abate rent or defer it. Certainly, a tenant would prefer to have rent abated, however it is more likely the landlord will want to defer rent and either tack it on to the end of the lease or amortize it over a period of time. Depending on the landlord's lending position and creditors, it may not be able to agree to an abatement, only a deferment which would be expected to be collected down the road.

If the parties can agree to a forbearance or deferment, then the question becomes, for how long? In many jurisdictions, the parties chose to tie forbearance agreements to government regulations related to COVID-19. For example, deferment of rent during any time of non-essential business shutdown as determined by local or state government. Likewise, Landlords and Tenants also agreed to reduced rent tied to capacity or other restrictions based on government mandates. The parties could also set a sliding scale based on gross profits or other measures of business, with a floor or ceiling set to protect both sides. A tenant may offer to cover landlord's expenses (triple net in many jurisdictions) at a minimum, with full rent due as the maximum. This encourages the tenant to keep business as operational as possible while also protecting landlord from defaulting on its creditor obligations.

If rent is deferred, in whole or in part, the landlord may require interest to run on the unpaid amounts. This depends on the marketplace and whether it is commercially reasonable to require such interest. Again, best practices would be to match the interest to the landlord's other financial obligations.

A landlord may choose to not negotiate a forbearance agreement and decide instead to terminate the lease based on tenant's failure to pay. A tenant should keep in mind that it should continue to attempt negotiations so as to raise these points in equity should the landlord file a lawsuit either for possession, unpaid rent, or both. In such a lawsuit, which will be governed by the Lease's choice of law, the tenant should consider what possible defenses it could raise, including but not limited to impossibility or impracticability of performance, and frustration of purpose. Each of these defenses will be determined under the law of the relevant jurisdiction and will likely be very fact specific based upon the purpose of the lease, the extent of the government shutdowns, and the overall ability of the tenant to operate its business. Generally, those two defenses are related but might have slight nuances in each jurisdiction. Under impossibility or impracticality, performance is excused where contracting parties assumed that something would continue to exist, neither party guaranteed that thing would continue to exist, and performance becomes impossible because the thing was destroyed through no fault of either party. That is to say: something outside of the guarantees of the parties changed so as to nullify the ability to perform. Under frustration, in contrast, performance is excused even though it is possible for the party to perform its contractual obligations, but the expected value of that performance has been destroyed by an unforeseeable event. Frustration looks more towards the intent of the performance rather than the ability to perform.

While there is not one nationwide defense for a tenant, these cases are useful to determine what may or may not provide feasible for a defense:

- UMNV 2-05-207 Newbury, LLC v. Caffé Nero Americas, Inc. (Mass. Superior Ct. Feb. 8, 2021): café tenant excused from paying rent during government shutdown period based on doctrine of “frustration of purpose.” The stated purpose of the lease was narrowly restricted to cafe use of the premises. The lease *force majeure* clause did not apply to frustration of purpose, only to impossibility.
- Simon Property Group L.P. v. Pacific Sunwear Stores LLC (2020 WL 5984297 June 26, 2020 (Ind. Super.) (Trial Order): Tenant was locked out of mall locations by Simon for failure to pay rent; court determined that tenant had a likelihood of success on impossibility defense to unpaid rent, ordering Simon to open properties back up for tenant.
- Bay City Realty, LLC v. Mattress Firm, Inc., Case No. 20-CV-11498 (E.D. Mich. April 7, 2021): primary and secondary retail purposes of mattress sales and storage area were frustrated by the Governor’s Order. The purpose of the lease, the retail sale of bedding products, was substantially frustrated during the shutdown.

At least a few New York courts have refused to find impossibility or frustration of purpose:

- 1140 Broadway LLC v. Bold Food, LLC, KBFK Restaurant Corp., 2020 WL 7137817 (Dec. 3, 2020): court rejected both impossibility and frustration of purpose arguments by tenant holding that the tenant’s reasons for non-payment did not fit the narrow doctrines. “Simply put, defendants could no longer afford the rent” which was not a justified defense under the circumstances.
- RHP Hotels 51st Street Owner, LLC v. HJ Parking LLC, 2021 NY Slip Op 30286, decided January 28, 2021: Neither doctrine applied to parking garage tenant because tenant did not face the substantial “frustration” or “impossibility” required to invoke these doctrines. Defendant faced decreased revenue from fewer customers and increased costs from pandemic-related regulations.
- Valentino U.S.A., Inc. v. 693 Fifth Owner LLC, 70 Misc. 3d 1218(A), 2021 WL 668788 (N.Y. Sup. Ct. 2021): court determined that tenant had assumed risk of reduced operation and indeed was not unable to operate; judgment for landlord.

Another consideration for tenant’s backed into a corner with creditors is bankruptcy. The following is a collection of cases in which courts across the country have considered a tenant’s excused performance for paying rent in the context of a bankruptcy proceeding:

- In re Hitz Rest. Grp., 616 B.R. 374 (Bankr. N.D. Ill. 2020)
 - Court determined force majeure clause in lease was “unambiguously triggered” by Governor executive order thus partially excusing restaurant from payment of rent.

- In re Cinemex USA Real Estate Holdings, Inc, et al. (U.S. Bankruptcy Court, S.D. Florida, Miami Div., Jan. 27, 2021, 2021 WL 564486)
 - Applying frustration of purpose, impossibility and impracticality doctrines under Florida law. “Impossibility of performance refers to those factual situations, too numerous to catalog, where the purposes, for which the contract was made, have, on one side, become impossible to perform.” Granting movie theatre release from rent during time of shut-down and adding those months on to end of lease.
- In re CEC Entertainment Inc. (Chuck E. Cheese bankruptcy), 2020 WL 7356380 (Bankr. Dec. 14, 2020)
 - Texas bankruptcy proceeding to address tenant’s inability to pay rents across multiple jurisdictions. The court noted that multiple landlords were able to resolve their disputes. In the remaining jurisdictions, North Carolina, Washington, and California, Court determined CEC was not entitled to an order involuntarily abating or reducing its rent obligations at those venues under those states laws on frustration of purpose and impossibility.
- In re Pier 1 Imports, Inc., 615 B.R. 196 (Bankr. E.D. Va. May 10, 2020)
 - Consideration of tenant’s inability to operate stores during shutdown, the Bankruptcy Court did not consider whether the doctrines of impossibility or frustration of purpose applied but held it had the power to give tenant temporary relief from the obligation to pay rent, provided the Landlords were given “adequate protection” in the bankruptcy proceeding. This could be done by...requiring the tenant to make all insurance payments, security obligations, utility payments, and other similar obligations. Deferring rent only temporarily (until May 31, 2020), with an obligation by the tenant to pay catch-up rent beginning in June, 2020. The court did not decide any impossibility or frustration or purpose arguments.

A final consideration from the tenant’s perspective is simply giving up the premises and walking away. There are certainly risks to this approach, but it may be the best option. One major risk is if there are personal guaranties on the lease, or, in some instances, personal guaranties on the equipment, fixtures or other possessions in the space. There is also a consideration regarding items left behind, what value they are and whether that value offsets the cost of removing them. A tenant needs to consider the corporate structure and the entity which actually benefitted from the lease could be liable to the landlord despite not being on the lease under third party beneficiary or intended beneficiary common law doctrines. Consideration must be made with regard to whether a parent corporation could be liable for the tenant’s breach and if there are other deep pockets the landlord could pursue. “Going Dark” may be the last option available but one that carries little costs in legal fees upfront with lingering risk and unsettled potential lawsuits.

COVID-19: Drafting Around the Pandemic:

Faced with the impact of non-paying tenants – while still obligated to pay ongoing expenses for mortgages, property upkeep and maintenance, taxes and insurance – Landlords may opt to take legal action. While specific leases will impact available legal options and strategies, as a general matter, Landlords may file suit for (1) damages, seeking payment of past due rent and potentially accelerated rent, (2) declaratory relief or potentially specific performance to require ongoing payment of rent, or (3) eviction. As well, Landlords may consider recourse to the bankruptcy courts, including instituting an involuntary bankruptcy proceeding!

The circumstances of Covid 19, especially in the early months of 2020 when access to Courts and judicial processes, including execution of writs of possession, were limited, influenced the choice of judicial action. The constraints on judicial eviction proceedings in some instances pushed Landlords to opt for actions seeking damages. While the specter of an eviction can create obvious concerns for a tenant, the remedy may leave a Landlord with a vacant space and a search for a new tenant in a clearly uncertain economic environment. A damages action under the circumstances of Covid 19 focused on the immediate issue of rent payment, without impacting the tenant's long-term occupancy or ending the lease relationship, while also avoiding potential delays in enforcement and execution, may be a more efficient method of collecting past due amounts owed.

Also, in terms of timing, Landlords may have more flexibility in promptly commencing a damages action than an eviction proceeding. An anticipatory repudiation theory may support the early initiation of legal action, upon a Tenant's indication that rent will not be paid for some uncertain period of time, whereas an eviction action will typically require an actual default, and satisfaction of various prerequisites under the leases and applicable law. Potentially, a theory of anticipatory repudiation may also provide a basis for the Landlord to contend that preconditions for suit under a lease, including certain notice and pre-suit requirements, are waived, excused, or would be futile. Including a claim for accelerated rent, if permitted under the terms of the lease and applicable law, is another litigation strategy for Landlords to consider. Such a claim, obviously, increases financial pressure on a tenant, with potentially substantial economic benefit to the Landlord from a lump-sum payment of future rents. The past year-and-a-half or so of litigation addressing the circumstances of Covid 19 provides guidance for future drafting of leases. Primary issues involve the scope and definition of force majeure provisions, allocating the risks and payment obligations between the parties pending a force majeure event, and the impact of non-contractual defenses to payment based on frustration of purpose, impracticability or impossibility of performance. These issues and drafting strategies largely turn on the specifics of the force majeure provision.

A. Whether the Force Majeure Clause Is Triggered.

A critical starting point, both for purposes of negotiation and litigation, is the wording of a lease's *force majeure* provision, and whether the circumstances of Covid 19 are a trigger. The provisions typically provide a laundry list of categories that will be considered *force majeure* events, such as war, riots, insurrections, strikes, acts of God, fire or other casualty. Prior to Covid, however "pandemics" or "epidemics" may not frequently have been listed. Including those terms now, as well as a reference to "governmental regulations or controls," will help ensure that circumstances like Covid 19 trigger a lease's *force majeure* provision. Nevertheless, courts have differently treated the requirement of demonstrating a causal tie between the listed event and the non-payment of rent. Compare *In re Hitz Rest. Grp.*, 616 B.R. 374, 376-77 (Bankr. N.D. Ill. 2020) ("Governor[s] executive order shutting down all 'on-premises' consumption of food and beverages in Illinois restaurants" was a *force majeure* event that partially excused tenant from paying rent), with *NVWELFL01, LLC v. Chatsworth at Wellington Green, LLC*, No. 18-80712, 2019 WL 4694146 (S.D. Fla. Feb. 5, 2019) (pre-Covid case holding that governmental action was not the cause of tenant's failure to perform).

B. Allocating Payment Obligations For Force Majeure Events.

The primary issue in Covid 19 related lease litigation has been the tenant's ongoing obligation to pay rent. In part, the litigation has occurred because the terms and provisions of leases have left room for argument about

the ongoing scope of a tenant's payment obligations in the event of the pandemic. With the issue now obviously part of the landscape for any future lease negotiation, the parties have the ability to specifically negotiate the risks of such an event, and to expressly allocate in the lease future payment obligations during a pandemic. As further discussed below, the dramatic reality of Covid may also reduce the ability to invoke common law arguments, outside the provisions of the lease, such as impossibility, impracticability, or frustration of purpose to excuse payment of rent in the event of a pandemic or other government closures. As an example of drafting approaches, the parties can place the risk on the tenant, and confirm the ongoing obligation to pay rent, through language such as: "The foregoing shall not excuse either party from the payment of any monies, including but not limited to the payment of Rents, pursuant to the terms of this Lease."¹ Or, alternatively, the language could provide for a period of suspended rent, addressing whether the payment is abated or deferred to be repaid at a later point. Although a provision simply confirming that rent must continue to be paid is clear cut, provisions that in some form excuse payment of rent may present certain drafting – and potential litigation – issues on points such as the duration of the period of non-payment, the amount of the reduction in rent if only partial, and the obligation to repay rent in the future in the event of a deferral.

Recent court decisions reflect how Courts have applied the rules of contract interpretation to enforce the allocation of risk in leases under the circumstances of Covid 19, with some variation. For example, in *In re CEC Entm't, Inc.*, No. 20-33162, 2020 WL 7356380 (Bankr. S.D. Tex. Dec. 14, 2020), the Court addressed the ongoing payment obligations of tenants operating Chuck E. Cheese restaurants in different parts of the country. Concluding that the *force majeure* provisions of the leases at issue were triggered by the circumstances of Covid, the Court held that rent payments were ***not*** excused where the *force majeure* provisions included language specifying that they "***shall not apply to the inability to pay any sum of money due hereunder or the failure to perform any other obligation due to the lack of money or inability to raise capital or borrow for any purpose***" (emphasis original). *Id.* at *5-7.

In contrast, though, the Court in *In re Hitz Rest. Grp.*, 616 B.R. 374, 376-77 (Bankr. N.D. Ill. 2020), applied a *force majeure* provision to partially excuse a tenant's payment of rent. The Court rejected the Landlord's argument that the tenant remained obligated to pay, based on language in the *force majeure* provision stating that: "lack of money shall not be grounds for Force Majeure." *Id.* The Court explained that the tenant "has not argued that lack of money is the proximate cause of its failure to pay rent. Instead, it is arguing that [the] Governor[s] executive order shutting down all 'on-premises' consumption of food and beverages in Illinois restaurants is the proximate cause of its inability to generate revenue and pay rent." The Court accepted that argument, as it said, "at least in part," providing a partial allocation of rent.²

¹ The application of a *force majeure* provision to non-monetary obligations under a lease can also be important, both for landlords and tenants, by for example, ensuring that no default occurs related to continuous use provisions.

² The Court's decision in *UMNV 205-207 Newbury, LLC v. Caff  Nero Americas, Inc.*, Case No. 2084CV01493-BLS2, 2021 WL 956069 (Mass. Sup. Ct. Feb. 8 2021), which excused a tenant's rent payments based on a frustration of purpose defense, notwithstanding a *force majeure* provision stating that payment of rent would never be excused, is discussed in more detail below.

Since, presumably, the goal of drafting is to achieve certainty and avoid litigation issues, the inconsistency between these two decisions may be avoided by language, as suggested above, confirming that that the “payment of Rents” is not excused by a *force majeure* event, or if excused, only for a defined and stated period of time.

C. Impossibility, Impracticability, Or Frustration Of Purpose.

Defenses to payment of rent based on the principles of impossibility, impracticability or frustration of purpose have also been vigorously litigated under the circumstances of Covid 19. Although Courts and commentators have extensively written on the scope and application of these doctrines, a general touchstone for the defense is the occurrence of a business risk that was **not foreseeable** at the inception of the agreement, and therefore could not have been the subject of an express contractual agreement. See, e.g., *THE GAP INC. v. PONTE GADEA NEW YORK LLC*, No. 20 CV 4541-LTS-KHP, 2021 WL 861121, at *8 (S.D.N.Y. Mar. 8, 2021). Accordingly, if the risk was foreseeable, then these defenses will not excuse a party’s performance of its obligations under a contract, including a tenant’s obligation to pay rent.

Following the discussion above, therefore, a *force majeure* provision that specifically includes pandemics and government closure orders, with a corresponding allocation of the parties’ risks and payment obligations, may limit the applicability of these non-contractual defenses. The *GAP* decision applies this rule, holding that the tenant at the *GAP* location on Times Square in New York City could not invoke these defenses to excuse its obligation to pay rent, since the lease included an applicable *force majeure* provision. Rejecting the frustration of purpose defense, the Court held: “In this case, Gap has not framed a genuine issue of material fact in connection with its frustration defense. First, to the extent Gap contends that New York State’s blanket prohibition on non-essential business between March 22 and June 8, 2020, frustrated the purpose of the Lease, the possibility of just such a prohibition was referenced in the Lease itself, defeating any claim that the possibility was ‘wholly unforeseeable.’” *Id.* On that same basis, the *GAP* Court rejected the impossibility defense: “Gap’s impossibility defense fails because the very text of the Lease demonstrates that the conditions that Gap claims render performance impossible were foreseeable.” *Id.* at 10.³

As noted above, however, the Courts have not been uniform in applying this rule. For example, in the *Caffé Nero* case, the Court granted summary judgment in favor of a tenant, based on a common law frustration of purpose defense, notwithstanding the lease’s *force majeure* provision. 2021 WL 956069; see *supra* note 2. Similar to the provision in the *GAP* case, the provision in the *Café Nero* Lease included governmental orders as a *force majeure* event and further provided that “in no event shall either party be excused or delayed in the payment of any money due under this Lease by reason of any of the foregoing.” *Id.* at 6. The *Café Nero* Court, however, held that, while the provision addressed the risk that performance might become impossible, it did “**not** address the distinct risk that the performance could still be possible even while [the] main purpose of the Lease is frustrated by events not in the parties’ control.” *Id.* (emphasis original). On that basis, the Court held – as a matter of law, in the context of a

³ The Court’s decision in *In re Cinemex USA Real Estate Holdings, Inc.*, 627 B.R. 693 (S.D. Fla. 2021), is consistent with the *GAP* Court’s analysis. The Court in *Cinemex* did excuse rent payments during a period of closure based on an impracticability defense, but indicated the outcome would have been different if the lease’s *force majeure* provision had been drafted differently to include the phrase “other than the failure to timely pay monies” in the applicable section. *Id.* at 5.

summary judgment ruling – that the common law doctrine of frustration of purpose applied, and excused the tenant’s obligation to pay rent. *Id.*

Like the decision in *Café Nero*, the Court in *Bay City Realty, LLC v. Mattress Firm, Inc.*, Case No. 20-CV-11498, 2021 WL 1295261 (E.D. Mich Apr. 7, 2021), also granted summary judgment in favor of a tenant, based on a common law defense of frustration of purpose. The *Bay City* Court rejected the Landlord’s argument that that the parties to the lease had assumed the risks based on various provisions of the lease at issue, but without discussion of the *force majeure* provision. The Lease in that case – like the leases in *Café Nero* and *Bay City* – included governmental regulations as a *force majeure* event, and also stated the excuse of performance was limited to “any non-monetary act.”

Without critiquing or seeking to reconcile these various decisions, they indicate that some uncertainty may remain as to the application of common law defenses, even with *force majeure* provisions that specifically address the ongoing obligation to pay rent. Arguably, at least for leases entered into after the onset of Covid 19, it may have become more difficult for the parties to contend such circumstances were unforeseen. But additional language may be considered in the drafting process to help eliminate any remaining uncertainty. The following provision, included as part of the *force majeure* clause, is an example:

Tenant agrees that Landlord shall not be in breach of this Lease nor liable to Tenant for damages or otherwise, for any failure to furnish, or a delay in furnishing, or a change in the quantity or character of any service when such failure, delay or change is occasioned, in whole or in by part, by any event of Force Majeure, whether specifically foreseen or not. No such failure, delay, change or Force Majeure event shall be deemed to be an eviction or disturbance of Tenant’s use and possession of the Premises, or relieve Tenant from paying Rent or from performing any other obligation of Tenant under this Lease without any deduction, offset, or defense, including based on frustration of purpose, impracticability, or impossibility.

Of course, the inclusion of such a provision will be a matter of negotiation. While provisions may be considered more-or-less Landlord or Tenant favorable, bargaining for more predictability should benefit all parties.

CONCLUSION

The dilemmas posed by the circumstances of Covid 19 have resulted in various approaches by Landlords and Tenants. In addition to a range of negotiated solutions, the issues have been hotly litigated in Federal and State Courts throughout the United States. Although some general rules and judicial approaches have emerged from the Court decisions to date, variability in outcomes indicates that uncertainty remains in the event of litigation, with different potential case-by-case outcomes. Reviewing the points of discrepancy in the Court decisions, though, does provide guidance for potential strategies in negotiating and drafting Lease provisions to allocate the risks and responsibilities of the parties in the event of Covid 19 or similar circumstances, and therefore ensure more predictability in Landlord-Tenant relationships.

EXHIBIT "A"

AMENDMENT TO LEASE AGREEMENT

THIS AMENDMENT TO LEASE AGREEMENT (the "Amendment") is made and entered into as of the day of _____, 2020, by and between _____, a _____ limited partnership ("Landlord") and _____, a _____ limited liability company ("Tenant"), and provides for as follows:

WITNESSETH:

WHEREAS, Landlord and Tenant are parties to that certain Lease Agreement dated _____ (as amended by that certain First Modification to Lease Agreement dated _____, collectively hereinafter referred to as the "Lease"), for approximately _____ rentable square feet of space commonly referred to as _____ (the "Premises"); and

WHEREAS, the Term of the Lease will expire on _____; and

WHEREAS, the parties agree that a portion of Minimum Rent and Additional Rent shall be abated and the Term of the Lease be extended; and

NOW THEREFORE, for and in consideration of the mutual covenants and agreements hereinafter set forth, the receipt and sufficiency of which are hereby acknowledged, the parties hereto intending to be legally bound, agree as follows:

1. Recitals. The parties acknowledge and agree that the recitals set forth hereinabove are true and correct and are hereby incorporated in their entirety. All terms used herein and denoted by their capitalization shall have the meaning set forth in the Lease unless set forth herein to the contrary.

2. Past Due Amount. The parties agree that Tenant has a past due balance of Rent due under the Lease through _____ in the amount of \$_____ (the "Past Due Amount"). Tenant covenants and promises to pay Landlord the sum of \$15,000.00 to be applied to the Past Due Amount pursuant to the following schedule:

Table with 2 columns: Payment Due Date, Amount Due. Rows: May 29, 2020 (\$4,000.00), June 5, 2020 (\$4,000.00), June 15, 2020 (\$7,000.00)

The remaining balance of the Past Due Amount in the amount of \$_____ shall be amortized over the remainder of the Term pursuant to paragraph 5 below. This Amendment is contingent upon the timely payment of the initial \$15,000.00 set forth above, and in the event Tenant shall fail to timely pay the three installments Landlord may, in addition to all other remedies deem this Amendment null and void.

3. Minimum Rent Abatement. The parties agree that Monthly Minimum Rent and Additional Rent shall be temporarily abated for the months of May, June and July of 2020 ("Abatement Period"), resulting in an abatement of Rent in the amount of \$_____ (the "Abated Rent"). The Abated Rent shall be repaid pursuant to paragraph #5 below. The abatement set forth herein is of Minimum Rent and Additional Rent.

4. Lease Term. The Lease is amended to extend the Lease Term three (3) months (said additional months being the "Extended Term") so as to expire on _____. Minimum Rent during the Extended Term shall be at the rate in effect immediately prior to the commencement of the Extended Term.

5. Minimum Rent following Abatement Period. Following the expiration of the Abatement Period and continuing through the Extended Term, (a) Minimum Rent shall continue to be due in amounts set forth in the Lease, and (b) the Abated Rent and Additional Rent plus the remaining balance of \$_____ (as set forth in paragraph 2 above) shall be amortized straight-line (at 0% interest) from _____ through _____, and repaid monthly in the amount of \$_____ to Landlord as Additional Rent. Acknowledging that the abatement of Minimum Rent and Additional Rent, and agreement to accept repayment of the Past Due Amount over the Term are granted in consideration for the timely performance by Tenant under all terms of the Lease, in the event of a default by Tenant under the Lease at any time during the Lease Term then, in addition to

all other rights and remedies of Landlord, the unamortized balance of the Abated Rent and Past Due Amount balance as of the date of default shall be deemed immediately due and payable, and there shall be no further abatement of Minimum Rent or Additional Rent hereunder.

6. Necessary Closure. Acknowledging that due to the National State of Emergency due to the Coronavirus pandemic, it may be necessary to close or limit hours of operation in the Premises to comply with laws and health recommendations, such a closure shall not be a default under the continuous operation clause of the Lease. However, it is required Tenant comply with all other terms of the Lease to assure that all required insurance is maintained, and that the Premises are monitored to remain secure, clean, and in good repair.

7. Conflicts and Non-Amended Provisions. In the event of any express conflict or inconsistency between the terms of the Lease and the terms of this Amendment, the terms of this Amendment shall control and govern. Except as may be modified herein, all other terms, covenants and conditions of the Lease are hereby ratified, reaffirmed and republished in their entirety and shall remain in full force and effect.

8. Duty of Strict Compliance. By execution hereof Tenant acknowledges that Landlord does and shall require strict compliance with all terms of the Lease, as amended herein, and Landlord is not in default under the Lease.

9. Execution. Delivery of an executed copy of this agreement by facsimile, .pdf, email, DocuSign or similar electronic format shall be effective as delivery of a manually executed counterpart for all purposes.

10. Confidentiality. Unless required by Law, neither Landlord nor Tenant shall disclose the substance of this Amendment and Landlord and Tenant agree to treat all information relating to this Amendment as confidential. This obligation of confidentiality shall not apply to disclosures compelled by law, any order of a court of competent jurisdiction or by a lawful proper subpoena, in which event Landlord or Tenant, as applicable, shall immediately notify the other party of the circumstances purporting to require such disclosure and shall refrain from such disclosure for the maximum period of time allowed by law so that such other party may take such actions as it may deem appropriate to protect the confidential information being sought. Notwithstanding the foregoing, Tenant and Landlord shall be permitted to disclose, to the extent necessary, the substance of this Amendment to their respective legal representatives and accountants. Acknowledging a default under this provision is a material default under the Lease, and that the damages suffered by Landlord resulting from a default by Tenant of this provision may be difficult to calculate, in addition to all remedies of Landlord, any previously Abated Rent shall be deemed immediately due and payable, and there shall be no further abatement of Rent hereunder.

Signatures on Following Page

IN WITNESS WHEREOF, the parties have executed this Amendment as of the day and year first above written.

Landlord:

Witness:

Witness:

By: _____

Name: _____

Its: _____

Dated: _____

Tenant:

Witness:

By: _____

Name: _____

Its: _____

Dated: _____