

Friday, November 5, 2021
12:00 PM – 1:15 PM

Workshop 24

The Covid Dilemma in Landlord/Tenant Disputes

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I. Introductions

II. COVID-19: THE DILEMMA

A. In General: With the onset of COVID-19 in the United States in early 2020, commercial real estate owners and operators have had to adapt to changes in the marketplace. Below are just a few examples of the dilemmas faced in the shopping center industry:

1. How are tenants expected to pay rent when there are governmental restrictions on the tenant opening or operating its business?
2. How are landlords expected to pay their mortgages if the tenants cannot pay their rent?
3. Can lenders survive if landlords cannot pay their mortgages?
4. Is it the role of the Government's to bail-out lenders, landlords, and tenants?

III. COVID-19: HOW TO WEATHER THE STORM

A. From the Landlord's standpoint

1. Forbearance Agreements (Rent Deferrals)
2. Lease Modifications (Rent Relief, Rent Forgiveness, Extended Lease Terms)
3. Lawsuits for past due rent
4. Eviction

B. From the Tenant's standpoint

1. Forbearance Agreements
2. Lease Modifications
3. Bankruptcy
4. Going Dark and Walking Away

IV. COVID-19: JUDICIAL LEASE ENFORCEMENT

A. From the Landlord's Perspective

1. Lawsuits for rent
2. Lawsuits for specific performance
3. Involuntary Bankruptcy Proceedings

B. From the Tenant's Perspective

1. Voluntary Bankruptcy Proceedings.
2. Pleading Force Majeure, Impossibility, and Frustration of Purpose.

V. COVID-19: DRAFTING AROUND THE PANDEMIC (Expanding the Definition of Force Majeure in Commercial Leases)

A. The Force Majeure Clause:

1. New Triggering Events for the implication of Force Majeure Clauses:

- a. Epidemics
- b. Pandemics
- c. Government Shutdown Orders
- d. Government Quarantine Orders

B. Expressly allocate payment obligations pending force majeure event.

C. See generally: Opinion and Order Granting Defendant's Motion for Summary Judgement, Denying Plaintiff's Motion for Summary Judgment, and Dismissing Complaint: Bay City Retail, LLC v. Mattress Firm, Inc., in the United States District Court, Eastern District of Michigan, Northern Division, Case No. 20-CV-11498, (Docket No. 24). **(Upholds doctrine of Temporary Frustration of Purpose defense until triggering event has evaporated).**

D. Compare to: Memorandum Opinion and Order: The GAP, Inc. v. Ponte Gadea New York, LLC., in the United States District Court, Southern District of New York, Case No. 20-CV-4541, (Docket No. 56) **(Rejecting "Impossibility of Performance" as a defense).**

E. Enforcing Force Majeure Provision Allocating Payment Obligations. *In re CEC Entm't, Inc.*, No. 20-33162, 2020 WL 7356380, at *5-7 (Bankr. S.D. Tex. Dec. 14, 2020) (holding that Chuck E. Cheese rent payments under multiple leases not excused where *force majeure* provisions provided 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")

VI. Conclusion