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The Force Majeure Clause, Impossibility, and Frustration of Purpose in the Age of COVID-19

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Abstract

The Covid-19 Pandemic and the resulting government-imposed shutdowns have caused financial difficulty for many businesses in the United States. In particular, the shutdowns have strained landlord and tenant relations, as the failure of the latter to pay monthly rent has resulted in both parties taking their disputes to court. The contractual, legal doctrines of force majeure, frustration of purpose, and impossibility are being brought up in court by tenants who are hoping to have their nonperformance of contractual duties excused. For this study, fourteen pandemic-era court cases from around the country were analyzed in order to determine how the legal concepts of force majeure, frustration of purpose, and impossibility are being interpreted and whether the results were more in favor of the tenant or the landlord. The study found that courts interpreted the arguments in a very narrow manner, which resulted in very little victory for tenants. However, the author suggests that the practice of off-court resolutions in the face of strict legal jurisprudence could be an effective route for the disputing parties.

Keywords: force majeure, impossibility, frustration of purpose, Covid-19, pandemic, government shutdowns, businesses, landlord, tenant

Overview

On March 11, 2020, the World Health Organization declared the novel SARS-CoV-2 virus a pandemic (Nwedu, 2021). The virus, also known as Covid-19, led to major disruptions on commercial and economic activities worldwide, and presented a grave threat to human life and wellbeing (Nwedu, 2021). In the United States, state governors issued emergency declarations and stay-at-home orders that paused nonessential business activities (Kelleher, 2020). This left many businesses with the inability to pay monthly rents owed to landlords. This disruption between tenant and landlord relations caused the parties to turn to the legal system to seek relief under the pandemic-generated circumstances (Drye, 2020).

One legal argument that tenants have been utilizing to secure a rent abatement consists of evoking the lease's force majeure clause (Drye, 2020). Since March 2020, tenants have been asking courts to consider force majeure, and the supplemental common law doctrines of frustration of purpose and impossibility, to excuse nonperformance of contractual duties amid the statewide closures. In response, landlords have sought to dismiss those claims and request that the tenants pay the rent amount due or face lease terminations and evictions.

The unprecedented use of force majeure, frustration of purpose, and the impossibility doctrine in courts by tenants necessitates an inquiry on how judges have been resolving these disputes, and whether the results favor either the tenant or landlord party. Fourteen court cases from various jurisdictions were selected and analyzed. Each case centers around rent, and whether courts have decided to excuse or delay monthly rent payments due to the government-imposed pandemic shutdowns under the legal doctrines listed. Before delving into the results of the case analysis, it is important to establish previous background knowledge on force majeure frustration of purpose, and impossibility, and how courts have traditionally interpreted them before the pandemic.

Force Majeure

The concept of force majeure dates back to Roman times (Phelps, 2021). It was codified during the Napoleonic years and the term in French translates to "greater force" (Drye, 2020). The purpose of a force majeure clause is to allocate risk for the occurrence of events that are outside the parties' control and cause contractual performance to become either impossible or impractical (Encinas, 2011). Carlos A. Encinas's 2011 article "Clause majeure?" details the category of events included in a typical force majeure clause. Examples of events listed include natural forces or *"*Acts of God" such as floods, tornadoes, or earthquakes; human events that originated outside the control of the contracted parties including wars, riots, or terrorist attacks; and performance failures including governmental decisions, supplier problems, and labor disputes (Encinas, 2011). At the end of the events list, the clause could also include a general catchall provision that encompasses, "other events beyond the reasonable control of the parties" (Phelps, 2021). Courts have traditionally interpreted the catchall provision to include events that are of the same nature as the events already listed in the clause (Phelps, 2021).

An important component to a force majeure clause is that unless otherwise stated, nonperformance caused by economic hardship is not an excuse. Amy Phelps, in her 2021 article "Contract fixer upper" explained how, "Even if a contract would involve greater expense than the parties anticipated at the time of drafting, increased expense alone is not a great enough effect to excuse performance" (p. 655). Because the pandemic has caused economic hardship amongst businesses, it is worth inquiring how courts have interpreted the motivations and arguments behind a tenant invoking the force majeure clause; in other words, whether it was for pure economic reasons, the physical impossibility of fulfilling the contracted provision, or a mixture of both.

Finally, the *unforeseeability* of the event is an important component that needs to be proved when invoking force majeure. As Phelps (2021) states, "a party that invokes force majeure must also prove that… the force majeure event was not foreseeable. This is particularly true when a party relies on a "catchall provision" (p. 8). None of the leases in the fourteen court cases analyzed for this study listed a pandemic in their force majeure clauses. This meant that judges had to resort to the catchall provision, if one was included, in order to evaluate the question of whether the pandemic classifies as a force majeure event.

Two Common Law Doctrines

Along with the force majeure clause, there are two supplemental common law doctrines: *frustration of purpose* and *impossibility*. An explicitly written force majeure clause supersedes both frustration of purpose and impossibility, meaning that the two doctrines are typically applied either when the lease in question has no force majeure clause, or when the event clearly falls outside of the clause and the catchall provision (Schwartz, 2021). Courts have rarely applied the two doctrines to excuse the nonperformance of a contractual duty, and if they are applied, it is in a narrow manner.

Impossibility

The impossibility doctrine involves the occurrence of an unforeseen event that makes contractual performance an impossibility (Cornell Law School Legal Information Institute, n.d.). The modern-day version of the impossibility doctrine emerged from the landmark 1863 case *Taylor v. Caldwell*, where an English court found that the burning of a music hall rendered the

hosting of performances impossible (Goldberg, 2010). Uri Benoliel (2020) described three central conditions under the doctrine of impossibility. To be excused under the impossibility rule, the party must prove that 1) the promisor in the contract did not agree to assume risk of the possible occurrence of the event where impossibility is the issue 2) the promisor is not at fault, and 3) the promisor had no reason to know of the event when the contract was made (Benoliel, 2020). Unlike *Taylor v. Caldwell*, where the property in question was destroyed, the cases analyzed in this study involved no physical destruction of the leased property. Courts within various jurisdictions had to evaluate whether the impossibility doctrine applies during a pandemic and the government-imposed shutdowns.

Frustration of Purpose

The frustration of purpose doctrine excuses nonperformance when an unforeseen event completely undermines the principal purpose of the contract (Schwartz, 2021). Another important component is that the parties involved in drafting the contract must have been operating with the assumption that the event in question would not occur (Phelps, 2021). Schwartz (2021) emphasized how rare and reluctant courts are to excuse contractual nonperformance under frustration of purpose: "Historically, the doctrine has played a marginal role in contract law, as parties very rarely invoked it -- and almost always without success. Thus, frustration has long been an obscure doctrine, taught in law schools but infrequently litigated in court" (para. 1). One reason for the doctrine's lack of consideration in courts is due to the legal principle that an explicitly written force majeure clause supersedes common law principles such as frustration of purpose. This is significant because the majority of the cases selected involve the tenant invoking the frustration of purpose doctrine (in addition to already invoking force majeure), presenting a new challenge to judges.

Inquiry

The government-ordered closures that were brought about as a result of the Covid-19 pandemic led to the proliferation of many lawsuits between landlords and tenants over rent. As a consequence of not paying rent, parties have sought abatements, forgiveness, lease terminations, and evictions, and have turned to the courts to settle those disputes. Common law doctrines that were once rarely invoked are now being heard by courts. Leases are being examined on a case-

by-case basis to determine if the pandemic and the government-ordered shutdowns qualify as a force majeure event, and whether those events in turn will lead to rent payments being excused. The unprecedented nature of these developments begs the question of how the force majeure clause, along with the common law doctrines of frustration of purpose and impossibility, have been applied by the courts in the wake of the pandemic and the government-ordered shutdowns. How will the scrutiny of contract law fare under pandemic-related rent disputes?

Methods

Fourteen cases were selected to determine how courts have interpreted the force majeure clause and the two common law doctrines of frustration of purpose and impossibility. The cases all feature a tenant and a landlord who is disputing whether the tenant's avoidance of paying rent constitutes either a legally valid excuse or a breach of contract. All the disputed leases in the selected cases, except for *Fives 160th, L.L.C. v. Qing Zhao*, feature a force majeure clause. The cases come from various jurisdictions, ranging from state to federal courts, and were found using the Nexus Uni database.

Results

After analyzing the cases, it was found that courts have applied the force majeure clause and the common law doctrines in a very narrow manner. In two cases, *1600 Walnut Corp. v. Cole Haan Co.* and *In re Hitz Rest. Grp*, the judge ruled that the pandemic and the government-ordered shutdowns constituted a force majeure event due to the chosen wording of the leases' clauses. However, did the acknowledgement lead to rent payments being excused? Efforts to invoke force majeure to excuse nonperformance (i.e., not paying rent) mostly failed. The only exception to this was in the case *In re Hitz Rest. Grp.* Additionally, only one case, *In re Cinemex USA Real Estate Holdings, Inc*., successfully invoked the impossibility doctrine to excuse nonperformance and *Umnv 205-207 Newbury, LLC v. Caffé Nero Ams., Inc* successfully invoked frustration of purpose.

Despite the near uniformity of the courts' findings, there were still some significant discrepancies amongst the cases concerning frustration of purpose. In addition, by June 2020 many state governors had begun their phase one reopenings, meaning that performance of contractual duties was not "impossible" anymore but still economically detrimental for

businesses. The cases examined demonstrate that courts were no longer willing to excuse nonperformance after the month of June. Overall, the case analysis demonstrates how despite the unprecedented nature of the pandemic, the provisions of contract law are still being narrowly applied by the courts.

Further Case Discussion

In *1600 Walnut Corp. v. Cole Haan Co*, a Federal District Court Judge acknowledged that the Covid-19 pandemic and the government-ordered shutdowns did constitute a force majeure event. However, the lease's own particular force majeure clause held that in the face of a force majeure event, "[it] shall not relieve Tenant from the obligation to pay Rent" (*1600 Walnut Corp. v. Cole Haan Co*., 2021). To circumvent this, the Cole Haan party argued that the pandemic fell outside of the listed events detailed in the clause. However, Judge Curtis Joyner concluded that the pandemic fell under the same category as the other life-changing events listed, (war, riots, and insurrection) and that the pandemic was therefore included under the catchall provision.

The wording of the force majeure clause matters. In the case *In re Hitz Rest. Grp*, a United States Bankruptcy court ruled that an Illinois restaurant's force majeure clause covered three months of rent obligations during the government shutdowns. The restaurant's lease stated that the "Landlord and Tenant shall each be excused from performing its obligations... provided in this Lease, in the event… hindered by. . .governmental action." However, Illinois's shutdown mandates still permitted takeout and delivery services, and so the Bankruptcy Court concluded that only 25% of the monthly rent from the past three months was due to the landlord (*In re Hitz Rest. Grp*., 2020). The *In re Hitz Rest. Grp* case was the only force majeure related victory out of the cases analyzed. A major reason for this is because the rent in contention originated from the first three months of quarantine, when state government orders over businesses were more restrictive. In contrast, the *In re Cinemex USA Real Estate Holdings, Inc* case dealt with rent that was owed past June 2020. The United States Bankruptcy Court for the Southern District of Florida ruled that any rent owed after the movie theater reopened was due in the full amount. The party representing the movie theater cited the *In re Hitz Rest. Grp* case to argue in favor of a partial rent reduction. However, the Court was not convinced. Judge Laurel M. Isicoff wrote, "What about the rent on and after June 5, 2020?... In this case, the force majeure clause…

excused all payment of rent during the closure, but adds on time to the end of the lease" (*In re Cinemex USA Real Estate Holdings, Inc.*, 2021). The different results in the *In re Hitz Rest. Grp, In re Cinemex,* and *1600 Walnut Corp. v. Cole Haan Co* cases demonstrate how both the wording of the force majeure clause and the timing of the invocation matter.

Fives 160th, L.L.C. v. Qing Zhao was the only case out of the fourteen to not contain a force majeure clause in the lease. Despite this, the defendants applied force majeure reasoning in their arguments, stating that the pandemic and the government shutdowns made monthly rent payments impossible. The judge overseeing the case ruled that the existence of a force majeure clause cannot be implied due to the Covid-19 pandemic (*Fives 160th, L.L.C. v. Qing Zhao*, 2021).

For the other cases where a force majeure clause was present, the existence of one made courts not as willing to apply common law doctrines to excuse nonperformance. Nevertheless, all the cases analyzed involved the tenant party invoking both the frustration of purpose and impossibility doctrine. For the frustration of purpose doctrine, only one case involved a successful invocation. In the Massachusetts case *Umnv 205-207 Newbury, LLC v. Caffé Nero AmsInc.*, the Superior Court granted summary judgement in the tenant's favor based on frustration of purpose. They found that the state's shutdowns frustrated the purpose of the tenant's contractual duty to offer indoor dining. The Court also reasoned that the lease's force majeure clause did not address the occurrence of a frustration of purpose event. Therefore, Caffé Nero did not breach the lease by not paying rent (*Umnv 205-207 Newbury, LLC v. Caffé Nero Ams., Inc.*, 2021). The *Caffé Nero* case stands out amongst the other cases because the court broke away from conventional contract law analysis by not placing the force majeure clause in a position that supersedes frustration of purpose (Schwartz, 2021). In fact, the tenant party in the *NTS W. USA Corp. v. 605 Fifth Prop. Owner LLC* case brought up the *Caffé Nero* result to support their frustration of purpose claim. In the court's opinion, Judge Cathy Seibel wrote, "I do not find [*Umnv v. Caffé Nero*] persuasive, and in any event, I think the Lease [in *NTS W. USA*] addresses both the risk that performance may become impossible and the risk that performance may become frustrated" (*NTS W. USA Corp. v. 605 Fifth Prop. Owner, LLC*, 2021). The *Caffé Nero* and the *NTS W. USA* cases show a discrepancy in how courts are applying the frustration of purpose doctrine during the pandemic.

Conclusion

Judge Laurel M. Isicoff's opinion in the *In re Cinemex* case provides an adequate summary of the situation. She wrote, "These times have not been easy for most people… The burden on businesses that rely on the public such as theaters, restaurants, bars, hotels and the travel industry, as well as their landlords, have been hit particularly hard. [I]n the absence of agreed upon resolution, we are left with the resolutions that parties have bargained for in their contracts, or, where appropriate, the equitable remedies that common law has fashioned" (*In re Cinemex USA Real Estate Holdings, Inc.*, 2021). Despite the severe economic impact from the Covid-19 pandemic, the analysis of these fourteen court cases shows that courts will not be lenient with their interpretations of contract law. The judges in these cases made decisions in the absence of any independent resolution from the two conflicting parties, leaving courts to rely on the wording of a contract that was drafted years before the pandemic began. The analysis of the tenant and landlord cases demonstrates the importance of outside and independent resolutions in the face of strict legal interpretation. A future study comparing the outcomes of similar tenant-landlord conflicts through independent mediation could yield relevant information on whether non-court methods of resolution are more beneficial to tenants.

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