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CLIENT ALERT

Bankruptcy Court Holds That Stay at Home Order Triggers Force Majeure Clause in Restaurant Lease

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For months, landlords and tenants impacted by the COVID-19 pandemic have wondered whether *force majeure* clauses in leases would excuse a tenant's non-payment of rent. On June 3, 2020, a Bankruptcy Court for the Northern District of Illinois offered us an early look into how courts might interpret such clauses in the midst of the current crisis. In *In re Hitz Restaurant Group*, No. 20-B-05012, 2020 WL 2924523 (Bankr. N.D. Ill. June 3, 2020), the Bankruptcy Court ruled that Executive Order 2020-7, the Stay-at-Home Order (the "Order") enacted by Illinois Governor, J.B. Pritzker, on March 16, 2020, triggered the tenant's *force majeure* clause. As a result, the tenant was partially excused from its obligation to pay rent for the duration of the Order.

In the case of *In re Hitz*, the *force majeure* clause provided that the "Landlord and Tenant shall each be excused from performing its obligations or undertakings provided in [the] Lease, in the event, but only so long as the performance of any of its 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 Bankruptcy Court held that the Order "unambiguously" triggered the *force majeure* clause under the lease as it constituted both "governmental action" and an "order of government." The Bankruptcy Court also found that the Order "hindered" the tenant's ability to fully operate and generate revenue due to its express prohibition against offering on-premises consumption of food and beverages – notwithstanding the fact that the tenant was still permitted (and even encouraged) to provide take-out and delivery services.

In its motion, the landlord, Kass Management Services, Inc., claimed that rent was still payable and the *force majeure* clause was inapplicable for the following reasons: (i) despite the Order, banks were open and the tenant had the ability to write and send checks; (ii) the tenant's failure to perform was due to lack of money, which is carved out from the *force majeure* clause; and (iii) the tenant could have obtained funding by applying for a Small Business Administration ("SBA") loan.

The Bankruptcy Court dismissed the landlord's claim that the tenant could still write and send checks as a "specious argument that [was] unresponsive to [the tenant's] arguments and one that lacks any foundation in the actual language of the force majeure clause in the lease."

Additionally, the Bankruptcy Court rejected the landlord's argument that the tenant's failure to perform was due to lack of money, agreeing with the tenant that the Order was the proximate cause of the tenant's inability to pay rent,

as it impeded the tenant's ability to fully operate and generate revenue.

Finally, the Bankruptcy Court rejected the landlord's claim that the tenant could have obtained the money to pay rent by applying for an SBA loan on the basis that there was no requirement in the lease or case law to support such an argument.

In reaching its decision, the Bankruptcy Court considered the fact that the tenant was not forced to completely shut down its operations and was still able to provide take-out and delivery services. In doing so, the Bankruptcy Court determined that the tenant should still be required to pay some rent, but only "in proportion to its reduced ability to generate revenue due to the [O]rder." Since neither party proposed a methodology by which the Bankruptcy Court could calculate the proportionate rent, the Bankruptcy Court ordered the tenant to pay 25% of the rent payable for the duration of the Order. The Bankruptcy Court reached this conclusion based on the tenant's estimate that the kitchen, which was still usable for take-out and delivery, comprised 25% of the restaurant's total square footage.

The Bankruptcy Court's decision illustrates how strictly courts may be willing to construe *force majeure* clauses. And while the Bankruptcy Court's decision is not binding on other jurisdictions, it could nevertheless serve as precedent for courts to, at least partially, excuse tenants from their obligation to pay rent in light of the pandemic where the language of the *force majeure* clause in the lease does not expressly carve out monetary obligations like the payment of rent, which such clauses oftentimes do.

If you have any questions regarding this case, its potential impact on your business, or about your organization's options for dealing with its own leases as they relate to the pandemic, please contact one of the authors of this alert or another member of Winston & Strawn's Real Estate Group.

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