COMMERCIAL TENANT DEFENSES TO NONPAYMENT OF RENT DUE TO THE PANDEMIC

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This booklet began as a presentation prepared for the New York Women's Bar Association on January 14, 2021. Then it evolved into this presentation prepared for the Appraisal Institute, Long Island Chapter, on May 5, 2021.

As I include this intro page in July of 2021, a good deal of the law that evolved during the Pandemic has been superseded by appellate case law. The Appellate Division, First Department, has recognized that impossibility and frustration of purpose are not defenses to the payment of commercial rent during the Pandemic. *Gap, Inc. v 170 Broadway Retail Owner, LLC*, 195 AD3d 575 [1st Dept 2021] states:

> The fourth cause of action, which seeks rescission based on the theories of frustration of purpose and impossibility, should also have been dismissed. The doctrine of frustration of purpose does not apply as a matter of law where, as here, the tenant was not "completely deprived of the benefit of its bargain" (*Center for Specialty Care, Inc. v CSC Acquisition I, LLC*, 185 AD3d 34, 43 [1st Dept 2020]; *558 Seventh Ave. Corp. v Times Sq. Photo Inc.*, 194 AD3d 561 [1st Dept 2021] [finding that reduced revenues did not frustrate the purpose of the lease]). Furthermore, plaintiff's assertion that Executive Order (A. Cuomo) No. 202.8 (9 NYCRR 8.202.8) rendered it objectively impossible to perform its operations as a retail store as required by the lease is unavailing as defendant correctly points out that by the time plaintiff filed its complaint in July 2020, this was no longer the case (*Kel Kim Corp. v Central Mkts.*, 70 NY2d 900, 902 [1987]; *558 Seventh Ave. Corp.*, 194 AD3d at 561 [also finding that performance of the lease was not rendered impossible by reduced revenues]).

Nevertheless, I leave the booklet up because it explored a lot of interesting topics. Also, a lot of these concepts could be relevant for the next big disaster. May it never happen.

Michelle Itkowitz

Commercial Tenant Defenses to Nonpayment of Rent Defaults Due to the Pandemic

A Presentation Prepared for the Appraisal Institute, Long Island Chapter

May 5, 2021

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CONTENTS

I. INTRODUCTION

As I sit down to begin to update these materials it is May 2021. The Pandemic is fourteen months old.

There has been no statutory rent forgiveness for commercial tenants from the City, State, or Federal government as of this writing. The government seems to be leaving it to the court system to decide whether the Pandemic and the Governor's executive orders that have ensued therefrom **(collectively "Pandemic")** create a defense to a commercial rent default.

The law is always slow to catch up with what is going on in the world. Although many commercial tenants in New York City have paid little or no rent since March 2020, fourteen months later we still have relatively little guidance from the courts about whether and how the Pandemic will excuse commercial tenants from paying rent. This booklet covers about a dozen New York State Supreme Court cases that have, so far, come down regarding this topic. It is always possible that other cases have come out as well and were not reported yet.

By examining these cases we are trying to answer the question – is the Pandemic a defense to the payment of commercial rent in New York City? And if so, how much of a defense. The answer to this question is obviously crucial to the health of commercial buildings all over the City and State, and therefore, to the health of their lenders.

This booklet is being produced as the companion material for a 100-minute continuing education seminar for the Appraisal Institute, Long Island Chapter. The author of these materials is a New York City attorney with her own practice, focusing exclusively on high-stakes landlord and tenant consulting and litigation. I represent equal numbers of commercial landlords and commercial tenants.

II. WHERE LEASE APPORTIONS RISK / FORCE MAJEURE

A. Force Majeure

1. Force Majeure In General

In the French language "force majeure" means "superior force". A force majeure clause is a *contractual* provision that allocates the risk if performance becomes impossible or impractical as a result of an event beyond the control of the parties. Black's Law Dictionary [11th ed. 2019]. Where the parties' integrated agreement does not contain a force majeure clause, there is no basis for a force majeure defense. *General Elec. Co. v. Metals Resources Group Ltd.*, 293 AD2d 417 [1st Dept 2002].

A force majeure is an event or effect that can be neither anticipated nor controlled; especially an unexpected event that prevents someone from doing or completing something that he or she had agreed or officially planned to do, and the phrase includes both acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes, and wars). Black's Law Dictionary [11th ed. 2019]. A force majeure is an event beyond the control of the parties that prevents performance under a contract and may excuse performance. *Beardslee v. Inflection Energy, LLC*, 25 NY3d 150 [2015]. The excuse is available only where the parties' reasonable expectations have been frustrated due to circumstances beyond their control. *Macalloy Corp. v. Metallurg, Inc.*, 284 AD2d 227 [1st Dept 2001].

A force majeure clause will be narrowly construed. *Reade v. Stoneybrook Realty, LLC*, 63 D3d 433 [1st Dept 2009].

Force majeure clauses are to be interpreted in accord with their function, which is **to relieve a party of liability when the parties' expectations are frustrated due to an extreme and event that is beyond the parties' control and occurs without the fault or negligence of the party claiming the benefit of the clause.** *Constellation Energy Services of New York, Inc. v. New Water Street Corp.*, 146 AD.d 557 [1st Dept 2017]; *Goldstein v. Orensanz Events LLC*, 146 AD3d 492 [1st Dept 2017].

When the parties define the contours of force majeure in their agreement, those contours define the application, effect, and scope of force majeure. *Belgium v. Mateo Productions, Inc.*, 138

AD3d 479 [1st Dept 2016]; *Constellation Energy Services of New York, Inc. v. New Water Street Corp.*, 146 AD3d 557 [1st Dept 2017].

When a force majeure clause contains an expansive catch all phrase in addition to specified events, words constituting general language of excuse are not given the most expansive meaning possible but are applied only to events that are the same general kind or class as those specifically mentioned. *Team Marketing USA Corp. v. Power Pact, LLC*, 41 AD3d 939 [3d Dept 2007]. General words are not to be given an expansive meaning but should be confined to things of the same kind and nature as the particular matters mentioned. *Kel Kim Corp. v. Central Markets, Inc.*, 70 NY2d 900 [1987].

Adverse economic conditions do not constitute a force majeure excusing performance of a contract. *Route 6 Outparcels, LLC v. Ruby Tuesday, Inc.*, 88 AD3d 1224 [3d Dept 2011].

2. *Force Majeure in Leases*

See Burnside 711, LLC v. Nassau Regional Off-Track Betting Corp., 67 AD3d 718 [1st Dept 2009] (Holding that force majeure clause of lease providing that tenant was to use and occupy the premises for "any legalized betting and ancillary uses," stating that "[i]n the event [either party] is prevented, delayed, or stopped from performing any act, undertaking, or obligation under this Lease by reason of an 'event of force majeure', including ... governmental action or inaction ... then the time for the party's performance shall be extended one (1) day for each day's prevention, delay, or stoppage by reason of such event of force majeure" applied to invalidate lease after the town's building zone ordinance was amended to restrict the location of off-track betting parlors.)

See Bouchard Transp. Co., Inc. v. New York Islanders Hockey Club, LP, 40 AD3d 897 [2d Dept 2007] (Holding that a labor dispute involving a league-wide lockout ordered by the Commissioner of the National Hockey League, of which lessor was one of 30 teams, was a cause "beyond the lessor's control", within the meaning of the force majeure clause of lease agreement, thereby excusing lessor's nonperformance under the agreement.)

Trump on Ocean, LLC v. Ash, 24 Misc.3d 1241(A) [Supreme Court, Nassau County, 2009] *aff's as modified* 81 AD3d 713 [2d Dept 2011] (Holding that the denial of the variance by a State agency is adequate to trigger the language of the force majeure clause of the lease agreement, specifically "unforseen restrictive governmental laws, regulations, acts or omissions"…)

3. Modern Force Majeure Example Lease Clause

In my experience, most commercial leases in New York City do not include force majeure clauses. Further, my experience is where there is a force majeure clause, it strongly favors landlord.

Here is an example of a force majeure clause in a lease I encountered recently: As per § 1.22 of the Lease, "Force Majeure" is defined as:

> any delays resulting from, directly or indirectly, any causes beyond Landlord's or Tenant's reasonable control, as the case may be, including, but not limited to, governmental regulation, governmental restriction, strike, labor dispute, riot, inability to obtain materials (giving due regard for the ability to substitute similar materials), acts of God, war, fire or other casualty and other like circumstances. Under no circumstances must the non-payment of money or a failure attributable to a lack of funds be deemed to be (or to have caused) an event of Force Majeure.

As per § 20.17 of the Lease:

> **Except with respect to the payment of Base Rent or Additional Rent**, either party's performance hereunder shall be excused to the extent permitted by Force Majeure as defined in Section 1.22.
>
> [Emphasis supplied.]

B. Recent Cases Involving Apportionment of Risk and Force Majeure Clauses in Commercial Leases

1. *January 7, 2021 Justice Borrok Decision – Where Lease Already Apportions Risk, Impossibility and Frustration of Purpose Cannot Be Defenses [RETAIL LINGERIE]*

On January 7, 2021, Justice Andrew Borrok, J.S.C., held that common law defenses will not relieve a commercial tenant of the obligation to pay rent where the Pandemic was foreseen and the risk of loss was already allocated for in the lease in a case entitled *Victoria Secret Stores LLC v. Herald Square Owner LLC*, 70 Misc.3d 1206(A) [Sup Ct New York County 2020]. Justice Borrok held:

> [D]efendant's [Landlord's] motion for summary judgment dismissing the complaint is granted in its entirety.
>
> The Complaint is premised on the mistaken theory that the parties did not allocate the risk of tenant not being able to operate its business and that tenant is therefore somehow forgiven from its performance by virtue of a state law. This is contrary to the express allocation of these risks set forth in Paragraph 26 of the Lease Agreement, … the Lease as drafted is broad and encompasses what happened here — a state law that temporarily caused a closure of the tenant's business (see, e.g., *Urban Archeology, Ltd. v 207 E. 57th St. LLC*, 2009 WL 8572326, at *5 (Sup Ct NY Cnty Sept. 10, 2009) (Sherwood, J. [citing *General Electric Co. v Metals Resources Group Ltd.*, 293 AD2d 417 (1st Dept 2002)], affd, 68 AD3d 562 (1st Dept 2009)]. The parties agreed that this would not relieve the tenant's obligation to pay rent. Thus, the Complaint must be dismissed in its entirety.

I pulled up the NYSCEF file on this case to see exactly what Article 26 of the Lease says. Here it is:

> INABILITY TO PERFORM.
>
> (i) Except as expressly set forth in subparagraph (ii) below, this Lease and **the obligation of Tenant to pay Rent** and additional rent hereunder and perform all of the other covenants and agreements hereunder on the part of Tenant to be performed **shall in nowise be affected, impaired or excused** because Landlord is unable to fulfill any of its obligations under this Lease expressly or impliedly to be performed by Landlord …or **by any cause whatsoever reasonably beyond Landlord's control, including but not limited to, laws, governmental preemption in connection with a national emergency or by reason of any rule, order or regulation of any federal, state, county or municipal authority or any department or subdivision thereof or any government agency or by reason of the conditions of supply and demand which have been or are affected by war or other emergency (herein sometimes referred to as "unavoidable delay").**
>
> (ii) If Landlord fails to provide any service or perform any obligation that Landlord is obligated to provide or perform under this Lease and solely as a result thereof, Tenant shall be not able to operate its store at the Premises, shall be closed for business and have discontinued its operation of the store for a period of six (6) consecutive days or more after written notice by Tenant to Landlord advising Landlord of such failure to provide any such service or perform any such obligation, that such failure has rendered the Premises unusable and that Tenant has closed for business and discontinued its operation of the store, then, Tenant shall be entitled to an abatement of Minimum Rent and additional rent for each day after said six (6) consecutive day period through the earlier to occur of the day preceding (i) the day on which the service is substantially restored and (ii) the day Tenant reopens for business and recommences its operation of the store at the Premises. **Tenant shall not be entitled to an abatement of rent in the event that such failure**

> **results from** (i) any installation, alteration or improvement which is not performed by Tenant in a good workmanlike manner; (ii) Tenant's failure to perform any obligation hereunder; (iii) the negligence or tortious conduct of Tenant; **(iv) casualty; or (vi) unavoidable delay.**
>
> [Emphasis supplied.]

2. ***January 27, 2021 – Justice Borrok again – lease expressly apportioned risk and constructive eviction only works if tenant abandons premises. [RETAIL CLOTHES]***

Valentino U.S.A., Inc. v. 693 Fifth Owner LLC, 70 Misc.3d 1218(A) [Sup Ct New York County, Justice Borrok, 2021] states:

> Valentino U.S.A., Inc.'s (Valentino) complaint is dismissed pursuant to CPLR §§ 3211 (a)(1) and (a)(7) because pursuant to Section 21.11 of the Lease, dated as of May 3, 2013, by and between Thor 693 LLC and Valentino (the Lease; NYSCEF Doc. No. 5) **the parties expressly allocated the risk that Valentino would not be able to operate its business and that Valentino is therefore not forgiven from its performance, including its obligation to pay rent by virtue of a state law** (*Victoria's Secret Stores, LLC v Herald Sq. Owner LLC*, 2021 NY Slip Op 50010[U] [Sup Ct, NY County 2021]). The fact that the COVID 19 pandemic was not specifically enumerated by the parties does not change the result because the Lease is drafted broadly and encompasses the present situation by providing that nothing contained in the Section 21.11 of the Lease including "restrictive governmental laws or regulations," certain cataclysmic events, "or other reason of a similar or dissimilar nature beyond the reasonable control of the party delayed in performing work or doing acts required" shall excuse the payment of rent [citations omitted] For the avoidance of doubt, "[t]o be an eviction, constructive or actual, there must be a wrongful act by the landlord which deprives the tenant of the beneficial enjoyment or actual possession of the demised premises" [citations omitted]. **The Plaintiff's failure to plead**

> **that it moved out of the subject premises or that the landlord substantially interfered with its use and possession (i.e., as opposed to the temporary interference by a state law) dooms its claim for constructive eviction.** … conclusory and general allegation that the landlord failed to maintain the premises, even taken as true as court must at this stage of the proceeding, lacks causation. Finally, to the extent that Valentino indicated that after filing this action, it subsequently made the decision to move out and vacate the premises also does not change the result. No wrongful act of the landlord is alleged to have caused the necessity of this decision. Thus, the complaint must be dismissed.
>
> [Emphasis supplied.]

3. *December 9, 2020 Justice Bluth – force majeure clause explicitly for Landlord and "failure of consideration" does not work either. [RETAIL SHOES]*

In *35 East 75th Street Corp. v. Christian Louboutin L.L.C.*, 2020 WL 7315470 [Sup Ct NY Cty Justice Bluth 2020], after rejecting impossibility and frustration of purpose, the Court held:

> **And, here, the parties actually included a force majeure clause in the lease that specifically provided that it would *not* excuse defendant from having to pay rent** (NYSCEF Doc. No. 11, ¶ 26[c]). Instead, it purported to extend the period of performance for whatever the delay may have been (*id.*). It did not contemplate that defendant could simply walk away with nearly a decade left on the lease and not pay any more rent.
> [Emphasis supplied.]

The Court also rejects lack of consideration:

> …The Court grants the motion and dismisses defendant's affirmative defenses and counterclaims. To the extent that defendant claims there was a lack of consideration (its fourth affirmative defense) that argument is without merit. The contract was for a retail space,

> which defendant occupied and ran its business out of starting in 2013. This is not a situation where some outside force (like a zoning change) prevented defendant from operating its store. And, as plaintiff pointed out, defendant failed to respond to plaintiff's arguments with respect to the first, fifth and sixth affirmative defenses.
>
> These are difficult times for landlords and tenants (both commercial and residential) in New York City. And while the Court recognizes the financial hardships that defendant has faced, it must also observe that plaintiff's faces challenges too. Even though defendant is not paying the rent, plaintiff still has its own obligations (such as paying property taxes) that must be fulfilled. Permitting the doctrines of impossibility or frustration of purpose to rescind an otherwise valid lease would simply allocate the loss to plaintiff. It is not this Court's role to ignore a contract and decide *sua sponte* who should take the financial loss.
>
> Under these circumstances, where defendant signed a lease in 2013 and ran a retail store for many years before the pandemic, the Court finds that plaintiff has met its burden as a matter of law.

III. CASUALTY

A. Casualty Clauses in Leases as Pandemic Defenses

Every lease has a casualty clause, which suspends a tenant's rental obligation, under certain circumstances, in the event of a casualty. Let us look at the clause in a version of the Real Estate Board Standard Form of Store Lease form from 1999 lease (try just reading the words highlighted in blue, which focus on "other casualty", as opposed to focusing on just fire):

> 9(a) If the demised premises or any part thereof shall be damaged by fire or other casualty, Tenant shall give immediate notice thereof to Owner and this lease shall continue in full force and effect except as hereinafter set forth.

> (b) If the demised premises are partially damaged or rendered partially unusable by fire or other casualty, the damage thereto shall be repaired by and at the expense of Owner, and the rent and other items of additional rent, until such repair shall be substantially completed, shall be apportioned from the day following the casualty according to the part of the demised premises which is usable.
>
> (c) If the demised premises are totally damaged or rendered wholly unusable by fire or other casualty, the rent or other items of additional rent as hereinafter expressly provided shall be proportionally paid up until the time of the casualty and henceforth shall cease until the date when the demised premises have been repaired or restored by Owner (or sooner reoccupied by Tenant then rent shall be apportioned as provided in subsection (b) above), subject to Owner's right to elect not to restore the same as hereinafter provided.

So, what is a "casualty" and is the Pandemic a casualty? You would think that with such voluminous insurance company litigation out there, that it would be easy to find a definition of "casualty". It is not.

See Citibank v. 15 Verbena Ave. Realty, LLC, 2006 WL 8431719 [Sup Ct New York County 2006]:

> The answer to the question posed turns on the definition of "casualty," which is not addressed in the writing itself. Although, intuitively, one would expect this issue to have been addressed by the courts in some detail, such is not the case. [Review of case law of other states.] These cases hone in on the concept of the suddenness and unexpectedness of the event. [Citations omitted throughout.]
>
> Citibank brings to the table the much more recent case of *120 Wall Street Company, L.P. v Continental Insurance Company*, 1994 WL 107885 [Sup Ct, NY County 1994], in which the court held that, because "casualty" was listed alongside destruction and fire as

> occurrences which would trigger an arbitration clause, the language of a lease "clearly indicate[d] that a casualty is a specific occurrence of catastrophic dimensions."

See also 45 Broadway Owner LLC v. NYSA-ILA Pension Trust Fund, 107 AD3d 629 [1st Dept 2013]:

> Even so, under the language of lease section 7.04, the releases will be effective only if the flood constitutes damage by "fire or other casualty." Citing 1 Friedman on Leases (§ 9.4 [5th ed.]), plaintiff argues that the flood in this case was not, in fact, a "casualty" because it was not an "act of God," but rather, an act of human beings—namely, the failure to perform maintenance on the HVAC system, leading to the rusted and corroded pressure gauge and the ensuing flooding. The lease's language, however, does not suggest that "casualty" is an event resulting only from an "act of God." Nor under the relevant case law is the definition so limited. To be sure, we have previously noted that the word "casualty" may be defined as an "accident" or an "unfortunate occurrence" [citations omitted]. Certainly, the flood and resulting damage to the building can fairly be classified under either one of those categories.

B. Where Pandemic-as-Casualty Defense Worked

1. *October 30, 2020 Justice James Decision – BOTH Casualty and Frustration Properly Pled in Yellowstone Case [RETAIL – CLOTHES]*

On October 30, 2020, Justice Debra A. James, J.S.C., allowed a cause of action for breach of contract based on a landlord's refusal to refund rent to a tenant due to "casualty" attributable to the Pandemic in a case entitled *The Gap, Inc. v. 170 Broadway Retail Owner, LLC*, bearing Index No. 652732/2020, 2020 WL6435136 [2020]. Justice James held:

> Contrary to defendant's [Landlord's] argument, plaintiff, thereby, identifies the portion of the lease that defendant purportedly violated. *Benderson Development Co., Inc. v Commenco Corp.*, (44 AD2d 889 [4th Dept. 1974]) supports plaintiff's position, as **paragraph C of Article 2 of the Lease at bar, under which defendant [Landlord] promises plaintiff [Tenant] a refund to the extent that a Casualty renders the Demised Premises not useable is akin to the provision under which the landlord warranted the use of the subject premises as a restaurant in that case.** As plaintiff does allege a portion of the lease that defendant breached, the "count one" breach of contract claim is sufficiently pled and shall not be dismissed.
>
> [Emphasis supplied.]

This decision was AFFIRMED by the Appellate Division on February 16, 2021 in 191 AD3d 549 [1st Dept 2021] ("Plaintiffs demonstrated their entitlement to a *Yellowstone* injunction…")

2. *December 21, 2020 Justice Kelley Decision – "Pandemic-as-Casualty" Defense Likelihood of Success on Merits [RESTAURANT]*

I was recently called in to represent a commercial tenant in a case already initiated by another lawyer. I was hired to secure a *Yellowstone* injunction for tenant. The first lawyer[1] pled in the complaint the defense that tenant did not owe rent because the Pandemic was a casualty. The Court held that tenant had a likelihood of success on the merits with the pandemic-as-casualty argument. The order was issued on December 21, 2020 in New York County by New York Supreme Court Justice John J. Kelley, in a case entitled *188 Ave. A Take Out Food Corp. v. Lucky Jab Realty Corp.*, bearing index no. 653967/2020, (2020 WL 7629597). The Court held that:

- A restaurant-tenant is likely to prevail on its claim that it did NOT owe rent when executive orders shut its business down during the Covid period.

- A landlord who wrongly drew down on a restaurant-tenant's security for an alleged rent default during the Covid period will likely have to put the money back.

- Attempting to terminate a restaurant tenant on specious legal grounds during the Covid period likely amounts to statutorily prohibited commercial tenant harassment, for which tenant has a private cause of action for damages against landlord.

Here are some quotes from the case:

> The [restaurant tenant and guarantor] have established a likelihood of success on the merits of their claim that the tenant is not obligated to the defendant for rent for the months of March through August 2020, and it is not obligated to replenish the security deposit equal to the rent otherwise owed for those months, even if the lease, by its terms, authorized the defendant to draw down the deposit to cover rent…

[1] Tiffany A. Donaldson, Esq. was the first lawyer on the case and the person who came up with the Pandemic-as-Casualty idea!

> **The [restaurant tenant and guarantor] have established that they are likely to succeed on their claim that the COVID-19 epidemic, and the consequent state-mandated suspension of indoor dining at restaurants, constituted a sudden, unexpected, unfortunate set of circumstances and, hence, a "casualty" within the meaning of the lease that rendered the premises unusable for a period of time, and thus relieved the tenant of its obligation to pay rent…**
>
> In the subject lease, there is no provision compelling the tenant to replenish a security deposit that the landlord drew down to cover allegedly unpaid rent. The [restaurant-tenant and guarantor] correctly assert that such an obligation cannot be implied into the terms of the lease…
>
> [The restaurant-tenant and guarantor] have also established a likelihood of success on the merits of their claim that the [landlord] violated Admin. Code of City of N.Y. (Ad Code) § 22-902(a) by engaging in commercial harassment of a commercial tenant that has been adversely affected by the COVID-19 pandemic.
>
> [Emphasis supplied.]

This decision was UPHELD upon reargument in *188 Ave. A Take Out Food Corp. v. Lucky Jab Realty Corp.*, bearing index no. 653967/2020, [2021 WL 1351199], where Justice Kelley affirmed his original ruling, refused to force tenant to pay use and occupancy pendente lite, but did order Tenant to pay a one-time bond of $7,500. The Court held:

> …[T]he court rejects the landlord's contention that the court erred in relieving the tenant of its rent obligations during the continuation of the emergency in accordance with the terms of a lease that was drafted by the landlord itself. Upon reargument, the court thus adheres to its determination granting the requested *Yellowstone* injunction to the tenant and its principal.

C. Where Pandemic-as-Casualty Defense Failed

1. *November 2, 2020 Justice Love Decision – Argument that the Pandemic is a Casualty is Entirely Without Merit in a Restaurant Case [RESTAURANT]*

On November 2, 2020, Justice Laurence L. Love, J.S.C., in *Dr. Smood New York LLC v. Orchard Houston, LLC*, 2020 WL 6526996 [Sup Ct New York County 2020], denied a tenant-restaurant ("a full service café specializing in fresh and raw quick-service products with menu items to include breakfast, lunch, and dinner") a preliminary (not a Yellowstone) injunction to prevent its lease from being terminated. Justice Love held:

> **[P]laintiff's [Tenant's] allegations that the pandemic constitutes a "casualty" are entirely without merit as there has been no physical harm to the demised premises** and **the lease does not provide for a rent abatement in such a case as plaintiff was required to obtain insurance to guarantee payment under said circumstances.** Plaintiff's argument that the lease has been frustrated is similarly without merit as "for a party to avail itself of the frustration of purpose defense, there must be complete destruction of the basis of the underlying contract; partial frustration such as a diminution in business, where a tenant could continue to use the premises for an intended purpose, is insufficient to establish the defense as a matter of law." See *Robitzek Inv. Co. v. Colonial Beacon Oil Co.*, 265 AD 749, 753 (1st Dept 1943). **Here, defendant has made a clear showing that the plaintiff has been operating out of the demised premises since at least July, 2020, yet has continued to assert that it has no obligation to pay rent. Specifically, the premises remain open for both counter service and pickup of orders submitted online. Plaintiff has only been prevented by the relevant executive orders from operating indoor dining services. As such, plaintiff has failed to establish a likelihood of success on the merits** and as such is not entitled to a preliminary injunction.
> [Emphasis supplied.]

2. *February 25, 2021 Justice Bluth rejects Casualty because Casualty is a physical loss not a pandemic, also rejects eminent domain [RESTAURANT]*

111 Fulton St. Investors LLC v. Fulton Quality Foods LLC, 2/5/2021 NYLJ No. 1614096143NY653579202 [Sup Ct New York County, Justice Bluth, Index No. 653579/2020, 2021]:

> Fulton Quality insists that Section 10.1 of the lease (the casualty clause) renders its performance under the lease as impossible. The Court disagrees. **That provision references damage to the building (such as a fire) that renders the commercial space unusable. A deadly infectious disease is not a "casualty." Throughout 2020, Fulton Quality was able to operate by doing takeout and delivery, outdoor dining if it acquired the proper permits and limited indoor dining during certain months. The physical space (and kitchen) was available to this defendant. That customers decided not to place as many orders does not lead to a conclusion that the pandemic qualifies as a casualty under the terms of the lease.**
>
> The Court also declines to find that pandemic-related restrictions qualifies as a taking sufficient to invoke Section 11.1 of the lease concerning Eminent Domain. No physical portion of the restaurant was taken for public or quasi-public use. Rather, governmental restrictions designed to save lives limited the operations of Fulton Quality. Under Fulton Quality's view, any regulation that limits the operation of a business would constitute a taking. The Court declines to endorse such a broad and expansive view of the definition of a taking.
>
> [Emphasis supplied.]

3. *March 22, 2021 Justice Crane – Casualty Clause Used Against Tenant [RESTAURANT]*

Philippe MP LLC v. Sahara Dreams LLC, 2021 WL 1135182 [Sup Ct New York County, Crane, 2021]:

> The problem for plaintiff is that the lease itself provides a remedy under these circumstances:

> In the event that (i) a fire or other casualty occurs during the last year of the term hereof and destroys more than twenty-five (25%) percent of the Demised Premises; or (ii) a fire or other casualty shall render all or substantially all of the Demised Premises unusable for Lessee's normal business purposes and Lessor's architect shall in good faith estimate that, working at a standard pace and without using overtime labor, it will take more than nine (9) months to repair or restore the demised premises so that Lessee can use same for its normal business purposes following a fire or other casualty (of which estimate Lessor shall give Lessee written notice not more than sixty (60) days after the fire or other casualty); then, in any of the foregoing events, Lessee shall have the right to terminate this Lease by written notice (*see* EDOC 7, pg 22 § 20).
>
> Thus, the remedy that plaintiff bargained for in the event of a forced restaurant shutdown, thereby rendering "substantially all of the Demised Premises unusable for Lessee's normal business purposes" (here the operation of a high end restaurant), was to terminate the lease. This clause placed the risk of a catastrophic event on the landlord. Had plaintiff wanted a different remedy because it spent considerable funds building out the space, it should not have signed this lease. According to the lease, plaintiff must make a choice: stay and pay rent or terminate and leave. What plaintiff cannot do is stay in the space and not pay rent. Thus, even if plaintiff could establish frustration of the lease's purpose, that still would not justify plaintiff's refusal to pay rent.

IV. IMPOSSIBILITY AND FRUSTRATION OF PURPOSE

A. Impossibility or Frustration of Purpose Defense to Nonperformance Under Contract

For a defense to contract performance based on impossibility or frustration of purpose, three things must be true:

1) First, the lease must not already address the situation. If a lease already apportions the risk of loss due to a pandemic and executive orders emanating therefrom, then the court will defer to the contract between the parties.

2) Second, the event preventing performance must NOT have been foreseeable. If the event preventing performance was foreseeable, the parties are presumed to have anticipated the event and negotiated it out of the contract. The court is not in the business of re-writing contracts between sophisticated commercial parties.

3) Third, the event complained of must either (a) make performance *objectively* impossible, either because the subject matter of the contract is destroyed or the means of performance are rendered impossible; or (b) the purpose of the contract is frustrated, such that the transaction contemplated by the parties no longer makes sense.

"Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract." *Kel Kim Corp. v. Central Markets, Inc.*, 70 NY2d 900 [1987]. In *Kel Kim Corp.* the parties entered a lease for a space that would be used as a skating rink. The lease provided that tenant would have a policy of insurance in the amount of $1 million per accident. Lessee obtained such a policy, but the policy expired during the term of the lease. The policy was not renewed because of a financial problem with the reinsurer. Despite diligent efforts, lessee could not obtain a policy with a $1 million limit but did obtain one with a $500,000 limit that would become effective two months after expiration of the policy. Lessor claimed the lease had been breached by the failure to have the requisite policy of insurance. The lessee argued impossibility excused compliance with the insurance provision in the lease. New York State's highest court stated that the purpose of contract law is to allocate the risks that might affect performance and performance should be excused only in extreme circumstances. The court indicated the defense of impossibility would be available when performance of the contract is objectively impossible because either the subject matter of the contract or the means of performance were destroyed or an event occurred that could not have been foreseen or guarded against in the contract. The court did not deem the tenant's inability to obtain insurance a defense to the payment of rent based on "impossibility".

"In order to invoke the doctrine of frustration of purpose, the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction

would have made little sense…[however] frustration of purpose…is not available where the event which prevented performance was foreseeable and provision could have been made for its occurrence". *Warner v. Kaplan*, 71 AD3d 1 [1st Dept 2009], *lv denied* 14 NY3d 706 [2010] (Purchaser in co-op purchase contract died. The purpose of the contract was for purchaser to live there. Yet this was not frustration of purpose. It was foreseeable that purchaser might die, and the contact made the contract applicable to purchaser's successors and assigns.)

1. ***Were the Pandemic and the executive orders closing everything down foreseeable events?***

The failure of tenant to get a dance hall license did not excuse payment of rent. *Raner v. Goldberg*, 244 NY 438, 440 [1927]. (Tenant's failure to get a dance hall license could have been foreseen. **"There is obviously no impossibility or illegality in paying the rent, and the landlord by making the lease has conveyed to the tenant the estate for which rent was promised.")**

The 2008 "Economic Tsunami" did not frustrate lease for a store selling "discretionary upscale decorative items". *Urban Archaeology Ltd. v. 207 E. 57th Street LLC*, 68 AD3d 562 [1st Dept 2009]. Plaintiff-tenant was Urban Archaeology Ltd. The lease excluded economic hardship in a clause on "Unavoidable Delay". Tenant argued its performance was frustrated due to an unforeseeable and extreme occurrence that was beyond its control and without any fault or negligence on its part. Tenant submitted an expert affirmation of Paul Wachtel, a Professor of Economics at the Stern School of New York University, attesting to the unprecedented nature and severity of the then economic downturn which has been likened to an "economic tsunami". Professor Wachtel stated that the economic downturn was "unforeseeable as to its occurrence or as to the extent and length of this deep crisis" and no high-profile economist had predicted its occurrence. He further stated that learned economists and financial experts agreed that the purchase of discretionary upscale decorative items of the kind sold by plaintiff are among the first things to go in an economic crisis of the present severity. **The court, however, held that the law in New York is well settled that once a party to a contract has made a promise, that party must perform or respond in damages for its failure, even when unforeseen circumstances make performance burdensome. The impossibility of performing the contract may be raised as an affirmative defense in a breach of contract action, but financial difficulty or economic hardship of the promisor, even to the extent of insolvency or bankruptcy, does not establish impossibility sufficient to excuse performance of a contractual obligation. The contract here was entered into by sophisticated commercial parties who could have anticipated the possibility that future events might result in financial disadvantage on the part of either party, even if the precise cause or extent**

of such financial disadvantage was not foreseen at the time the contract was executed. Thus, under the circumstances extant at bar the impossibility of performance doctrine does not relieve plaintiff of its obligations under the Lease.

Furthermore, I note that courts may take judicial notice that the risk of a pandemic was already being discussed in secondary literature. *See, e.g.*, Jodi Feder, "Riots! Pandemics! Active Shooters! – Thinking about the Unthinkable When Negotiating Real Estate Documents," 33 (no. 2) Practical Real Estate Lawyer 5 (March 2017); and Patrick O'Connor, "Allocating Risks of Terrorism and Pandemic Pestilence: Force Majeure for an Unfriendly World," 23 Construction Lawyer 5 (Fall 2003), both available on Westlaw.

2. ***Did the Pandemic and the executive orders that shut everything down render a tenant's performance objectively impossible, either because the subject matter of the lease was destroyed or the means of performance was rendered impossible; or was the purpose of the lease frustrated, such that the transaction contemplated by the parties no longer makes sense?***

"Where tenant can still continue in business at premises within confines of lease although not as profitably or at least by substantial diminution of volume of business because of statute adopted subsequent to lease, nevertheless tenant is responsible for rent under lease." *Port Chester Central Corp. v. Leibert*, 179 Misc. 839 [County Court Westchester 1943].

See Pink v. Ginsberg, 179 Misc. 126 [Sup Ct New York County 1942] (Federal War Production Board conservation order prevented erecting multiple dwellings, but mortgagee still must pay mortgage on property.) The court in *Pink* held that an equity court cannot relieve mortgagor from an express promise to pay interest on a mortgage debt on the ground that mortgaged realty has been deprived of its income-producing character and made incapable for intended purpose of erecting multiple dwellings thereon by Federal War Production Board's conservation order. **"If lack of income is justification for extirpation of express promise to pay, then a bond and mortgage will degenerate from a positive into a chimerical asset."**

Other examples of where the courts rejected a party's suggestion that their performance was impossible or frustrated by an event:

1) Hotel could not stop paying on contract to parking garage just because hotel shut down.[2]
2) Book manuscript must be finished in spite of economic upheaval occurring in 1971.[3]
3) Theater still had to pay on contract to rent projector, even after theater burned down.[4]
4) Contract to manufacture cloth not impossible when it is impossible to get yarn because Government took control of yarn mills.[5]
5) Defendant blamed snowstorm but evidence showed failure to perform was due to dispute between parties over money.[6]
6) Subcontractor quit, so contractor had trouble completing job on time.[7]

Summary judgment was denied, however, where the government prevented the manufacture of practically all articles produced by tenant, with the exception of a few. *Canrock Realty Corp. v Vim Elec. Co., Inc.*, 179 Misc. 391[Supreme Court Westchester County 1942]. **If a tenant is deprived by governmental regulations of the beneficial use of the property demised, that is, is prevented from using it for the primary and principal purpose for which it was rented, the lease is terminated. If, on the other hand, the tenant can still continue in business on the premises within the confines of the lease, even if not as profitably or even with a substantial diminution of the volume of his business, he is liable under the lease.** The lease in question in *Canrock* permits the following use of the premises, "Tenant shall use and occupy the demised premises as a retail store for the sale of radios, radio apparatus, radio repairs, television and apparatus, musical instruments, phonographs, and records, electrical supplies and appliances, washing machines, refrigerators, toys, cameras, oil burners, gas stoves, electric ranges, sporting goods, sportswear, and sporting apparel of every kind, nature and description and for no other purpose." The manufacture of practically all the above articles, except for sporting goods, sportswear and sporting apparel, was greatly restricted or entirely prohibited.

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[2] *407 East 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 281, 296 N.Y.S.2d 338, 343-44, 244 N.E.2d 37 [1968].

[3] *Goodyear Pub. Co., Inc. v. Mundell*, 75 A.D.2d 556, 427 N.Y.S.2d 242 [1st Dep't 1980].

[4] *General Talking Pictures Corp. v. Rinas*, 248 A.D. 164, 288 N.Y.S. 266 [1st Dep't 1936].

[5] *Crown Embroidery Works v. Gordon*, 190 A.D. 472, 180 N.Y.S. 158 [1st Dep't 1920].

[6] *Ahlstrom Machinery Inc. v. Associated Airfreight Inc.*, 251 A.D.2d 852, 675 N.Y.S.2d 161 [3d Dep't 1998].

[7] *Beagle v. Parillo*, 116 A.D.2d 856, 498 N.Y.S.2d 177 [3d Dep't 1986].

Other examples of where a court found performance impossible:

1) Defendant excused from delivering boat when its boat factory burned down.[8]
2) Defendant excused from producing butter and milk when fire destroyed the factory.[9]
3) Saloon during prohibition.[10]
4) Building could no longer be used as a theater because of a law saying it must remain a tenement. *Adler v. Miles*, 69 Misc. 601 [City Court of NY 1910].

But can we not, you ask, *say that the purpose of the Lease was frustrated by the Pandemic and the executive orders?* Let us look at just a few more cases.

If the certificate of occupancy or zoning prevents the use anticipated in a lease, it will not be frustration of purpose if the lease said that landlord was not warranting anything about the suitability of the premises for the use. *1357 Tarrytown Road Auto, LLC v. Granite Properties, LLC*, 142 AD3d 976 [2d Dept 2016]. "Specifically, the lease agreements, which the defendants submitted in support of their motion, provided that the written agreements superseded all 'representations and understandings, written, oral or otherwise, between or among the parties with respect to the matters contained herein.' Additionally, the specific provisions in the lease agreements relating to parking were made subject to 'any restrictions of local law, zoning or ordinance.' Finally, the lease agreements specifically provided that the landlord made no representation concerning the suitability of the premises for the plaintiffs' intended business. Imposing a duty on the landlord to disclose zoning or local law restrictions would render those provisions ineffective. These express and specific provisions in the lease itself conclusively establish a defense to causes of action for rescission."

However, here are a few examples of where courts found a lease's purpose was frustrated and tenant was excused from performance.

In *Benderson Dev. Co. v. Commenco Corp.*, 44 AD2d 889 [4th Dep't 1974], *affd* 37 NY2d 728 [1975], the tenant was unable to use the premises as a restaurant until a public sewer was

[8] *Goddard v. Ishikawajima-Harima Heavy Industries Co.*, 29 A.D.2d 754, 287 N.Y.S.2d 901 [1st Dep't 196], *order aff'd*, 24 N.Y.2d 842, 300 N.Y.S.2d 851, 248 N.E.2d 600 [1969].

[9] *Stewart v. Stone*, 127 N.Y. 500, 507, 28 N.E. 595, 596 [1891].

[10] *Doherty v Eckstein Brewing Co.*, 115 Misc. 175 [AT 1st Dep't 1921].

completed, which took nearly three years after the lease was executed. The court excused tenant's performance based on frustration of purpose.

In *Jack Kelly Partners LLC v. Zegelstein*, 140 AD3d 79 [1st Dept 2016], *lv dismissed* 28 NY3d 1103 [2016], a tenant entered into a lease of premises for office space could not occupy the premises because the certificate of occupancy allowed only residential use and the landlord refused to correct it. The court excused tenant's performance based on frustration of purpose.

B. Where Pandemic-as-Impossibility/Frustration-of-Purpose Worked

1. *December 19, 2020 Justice Feinman Decision – Case Not Disposed of on Summary Judgment; Frustration of Purpose Defense Proceeds to Discovery [RETAIL MAKE UP]*

On December 19, 2020, the Hon. Carol Ruth Feinman, J.S.C., denied summary judgment in a New York State Supreme Court, New York County, case entitled *International Plaza Associates, LP v. Amorepacific US Inc.*, bearing Index No. 155158/2020 [not reported]. I am herein providing most of the text of that decision because this is a very important case. The Court held:

> Plaintiff, landlord, moved for summary judgment against defendant, commercial tenant, on the grounds that that, as a matter of law, this Court should grant plaintiff a judgment of at least $314,000.00 in rent arrears. These arrears were incurred from the period from March 2020 through the present time and defendant claims that they are due to the Covid-19 pandemic and the Governor's Executive Orders relating to the opening of retail stores which sell and demonstrate cosmetics and personal products. The motion is denied by this Court.
>
> This motion was brought by plaintiff almost immediately after its commencement of the case. Plaintiff claims that it is not seeking to evict defendant, so that he would not be bound by Governor Cuomo's moratorium on evictions until at least January 1, 2021. Instead plaintiff is seeking to recover the rent owed by defendant as a commercial debt. Defendant does not deny that it has not paid the

full rent amounts owed for the period of arrears although it has paid partial rent and plaintiff has accepted these payments. Defendant argues that there are factual issues necessary to seek out through discovery especially due to what, if anything, is the role played by the Covid-19 pandemic and its resultant governmental shutdown and then restrictions of retail sale of the goods sold by defendant. **Contrary to plaintiff's [landlord's] claims Covid-19 could not have been foreseen and a clause in the lease could not have been designed by defendant.** Plaintiff also does not state that it would have agreed to such a clause and it is unlikely that it would have. **Also, contrary to plaintiff's [landlord's] claim in its memorandum of law, the defendant's loss and at times a lack of income due to Covid-19 is not just part of the up and downs during a commercial tenant's lease period.**

It is well accepted that summary judgment is a "drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue" *(Rotuba Extruders, Inc. vs. Ceppos,* 46 N.Y.2d 223 [1978]. **Defendant raises several defenses to justify a denial of summary judgment but the primary one is "Frustration of Purpose." Namely that the shutdown of the defendant's shop from March, 2020 to June, 2020 and the continuing restrictions made it almost impossible for defendant to fulfill its function for which it signed a lease with plaintiff. Defendant is a manufacturer and purveyor of cosmetics and other beauty supplies and part of its business includes allowing customers to test the product. That is limited with the important requirement that people who walk into the store must wear a face mask and that they keep a six foot distance from each other. With the present second wave of Covid-19 it cannot be foreseen when the situation will return to "normal." A good part of this defense requires defendant to present facts on how it has attempted to conduct its business and its alleged failure to do so for a reason never imagined let alone foreseen by either defendant or plaintiff. These changes in circumstances cannot be shown by legal memoranda or oral arguments alone. They require discovery.** *(See,*

PPF Sageguard, LLC v. BCR Safeguard Holding LLC, 924 N.Y.2d 391 [1st Dep't 2011].

One of the questions to answer is that of foreseeability. As Defendant states this must be determined by findings of fact, especially in this crisis that has never occurred in most of our lifetimes. Findings of summary judgment based on previously occurred events cannot be applied to the present case. There is a need to begin the fact finding discovery process in order to enable defendant to make its case. This is not saying that a finding of summary judgment can never be found. It is just premature at this point.

[Emphasis supplied.]

2. *March 15, 2021 Justice Baily-Schiffman undertakes a fresh look at the topic and concludes the Pandemic = impossibility! [RETAIL – BABY STORE]*

267 Development, LLC v. Brooklyn Babies and Toddlers, LLC, 2021 WL 963955 [Sup Ct Kings County, Justice Baily-Schiffman, 2021]:

> The doctrine of impossibility was applied after the September 11th terrorist attacks in *Bush v. Protravel International, Inc., 192M.2d 743, 747-748 (Civ. Ct., Richmond County 2002)*. Telephone communications had been disrupted throughout New York City after 9/11. As a result, the Plaintiff in the aforementioned case was precluded from timely canceling travel reservations. The Civil Court found that performance of the travel contract was rendered impossible for a period of time immediately following the 9/11 attack where New York City was in virtual lockdown. *Id. at 747*.
>
> In a recent article entitled, *"New York Contract Law Remedies in the Face of Disruption Caused by COVID-19", Ropes & Gray Newsletter 200:100, 2020 by Gregg Weiner, Adam Harris, Christian Reigstad, Dielai Yang and Andrew Todres*, the issues before this Court were discussed and the authors concluded:
>
> "In the context of the coronavirus outbreak, impossibility may provide grounds for excusing performance if, for example, government responsive measures such as shutdowns, travel bans, or quarantines entirely preclude a party from performing its contractual obligations. However, even then, the party invoking the doctrine must show that the measures were unforeseeable and the risk associated with them could not have been built into the contract. The sheer magnitude of COVID-19's impact has left businesses large and small scrambling in search of relief from contractual obligations. Affected parties to contracts governed by New York law may be able to use the doctrines of force majeure, impossibility, or frustration of purpose to exit contracts or protect themselves from liability for non-performance."

> In the case at bar this Court finds that the shutdown of BB's business has precluded it from performing its contractual obligations. The government shutdown was unforeseeable and could not have been built into the contract. Under the circumstances presented, this Court finds that performance under the subject lease was made impossible.
>
> [Emphasis supplied.]

C. Where Pandemic-as-Impossibility/Frustration-of-Purpose Did Not Work

1. *December 3, 2020 Justice Bluth Decision – Summary Judgment Granted Against Tenant on Impossibility and Frustration of Purpose Defenses Where Tenant Not Shut Down by Executive Orders (Even Though Tenant's Customers Were) [OFFICE – CONSULTANTS]*

On December 3, 2020, the Hon. Arlene Bluth, J.S.C., granted summary judgment to a landlord of an office space tenant, rejecting tenant's reliance on impossibility and frustration of purpose as defenses to nonpayment of rent during the Pandemic. The tenant's business was consulting for the restaurant industry. The tenant's argument was that the Executive Orders shut down the restaurants (tenant's clientele), thus tenant got no business during the Pandemic and it was impossible for it to pay the rent. Justice Bluth found, however, that this scenario did not fit into the into the narrow frustration of purpose doctrine simply because tenant could not afford the rent. The order was issued in New York County in a case entitled *1140 Broadway LLC v. Bold Food LLC*, bearing index no. 652674/2020, [2020 WL 7137817, Sup Ct New York County 2020]. The Court held that:

> The motion by plaintiff for summary judgment is granted as to liability only.
>
> …In this commercial landlord-tenant case, plaintiff (the landlord) moves for summary judgment. It claims that defendant Bold Food (the tenant) leased a portion of the twelfth floor at plaintiff's building in Manhattan as office space. Defendant KBFK entered into a good guy guarantee in connection with the lease, which expired in February 2022. Plaintiff contends that the tenant stopped paying

rent in February 2020 and eventually vacated the space on June 30, 2020, five months later.

In opposition, defendants cite the ongoing pandemic as the reason the tenant stopped paying rent. They argue that performing under the contract was objectively impossible and therefore any default was excusable. Defendants also rely on the frustration of purpose doctrine to excuse the tenant's failure to pay rent. Defendant Bold Food observes that its primary services involve managing and consulting for a group of restaurants and the shutdown of restaurants renders its business model unprofitable. Defendants argue in the alternative that there must be an inquest to determine the precise amount plaintiff is due.

In reply, plaintiff argues that the impossibility and frustration of purpose defenses are inapplicable and fail as a matter of law. Plaintiff also insists that the guarantor must be held liable and that its damages are not disputed…[Summary judgment standard recitation omitted.]

As an initial matter, the Court grants plaintiff's motion as to liability and rejects defendants' reliance on the doctrines of impossibility and frustration of purpose. The Court empathizes with the many business that have been adversely affected by the ongoing pandemic; here, both the landlord and the tenant have undoubtedly faced significant hardship.

The doctrine of frustration of purpose requires that "the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense"(*Crown IT Services, Inc. v. Koval-Olsen*, 11 AD3d 263, 265, 782 NYS2d 708 [1st Dept 2004]). "[T]his doctrine is a narrow one which does not apply unless the frustration is substantial"(*id.*). **Here, the lease was for office space in a building and the tenant's business was devastated by a pandemic. That does not fit into the narrow doctrine of frustration of purpose. Simply put, defendants**

could no longer afford the rent because restaurants no longer needed the management help that the tenant provides.

This is not a case where the office space leased was destroyed or where a tenant rented a unique space for a specific purpose that can no longer serve that function (such as a factory that was condemned after the lease was signed or a agreeing to rent costumes for a specific play to be performed at a specific theater on specific dates but the theater burned down before the first rental date). To be clear, the Court takes no position on what circumstances might permit the implication of a frustration of purpose doctrine under a generic office lease. The Court merely concludes that it does not apply here, where the tenant rented office space, the tenant's industry experienced a precipitous downfall and the tenant to no longer be able pay the rent.

Similarly, the Court finds that the impossibility doctrine does not compel the Court to deny the motion. "Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract" (*Kel Kim Corp. v. Cent. Markets, Inc.*, 70 NY2d 900, 902, 524 NYS2d 384 [1987]).

It is critical to point out that the tenant merely provided restaurants with consulting services. It was not shut down by any public health directives. In other words, the tenant was one step removed from the governor's public health orders relating to restaurants because their business assists restaurants. [FN - To be clear, the Court takes no position on whether a restaurant could successfully rely on the doctrines of impossibility or frustration of purpose. That issue is not before the Court in this motion.]. It appears that restaurants no longer needed assistance with human resources, payroll or accounting, not because of anything plaintiff did (or failed to do).

Sometimes that happens in business — an industry changes overnight.

And although restaurants were required to scale back certain operations (such as indoor dining) because of the pandemic, they were not fully shut down. Many food establishments decided to shut down because of the financial consequences from both the pandemic and the public health orders, but that does not mean there was a "destruction of the subject matter" contemplated in the contract at issue here, which was for office space on the twelfth floor of an office building. The Court is unable to find that the doctrine of impossibility has any application here…

The undisputed fact is that the lease was for office space in a building and the tenant stopped making payments. Nothing in the lease provides a remedy for a situation like this. The landlord never agreed to make paying the rent contingent on the tenant being able to afford it. The Court declines to step in and unilaterally modify the parties' contract and tell the landlord that it should not be able to enforce the agreement it signed with a tenant.

And the parties included a safeguard: this landlord agreed to a good guy guaranty, thus lessening the guarantor's risk if the tenant went out of business so long as certain obligations were satisfied. The guarantor is only responsible for rent for the time the tenant is actually in possession and had the power to return the premises to the landlord. Here, the tenant waited five months to return the premises to the landlord — yet the tenant and guarantor ask this Court to absolve them of their obligations. The Court declines to ignore a clear contractual provision designed to address the situation at issue here — where the tenant stops paying the rent and retains possession of the premises.

However, the Court finds that a hearing is required to assess the amount of damages plaintiff is due…

[Emphasis supplied.]

2. ***December 22, 2020 – Justice Bluth again – declines to make new law where the legislature left commercial tenants hanging; she also rejects "failure of consideration". [GYM]***

CAB Bedford LLC v. Equinox Bedford Ave, Inc., 2020 WL 7629593 [Sup Ct New York County, Justice Bluth, 2020]:

> The doctrine of frustration of purpose requires that "the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense" (*Crown IT Services, Inc. v Koval-Olsen*, 11 AD3d 263, 265, 782 NYS2d 708 [1st Dept 2004]). "[T]his doctrine is a narrow one which does not apply unless the frustration is substantial"(*id.*).
>
> The undisputed fact is that the Tenant has not made rent payments since March 2020. That violates the terms of the lease. The question is whether the ongoing pandemic raises an issue of fact as to whether the lease's purpose was frustrated. This Court concludes that it was not. The temporary shutdown of gyms certainly devastated defendants' business. But the executive orders cited by defendants did not suspend a commercial tenant's obligation to pay rent. Instead, other steps have been taken, such as the moratorium on commercial evictions. **But the Court declines to impose a rule that could indirectly impose a freeze on rent for commercial tenants; that is the province of the legislative and the executive branches.**
>
> There is no doubt that defendants would not have entered into the lease if they knew there would be a pandemic that would shut down gyms for most of 2020. But that is not sufficient to invoke the frustration of purpose doctrine (*PPF Safeguard, LLC v BCR Safeguard Holding, LLC*, 85 AD3d 506, 924 NYS2d 391 [1st Dept 2011] [finding that Hurricane Katrina was not a sufficient basis to implicate the frustration of purpose doctrine to excuse payment in New Orleans-based self-storage contract]). A gym being forced to

shut down for a few months does not invalidate obligations in a fifteen-year lease.

Nothing in the lease itself provides for the Tenant to avoid its obligation to pay rent (*see* NYSCEF Doc. No. 24, ¶ 3). In fact, the lease contains an "Inability to Perform" paragraph that states, in part, that "the obligation of Tenant to pay rent, and to perform all of the other covenants and agreements hereunder on the part of the Tenant to be performed shall in no wise be affected, impaired or excused because Landlord is unable to fulfill any of its obligations under this Lease expressly or impliedly to be performed by Landlord" (*id.* ¶ 46). This same paragraph also mentions that rent is not excused if the Landlord is prevented from fulfilling its obligations by "laws, governmental preemption in connection with a national emergency or by reason of any rule, order or regulation of any federal state, county or municipality authority" (*id.*).

Simply put, the parties did not contract to absolve the Tenant of its obligation to pay rent if it were forced to shut down due to governmental orders. That they did not include such language is not surprising; a global pandemic is not a common occurrence. Although it is terribly unfortunate for the defendants, they ran a business that was hit hard by pandemic restrictions…

"Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract" (*Kel Kim Corp. v Cent. Markets, Inc.*, 70 NY2d 900, 902, 524 NYS2d 384 [1987]).

The Court finds that this doctrine has no applicability here and does not raise an issue of fact. Defendants ran an "upscale gym" for many years prior to the Covid-19 pandemic and, after some painful months, are now permitted to operate (although at a limited

> capacity). The subject matter of the lease was not destroyed. At best, it was temporarily hindered. That there are more hurdles to running the business is not a basis to invoke the impossibility doctrine…
>
> The Court rejects defendants' argument that there was a failure of consideration. Defendants entered into a lease and guarantee in 2016, operated a gym for a few years before a temporary shut down and now are permitted to run the gym again. This is not a case where they are forbidden from running a gym ever again at the premises.
>
> However, the Court grants the motion for summary judgment only as to liability.

3. *January 28, 2021 Justice Bluth – no impossibility or frustration of purpose where business operating [PARKING GARAGE TIMES SQUARE]*

RPH Hotels 51st Street Owner, LLC v. HJ Parking LLC, 2021 WL 291199 [Sup Ct New York County, Justice Bluth, 2021]:

> There is no doubt that there are many commercial tenants like defendant who have faced significant challenges during this pandemic. Defendant's business model relies on visitors and local workers driving to Times Square. Obviously, the number of people driving into Manhattan, and particularly that area of Manhattan, has greatly diminished due to the pandemic. And defendant certainly has greater costs to ensure a safe workplace. But these obstacles cannot support a defense that would absolve them of any responsibility to pay rent. The Court's empathy for defendant's plight is not a basis to find that there is a meritorious defense.
>
> The Court cannot ignore the facts: defendant has not paid since March 2020 and has continued to operate the parking garage. Pointing to equitable doctrines is not sufficient to grant defendant's motion. The Court has to consider the impact of finding that these doctrines constitute a meritorious defense. **If a business that was**

> **permitted to operate throughout the pandemic (as opposed to others, such as gyms, that were forced to close for months) can assert a frustration of purpose or impossibility defense, then nearly every struggling commercial tenant could seek relief from their leases. Quite simply, here, where there is a downturn in a tenant's business – with or without Covid -- it does not invoke the doctrine of impossibility of performance, especially when the business is operating. Nor does it invoke frustration of purpose -- defendant's purpose was to operate a garage, and it certainly is doing just that.**
>
> The fact is that nearly every business that relies on in-person customers has suffered greatly during the pandemic and consequently it has also affected nearly every landlord who has nonpaying tenants. The solution is not for this Court to ignore an otherwise-valid contract to the severe detriment of one party.
>
> [Emphasis supplied.]

4. ***March 1, 2021 Justice Bluth – Rejecting Frustration of Purpose Again [OFFICE CENTER]:***

Mept 757 Third Ave. LLC v. Grant, 2021 WL 781321 [Sup Ct New York County, Justice Bluth, 2021]:

> Defendant's claim that restrictions on the number of people that can be present in the office space undoubtedly reduced the Tenant's revenue and likely reduced the Tenant's ability to meet its rental obligations given the nature of Tenant's business. The Tenant appears to make money by licensing office space, which means it makes more money by entering into more license agreements. But a reduction in potential revenue is not the same as completely frustrating the purpose of the contract. After all, the contract was to lease an office space and the Tenant chose to run a particular business. It is not the landlord's concern how the Tenant tried to turn a profit from the premises.

> Sometimes, outside factors reduce the profitability of businesses and in many cases those factors are outside the control of both the landlord and the tenant. But that does not mean that defendant can raise an issue of fact to simply rip up the contract. The pandemic has devastated businesses across New York City, but there is nothing in existing case law that would permit a Tenant (or a guarantor) to walk away from a contract on the ground that its business model is no longer as profitable as it used to be. Under such a theory, all manner of businesses could seek rescission of leases during a downturn in their particular business.

5. *April 4, 2021 Justice Bluth – Rejecting Frustration of Purpose Again [RETAIL – WATCHES]*

Ten West Thirty Third Associates v. A Classic Time Watch Co. , 2021 WL 1331372 [Sup Ct New York County, Justice Bluth 2021]:

> Neither [impossibility or frustration of purpose] justify permitting the defendants to simply walk away from a valid contract into which they entered, especially on a motion to dismiss. There is no dispute that defendants stopped paying rent under the contract or that the individual signed the guaranty. And, here, the decline in Tenant's business does not constitute a frustration of purpose or render its performance under the contract as impossible [citations omitted]. **Under defendants' view, anytime a business faces revenue problems due to factors outside its control, that business should be able to walk away from the contract. This Court disagrees.**
>
> The Court recognizes that the pandemic has decimated businesses around Manhattan and throughout the country. But that does not mean that the Court can ignore defendants' obligations. The Court must also consider the rights of the other contracting party, which must still maintain buildings and pay taxes even though the Tenant has not paid rent for months.

> To be clear, the Court does not endeavor to make any definitive comparisons about the pain caused by the pandemic on landlords and commercial tenants. There is undoubtedly more than enough difficulty to go around. The point is that the Court cannot just rip up a contract because a tenant faced financial hardship due to the pandemic.
>
> [Emphasis supplied.]

6. *April 6, 2021 Justice Kelly – no frustration of purpose, parties could have anticipated this and did not [RESTAURANT]*

Fives 160th, LLC v. Zhao, 2021 WL 1298090 [Sup Ct New York County, Justice Kelly. 2021]

> Defendants further allege that they should be excused from performing under the contract as their ability to pay rent and additional rent has been made impossible by the current COVID-19 pandemic and the effect it has had on their business.
>
> The contract here was entered into by commercial parties who could have anticipated the possibility that future events might result in financial disadvantage on the part of either party, even if the precise cause or extent of such financial disadvantage was not foreseen at the time the contract was executed (*see General Electric Co. v Metals Resources Group Ltd.*, 293 AD2d 417 [1st Dept 2002], *affd*, 68 AD3d 562 [1st Dept 2009]). Thus, under the circumstances extant at bar, the impossibility of performance doctrine does not relieve Defendants of their obligations under the Lease.

V. COMMERCIAL EVICTION MORATORIUM

As of this writing, landlords to not have access to summary nonpayment proceedings against commercial tenants until August 31, 2021.

On May 7, 2020, the Governor issued Executive Order 202.28[11], which states, in part:

> [t]here shall be no initiation of a proceeding or enforcement of … an eviction of any residential or commercial tenant, for nonpayment of rent … by someone … facing financial hardship due to the COVID-19 pandemic for a period of sixty days beginning on June 20, 2020.

On July 6, 2020, the Governor issued Executive Order 202.48, which clarified that, due to subsequent State legislation, Executive Order 202.28 applied henceforth only to commercial cases. Thus, I will henceforth refer to the ban on commercial landlord and tenant cases as the **"Commercial Eviction Moratorium"**.

The Commercial Eviction Moratorium was extended by Executive Order 202.55 (August 5, 2020) and 202.55.1 (August 6, 2020) to September 4, 2020. Then Landlords challenged this in United States District Court for the Southern District of NY and lost.[12]

Thereafter, on September 18, 2020, Executive Order 202.64 extended the Commercial Eviction Moratorium to October 20, 2020. Thereafter, on October 20, 2020, Executive Order 202.70 extended the Commercial Eviction Moratorium to January 1, 2021. Thereafter, on December 11, 2020, Executive Order 202.81 extended the Commercial Eviction Moratorium to January 31, 2021.

The moratorium was extended thereafter by the legislature in a piece of legislation called the COVID-19 Emergency Protect Our Small Businesses Act of 2021 through August 31, 2021. The moratorium does not apply to all commercial tenants. The definition of "tenant" in Part A § 1(3) of the Act, which is:

> "Tenant" includes a commercial tenant that is a resident of the state, independently owned and operated, not dominant in its field and employs fifty or fewer persons.

[11] https://www.governor.ny.gov/executiveorders.

[12] https://images.law.com/contrib/content/uploads/documents/389/108270/Cuomo-Eviction-Ruling.pdf.

VI. GUARANTY DEFENSES

NYC Admin Code § 22-1005 shields personal guarantors of certain commercial leases in New York City from personal liability from March 7, 2020 through June 30, 2021 **("Personal Guarantor Moratorium")**. This applies to:

a. Tenants required to cease serving patrons food or beverage for on-premises consumption or to cease operation under executive order number 202.3 issued on March 16, 2020;
b. Tenants that are non-essential retail establishments subject to in-person limitations under guidance issued by the New York State Department of Economic Development pursuant to executive order number 202.6 issued on March 18, 2020; and
c. Tenants required to close to members of the public under executive order number 202.7 issued on March 19, 2020 (barber shops, hair salons, tattoo or piercing parlors etc.).

Notice that the Personal Guarantor Moratorium is limited in the following ways:

- It does not protect the guarantor of every type of tenant. It protects restaurant, retail, and salon-type tenants.

- It does not protect a guarantor that is not an individual. Many sophisticated leases are guaranteed by parent company entities.

- Many good guy guaranties require the tenant to do all of three things for the guarantor to be off the hook personally:

    - (1) Surrender;
    - (2) Give notice to landlord anywhere from 30 to 180 days; and
    - (3) Be 100% current on the rent at the time of surrender.

So, let us say it is October 2020 and you are a commercial tenant, running a business as an entity and you have personally guaranteed the lease and you want to go out of business. Let us say the lease has another five years left on it. To get out of the guaranty and protect yourself from being on the hook personally for the better part of the next five years, you need to give 90 days'

notice before you surrender *and be current at the time of surrender.* So…you are telling me that you are NOT going to pay November, December, and January rent, because the Personal Guarantor Moratorium exculpates you from personal liability for those three months? Great. But now you have not satisfied the dictates of the good guy guaranty, and you are not off the hook for the rent personally from February 2021 through the end of the lease. What tenant is going to make that choice – assuming, of course, they have the money to be current? Probably none.

See *204 E. 38th LLC v. Sons of Thunder LLC*, Supreme Court, NY County, 11/20/2020, Index No. 155933/2020 Justice Bluth. (Landlord argued the Personal Guarantor Moratorium was inapplicable to a personal guaranty, claiming the new law only applied to a provision within a commercial lease providing for personal liability, and not to a separate agreement like a guaranty. The court found the subject provision applied to a stand-alone personal guaranty for a commercial lease, and did not violate the contracts clause of the U.S. Constitution. It also found the provision, intended to alleviate the personal financial burden on guarantors, was not unreasonable or inappropriate to curb the pain caused by COVID-19, thus, was permissible and applicable retroactively.)

VII. COMMERCIAL TENANT ANTI-HARASSMENT LAW AND NO SELF-HELP

NYC Admin. Code § 22-902(a)(5), speaks to a commercial landlord's initiation of frivolous court proceedings against a commercial tenant, and gives rise to a private cause of action as per NYC Admin. Code § 22-903.

Furthermore, *in this author's opinion*, no commercial landlord should resort to self-help eviction during the Pandemic. Landlords may be frustrated by their limited access to the courts, but they should also keep in mind that every landlord is in the exact same position. The Pandemic is not an excuse to take the law into one's own hands. On the contrary, the Pandemic is the reason that we should all hold ourselves to a higher standard. If my moralistic admonitions are not enough for you, keep in mind Real Property Actions and Proceedings Law § 853 (Action for forcible or unlawful entry or detainer; treble damages):

> If a person is disseized, ejected, or put out of real property in a forcible or unlawful manner, or, after he has been put out, is held and kept out by force or by putting him in fear of personal violence or by unlawful means, he is entitled to recover treble damages in an action therefor against the wrong-doer.

VIII. CONCLUSION

The lecture accompanying this booklet is scheduled for May 5, 2021. If you pick up this booklet on May 6, 2021, it may well be obsolete. There will be tens or maybe even hundreds of decisions on these topics. Surely some will percolate up to the appellate courts. Perhaps Albany will legislate on the topic of commercial tenant rent relief. The practitioner in this area should be looking every day for new developments.

ABOUT THE AUTHOR

Michelle Maratto Itkowitz is the owner and founder of Itkowitz PLLC and has been practicing landlord and tenant litigation (both complex-residential and commercial) in the City of New York for over twenty years. Michelle represents BOTH tenants and landlords and her core competencies include: Rent Stabilization and DHCR Matters; Rent Stabilization and Regulatory Due Diligence for Multifamily Properties; Rent Stabilization Coverage Analysis for Tenants; Sublet, Assignment, and Short-Term Leasing Cases (like Airbnb!); all kinds of Residential Tenant Representation; High Stakes Commercial Landlord and Tenant Litigation; Good Guy Guaranty Litigation; Co-op Landlord and Tenant Matters; Loft Law Matters; De-Leasing Buildings for Major Construction Projects; and Co-Living.

Michelle publishes and speaks frequently on landlord and tenant law. The groups that Michelle has written for and/or presented to include: Lawline.com, Lorman Education Services, Rossedale CLE, The New York State Bar Association, Real Property Section, The Women Attorneys in Real Estate, The National Law Institute, The Long Island Chapter of the National Appraisal Institute, The Columbia Society of Real Estate Appraisers, The NYS Society of Certified Public Accountants, LandlordsNY, The Association of the Bar of the City of New York, Thompson Reuters, The Cooperator, and Argo U.

Michelle regularly creates and shares original and useful content on landlord and tenant law, including via booklets, blogs, videos, and live presentations. Michelle developed and regularly updates a multi-part continuing legal education curriculum for Lawline.com entitled "New York Landlord and Tenant Litigation". Over 20,000 lawyers have purchased Michelle's CLE classes on Lawline.com (a labor of love for which Michelle gets not a dime) and the programs have met with the highest reviews. Michelle co-authors a chapter on lease remedy clauses and guaranties for the New York State Bar Association, Real Property Section, Commercial Leasing Committee's treatise. Michelle co-authored the upcoming 2021 version of the New York State Bar Association's treatise "New York Residential Landlord-Tenant Law and Procedure". As the "Legal Expert" for LandlordsNY.com, the first social platform exclusively for landlords and property managers, Michelle answers member's questions, guest blogs, and teaches. Michelle is also an instructor and blogger on the Tenant Learning Platform, www.tenantlearningplatform.com.

Michelle is immensely proud that Itkowitz PLLC was awarded its NYS Women Business Enterprise Certification by the Empire State Development Corp. Michelle's eponymous law firm is one of the largest women-owned law firms, by revenue, in the State.

Michelle is admitted to practice in New York State and the United States District Court for the Southern District of New York. She received a Bachelor of Arts in Political Science in 1989 from Union College and a Juris Doctor in 1992 from Brooklyn Law School. She began her legal career at Cullen & Dykman.

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