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# The F-Word: Force Majeure

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As discussed in a previous blog post, many commercial tenants looked to the force majeure clauses in their leases for relief during the COVID-19 pandemic. As a result, there is a great deal of caselaw applying the concept which is instructive for commercial tenants moving forward.

The application of a force majeure clause in a lease must be analyzed on a case-by-case basis, because each particular clause will specify whether the parties are entitled to relief from certain obligations (for example, relief from all obligations under the lease or relief from only those obligations related to construction at the premises), what relief the parties are entitled to (for example, forgiveness of obligations or delay of obligations) and, critically, will specify whether the parties are entitled to this relief as a result of a "triggering event" – the definition of which varies from contract to contract. Many commercial tenants discovered during the pandemic, to their dismay, that the force majeure clause in their lease provided the parties with relief except for the obligation to pay rent. Triggering events may be spelled out, or the clause may be broadly worded, leaving tenants wondering whether a global epidemic constitutes an "act of God" or "unforeseeable event," under their contract.

Commercial tenants have had some success in leveraging force majeure and similar provisions in their leases during the pandemic. In *In re: Hitz Restaurant Group*, 2020 WL 2924523 (U.S. Bankruptcy Court, N.D. IL, Eastern Div., [June 3, 2020]), the court ruled that because the tenant's business was partially shut down, the force majeure clause partially relieved the tenant of their rent obligations. In that case, the tenant, a restaurant, was able to utilize delivery and takeout services, but was closed for dining during the pandemic by government order. The Court partially excused performance of its obligation to pay rent, reducing the tenant's payment in proportion to its diminished ability to generate revenue. In *In Re: Cinemex USA Real Estate Holdings*, 2021 WL 564486 (U.S. Bankruptcy Court, S.D. Fla. [Jan. 27, 2021]), the court ruled that the force majeure clause in the lease excused a movie theatre tenant from paying rent until it was legally permitted to open. The decision of the district court of Arapahoe County, Colorado, in the *Weingarten Sheridan LLC v. Regal Cinemas, Inc.*, Case No. 2021CV30864, case held that the COVID-19 pandemic shutting down the defendant's business was a triggering event under the force majeure clause, and, critically, further held that the government orders that restricted the commercial tenant from operating at capacity, "hindered" the defendant from performing, thus justifying relief under the lease's force

majeure provision, which provides for relief where the tenant is, among other things, “hindered” from performance. In *188 Ave A. Take Out Food Corp. and Tarik Fallous v. Lucky Jab Realty Corp.*, Case No. 653967/2020 (N.Y. Sup. Ct. Dec. 21, 2020), the court held that a commercial tenant was absolved from their obligation to pay rent after the premises was made temporarily unusable during a state mandated suspension of indoor dining. Interestingly, the court in this case did not apply force majeure, and, instead, held the suspension was a “casualty event” as defined in the lease. The case is indicative of certain courts’ willingness to provide relief to commercial tenants in this tumultuous year.

For commercial tenants, these cases provide critical guidance as to how well-drafted leases can keep a business afloat during unprecedented times. Contact us for an in-depth analysis of your rights under your commercial lease and to discuss your options for relief.