

8 Key Factors That Influence COVID Commercial Lease Suits

By **Theresa Wanat and Francie Trimble** (August 25, 2022)

Were the events surrounding COVID-19 unprecedented? Unforeseeable? Man-made? Who should bear the loss of unpaid or underpaid rent during the time period that businesses were closed?

Courts across the country have been grappling with these questions, and certain common factors have emerged that parties should consider when weighing the risks of moving forward with litigation in commercial lease disputes.

What does the lease say?

A force majeure event is generally defined as an unanticipated and uncontrollable event that is not due to market-driven forces or economic hardship, which excuses performance under a contract.

COVID-19 has typically been considered a force majeure event — unless there is clear language in the lease stating that a pandemic is not, or if the lease was entered into/amended during the pandemic itself, as it affects the foreseeability element.

As with other agreements, courts look to the language of the contract first. What does the force majeure provision, if any, say? And, how does the lease allocate risk in light of such?

In *Simon Property Group LP v. Regal Entertainment Group*, the Delaware Superior Court held on June 27 that COVID-19 was a force majeure event, and that the tenant was not excused from paying the rent because the two parties allocated the risk of such to the tenant.[1] Namely, the provision stated as follows:

Notwithstanding the foregoing, the provisions of this Section 21. 5 shall at no time operate to excuse Landlord or Tenant from the payment of Minimum Annual Rent, additional rent or any other payments required by the terms of this Lease when the same are due, and all such amounts shall be paid when due.[2]

The court stated that

this ruling may seem harsh. However, all parties to the Leases are sophisticated. The parties freely contracted and allocated risks. The parties chose to allocate force majeure risk to Tenants. The events surrounding COVID-19, although unfortunate, are neither unprecedented nor unforeseeable. In the early 20th century, the world experienced one of the most severe pandemics — the Spanish Flu. In 1988, the film industry was significantly affected by the Writers Guild of America strike — halting the release of first-run movies.[3]

Likewise, in *1600 Walnut Corp. v. Cole Haan Co. Store* in 2021,[4] the tenant argued that the force majeure clause was limited to "man-made events of relatively short duration." [5]

The U.S. District Court for the Eastern District of Pennsylvania disagreed and held that



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COVID-19 is akin to other life-altering national events, such as war, riots and insurrection.[6]

Thus, because COVID-19 constituted a force majeure event and the lease allocated the risk to the tenant if such occurred, the tenant remained obligated to pay the full rent.[7]

Moreover, in *Simon Property Group LP v. Brighton Collectibles LLC* in 2021,[8] the Delaware Superior Court applied the same reasoning and also looked at additional factors such as the broadness of the force majeure clause, the sophistication of the parties who entered into the lease, and the purpose of the lease.[9]

The tenant's argument that its performance was excused because it was a nonessential business, and closure was necessary out of concern for the health and safety of its employees and the community general, was not sufficient.[10]

Were the closures a partial force majeure event?

Say the court finds that the force majeure was triggered and applies. How does such comport with partial restrictions? More specifically, the full and complete closure of many brick and mortar stores lasted a brief period of time for most areas of the county. Should the rent then match the amount of the restriction?

In re: *Hitz Restaurant Group* in 2020,[11] the U.S. Bankruptcy Court for the Northern District of Illinois answered yes to this question and held that the restaurant was required to pay rent in the same proportion as the restrictions: When the restaurant was able to operate at 25% capacity, then 25% of the rent was due for those months.[12]

That being said, in *55 Oak St. LLC v. RDR Enterprises Inc.* in May,[13] the Maine Supreme Judicial Court held the opposite, stating that the force majeure provision did not include any language incorporating the concept of a partial force majeure.[14] Thus, the tenant remained liable for the full rent payments when it was able to operate in any capacity.[15]

Was performance excused?

To further muddy the waters, many tenants have argued that the purpose of the lease was frustrated or that the restrictions imposed in light of COVID-19 made it impossible to comply with the lease. Again, the courts have approached these situations differently.

The seminal case on this is *UMNV 205-207 Newbury LLC v. Caffe Nero Americas Inc.* in the Commonwealth of Massachusetts Superior Court in 2021.[16] Of note, the lease had both a force majeure provision and a separate provision as to frustration of purpose, and use of the premises was limited to a dine-in establishment.[17]

The court held that the purpose of the lease was frustrated and excused the tenant from paying rent during the specific months while the restrictions prohibiting sit-down dining were in place.[18]

However, in the *1600 Walnut Corp.* case and both *Simon Property Group* cases, the courts looked at these same common law defenses and held that they did not apply because: (1) the lease provisions were clear and unambiguous as to force majeure events and allocation of risk for such; (2) the purposes of the leases were more broadly worded; and (3) there were not separate frustration of purpose provisions.

Likewise, in the restaurant context, in *AGW Sono Partners LLC v. Downtown Soho LLC* in May,[19] the Supreme Court of Connecticut rejected the application of the common law doctrines of frustration of purpose and impossibility as the purpose of the lease was broader than that seen in *Caffe Nero*.

The court stated that the purpose was for the operation of a first-class restaurant and bar selling food, beverages, and related accessories and was not limited to in-person dining.

Consider all the factors.

In summary, below are factors to consider when in a lease dispute.

1. Timing Matters

Did the parties enter into or extend the terms of the lease during the pandemic? If so, then the foreseeability element becomes significantly more salient.

2. Parties, Parties, Parties

Who negotiated this lease? Sophisticated parties? Small business versus corporation?

3. Clarity or Ambiguity

Is the lease ambiguous, or can it be argued as such? Or can its terms be clearly interpreted such that common law defenses do not then apply?

4. Shifting the Risk

Does the lease contain a clause that shifts the risk as to potential losses when a force majeure event occurs?

5. Financial Squeeze

Is a party's inability or refusal to pay expressly addressed in the lease, and if so, to what extent?

6. Purpose

Does the lease have a limited, defined purpose or is it more general?

7. COVID-19 Restrictions to the Business

To what extent was the lease's purpose paused? Were there alternative steps or business models that the tenant, theoretically or even practically, could have taken such as carry-out service if it were a restaurant? Or running old films instead of first runs if it were a movie theater? To what extent did your state shut-down and for how long? When did those restrictions start to lift?

8. Timing

How did the parties respond to COVID-19 restrictions in the lease? Did the tenant open when it could? Did the landlord make accommodations during the closure period and for how long?

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[1] Simon Property Group LP v. Regal Entertainment Group, No. CVN21C01204MMJCCLD, 2022 WL 2304048, at *3-6 (Del. Super. Ct. June 27, 2022).

[2] Id. *4.

[3] Id. at *6.

[4] 1600 Walnut Corp. v. Cole Haan Co. Store, 530 F. Supp. 3d 555 (E.D. Pa. 2021).

[5] Id. at 559.

[6] Id.

[7] Id.

[8] Simon Property Group LP v. Brighton Collectibles LLC, No. CVN21C01258MMJCCLD, 2021 WL 6058522, at *6 (Del. Super. Ct. Dec. 21, 2021).

[9] Id.

[10] Id.

[11] In re: Hitz Restaurant Group, 616 B.R. 374, (Bankr. N.D. Ill. 2020).

[12] Id. at 378.

[13] 55 Oak St. LLC v. RDR Enterprises, Inc., 275 A.3d 316, 231 (Me. May 24, 2022) amended (June 9, 2022).

[14] Id. at *323.

[15] Id.

[16] UMNV 205-207 Newbury LLC v. Caffè Nero Americas Inc., Mass. Super., No. 2084CV01493-BLS2, at *6 (Feb. 8, 2021) ("Caffé Nero").

[17] Id. at *5.

[18] Id.

[19] GW Sono Partners, LLC v. Downtown Soho, LLC, 273 A.3d 186, 198-201 (Conn. 2022).