



CCM COVID-19 ALERT

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Clingen Callow & McLean, LLC

Bankruptcy Court Determines Illinois COVID-19 Stay-at-Home Orders are Force Majeure Events Sufficient to Partially Excuse Rent.

Widespread closures due to the COVID-19 pandemic have generated countless lawsuits across the country over missed rent payments. Defendants in these cases are often commercial tenants with conflicting obligations to pay rent under their leases, while also shuttering their doors in accordance with government stay-at-home orders.

For several such tenants, *force majeure* clauses offer a possible solution to this incongruity. Many commercial leases include *force majeure* provisions that address situations in which one party is prevented or delayed from performing their contractual obligations due to unforeseeable events outside their reasonable control.

Until recently, courts had not addressed whether *force majeure* provisions excused lessee obligations to pay rent during COVID-19 mandated shut-downs. However, on June 3, 2020, the Bankruptcy Court for the Northern District of Illinois ruled the *force majeure* provision in a restaurant lease partially excused a tenant's obligation to pay rent during a state-ordered suspension of service. *In re Hitz Restaurant Group*, No. 20-B-05012, 2020 WL 2924523 (Bankr. N.D. Ill. June 3, 2020).

On February 26, 2019, Hitz Restaurant Group (“Hitz”), a Chicago based restaurant, leased space from landlord creditor, Kass Management Services, Inc. (“Kass Management”). The lease contained a *force majeure* clause that provided:

“Landlord and Tenant shall each be excused from performing its obligations or undertakings provided in this Lease, in the event, but only so long as the performance of any of its obligations are prevented or delayed, retarded or hindered by . . . laws, governmental action or inaction, orders of government Lack of money shall not be grounds for Force Majeure.”

On February 24, 2020, Hitz filed for bankruptcy protection, citing loss of sales from the COVID-19 pandemic. Hitz subsequently failed to pay rent from February 2020 to June 2020. Hitz argued its rent obligations for those months should be waived because Illinois Gov. Jay Pritzker’s executive order directing all dining rooms in Illinois to close effective March 16, 2020, was a *force majeure* event that excused its rent obligation under the lease. [Ill. Exec. Order 2020-7 §1](#).

Hitz’s landlord, Kass Management, filed a motion arguing the *force majeure* provision specifically stated lack of money was not grounds for *force majeure* and further, Hitz’s failure to apply for a Small Business Administration loan prevented them from enforcing their rights under the *force majeure* provision. The court rejected these arguments as it was a government-mandated prohibition on business—not lack of money—that was the proximate cause of Hitz’s inability to pay rent and that while Hitz

could have applied for a Small Business Administration loan to cover rent, it had no affirmative duty to do so.

The court found Governor Pritzker's executive order "unambiguously triggered" the *force majeure* provision of the lease as it (1) "unquestionably" constitutes "governmental action" or "order of government" as contemplated in the lease; (2) "unquestionably hindered" Hitz's ability to perform under the lease by barring on-site food consumption; and (3) was "unquestionably" the proximate cause of Hitz's inability to pay rent because "it prevented [Hitz] from operating normally and restricted its business to take-out, curbside pick-up, and delivery." *Id.*

However, the court also declared that as Hitz's March rent obligation was due before the executive order went into effect, it remained liable for March rent. The court further stated that because the restaurant still had the ability to generate business, it should not be wholly excused from paying its rent obligation; instead it should pay a reduced rent "in proportion to its reduced ability to generate revenue due to the executive order." *Id.*

Based on the restaurant's estimate that 75% of its premises was made unusable by the executive order, the court ordered Hitz to pay 25% of its rent obligation for the months following the effective date of the executive order until restrictions are lifted in whole or in part.

While this ruling is specific to Illinois, it directly addresses the issue of whether a tenant can use a government stay home order to excuse all or part of its obligation to pay rent, in concert with invoking a *force majeure* clause in its lease. It is notable that the lease in *Hitz* specifically excludes failure to pay rent from "lack of money" from the

force majeure clause. The court's ruling despite this exclusion addresses an issue many states are grappling with – should tenants be protected from liability for rent obligations during the COVID-19 pandemic?

In New Jersey and the Eastern District of Virginia, courts have suspended certain payment obligations under the bankruptcy code and lawmakers in New York have addressed the issue by passing [legislation](#) to insulate restaurant owners from personal liability for unpaid lease payments. *In re Modell's Sporting Goods Inc., et al.* (Bankr. N.J. Case No. 20-14179); *In re Pier 1 Imports, Inc., et al.* (Bankr. E.D. Va. Case No. 20-30805). The *Hitz* case, while helpful precedent, only begins to address a wider swath of questions for landlords and tenants in the wake of COVID-19.

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