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Dining Out, Covid-19 and Lease Payments: A Bankruptcy Judge Interprets Force Majeure

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A memorandum opinion issued in Illinois provides an interesting perspective and helpful arguments regarding an issue of importance to several categories of our client base: landlords, tenants and lenders as well as other creditors dependent on the successful reorganization of debtor companies.

In this recent decision, a Chicago Bankruptcy Court Judge addresses a situation where a landlord (the "Landlord") sought to compel its debtor tenant to pay rent owed under a lease of nonresidential real property (the "Lease") pursuant to section 365(d)(3) of the Bankruptcy Code. The debtor tenant, a restaurant operator, argued it should be excused from performance because, among other reasons, the language of a force majeure provision in the Lease excused its performance when such performance was hindered or delayed by the government-ordered shutdown related to the Covid-19 pandemic.

The debtor tenant asserted that the Illinois Governor's emergency order closing restaurants in response to the pandemic made it impossible for it to operate and perform its obligations under the Lease.

The Landlord argued, among other things, that the cessation of restaurant operations did not make it *impossible* to pay rent. The Governor had shut neither banks nor post offices so that there was no impossibility to pay. The Landlord also argued that the exclusion in the force majeure provision of lack of money as a cause for non-performance rendered the clause inapplicable.

The Court found that the emergency order did constitute a government order as contemplated by the force majeure provision of the Lease, but found that it did not completely excuse the debtor tenant's performance under the Lease. Interestingly, the Court critiqued the parties' legal reasoning, finding fault with both, and offered its own reading of the facts and law.

First, the Court found that the emergency order was the proximate cause of the debtor tenant's inability to pay rent and that the exclusion based on lack of money did not render the provision wholly inapplicable.

Second, the Court noted that the emergency order did not order complete closure of restaurants but, rather, prohibited regular sitdown dining operations while encouraging take out and curbside delivery. Therefore, some performance by the debtor tenant was possible.

Third, the Court noted the emergency order was issued in the middle of the month of March and, therefore, had no impact on half of that month's rent obligations.

The memorandum opinion addresses additional arguments and concludes by ordering the debtor tenant to pay March rent through the date of the emergency order and thereafter to pay 25% of the rent representing the portion of the restaurant operations which were permitted under the emergency order.

Please note that this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient. If you have questions regarding these provisions, or any other aspect of bankruptcy law, feel free to contact Michelle McMahon at (212) 510-2296 or via email at **MMcMahon@cullenllp.com**, or Michael H. Traison at (312) 860-4230 or via email at **MTraison@cullenllp.com**.

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