



## LAW ALERT

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*Smart Counsel. Straight Talk.*

### **To Pay or Not to Pay: Issues Concerning the Payment of Rent During the Coronavirus Pandemic**

Businesses are shutting down, and people are staying home. Although necessary to slow the spread of the COVID-19 virus and “flatten the curve,” as they say, it is having a devastating effect on the national and local economies, not to mention household finances. Already, people and businesses are faced with the difficult demand of paying their rent expenses when there are no customers or income coming through the doors.

The question on every tenant's and landlord's mind: Do tenants have to pay rent during this unprecedented and extraordinary time? There are several places to look for an answer.

#### **Look to the Lease**

Since rent is typically a function of a negotiated lease, the first place to look in answering the question is the lease itself. Although every lease is different, most commercial leases and many residential leases contain a force majeure clause that excuses performance in the event of certain unforeseeable circumstances outside of that parties' control.

Typically, the events triggering a force majeure clause are war or natural disasters, but the clause may include events like pandemics or government ordinances. Even if the clause does not include triggering events that apply directly to the Covid-19 pandemic, an argument could be made for a court to interpret it and apply it in light of its purpose, namely, the frustration of the purpose of the lease due to unanticipated events that are beyond either parties' control. A Court may find that a government mandated shutdown of businesses, like that ordered by Governor Cuomo, and the resulting mass layoffs meet this standard.

#### **Look to the Common Law**

But what happens if the lease either does not include a force majeure clause or the included clause specifically excludes the payment of rent from an excused obligation, as is the case in many leases? There are two common law doctrines that may still provide an answer: the doctrine of frustration of purpose and the doctrine of impossibility of performance.



To invoke the frustration of purpose doctrine as a defense for non-payment of rent, 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. In the commercial context, the obvious intended purpose of a lease is to provide a space for the service of the tenant's customers. Given Governor Cuomo's orders requiring the shutdown of non-essential business, this doctrine most strongly applies to businesses requiring a physical location and foot-traffic to operate. The doctrine does not apply, however, if the business can remain open, even if just virtually, but experiences a decline in income due to fewer customers. The doctrine also would not apply in the residential context because the purpose of the lease – providing shelter – can still be fulfilled.

The doctrine of impossibility or impracticability, on the other hand, excuses performance when the "destruction of the subject matter of the contract or the means of performance makes performance objectively impossible." Just like with a force majeure clause, the impossibility must also be produced by an unanticipated event that could not have been foreseen or guarded against in the contract. "Financial disadvantage" is not a basis for invoking this doctrine, however, and because one's inability to pay rent is likely caused by a lack of revenue, it is unlikely to be applied successfully under the current circumstances.

For an excellent analysis of force majeure clauses, and the doctrines of frustration of purpose and impossibility of performance, please read: [COVID-19 — Navigating the Impact on Your Business](#).

### **Look to Legislation**

Legislation may also provide an answer if the lease and the common law do not.

In the short term, the risk of eviction for failure to pay rent is minimal. On March 20, 2020, Governor Cuomo signed Executive Order No. 202.8, stating that, for 90 days, "[t]here shall be no enforcement of either an eviction of any tenant residential or commercial." Two days later, the Chief Administrative Judge of the New York State courts issued an administrative order prohibiting all non-emergency/non-essential filings in any case, including new eviction petitions.

The orders do not alleviate obligations to pay rent, however. They only stay the consequences of failing to do so. Although eviction proceedings are stayed for now, there will come a time when they can begin again. Rest assured, the failure to pay rent during the stay period will be used as grounds for lease terminations and new eviction proceedings.

There is proposed legislation circulating to address this problem. For example, on March 23, 2020, New York State Senate Deputy Majority Leader Michael Gianaris introduced a bill seeking to protect residential and commercial tenants alike who suffered financial difficulties as a result of the COVID-19 pandemic and the mandatory business closures by waiving rent payments for certain residential tenants and small businesses for 90 days. In other words, rent and late fees otherwise due during the 90 days would no longer be collectable.



Recognizing the adverse impact on landlords, the proposed legislation also provides that landlords facing a “financial hardship” due to the loss of rent would be entitled to forgiveness on their mortgages in an amount based on a formula in the proposed legislation.

Of course, there is no guaranty this proposed legislation will become law, as it still needs several approvals. In the meantime, New York City is attempting to pass legislation that would have a similar effect for its residents.

### **Look to Each Other**

Although courts and legislation aid in the resolution and solution of problems among citizens, they are not a panacea. One of our country’s greatest strengths is its people’s ability to come together in times of need to overcome adversity and hardship. Speaking with your landlord or tenant about the problems you are both facing may result in a faster, more certain, and a mutually beneficial resolution.

Discussions should not start with an outright refusal to pay rent or a demand for all rent that is due, but with an effort to solve everyone’s problem. Perhaps the parties can reach an agreement to make the rent payments that would be due now payable as a balloon payment at the end of the year or the lease term. If that is not an option, the parties could agree to continue making the rent payments, but in smaller amounts spread out over time until business and the economy picks up again.

Because stress and emotions are running high, you should strongly consider having counsel deal with your landlord or tenant or their counsel. Ruskin Moscou Faltischek, P.C. regularly assists landlords and tenants in their lease negotiations and litigations, and stands ready to assist you reach your goals.

**If you have any questions, please contact**

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