



LAW ALERT

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By: E. Christopher Murray, Esq.
Neil P. Diskin, Esq.

RMF
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ENFORCEABILITY OF CONTRACTS DURING A PANDEMIC

Many businesses are now wondering whether they are required to perform their contractual obligations in light of COVID-19 pandemic and the “New York State on PAUSE” executive order which prohibited non-essential business from keeping their offices open as the State tries to combat the virus [1]. Whether a party to a contract can be relieved from its contractual obligations due to the coronavirus and/or subsequent business shutdowns may depend on the language of the contract itself, or the law as applied by the Courts to specific contracts, such as for the sale of real estate.

Many contracts contain “force majeure” provisions. Black’s Law Dictionary defines force majeure as:

An event or effect that can be neither anticipated nor controlled; esp. an unexpected event that prevents someone from doing or completing something that he or she had agreed or officially planned to do. The term includes both acts of nature (e.g., floods and hurricanes) acts of people (e.g., riots, strikes, and wars) [2].

While the definition of force majeure would appear to include a global pandemic that shuts down the economy, the application of such a provision is not quite as simple. The New York Court of Appeals has held that “only if the force majeure clause specifically includes the event that actually prevents a party’s performance will that party be excused [3].” Some contracts contain broad force majeure provisions, which have been upheld, that include phrases such as “or other similar or dissimilar events or circumstances [4].” Therefore, when determining whether a business can avoid its contractual obligations under a force majeure provision, it is important to analyze the specific events listed in the provision, as well as any broadening language.

On the other hand, sometimes the courts will relieve a party of its contractual obligations despite the contract not having an express provision allowing for its cancellation. For example, many contracts for the sale of real property provide for a contingency period during which the purchaser can secure a mortgage, and provide for the cancellation of the contract and a return of the down payment if the purchaser cannot secure financing

[1] See CONTINUING TEMPORARY SUSPENSION AND MODIFICATION OF LAWS RELATING TO THE DISASTER EMERGENCY, 2020 Sess. Law News of N.Y. Exec. Order 202.8 (McKINNEY’S).

[2] FORCE MAJEURE, Black’s Law Dictionary (11th ed. 2019).

[3] *Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d 900, 902-903 (1987)(citing *United Equities Co. v. First National City Bank*, 41 N.Y.2d 1032 [1977]; *Squillante & Congalton*, Force Majeure, 80 Com.L.J. [1975]).

[4] See, e.g., *Castor Petroleum v. Petroterminal De Panama*, 107 A.D.3d 497, 498 (1st Dept. 2013)(holding that the broad language of the force majeure provision relieved the defendant from its contractual obligations).



property provide for a contingency period during which the purchaser can secure a mortgage, and provide for the cancellation of the contract and a return of the down payment if the purchaser cannot secure financing during that time period. However, lenders sometimes revoke financing after the contingency period has expired due to a change in financial conditions—e.g., loss of revenue due to NY PAUSE—leaving the purchaser without financing and without a contractual exit. In such a scenario, courts have held that the purchaser is still entitled to a return of its down payment and cancellation of the contract so long as the lender's revocation was not attributable to any bad faith on the part of the purchaser [5].

In the end, whether or not a party will be relieved of its contractual obligations as a result of COVID-19 and/or NY PAUSE will depend on the language of the individual contracts in question as well as the applicable law.

[5] *Blair v O'Donnell*, 85 AD3d 954, 955 (2d Dept. 2011); see also, *Applied Behavior Analysis, Inc. v. Greater N.J. Annual Conference of United Methodist Church*, 67 A.D.3d 714, 716 (1st Dept. 2009) (granting summary judgment for seller because purchaser failed to raise a triable issue of fact as to whether its financial conditions leading to the rescission of the loan commitment was through no fault of its own and was not intended to bring about the failure of the real estate contract).

For additional information, please contact

E. Christopher Murray, Esq.
(516) 663-6515
emurray@rmfpc.com

or

Neil P. Diskin, Esq.
(516) 663-6626
ndiskin@rmfpc.com