Mounting A Successful COVID-19 Force Majeure Argument

By **Jamie Furia and Justin Corbalis** (September 25, 2020)

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As the economic effects of COVID-19 rage on, litigants are seeking to excuse contractual performance by invoking force majeure clauses.

To date, there is a limited universe of applicable decisions, and the rulings reaffirm the principles that were applied in the pre-COVID-19 era: Force majeure clauses are strictly interpreted and narrowly applied. Unsuccessful litigants have continued to try to fit the facts of their case into a force majeure event without careful attention to the specific language of the operative force majeure clause or a thoroughly developed argument connecting the force majeure event with the purported inability to perform.

A recent opinion from the U.S. District Court for the Southern District of Florida, Palm Springs Mile Associates Ltd. v. Kirkland's Stores Inc.,[1] follows suit. There, the plaintiff sued Kirkland's Stores for breach of a commercial lease based on failure by Kirkland's to pay rent beginning in April 2020.

Kirkland's then moved to dismiss, arguing that its obligation to pay rent was relieved by the force majeure provision in the lease, which was triggered by COVID-19-related government shutdowns and restrictions. But the court firmly rejected this argument.

The court began by noting the traditional principles governing force majeure clauses: (1) force majeure clauses are limited in scope, (2) performance should only be excused upon the occurrence of a specific event beyond a party's control, and (3) parties will generally be excused based on a force majeure event only if the event that justifies nonperformance is specifically identified in the contract. The court then turned to the lease's force majeure clause, which provided as follows:

> Whenever a period of time is prescribed in this Lease for action to be taken by either party, such party will not be liable or responsible for, and there will be excluded from the computation of any such period of time, any delays due to strikes, riots, acts of God, shortages of labor or materials, war, governmental laws, regulations or restrictions or any other causes of any kind whatsoever which are beyond the reasonable control of such party.[2]

In this respect, Kirkland's asserted that the restrictions on business operations and nonessential activities qualified as force majeure events, and therefore its obligation to pay rent was automatically suspended. Yet the court found several shortcomings with this argument.

First, Kirkland's failed to "explain how the [government action] it describes as a force majeure event resulted in its inability to pay rent,"[3] and instead lodged only a general argument that the shutdown excused its rent obligations.

Second, the court noted that even if Kirkland's properly demonstrated causation between the government restrictions and its inability to pay rent, the analysis would be an inherently

factual determination that is improper on a motion to dismiss.

Third, and in the same vein, the court noted that force majeure is an affirmative defense under Florida law, which generally cannot be decided on a motion to dismiss.

There are several takeaways from this case.

On the transactional side, drafters of force majeure clauses should understand that government shutdown orders may serve as a basis for excusing failure to perform as long as they are explicitly mentioned as force majeure events.

On the litigation side, it is important to recognize that shutdown orders do not provide carte blanche to invoke a force majeure event. As with Kirkland's, any party seeking to excuse its contractual obligations based on a force majeure event must carefully connect the dots between the cause — whether a government order or the effects of the pandemic — and the frustration of the specific conduct sought to be relieved. Thus, careful attention should be paid to the language and scope of the government order and how, in particular, it affects your client.

As a procedural matter, moreover, Palm Springs strongly suggests that motions to dismiss based on force majeure events are likely nonstarters because of (1) the factual matters inherent in deciding such issues and (2) the characterization of force majeure as an affirmative defense. Thus, the only seemingly good target for a motion to dismiss in this regard would be a complaint that effectively establishes the defense through its pleadings, which is rare.

In terms of substantive arguments, practitioners should be mindful that if a business is still operating and thus generating revenue for rent, then it is likely that impact of the pandemic or related shutdowns orders will be seen as a market event that merely reduces profitability, which falls short of establishing the impossibility of performance.

Commercial tenants seeking to be relieved of performance obligations, therefore, should consider focusing less on profitability and instead fine-tune their arguments to how specific government orders made it impossible for them to continue their business, in whole or in part.

Litigants seeking to make this argument should also anticipate the counter: The proximate cause of the breaching party's inability to pay is not the pandemic or shutdown orders but rather the broader financial crisis caused by the pandemic. Thus, a successful force majeure litigation strategy should incorporate alternative theories of causation or causes of action.[4]

Ultimately, given these complexities, litigants considering filing or defending an action based on a force majeure event should ensure that the following issues are clearly understood and developed.

The Triggering Event That Excuses Performance

The mere fact of a pandemic-related economic downturn may not be enough, so practitioners should determine whether any government shutdown orders apply and what specific activities or industries such orders affect. If they do not directly prohibit the kind of performance at issue, then other causes and their sufficiency as a force majeure event should be considered (e.g., a major supplier of a client's essential goods being forcibly shut

down by a government order).

The Contract's Choice of Law Provision

Jurisdictions vary in their requirements for demonstrating a force majeure event; some, for example, require that the event be unforeseeable while others do not. In the former case, a client's failure to perform based on a recent pandemic-related event may be considered foreseeable because of how long the pandemic has been in the public spotlight. Similarly, some jurisdictions, such as Florida, consider force majeure an affirmative defense; a point that informs both dispositive motion practice and responsive pleadings.

The Specific Ways That the Event Affected or Frustrated Performance

In keeping with Palm Springs, practitioners must show with particularity how a pandemic-related event frustrated performance or made it impossible. In the case of a shutdown order, for example, this would require an analysis of the order itself, showing that your client's activity was within the scope of the order, and demonstrating that your client's performance was frustrated by the order (e.g., affidavits attesting to a close of business, bank statements showing a cessation of revenue).

The Complexity of the Facts

The facts needed to mount a successful force majeure argument will inform whether certain dispositive motions are advisable or even viable. Per Palm Springs, a motion to dismiss based on a force majeure event will likely be a loser because of the fact-specific nature of the doctrine and its status as an affirmative defense in Florida. Other jurisdictions, such as New York, however, permit documentary evidence to be used on a motion to dismiss (albeit in limited circumstances).

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[1] No. 20-cv-21724, 2020 WL 5411353, at *2 (S.D. Fla. Sept. 9, 2020).

[2] Id. at *2.

[3] Id.

[4] See, e.g., Banco Santander. v. American Airlines, Inc., No. 20-cv-3098, Dkt. No. 1 (E.D.N.Y. July 1, 2020) (complaint alleging that decline in air travel qualified as a force majeure event because it was caused by both (i) government restrictions on travel and (ii) decline in both market conditions and the public's desire to fly, which was precipitated by the pandemic).