Analyzing Force Majeure Clauses in Light of the Coronavirus Outbreak – New York Law Journal – Justin Kelton author

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Will these unprecedented circumstances constitute force majeure events, such that they provide a defense to a claimed breach? This article provides an overview of how New York courts are likely to grapple with this urgent issue.

In light of the global outbreak of the novel Coronavirus (COVID-19), contracting parties may experience an increased risk of non-performance under their agreements. Daily life has been significantly disrupted, with many businesses experiencing forced closures or major reductions in their operations, personnel, abilities, and revenues. This new reality is likely to cause a large number of businesses and individuals to have considerable difficulty meeting their contractual obligations. Will these unprecedented circumstances constitute *force majeure* events, such that they provide a defense to a claimed breach? This article provides an overview of how New York courts are likely to grapple with this urgent issue.

The Interpretation and Enforcement of Force Majeure Clauses In New York

"Generally, a force majeure event is an event beyond the control of the parties that prevents performance under a contract and may excuse nonperformance." *Beardslee v. Inflection Energy, LLC*, 25 N.Y.3d 150, 154 (2015) (citation omitted). Force majeure clauses excuse non-performance where the reasonable expectations of the parties have been frustrated due to circumstances beyond their control. *See Kel Kim Corp. v. Cent. Mkts., Inc.*, 70 N.Y.2d 900, 902, (1987); *United Equities v. First Natl. City Bank*, 52 A.D.2d 154, 157, 383 N.Y.S.2d 6 (1976), *affd*. 41 N.Y.2d 1032 (1977). Under New York law, force majeure

clauses are “to be narrowly construed”. *Reade v. Stoneybrook Realty, LLC*, 63 A.D.3d 433, 434 (1st Dep’t 2009).

Moreover, New York courts impose a significant hurdle on a party seeking to assert a defense of force majeure: “only if the force majeure clause specifically includes the event that actually prevents a party’s performance will that party be excused”. *Reade*, 63 A.D.3d at 434 (citing *Kel Kim Corp.* 70 N.Y.2d at 902-903). Where the parties to a written agreement do not include a force majeure clause, there is no basis for such a defense. *See General Electric Company v. Metals Resources Group Ltd*, 293 A.D.2d 417 (1st Dep’t 2002) (“The force majeure doctrine is no more helpful to defendant. The parties integrated agreement contained no force majeure provision, much less one specifying the occurrence that defendant would now have treated as a force majeure, and, accordingly, there is no basis for a force majeure defense.”).

As is the case with all contractual provisions, New York courts interpreting a force majeure clause seek to effectuate the parties’ intent. “[W]hen the parties have themselves defined the contours of force majeure in their agreement, those contours dictate the application, effect, and scope of force majeure.” *Route 6 Outparcels, LLC v. Ruby Tuesday, Inc*., 88 A.D.3d 1224, 1225 (3d Dep’t 2011). Therefore, courts interpreting a force majeure provision seek to determine, *inter alia*, the intended breadth and scope, and whether the clause was designed to protect one party, or both. *Id*. (finding that clause was “expansive in scope” and “affords protection to both plaintiff and defendant”).

The Potential Impacts of Coronavirus-Related Regulations

Both the New York State and City governments have enacted a variety of laws and regulations mandating actions to be taken by businesses and individuals in order to try to stop the spread of the virus. For example, bars and restaurants are currently forbidden from serving customers onsite, gyms, movie theaters, and casinos have been forced to close, and events have been forced to be postponed or cancelled. While all force majeure clauses are different and each contract should be individually evaluated, the new requirements may trigger force majeure provisions, depending on how they are drafted.

> Indeed, New York courts have recognized the validity of force majeure clauses contemplating potential non-performance due to “governmental prohibition.” See, e.g., Reade, 63 A.D.3d at 433 (“One of the listed acts that would trigger this clause was “governmental prohibitions.” . . . a judicial TRO falls within the meaning of the term “governmental prohibition,” and the time during which such TRO was in effect must be included in computing the starting date of the rent abatement.”).

Conversely, the Appellate Division, First Department has held that a voluntary plant shutdown due to financial considerations brought about by governmental regulations “are not circumstances constituting a force majeure event, and financial hardship is not grounds for avoiding performance under a contract.” Macalloy Corp. v. Metallurg, Inc., 284 A.D.2d 227, 227 (1st Dep’t 2001) (citing 407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp., 23 N.Y.2d 275, 280 (1968)). In other words, where performance is possible, though unprofitable, the legal excuse of impossibility is not available. See Tracy Altman Warner v. Kaplan, 71 A.D. 3d 1 (1st Dep’t 2009).

Thus, courts evaluating a potential force majeure defense arising out of the Coronavirus pandemic will focus on: (i) the specific language used in the force majeure clause, and any indicia of the drafters' intent; (ii) whether the pertinent event falls within the scope of the clause, and whether it could have been contemplated at the time that the parties entered the contract; and (iii) whether the event renders performance completely impossible, as opposed to inconvenient or financially imprudent.

Conclusion

Due to the rapid spread of the Coronavirus, New York is experiencing challenges unlike anything we have previously seen. While no court in New York has directly addressed the issue of whether the Coronavirus outbreak gives rise to a force majeure defense, the matter is likely to arise in litigation soon, in light of the vast number of companies who may find it impossible to continue operating under their agreements. New York courts construe force majeure clauses narrowly, but it is possible that either the Coronavirus itself or governmental regulations designed to address the virus could lead to unforeseeable impossibility of compliance, and trigger a force majeure defense.

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