

Litigation Alert: COVID-19 A Year Later: Have Our Courts Eased Contract Requirements and Contract Performance Due to the Pandemic?

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As we know, many businesses have suffered financially due to the unprecedented and unexpected COVID-19 pandemic. Demand in some industries has sharply declined, as customers have learned new ways of conducting business or shifted their business practices. How have the courts handled the inability of a business to meet its contract obligations due to COVID-19? Two New York courts recently rejected protections urged by a party who could not perform due to business losses, and other cases are making their way through the courts. Although the New York cases dealt with leases and a commercial tenant's inability to pay rent, the cases may be instrumental in assessing how the courts will continue to decide the financial hardships business face as a result of the pandemic.

At common law, a party may be excused from its failure to perform a contract due to the doctrine of **frustration of purpose**. Frustration of purpose may apply when the fundamental purpose of the contract is frustrated by events beyond the contracting parties' control. The doctrine of **impossibility of performance** similarly excuses a party from performance of a contract when the destruction of the subject matter of the contract or of the means of performance makes performance impossible. Let's take a brief look at how these doctrines have been recently applied by the courts.

In *35 E. 75th St. Corp. v Christian Louboutin L.L.C.*, 2020 N.Y. Slip Op 34063(U) (N.Y. Sup. Ct. Dec. 9, 2020), the New York Supreme Court, New York's trial court, rejected a commercial tenant's arguments that it could terminate its lease and obtain rent abatement under the doctrines of frustration of purpose and impossibility of performance due to the pandemic. The defendant, Christian Louboutin, LLC, a high-end fashion company, stopped paying rent under a lease agreement for its store on the Upper East Side in March 2020. The plaintiff/landlord sued and Christian Louboutin counterclaimed to terminate the lease and petitioned for rent abatement. Christian Louboutin argued that it was absolved of its obligations under the lease, as its business was built on a well-trafficked retail location and the decline of customer traffic destroyed the store's revenue. The trial court granted the landlord's motion for summary judgment and entered a judgment against Christian Louboutin for the past due rent. The trial court held that the frustration of purpose and impossibility of performance doctrines were not applicable because this was not a case where the retail store does not exist or the tenant was not able to open the store or sell its products. Rather, it involved a decline in business due to COVID-19 and such a change in market conditions does not permit the court to rip up a contract between two sophisticated parties.

Similarly, in *1140 Broadway LLC v. Bold Food, LLC*, 2020 N.Y. Slip. Op. 34017 (N.Y. Sup. Ct. Dec. 3, 2020), the New York Supreme Court rejected a commercial tenant's impossibility of performance and frustration of purpose defenses for non-payment of rent due to the pandemic. The defendant, Bold Food, LLC, a restaurant management and consulting organization, leased office space from the plaintiff, the landlord. The tenant stopped paying rent in February 2020 and vacated the premises five months later. The landlord sued, and Bold Food similarly argued that performance of the lease was impossible and its purpose was frustrated due to the pandemic and therefore any failure to pay rent should be excused. This trial court held that the defenses are inapplicable and a sudden downfall in the industry that impacted the tenant's ability to pay the rent did not excuse the tenant's performance under the lease. The trial court also noted that the tenant provided restaurant consulting services and was not directly impacted by the Governor's COVID-19 orders, although there was a sharp demand for those services.

Other contracts and leases impacted by the pandemic are also making their way through the courts. For example, currently pending in New Jersey is a case captioned *Prospect Real Estate, LLC v. Wawa, Inc.*, OCN, L-000172-21. The plaintiff/landlord in

this case alleges that Wawa is using the COVID-19 pandemic as an excuse to delay rent payments and break a \$7.2 million 20-year lease for a convenience store and gas station in Ocean County, New Jersey. Wawa allegedly terminated its lease in November 2020, citing an environmental provision attached to the due diligence period. The landlord alleges that the termination is an improper pretext and Wawa is in breach of its lease entitling it to damages. The *Wawa* case, like others, is moving through the courts.

Courts are considering a variety of reasons for a party's failure to perform under a contract and the impact the pandemic has had on its business. A fact-sensitive analysis is needed and the success of each matter will depend on its circumstances. In some instances, litigation may be necessary to protect your company's interests. We have reviewed contracts and conducted the necessary analysis of whether and when litigation is necessary, or when to simply to negotiate a resolution. If you have any questions about this alert, please contact:

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