

# Law of the Land - July 2020

July 6, 2020

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This newsletter is meant to keep readers informed about current property law issues in Massachusetts and elsewhere. A team of Goulston & Storrs real estate litigators reports on recent cases and important news relevant to the real estate industry.

## **Trends in Real Estate Litigation**

### ***Commercial Landlords and Tenants Take Their COVID-Related Lease Disputes to Court***

The slow-burning standoffs between commercial landlords and tenants in the COVID-19 pandemic are beginning to turn white-hot. Some landlords are starting to file lawsuits against tenants who have fallen behind on rent. And some tenants have gone on the offense, seeking court rulings to restrict landlords' ability to terminate leases or enforce what the tenants feel are onerous financial obligations in the face of decreasing revenues caused by the pandemic.

In the former category, the landlord for the **National Basketball Association** (NBA) has sued it for failing to pay two months' rent and charges totaling \$1.2 million on its Fifth Avenue store. The lawsuit filed by the landlord seeks not only unpaid rent from the NBA, but also payment of damages and \$20,000 in legal fees.

**Simon Property Group**, the country's largest mall operator, sued its largest tenant Gap, Inc. (which includes brands Old Navy, Gap, Banana Republic, and Athleta) for more than \$65 million in unpaid rent for April, May, and June for the 412 Gap stores across Simon's portfolio of properties. Simon also just filed another \$8.7 million suit against Brooks Brothers. In the other corner, multiple New York retail tenants, from Bath and Body Works all the way to high-end designer Valentino, have sued their landlords to get out of the lease obligations.

Locally, Town Sports International, the parent company of **Boston Sports Clubs**, filed suit against its landlord for its South Station location in Suffolk Superior Court, alleging that the landlord improperly terminated the lease. Separately, Boston landlord **Gazit Horizons, Inc.** sued its tenant **Ann Taylor** in federal court for nearly \$250,000 in back rent.

These lawsuits are likely to bounce along for some time, due to the slowdown of courts during the pandemic that has resulted in a backlog. And these cases involve somewhat arcane issues that have rarely been litigated until now, such as force majeure, impossibility or impracticability of performance, and frustration of purpose. Read more about force majeure in the G&S advisory, [Ten Things You Need to Know About Force Majeure Now](#).

### ***COVID Impacts on Pending Real Estate Deals***

The pandemic also has impacted pending real estate transactions, causing disputes that have found their way, or will soon find their way, to the courts.

On February 20, 2020, as the stock market roared to an all-time high, Sycamore Partners signed a \$525 million deal to purchase a majority of Victoria's Secret from **L Brands**. As the ink dried, L Brand shares were worth more than \$23 each. One month later, as the Coronavirus bore down on America, those shares traded for less than \$10. Sycamore proposed "adjusting" the purchase price. L Brands refused. The parties are now locked in litigation in Delaware. Read more about this case in the G&S advisory, [\*Doing Deals In the COVID-19 Era: Renegotiating Price and Other Changes Before Closing.\*](#)

In another recently filed lawsuit, **Simon Property** seeks a ruling that it was on sound legal ground when it backed out of its February 9 agreement to acquire **Taubman Centers** because Taubman was disproportionately affected by the COVID-19 pandemic and didn't take actions needed to mitigate its effect on Taubman's operations. Taubman calls Simon's move to terminate the deal "a classic case of buyer's remorse" and claims that Simon knew full well that a global pandemic was raging and could possibly impact the centers Simon was agreeing to buy from Taubman. A Delaware court will sort this out.

The court decisions that will result from these cases will have a significant impact on and ramifications for the commercial real estate industry. We will continue to monitor these cases and new ones that will inevitably come. We will provide updates as these cases unfold.

## **Real Estate Litigation Cases of Note**

### ***Tenant's Post-Petition Rental Obligations During Bankruptcy***

#### ***In re Hitz Restaurant Group***

An Illinois bankruptcy court has issued one of the first COVID-related commercial lease decisions. In that case, **Hitz Restaurant Group** filed for bankruptcy. A creditor moved to have the bankruptcy court rule that Hitz still had an obligation to pay post-petition rent per Bankruptcy code 365(d)(3). Hitz argued that the lease's Force Majeure clause relieved it of this obligation. The Force Majeure clause specifically provided that "lack of funds" was not a "Force Majeure." But Hitz claimed that the Illinois Governor's order requiring the closure of restaurants for on-premises table and bar service was a "governmental act" that triggered Force Majeure protection. The court held that the Governor's order had been issued after the March 1 rent due date and so March rent at the lease rate was due and owing. However, the court went on to rule that future rent should be adjusted because the Governor's order was a "Force Majeure" that required Hitz to close about 75% of its operation—its in-house bar and restaurant service—leaving only take-out. Accordingly, the court held that Hitz's rent should be reduced by 75%. While the decision is curious, to say the least, and perhaps not the last word on the issue, it is a reminder that the commercial real estate world should keep its eyes on the courts and the many more decisions that are likely to come.

Retailers are filing for bankruptcy in droves and tenants and landlords alike are eager to hear decisions like this one to help guide them through the COVID recovery. Read more about this topic in our recent advisory, [\*Considering Lease Concessions In The Face Of A Tenant Bankruptcy.\*](#)

***Christopher Martorella v. Stuart Rapp, Esq. 2020 WL 2844693 (Mass. Land Ct. June 1, 2020)***

In a recent Land Court decision, the Court made it clear that, even during the COVID-19 pandemic, the Court will impose well-established contract principles to defeat claims of impossibility. Plaintiff Christopher Martorella (“Mr. Martorella”), an experienced real estate investor, entered into a purchase and sale agreement (the “Agreement”) for a property on Nantucket. The Agreement did not contain a financing contingency clause, which would have allowed Mr. Martorella to receive his initial deposits back if he failed to obtain mortgage financing.<sup>[1]</sup>

Mr. Martorella paid two deposit totaling \$182,700, which was 10% of the purchase price. The closing was originally scheduled for March 13, 2020. Due to the COVID-19 pandemic and the accompanying instability in banks and other financial institutions, Mr. Martorella experienced difficulty in obtaining financing for the remainder of the purchase price. However, he was able to obtain two brief extensions, pushing the closing date out to April 6, 2020. Concurrently, Mr. Martorella’s wife fell ill with COVID-19, experienced serious symptoms, and was hospitalized. In light of these tumultuous personal and financial events, Mr. Martorella asked to postpone the closing date a third time, claiming it was “impossible” for him to obtain financing. The Commissioner denied the additional extension, and Mr. Martorella filed suit.

The court held that Mr. Martorella could not further postpone the closing date for two primary reasons. The first being that Mr. Martorella knowingly assumed liability for the entire purchase price in cash by signing an Agreement without a financing contingency clause. The second reason was that he did not personally fall ill and Mrs. Martorella was not a party to the contract. Therefore her health had no bearing on the sale. Accordingly, the Court found Mr. Martorella to be in breach of the Agreement, entitling the Commissioner to retain Mr. Martorella’s \$182,700 deposit.

[1] Additionally, we note a unique wrinkle to this case is that Mr. Martorella was purchasing the Nantucket property out of a partition action. The property was owned by three people: Mr. Martorella’s wife, as well as a couple that were his former business partners. The former business partners filed a partition action in 2017 to force a sale of the property. After hiring a broker and attempting to sell the property for over a year, the court-appointed Commissioner tasked with the method for selling the property, eventually held an auction sale, at which Mr. Martorella was the winning bidder.

## **News Alerts**

### ***Tenant Safe Harbor Act***

On June 30, Governor Cuomo signed the Tenant Safe Harbor Act (Chapter 127 of the Laws of New York, 2020) (the “Act”) into law, prohibiting evictions of residential tenants, but allowing money judgments for nonpayment of rent, for as long as any part of the county in which such tenant resides is shut down due to COVID-19. [Click here to read more.](#)

***Eviction Moratorium Extensions - MA***

Now that many states are reopening businesses, offices, and courts to the public, we anticipate that many landlord-tenant legal battles will no longer be tolled. Many states instituted moratoriums which prohibited both the initiation and execution of commercial eviction actions. Specifically in Massachusetts, the Supreme Judicial Court (SJC) issued [an order](#) further tolling all court deadlines to July 1, 2020, but does not expect any further tolling to occur. A statute restricting residential and certain small business evictions (Chapter 65 of the Acts of 2020), however, remains on the books—for now. As a result, the clock will once again be ticking for the initiation or execution of some commercial eviction actions. G&S is closely monitoring the status of eviction moratoriums in states across the nation. For state-specific questions, please feel free to reach out to either Derek Domian ([ddomian@goulstonstorrs.com](mailto:ddomian@goulstonstorrs.com)) or Julius Halstead ([jhalstead@goulstonstorrs.com](mailto:jhalstead@goulstonstorrs.com)).

***Landlords and Commercial Tenants Negotiate Delicate Deals with High Stakes*** from the *Boston Globe*

As captured in a recent Boston Globe article, landlords and tenants are often working together to find a solution to missed rent payments. Some Boston-area developers are taking a number of steps to aid their retail tenants, including Samuels & Associates. According to the Globe, "Samuels & Associates, which in recent years has redeveloped a huge swath of the Fenway neighborhood, is converting plazas into outdoor seating for restaurants in its buildings and helping tenants navigate new permitting processes at City Hall. It has three people working full time on lease negotiations with 70 or 80 commercial tenants, said president Joel Sklar. The goal is to reach deals that make sense for everyone - including Samuels and its lenders." [Click here to read the article.](#)

*If you have a real estate litigation question or business concern, we invite you to reach out directly to any member of our [Real Estate Litigation Group](#).*

*This advisory should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own lawyer concerning your situation and any specific legal questions you may have.*