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Law of the Land - Real Estate Litigation Newsletter

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CASES OF NOTE

THE SECRET'S OUT

Victoria's Secret Stores, LLC v. Herald Store Owner LLC, 70 Misc. 3d 1206(A) (N.Y. Sup. Ct. Jan. 7, 2021)

A New York court recently held that a retailer's closure due to a state law imposed as a result of the COVID-19 pandemic did not excuse the retailer of its obligations to pay rent. In so holding, the Court rejected the retailer's invocation of the doctrines of impossibility and frustration of purpose as defenses for its failure to pay rent. The decision demonstrates that tenants may be obligated to pay rent despite facing mandated closures of their businesses arising from COVID-19, and certain common-law doctrines will be unavailable as defenses to excuse such failures. Tenants and landlords will need to contract around such rent-payment commitments, and specifically include such language in their leases, if they wish to avoid such strict financial covenants.

In *Victoria's Secret Stores*, defendant Herald Square Owner LLC Successor in Interest to 1328 Broadway, LLC ("Landlord") moved for summary judgment to seek the rent payments due pursuant to the lease agreement (the "Lease") with plaintiff Victoria's Secret Stores, LLC Successor in Interest to Victoria's Secret Stores, Inc, L Brands Inc., Successor in Interest to the Limited, Inc. and Intimate Brands, Inc. ("Tenant").

Tenant initially brought this action in May 2020 against Landlord seeking a declaratory judgment that the Lease was unenforceable under common law doctrines, such as the doctrine of impossibility and frustration of purpose, and that no rent payments were due since March 22, 2020 —the date Governor Cuomo imposed the "New York State on Pause" Executive Order and such related Orders, which directed that all non-essential businesses needed to close in-office personnel functions, temporarily banned all non-essential gatherings of individuals of any size for any reason, and instituted a 90-day moratorium on any residential or commercial evictions.

On January 7, 2021, the NY Supreme Court ruled that the Lease was enforceable and both properly and expressly allocated the risk of Tenant not being able to operate its business. The Court was unmoved by Tenant's arguments that the specific cause of the closure had not been enumerated in the Lease. It held that the Lease language was broad enough to capture the circumstances that resulted in the retailer's closure, namely the imposition of a state law mandating as such. As the parties agreed to the Lease, which obligated the Tenant to pay rent despite the store's closure, the Court dismissed Tenant's action in its entirety.

STILL SOME FRUSTRATION FOR LANDLORDS

Intern. Plaza Associates L.P. v. Amorepacfiic US, Inc., 2020 WL 7416598 (N.Y. Sup. Ct. Dec. 14, 2020)

Contrary to the *Victoria's Secret* case discussed above, a NY court recently infused the common law defense of frustration of purpose with new life by denying a plaintiff landlord's motion for summary judgment to collect overdue rental payments from a defendant commercial tenant. In so holding, the Court recognized the tenant's reliance on frustration of purpose and noted that due to the unforeseeable nature of the COVID-19 pandemic, this crisis could not properly have been designated in a lease provision. Landlords and tenants, then, must ensure they thoroughly contemplate the specific terms of lease provisions if they seek either enforcement or protection of that language.

In *Intern. Plaza Associates L.P.*, plaintiff International Plaza Associates L.P. ("Landlord") moved for summary judgment to collect approximately $314,000 in rent arrears from defendant Amorepacfiic US, Inc., d/b/a Innisfree ("Tenant"). Tenant is a manufacturer and purveyor of cosmetics and other beauty supplies, and a part of its business includes allowing customers to test the products. The rent arrears accrued from March 2020 through the present date. Due to the COVID-19 pandemic, and in particular, due to Governor Cuomo's Executive Orders, Tenant was forced to close from March to June 2020, and has continued to adhere to the Orders' restrictions. Tenant has not disputed it failed to make full rental payments, and Landlord has accepted partial rent. Tenant responded to Landlord's Motion by arguing that discovery is necessary, prior to the finding of any judgment, to determine the extent the pandemic and government shutdown have restricted its sales.

The NY Supreme Court was moved by Tenant's arguments and specifically focused on the doctrine of frustration of purpose. The Court determined that COVID-19 could not have been foreseen and Tenant could not have designed a clause in the lease to address it. To that end, the Court held that Tenant needs the chance to support its frustration of purpose defense through discovery. In particular, it needs the opportunity to produce facts regarding its ability, or lack thereof due to the pandemic and government orders, to conduct its business. Therefore, the Court determined that granting Landlord's motion for summary judgment without any discovery was premature.

Although not a definitive victory for commercial tenants, the Court's decision, opens the door to the potential success of a common-law defense to legal action by landlords to collect overdue rent in this COVID-19 environment, or at least the need for evidence concerning the effect of the pandemic on a tenant's business, especially in the absence of any clear contractual language between such parties.

Taken together, while *Intern. Plaza Associates* shows a court's willingness to allow discovery into the effect of the pandemic on a tenant's business in order to potentially establish a frustration of purpose defense, *Victoria's Secret Stores* suggests that tenants are still unlikely to ultimately prevail on such a defense. Both landlords and tenants should be aware that the law surrounding the application of frustration of purpose and impossibility doctrines in the context of the pandemic continues to evolve. We will monitor the development of the law in this area and provide updates as needed.

NEWS ALERTS

NY Anti-eviction Law

On December 28, 2020, the NY legislature overwhelmingly passed one of the most comprehensive anti-eviction laws in the nation (the "COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020") to assist the state in addressing the high levels of unemployment stemming from the COVID-19 pandemic. The law, which Governor Cuomo immediately signed, is exceptional in its reach, as it eases the process for tenants and small landlords to claim financial hardships and eliminates hurdles for disabled and older homeowners to renew tax emptions.

Under this measure:

- landlords are barred from evicting most tenants, and pending eviction cases are stayed, for at least 60 days from the date of the bill's passage (until approximately February 26, 2021);
- landlords are not allowed to being new eviction proceedings until at least May 1, 2021;
- tenants can protect their homes by submitting a document stating financial hardship related to the COVID-19 pandemic (this hardship declaration addresses not only financial hardship, but also the "significant health risk" of moving in the pandemic);
- small landlords, such as those who own 10 or fewer apartments, are able to file similar financial hardship declarations with their mortgage lenders to protect them from foreclosures, including those involving tax liens; and
- tax exemptions are automatically renewed for homeowners who are elderly or disabled.

Some landlords expressed opposition to the bill, claiming it allows tenants to avoid eviction by merely stating financial hardship rather than proving it. The law **will** allow evictions to proceed in cases where judges find tenants have persistently created a nuisance for neighbors, such as playing loud music in early morning hours (i.e. 3 AM) or creating hazardous conditions.

It bears noting as well that this new law is by no means a cure from paying rent; tenants will continue to owe landlords any back rent they haven't paid, once the moratorium ends.

Massachusetts Anti-Eviction Law

The Commonwealth of Massachusetts has similarly taken measures to protect its citizen tenants from eviction.

The Massachusetts Legislature passed Chapter 257 of the Acts of 2020, which requires that from December 18, 2020, until the termination of the COVID-19 state of emergency declared by Governor Baker, a notice to quit for nonpayment of rent given by a landlord to a residential tenant pursuant to §§ 11 or 12 of M.G.L. 186, on or after December 18, 2020, **must be** accompanied by an attestation form available through the Executive Office of Housing and Economic Development (EOHED). In addition to the attestation form, EOHED also provides a tenant resources and information form.

These forms can be viewed here.

Massachusetts Economic Development Law

On January 6, 2021, the MA Legislature passed an omnibus Economic Development Bill (H.5250, "An Act Enabling Partnerships for Growth"). One particular component of the Bill was the "Housing Choice" legislation, which changes zoning laws so zoning changes can be approved with a simple majority vote, rather than a two-thirds (2/3) majority.

While this specific legislation does not mandate cities and towns to make any of these zoning changes, it will allow municipalities that want to rezone for denser, transit or downtown oriented, and new housing development, to do so more easily. The final language also requires MBTA communities to have a zoning ordinance or bylaw that allows for at least one (1) by right multi-family district. Communities that do not comply with this language will not be eligible for certain state-funded programs. The legislation is expected to help spur housing production and mitigate the housing shortage that legislators say plays a role in high rental prices in the Greater Boston area.

On January 14, 2021, Governor Baker signed the Economic Development Bill, which included the Housing Choice legislation, into law; the legislation takes place immediately. In addition to the Housing Choice component, the Bill had three additional significant effects:

1. It doubles the low-income housing tax credit by increasing the allocation to $40 million;
2. It includes language to allow a court-ordered bond in zoning appeals throughout the Commonwealth; and
3. It includes provisions that would allow approvals of mixed-use developments that include 10% affordable housing by a simple majority vote as opposed to a supermajority vote.

Regarding the bond requirement, the new law allows judges to require a plaintiff who appeals a decision to approve a special permit, variance, or site plan to post a surety or cash bond up to $50,000. In determining whether to require a bond and the amount of a bond, the court is to consider the relative merits of the appeal and the relative financial means of the plaintiff and defendant. The bond requirement has always been a feature of the Boston Zoning Enabling Act, but, up to now, was not a feature of the state's zoning enabling act, G.L. c. 40A. This amendment to Chapter 40A may operate to dissuade appeals inasmuch as the posting of a bond will be a condition of maintaining an appeal and will be surrendered to the defendant/developer if the zoning relief is ultimately upheld.

The change in the law allowing mixed-use projects that include 10% affordable housing to be approved by a majority rather than a supermajority vote of municipal permit-granting authorities reduces a procedural hurdle for developers who often face opposition and highly politicized situations at the local level and will help to foster the development of more affordable housing.

CLIENT WINS

A team of Goulston attorneys, Martin Fantozzi, Derek Domian, and Julius Halstead, recently defeated a motion to dismiss in a lease termination dispute in the Massachusetts Land Court on

behalf of a commercial landlord client ("Landlord"). The dispute primarily centered on the Land Court's jurisdiction, with the tenant contending that a Landlord's action for possession was outside the Land Court's jurisdiction and the Landlord alleging that the Land Court had jurisdiction to issue a declaration that the Landlord validly terminated the lease. The Land Court, while acknowledging that it is a close call, found that it has previously made the type of determination Landlord is seeking and, therefore, jurisdiction is proper.

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.