

# PROPERTY MANAGEMENT

## Quarterly

### Law

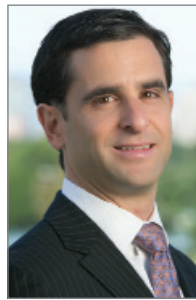
## COVID-19 doesn't excuse you from your lease

**T**hroughout Colorado, the COVID-19 pandemic has raised tensions surrounding commercial leases as both state and local regulations forced tenants to temporarily shutter their business or change the way they operate. Given this unprecedented change, there has been a growing trend within Colorado among tenants asking their landlords for concessions on their lease terms.

In fact, some tenants believe that this pandemic is a legal excuse to stop paying rent altogether or to terminate their leases. In the vast majority of cases, this argument is unlikely to succeed and ultimately could cost the tenant in unnecessary litigation fees and landlord goodwill. This article aims to help explain why this COVID-19 pandemic is more than likely not going to serve as an allowable "out" from rent payments or a lease altogether and, also, will discuss better options for the landlord and the tenant to navigate this unprecedented situation.

The legal arguments that tenants most often are citing to support their right to terminate are rooted in the concepts of frustration of purpose/impossibility of performance, casualty, condemnation and constructive eviction.

For a valid claim of impossibility of performance, the performance under the lease must be objectively impossible and not just financially unfavorable. By and large, the short duration and scope of the Colorado orders, and the fact that Colorado already has begun its reopening of most sectors of business, make it such that performance under the lease is not objectively impossible. The only potentially valid argument for impossibility is where the lease was signed right before the COVID-19 pandemic and the tenant is hav-



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ing a difficult time building out the space and ramping up business operations even as gradual reopening is occurring and for a substantial period thereafter. In that specific and limited circumstance, a tenant may have a strong economic reason and valid legal argument to terminate the lease.

Some tenants also are stating that Colorado's stay-at-home and safer-at-home orders trigger their termination rights pursuant to the casualty and condemnation provisions under their lease. As it relates to a casualty event, the temporary closures do not meet the standard definition of casualty. Traditionally, courts have treated an event as a casualty only if caused by an accident or natural disaster resulting in physical damage without an intervening cause. Most experts agree that the pandemic was not caused by an accident or natural disaster, but rather by human action.

There are two main issues to consider when determining whether lease condemnation provisions would apply. The first is whether a governmental order actually falls within the government's eminent domain powers. Constitutional scholars have determined that COVID-19-related orders typically are not tantamount to constitutional takings. Second, constitutional takings require that the regulation permanently deprive the property of all value. Thus, a tenant's attempt to exercise a termination right tied to condemnation pursuant to Colorado's temporary COVID-19 closures likely will fail.

Similarly, Colorado's response to



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the pandemic likely will not amount to a valid constructive eviction claim. A constructive eviction claim usually requires the leased premises to be made so unbearable by the landlord that a tenant cannot use the premises for its intended use under the lease.

The executive orders put out by the state of Colorado likely will not give rise to a true constructive eviction claim because those actions are not landlord caused, they were temporary and the disruption only lasted for a small portion of the lease term.

Tenants also are utilizing the COVID-19 pandemic as an excuse to avoid paying rent, citing the familiar force majeure, casualty or condemnation provisions as the underlying reason for not paying rent. This analysis also is unlikely to be met with any success.

Force majeure typically excuses the performance of a party's obligation due to "acts of God," "governmental actions or orders" and those events "caused beyond the reasonable control of each party," but rarely the obligation to pay rent. The vast majority of leases we have negotiated have an express carve out requiring payment of all rent despite cases of force majeure. In fact, force majeure may not even be triggered if it was not drafted in such a way so as to include a pandemic or a national emergency. Force majeure clauses are construed narrowly and an "act of God" is usually defined as "[a]n overwhelming, unpreventable event caused exclusively by forces of nature, such as

an earthquake, flood, or tornado." Depending on how specific the force majeure clause is drafted, if force majeure applies at all, it may excuse the tenant's nonfinancial lease obligations but rarely a tenant's financial ones. However, we are seeing a trend toward tenants negotiating broader force majeure provisions that include pandemic and similar types of events.

A tenant would similarly struggle to make a valid argument that they could stop paying rent due to casualty, condemnation or constructive eviction. Based on the above discussion regarding termination claims, since it is unlikely for a tenant to meet the first threshold of proving the elements of casualty, condemnation or constructive eviction succeeding in a rent reduction remedy is as improbable as obtaining a termination remedy.

A tenant's best option is to discuss its situation candidly with the landlords with the recognition that landlords want to see their tenants succeed. The more concrete financial background the tenant can provide to its landlords to explain the tenant's current economic situation, the easier it will be to reach a mutually workable solution. Many landlords have been willing to offer tenants reasonable options such as rent reductions, deferrals and covenant waivers (such as opening requirements) to the extent allowable by landlords' lenders.

Ultimately, the best choice for both the landlord and the tenant is to proactively work together through the challenges the COVID-19 pandemic is presenting. Such a unified approach will result in tenants and landlords emerging from this pandemic with the least disruption and harm possible. ▲