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## **Tenant entitled to rent abatement during shut down - by Christopher Kenney**

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Christopher Kenney  
Kenney & Sams, P.C.

During the COVID-19 pandemic, governor Baker issued orders prohibiting certain business operations in the Commonwealth. Consequently, commercial tenants unable to operate in their leased premises have asserted numerous arguments seeking relief from their rent obligations during the time that their business was ordered closed.

In February, the Suffolk Superior Court's Business Litigation Session issued a groundbreaking decision protecting a restaurant tenant from default for nonpayment of rent during the government shut down. In a thoughtful and bold ruling, the court entered summary judgment against a landlord who had filed suit seeking damages from the tenant for nonpayment of rent. The case, UMNV 205–207 Newbury, LLC v. Caffé Nero Americas, Inc., explains the overlap and distinctions among various common law contract doctrines, including force majeure, impossibility of performance, and frustration of purpose.

### Background

The tenant, Caffé Nero, signed a 15 year lease that limited the restaurant's use solely for "operation of a Caffé Nero themed café" and "for no other purpose." In late March 2020, the COVID-19 pandemic forced Caffé Nero either to shift to a take-out business model or close entirely. By order of governor Baker, as of noon on March 24, 2020, Caffé Nero - like all other restaurants and cafés in Massachusetts - was barred from allowing any "on-premises consumption of food or beverages," and instead could only offer food or beverages for take-out or delivery. The governor extended this order several times. Based on the order, the tenant stopped paying rent in March 2020.

The landlord notified the restaurant it would be in default under the lease if it didn't pay its April rent within five days. The rent was not paid, so the landlord terminated the lease in May. The tenant remained in the premises until the end of October 2020. It did not pay any rent for the months of April through October, 2020. Consequently, landlord filed suit against the tenant for eviction and rent

due under the lease.

## Legal Analysis

The court's decision reviewed three contract law doctrines: Force majeure, impossibility of performance, and frustration of purpose. The court based its ruling on frustration of purpose.

Under the legal doctrine of "frustration of purpose," a party to a lease or other contract is excused from performing its contractual obligations "when an event neither anticipated nor caused by either party, the risk of which was not allocated by the contract, destroys the object or purpose of the contract, thus destroying the value of performance." *Chase Precast Corp. v. John J. Paonessa Co., Inc.*, 409 Mass. 371, 374 (1991). In other words:

Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

*Id.* at 375, quoting Restatement (Second) of Contracts § 265 (1981).

The central purpose of this contract was not in dispute. The lease required that Caffé Nero could use the leased premises only to operate a café with a sit-down restaurant menu "and for no other purpose." The court found that this purpose was destroyed or frustrated while the governor's COVID-19 orders barred Caffé Nero from allowing customers to consume food or drink inside the leased premises.

The court distinguished the separate contract doctrine of "impossibility of performance." That doctrine might have applied if, for example, the restaurant building was destroyed by a fire so that it would be virtually impossible for the landlord to lease the space to the tenant. Here, by contrast, the building exists, the tenant could enter it, but could not use it for its only purpose under the lease.

The court ruled that Caffé Nero's obligation to pay rent was discharged at least from March 24 to June 22, 2020, "because the entire purpose of the lease was completely frustrated while the governor's COVID-19 orders barred restaurants from serving customers indoors." Therefore, the court ruled: (i) UMNV's written notices asserting that Caffé Nero had breached the lease by not paying the April 2020 rent and was in default for still not making that rent payment within five days after the first notice were both wrong, (ii) Caffé Nero was not in default under the lease as of May 19, 2020, and (iii) UMNV's purported termination of the lease on May 19, 2020, was invalid.

The landlord argued that the lease's "force majeure" clause contemplated the prospect that external forces beyond the parties' control could render performance impossible, but still required the tenant to pay rent. The landlord also pointed to the lease provision that rent payment is an "independent covenant" not dependent upon landlord's performance of its promises in the lease.

The court rejected both arguments. It reasoned that the force majeure provision addresses the risk that performance may become impossible, but does not address the distinct risk that the performance could still be possible even while the main purpose of the lease is frustrated by events not in the parties' control. In short, the court ruled that the force majeure provision does not address the prospect for frustration of purpose that arose in this case. Likewise, the court ruled that the lease's "independent covenant provision" is irrelevant to this case, because tenant's rent obligation was excused – not because landlord did not perform its covenants under the lease – but because the purpose of the tenant's promise (i.e. to operate its indoor, sit-down restaurant) was frustrated by the pandemic-related closure order.

## Conclusion

This decision provides hope for commercial tenants (and anxiety for commercial landlords) still engaged in rent disputes stemming from the COVID-19 business shut down orders. The commercial real estate and retail business communities are watching with great interest as this legal battle unfolds.

Christopher Kenney is a founding partner of Kenney & Sams, P.C., Boston, Mass.

New England Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540