

TYPES NOT MAPPED YET May 17, 2023 | TTR not mapped yet | Jeffrey N. Brown, Aya Elalami

Landlords and tenants: Pay close attention to your force majeure provisions

Since March 2020, California commercial landlords and tenants have faced financial ramifications as a result of COVID-19 and associated ordinances which imposed occupancy restrictions and mask and vaccination requirements. Various legal issues have arisen from the pandemic and its impact on business. One such issue that has arisen is: Does COVID-19, a global pandemic, fall within the protections of a lease's "*force majeure*" provision and, therefore, excuse the tenant from paying rent? The Court in [West Pueblo Partners, LLC v. Stone Brewing Co., LLC](#) held that the parties must focus on the terms of the *force majeure* provision to answer that question.

In *West Pueblo Partners, LLC*, tenant Stone Brewing Co., LLC ("Stone") entered into a 20-year building Lease with landlord West Pueblo Partners, LLC ("West Pueblo"). The Lease provided that without West Pueblo's permission, Stone could only use the leased Premises as a full service restaurant and brewery. The Lease also contained a *force majeure* provision:

If either Party is delayed, interrupted or prevented from performing any of its obligations under this Lease, and such delay, interruption or prevention is due to fire, act of God, governmental act or failure to act...or any cause outside the reasonable control of that Party, then the time for performance of the affected obligations of the Party shall be extended for a period equivalent to the period of such delay, interruption or prevention.

Stone took possession of the Premises in January 2018. From March 20, 2020 through March 2, 2021, Stone was forced to comply with drastically changing COVID-19 dine-in ordinances, including prohibitions against indoor and on-premises dining. Stone described these restrictions as "devastat[ing]," and as a result, Stone withheld rent from December 2020 through March 2021, contending that COVID-19 excused or deferred its obligation to pay rent based on the *force majeure* provision.

Landlord West Pueblo sued Stone for the rent that would ordinarily be due for that time period. In ruling in favor of Landlord West Pueblo, the Court of Appeal applied the plain meaning of the *force majeure* provision to hold that Stone was not "delayed, interrupted or prevented from" paying rent due to COVID-19. The Court found Stone had the financial resources to pay rent to West Pueblo. Indeed, Stone conceded that it could and, therefore, the Court found the provision did not apply because Stone was able to meet its obligations under the Lease by making timely payments. The Court noted that a "mere increase in expense does not excuse the performance unless there exists extreme and unreasonable difficulty, expense, injury, or loss involved." Essentially, because Stone was able to make the rental payments, it was still responsible for the rent.

The Court did note that "the COVID-19 pandemic qualified as a *force majeure* event" under the Lease, *i.e.*, "is due to fire, act of God, governmental act or failure to act ... or any cause outside the reasonable control of that Party." That the Tenant could still make its rent precluded the Tenant from taking advantage of that provision.

The moral of the story? As we have explained previously, it sometimes is all about the drafting. Be careful in drafting what some people call "boilerplate" provisions, as they may become all-important in a subsequent lawsuit.



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