Ontario Courts consider force majeure clause in the context of COVID-19

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In *Durham Sports Barn Inc. Bankruptcy Proposal*, 2020 ONSC 5938 (Durham), the Ontario Superior Court of Justice (the Court) found in favour of the landlord when interpreting a commercial lease's *force majeure* clause in the context of a tenant seeking relief from the obligation to pay rent when it was statutorily prevented from operating due to COVID-19.

Background

Durham Sports Barn Inc. (the Tenant) operates an athletic performance centre at a building in Oshawa, Ontario (the Leased Premises). 1213423 Ontario Inc. (the Landlord) rented the Leased Premises to the Tenant for 10 years commencing at the end of 2015 pursuant to two leases (the Leases). Due to public health mandated closures of non-essential businesses in light of the pandemic, the Tenant closed for business from March 18, 2020 until May 25, 2020. The Tenant began a phased re-opening from May 25, 2020 to July 25, 2020, and resumed full operations in August. The Landlord did not apply for any federal government assistance during this time to assist the Tenant.

Among other matters considered in the case, the Tenant requested that the Court relieve it of its obligations to pay rent during the time of mandated shutdown and to allow the Tenant to pay a prorated amount of rent during the period of limited operations.

Issue

Is the Tenant is liable to pay rent during the period of mandatory closure ordered by public health authorities due to the COVID-19 pandemic.

Discussion

The Tenant argued that the Leases were frustrated during the mandated shut down and such a closure is a *force majeure*. While the Tenant argued the doctrine of frustration, there was no consideration of this argument (either favourable or unfavourable) in the

Court's reasons and the remainder of this piece focuses on the Court's consideration of the *force majeure* clause. The Leases contained a *force majeure* clause that excluded the Landlord from its obligation to provide the Tenant with quiet enjoyment of the Leased Premises as a result of the mandatory closure.

The Tenant attempted to rely on *Hengyun International Investment Commerce Inc. c. 9368-7614 Quebec Inc*., 2020 QCCS 2251 (Hengyun) in which a tenant was relieved from paying rent due to pandemic lockdowns. The Court in Hengyun held that, despite the fact that the *force majeure* term in the applicable lease maintained the tenant's obligation to pay rent in such circumstances, the concept of *superior force* in the Civil Code of Québec meant the tenant was relieved of its rent obligations when closure was required.

However, contrary to Hengyun, the Court in Durham concluded that the Tenant was not relieved of any portion of rent based on the following six items:

1. The *force majeure* clause in the Leases relieved the Landlord from providing quiet enjoyment but did not relieve the Tenant from rent payment obligations;
2. The obligation of the Landlord to provide quiet enjoyment of the Leased Premises is subject to payment of rent, and therefore such an obligation did not arise once rent was not paid;
3. The Landlord was not advised prior to the commencement of the claim of the Tenant's position regarding relief or abatement of rent and therefore had no opportunity to help the Tenant;
4. The language of the *force majeure* clause is different from Hengyun and the doctrine of *superior force* does not apply in Ontario;
5. Government legislation that prevented the eviction of small business tenants did not suspend the payment of rent; and
6. The Court distinguished the case *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (CCAA), *Comark Holdings Inc., Re* (June 3, 2020), Doc. Toronto CV-20-00642013-00CL (Ont. S.C.J.) (Comark), 2020 QCCS 2251 which the Tenant attempted to rely upon for rent relief and stated Comark "cannot stand for the proposition that a precedent for long term rental relief during the shutdown or the limited operation period has been created."

Moving Forward

The *force majeure* clause has been the subject of much debate since the start of the COVID-19 pandemic. See our article on Contractual risks amid the COVID-19 outbreak for more information. Durham provides landlords in common-law jurisdictions with some clarity as to how such a clause is likely to be interpreted. However, given the unique nature of the Leases and of the *force majeure* clauses in this case (which was not reproduced in the decision), one can expect that increased judicial consideration of similar clauses will arise in the coming months. One particularly relevant question is how much, if any, rent relief or abatement the Court may consider fair in instances where a tenant has requested rent relief or abatement from a landlord.

Please reach out to your BLG lawyer or one of the key contacts listed below with any questions you may have.

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