COVID-19 Renders “Peaceful Enjoyment” impossible and relieves tenant from obligation to pay rent

July 23, 2020

A long-awaited first decision was rendered on July 16, 2020 by the Superior Court of Québec in relation to the obligation of paying rent during the COVID-19 pandemic. Such decision is favourable to tenants but may still be appealed or distinguished in future decisions. We will have to wait several months before understanding the trend of the Québec courts on this issue. The following is a summary of such decision.

On July 16, 2020, in the matter of *Hengyun International Investment Commerce Inc. v. 9368-7614 Québec Inc.*, the Québec Superior Court released one of its first decisions addressing a commercial tenant’s obligation to pay rent during the COVID-19 pandemic.

Hengyung International Investment Commerce Inc. (the Landlord) leases premises in Montréal (the Lease) to VitalMaxx Fitness Centre Inc. for use as a gym. The Lease was subsequently assigned to 9368-7614 Québec Inc. (the Tenant). Unfortunately, the relationship between these parties turned sour almost immediately, with each eventually initiating several applications for injunctive relief.

In the case at hand, the Court assessed multiple claims made by the Tenant for rent reduction, one of which related to the period between March and June of 2020. During such period, the Tenant was forced by government decree to close its gym as it was deemed to be a “non-essential service” (the Decree) by the Québec government. The Tenant claimed that the Decree constituted a superior force (*force majeure*) and that it should therefore be relieved from its obligation to pay rent during the entirety of the previously mentioned period.

As might be expected, the Landlord opposed the Tenant’s position, arguing that superior force had not occurred, and that even in the case of superior force, the specific provision under the Lease dealing with it obligated the Tenant to pay rent.

As part of its analysis, the Court reviewed the preconditions required by Article 1470 of the *Civil Code of Québec* to establish the occurrence of an event of “superior force”, namely:

1. **An unforeseeable event**: An event is unforeseeable if it could not be foreseen when the obligation was contracted; and
2. **An irresistible event**: An event is irresistible if it would prevent the performance of the subject obligation by anyone, not just the debtor.

The first criterion is considered to be satisfied by the Court, as COVID-19 could not be foreseen when the Lease was executed in 2017.

With respect to the second criterion, the Tenant purports that such criterion is also satisfied as the Decree prevented the Tenant from operating and generating revenue to allow it to pay its rent. The Court indeed considered this second criterion to be satisfied, but for an entirely different reason. The Court refuted the "subjective" approach to irresistibility proposed by the Tenant. In order to be considered as irresistible, the event at issue must prevent any tenant placed in the same circumstances from paying its rent notwithstanding its financial capacity.

However, the Court considered that the Decree was an event, both "unforeseeable" and "irresistible", of superior force that prevented the Landlord from fulfilling its obligation to provide the Tenant with peaceable enjoyment of the premises and that such obligation is an obligation of result, which may be limited, but not completely excluded, by the parties to a commercial lease. In the circumstances, the Court applied Article 1694 of the *Civil Code of Québec* and released the Tenant from its correlative obligation to pay rent.

Moreover, the Court refused to apply the "unavoidable delay" provision set forth in the Lease pursuant to which the Tenant would still have to pay its rent notwithstanding the occurrence of an unavoidable delay. Per the Court, such a clause only governs obligations the performance of which can be delayed but not obligations that can not be performed at all. In instance, given that the Court considered that the Landlord's obligation to provide peaceable enjoyment of the premises during such period was no longer possible, the Landlord could therefore not claim the payment of the corresponding rent.

Should you have any questions or concerns regarding your obligations as landlord or tenant in light of the foregoing decision, please do not hesitate to contact a member of our leasing team

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