Alert

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Commercial Tenants Raising Impossibility of Performance and Frustration of Purpose

New York courts have applied the common law doctrines of Impossibility of Performance and Frustration of Purpose narrowly and strictly and only in limited circumstances when raised by commercial tenants who refused to pay rent in situations analogous to the COVID-19 pandemic. In both instances, New York courts have made clear that economic hardship or difficulty, even if severe, is not sufficient to excuse the performance of obligations under a lease, and the event in question must be wholly unforeseeable. New York courts have declined to rescind leases or to excuse a tenant's failure to pay rent in circumstances as dire as the September 11 terrorist attacks, the 2008 global financial crisis, and Hurricane Sandy. Notably, cases from the 1918 influenza — a situation similar to the current pandemic — have also noted that parties could have drafted carve-outs to their contracts in advance to protect themselves from such an occurrence. Clear contractual language requiring rent to be paid without mitigation or "without setoff, abatement, or deduction whatsoever" only strengthens the position that rent obligations cannot be avoided. It is therefore not likely that a commercial tenant would be able to avail itself of the defenses of impossibility or frustration of purpose to avoid paying rent due to the COVID-19 pandemic.*

Governing Principles

As a general matter, New York courts recognize that "once a party to a contract has made a promise, that party must perform or respond in damages for its failure, even when unforeseen circumstances make performance burdensome." *Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d 900, 902 (1987). Therefore, defenses like impossibility of performance and frustration of purpose are applied narrowly. *Id.*; *Crown IT Servs., Inc. v. Koval-Olsen*, 11 A.D.3d 263, 265 (1st Dep't 2004).

A lease is subject to the same rules of construction as any other contract, and once it is made, "only in unusual circumstances will a court relieve the parties of the duty of abiding by it." *George Backer Management Corp. v. Acme Quilting Co.*, 46 N.Y.2d 211, 217–18 (1978). "[I]t is a basic contract principle that when parties set down their agreement in a clear, complete document, their writing should … be enforced according to its terms. [Courts] have also emphasized this rule's special import in the context of real property transactions, where commercial certainty is a paramount concern, and where … the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length." *TAG 380, LLC v. ComMet 380, Inc.*, 10 N.Y.3d 507, 512–13 (2008).

In this vein, "[i]t is well settled that '[a] covenant to pay rent at a specified time … is an essential part of the bargain as it represents the consideration to be received for permitting the tenant to remain in possession of the property of the landlord,'" and such provisions are enforced by New York courts. *Medlock Crossing Shopping Ctr. Duluth, Ga. LP v. Kitchen & Bath Studio, Inc.*, 126 A.D.3d 1463, 1464–65 (3d Dep't 2015) (citation omitted) found commercial tenant liable for unpaid rent based on plain language of the lease irrespective of whether the landlord locked tenant out or tenant abandoned the premises as the covenant to pay rent survives landlord's reentry to the premises upon tenant's default).

The appellate courts in New York have steadfastly enforced "without set off, deduction, or abatement" provisions as an independent covenant, even where the tenant has a defense to rent payment or a claim against the landlord. *See Cut-Outs, Inc. v. Man Yun Real Estate Corp.*, 286 A.D.2d 258, 258, 260 (1st Dep't 2001). Cut-Outs Inc., reversed judgment in favor of plaintiff-tenant and awarded judgment for unpaid rent to defendant-landlord where plaintiff alleged partial eviction due to defendant's repair work, but the lease contained provisions "that specifically authorized defendant to perform the work in question without incurring liability to plaintiff, and without abating plaintiff's obligation to pay rent. Plaintiff's argument that the exculpatory provisions do not protect

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acts that would otherwise constitute a partial actual eviction or constructive eviction, if accepted, would largely read them out of the lease."

In *Pacific Coast Silks, LLC v. 247 Realty, LLC*, 76 A.D.3d 167, 170, 173, 176 (1st Dep't 2010) the lease rider contained a provision that the failure to complete landlord's repair work still required that "Tenant shall pay the entire Annual Rental Rate and additional rent without any offsets or abatement on the Commencement Date," the tenant could not establish constructive or actual partial eviction based on lack of elevator service, and that "the lease must be understood to provide that the tenant's obligations thereunder, including the obligations to pay rent and to notify the landlord of any claimed default, began … regardless of the lack of elevator service."

Accordingly, commercial lease requirements for payment of rent are generally enforced where the lease language clearly provides for the payment of rent without mitigation, or "without set off, deduction, or abatement," even in scenarios where the failure to pay is related to a catastrophe. *Axginc Corp. v. Plaza Automall, Ltd.*, 759 Fed. App'x 26, 29, 31 (2d Cir. 2018) found defenses of impossibility of performance and frustration of purpose barred by lease language that states "Tenant hereby waives any and all statutory defenses … and any other defenses Tenant may have in any action brought by Landlord for … failure to pay rent" even where defendant could not obtain flood insurance in the aftermath of Hurricane Sandy and affirmed judgment in favor of lessor.

With these general principles and defenses in mind, we turn to a discussion specific to impossibility of performance and frustration of purpose, respectively.

Impossibility of Performance

The defense of impossibility of performance is applied narrowly. *Kel Kim Corp.*, 70 N.Y.2d at 902. New York courts adopt an "objective impossibility" standard with regard to impossibility of performance "[i]mpossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract." *Id.* "The excuse of impossibility is generally limited to the destruction of the means of performance by an act of God, vis major (Latin for "superior force" and synonymous with act of God and force majeure), or by law." *Kolodin v. Valenti*, 115 A.D.3d 197, 200 (1st Dep't 2014) (citation and quotation marks omitted). "Thus, where impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused." *407 East 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 281 (1968).

New York courts have narrowly applied this doctrine to commercial tenant rent disputes in disaster scenarios similar to the current COVID-19 pandemic. In *Trinity Ctr. v. Wall St. Correspondents*, 798 N.Y.S.2d 348, 4 Misc. 3d 1026(A), at *1 (Sup. Ct. N.Y. Co. 2004) defendant-tenant entered into a five-year lease for space in a building in October 2000. After the 9/11 terrorist attacks in 2001, the area was cordoned off by the New York City Police Department (NYPD) and the U.S. military. *Id.* Lessor promised to have the building back to full operation and available by October 10, 2002. *Id.* Defendant-Tenant gave notice that it was vacating the premises and lessor commenced an action for liquidated damages and the rent arrearage. *Id.* at *2. In considering defendant-tenant's cross-motion for summary judgment on the doctrine of impossibility of performance, the court denied the motion, holding, *inter alia*, that:

> The tragic events of 9/11 do not relieve defendants of their obligations under the lease. In their application for federal assistance, [defendant-tenant] stated that after September 11, as the operations at [defendant-tenant] "scaled down, the company has fewer employees and our lease for 55 Broadway is still running we decided to go back to this smaller space." A down turn in the economy partially resulting from the 9/11 tragedy, however, is not a valid reason for relieving a party from its responsibilities under a lease.

Id. at *5.

This holding is consistent with the principal that impossibility of performance does not excuse a commercial tenant of its lease obligations, even when financial difficulty or economic hardship is occasioned by a tragic event. This principal was echoed by the Appellate Division, First

Department during another recent financial crisis scenario. In *Urban Archaeology Ltd v 207 E. 57th St. LLC*, 68 A.D.3d 562, 562 (1st Dep't 2009), plaintiff-tenant claimed that it was excused from performing its obligations under the lease due to the impact of the economic downturn. Considering the doctrine of impossibility, the Appellate Division, First Department held that "impossibility occasioned by financial hardship does not excuse performance of a contract." *Id*. *See generally, Flushing Sav. Bank, FSB v. Yossi's Heimishe Bakery Inc.*, 2011 N.Y. Misc. LEXIS 5053, at *1, 4–5, 8 (Sup. Ct. N.Y. Co. 2011) (granting summary judgment for bank and dismissing bakery's counterclaim raising impossibility of performance, stating "[s]uccinctly put, that the [b]akery may be one of a multitude of business entities which has suffered severely as a result of the global financial crisis does not excuse its performance under the contract."). In affirming the lower court's decision granting defendant's motion to dismiss plaintiff's complaint, the court noted that "an economic downturn could have been foreseen or guarded against in the lease," and affirmed the grant of defendant's motion to dismiss plaintiff's complaint. 68 A.D.3d at 562.

During business closures related to Hurricane Sandy in 2012, the Second Circuit reached a similar result in the case of a defendant sub-lessee that raised arguments including commercial impracticability against its obligation to pay rent owed where it could not obtain flood insurance in aftermath of the storm. In its discussion of the defense of impracticability, the court analyzed impracticability as synonymous with impossibility under New York law *Axginc Corp. v. Plaza Automall, Ltd*., 759 Fed. App'x 26, 29, 31 (2d Cir. 2018). On February 2, 2007, plaintiff entered into a 15 year lease with the City of New York Department of Small Business Services for a large parcel of waterfront land at South Brooklyn Marine Terminal (ground lease). *Axginc Corp. v. Plaza Automall*, No. 14-CV-4648 (ARR) (VMS), 2017 U.S. Dist. LEXIS 227928, at *2 (E.D.N.Y. Feb. 15, 2017). On February 27, 2007, plaintiff sub-leased a portion of that land to defendant sub-lessee to store its excess automobile inventory. *Id*. at *3–4. In 2012, Hurricane Sandy made landfall and destroyed lessee's inventory. *Id*. at *5. After some negotiations and lease adjustments whereby a new sublease was entered into (sublease), and a six-month period where no rent was paid, plaintiff filed for bankruptcy and terminated the ground lease, automatically terminating the sublease, and commenced an action seeking the rent owed from defendant sub-lessee. *Id*. at *8. Defendant sub-lessee raised numerous counterclaims and affirmative defenses including commercial impracticability based on its inability to obtain flood insurance. *Id*. at *2.

The lower court awarded summary judgment in plaintiff's favor, which the Second Circuit affirmed on appeal. Initially, the Second Circuit found this defense barred by the sublease, which stated that "Tenant hereby waives any and all statutory defenses … and any other defenses Tenant may have in any action brought by Landlord for … failure to pay rent." *Id*. at 29. This is similar to lease provisions that require the payment of rent "without offset, abatement, or deduction whatsoever." Next, the Second Circuit found that even if commercial impossibility could be raised, it would fail as a matter of law because, since Hurricane Sandy occurred before the signing of the sublease, "it was readily foreseeable that Plaza would subsequently experience difficulties in obtaining flood insurance coverage." *Id*. This case underscores two important points about treatment of impossibility by New York courts: lease language can preclude a tenant from asserting a defense, and, even if something is impossible to comply with (i.e. obtaining flood insurance for waterfront space after a hurricane), if it is foreseeable at the time of contracting then the defense of impossibility is unavailable. Notably, many leases require a tenant to obtain business interruption insurance for a certain number of months of rent, clearly indicating that the parties did foresee the possibility of the tenant's premises being unable to operate and relegating tenant to a specific remedy — the lease mandated insurance.

The legal analysis of impossibility set forth by the foregoing cases is buttressed by case law from the 1918 influenza epidemic. Although there were no New York cases on point, a decision reached by the Illinois Supreme Court held that where a school was closed due to the epidemic, the school district was still liable to pay its teachers who were ready and willing to work. *Phelps v. School Dist.*, 302 Ill. 193, 194 (Ill. 1922); see also *Crane v. School Dist.*, 95 Ore. 644 (Or. 1920) (affirming judgment in favor driver employed by school to be paid where school was closed due to influenza). The court in *Phelps* noted that the school district could have protected itself by including a provision in the contract that would have "exempt[ed] them from liability in the event of the school being closed on account of a contagious epidemic." 302 Ill. at 198. In the absence of this exemption the school therefore could not benefit from a condition omitted from its own contract. *Id*. at 197–98. The court also noted that "performance was not legally impossible," and that "when

a party contracts to do a thing without qualification, performance is not excused because by inevitable accident or other contingency not foreseen it becomes impossible for him to do that which he agreed to do." *Id*. The school closing "for the protection of the lives and health of the people of the community against the spread of a contagious epidemic," was lawful, and "[t]hat the school might be closed on that account was a contingency that might happen … does not alter the rights of the parties to the contract." *Id*. at 198. "[T]he closing of a school by the order of a school board or a board of health is not the act of God." *Id*. at 195–96 (citation and quotation marks omitted); *see also Crane*, 95 Ore. at 655 ("[T]he school was closed in obedience to the order of the health officer, and not otherwise, and hence it must follow that defendant's school was not closed by operation of law."). In *Phelps*, the court drew a helpful analogy to landlord-tenant disputes: "[I]n absence of a provision in the lease of a building to the contrary the destruction of the building *does not discharge the tenant from liability to pay the rent for the full term*." *Id*. at 198 (emphasis added). Notably, all leases contain a provision requiring a tenant to comply with all laws, ordinances, and governmental orders, without any carve-out for frustration of purpose or impossibility of performance. Thus, a tenant complying with a governmental shut-down order pursuant to its lease cannot seek to have the court engraft into the lease any exceptions not contained therein.

In sum, New York courts have been reluctant to apply the extreme common law doctrine of impossibility of performance, reserving its application for narrow circumstances. As these cases illustrate, legal impossibility requires objective impossibility, and even immensely difficult performance is not sufficient. This is borne out in cases like *Trinity Ctr.* and *Urban Archaeology*, where commercial tenants were not relieved of their financial obligations to pay rent due to impossibility based on effects of the September 11 terrorist attacks and the 2008 global financial crisis. Moreover, even severe financial difficulty or economic hardship are not grounds for excusing performance of a contract. *Urban Archaeology*, 68 A.D.3d 562. The conclusion that commercial tenants would not be able to avoid their rental obligations here is buttressed by *Phelps* and *Crane*: a pandemic-related closure is not an act of God or closure due to the operation of law relieving a party of its unmitigated contractual duties based on impossibility.

Additionally, the case law lends support to the argument that government-mandated closures due to the COVID-19 pandemic were not completely unforeseeable as is also required to assert impossibility of performance under the standard enunciated by New York courts. While cases like *Axginc* involved a lease entered into after the traumatic event, *Urban Archaeology* noted that an economic downturn was something that could be foreseeable and guarded against in the lease. 68 A.D.3d at 562. In the same way, a viral pandemic is something that could have been foreseen and guarded against in a contract because it has happened previously, however unlikely its reoccurrence may have been. *See Phelps*, 302 Ill. at 197–98 (Noting that school board could have protected itself by including a provision in the contract and stating "[i]t works no hardship on anyone to require school authorities to insert in the contract of employment a provision exempting them from liability in the event of the school being closed on account of a contagious epidemic."). Moreover, the severe acute respiratory syndrome (SARS) virus outbreak occurred only 18 years ago, and New York City has experienced numerous epidemics including yellow fever, cholera, polio, typhoid fever, and the influenza. See Nevius, James, "New York's Built Environment Was Shaped By Pandemics," Curbed New York (Mar. 19, 2020); Hazelwood, Madeleine, "Germ City: Epidemics Throughout New York's History," Museum of the City of New York (Oct. 23, 2018). The bottom line is that epidemics, pandemics, and plagues are not wholly unforeseeable. Indeed, we have seen various force majeure clauses in leases that specifically reference epidemics, pandemics, or plague, albeit that these provisions expressly carve out payment of rent as not being subject to force majeure. Finally, as *Axginc*, illustrates, unambiguous lease terms governing the payment of rent will be strictly construed, and will preclude impossibility of performance from being raised as a defense when the terms of a lease are clear that rent must be paid without mitigation or "without offset, abatement, or deduction whatsoever." 759 Fed. App'x at 29.

Frustration of Purpose

Frustration of purpose is a doctrine with similarly narrow application by New York courts in only limited circumstances. *Crown IT*, 11 A.D.3d at 265. Under New York law, frustration of purpose discharges a duty to perform under a contract where "an unforeseen event has occurred, which, **in the context of the entire transaction**, destroys the underlying reasons for performing the contract, even though performance is possible." *Gander Mt. Co. v. Islip U-Slip LLC*, 923 F. Supp.

2d 351, 359 (N.D.N.Y. 2013) (citation and quotation marks omitted). "'For a party to a contract to invoke frustration of purpose as a defense for nonperformance, the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense.'" *PPF Safeguard, LLC v. BCR Safeguard Holding, LLC*, 85 A.D.3d 506, 508 (1st Dep't 2011) (*quoting Crown IT*, 11 A.D.3d at 265). "The doctrine applies when a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract." *Id.* (citation and quotation marks omitted). "Discharge under [the frustration of purpose] doctrine has been limited to instances where a virtually cataclysmic, wholly unforeseeable event renders the contract valueless to one party." *A + E TV Networks, LLC v. Wish Factory*, No. 15-CV-1189 (DAB), 2016 U.S. Dist. LEXIS 33361, at *38 (S.D.N.Y. Mar. 11, 2016) (citation and quotation marks omitted). As with impossibility of performance, "New York law is clear that financial hardship, even to the point of insolvency, is not a defense to enforcement of a contract." *Id.* at *41 (finding that application of frustration of purpose doctrine in a situation of commercial impracticability means the defense fails as a matter of law); *see also Gander Mt.*, 923 F. Supp. 2d at 359 (discussing frustration of purpose and stating "[i]t is not enough that the transaction has become less profitable for the affected party or even that he will sustain a loss."); *Kate Spade & Co.*, 114 N.Y.S.3d 184, 63 Misc. 3d 1205(A), at *7 (N.Y. Civ. Ct. 2019) ("[T]here is no basis to rescind the Sublease based on Subtenant's theory that the purpose of the Sublease was frustrated. … Subtenant's nonperformance is based not on impossibility, but its own, unsupported determination of economic infeasibility.").

Frustration of purpose has been invoked by parties in the context of economic crises, and much like in cases of impossibility of performance, New York courts have rejected those claims. In *Sage Realty Corp. v. Jugobanka*, D.D. New York Agency, No. 95 Civ. 0323 (RJW), 1998 U.S. Dist. LEXIS 15756, at *1 (S.D.N.Y. Oct. 8, 1998), a landlord entered into a lease agreement with Jugobanka, a Yugoslavian banking corporation, in June of 1991. In April 1993, President Clinton issued an executive order implementing sanctions "which blocked all Yugoslavian entities from using or accessing any of their assets located in the United States." *Id.* at *2. Jugobanka's assets were frozen, its office sealed, and it ceased paying rent to the landlord in September 1994. *Id.* at *3. Landlord commenced an action seeking to recover all amounts due and owing under the lease. *Id.* The court denied Jugobanka's claim that it was not liable on grounds of frustration of purpose, finding that "the sanctions imposed on Jugobanka pursuant to the Executive Order were reasonably foreseeable by Jugobanka at the time of the execution of the lease." *Id.* at *11. For example, there were news articles in the media prior to the execution of the lease in June 1991 beginning to document the growing civil strife in Yugoslavia and deterioration between Yugoslavia and the United States. *Id.* at *8. Moreover, Jugobanka's principals were aware of these events and had personal knowledge that sanctions could be imposed that would close the bank. *Id.* at *9–11. Jugobanka argued that the relevant inquiry should be whether the total disintegration of Yugoslavia could have been foreseen. *Id.* at *8 n.2. The court rejected the argument concluding it was the sanctions from the executive order that closed its office, not the total disintegration of the country, and the proper inquiry was whether those sanctions were foreseeable. *Id.*

New York courts have also found broader and more dire economic crises, namely the 2008 global financial crisis, an insufficient basis on which to raise a frustration of purpose argument. In *Twin Holdings of Del. LLC v. CW Capital, LLC*, 906 N.Y.S.2d 784, 26 Misc. 3d 1214(A), at *1 (Sup. Ct. Nassau Co. 2010), plaintiffs entered into a contract to purchase a commercial building from defendant. Plaintiffs thereafter commenced an action in May 2009 alleging that defendant breached the loan agreement and, in part, sought a declaratory judgment that plaintiffs were temporarily excused from performance under the note based on impracticability or frustration of purpose. *Id.* at *2, 3. Plaintiffs argued that the decline in the real estate market was "a factor outside their control" that made it difficult for them to lease space in the building. *Id.* at *5. The court also stated that the complaint may be read as "alleging that the 'financial crisis' has made it more difficult for plaintiffs to obtain long term, fixed rate financing in order to pay off the loan made by defendants." *Id.* Plaintiffs further argued that these external factors beyond plaintiffs' control frustrated the purpose of the contract between the parties. *Id.* at *5–6. The court rejected this argument and acknowledged that the parties were sophisticated entities who knew the real estate industry, understood its cyclical nature and were aware of possible market volatility and its effects. *Id.* at *6. Therefore, "the non-occurrence of a decline in the real estate market and tight credit was clearly not a basic assumption on which the loan was made." *Id.* As this case illustrates, frustration of

purpose is a narrow ground on which New York courts will grant relief, especially on the claimed basis of economic hardship and when the agreement is between sophisticated parties.

The Second Circuit, in the *Axginc Corp.* case, also discussed frustration of purpose, but in the context of Hurricane Sandy. There, the court found frustration of purpose failed for the same reason that lessee's arguments about commercial impracticability failed: (i) the defense was precluded by language in the sublease ("Tenant hereby waives any and all statutory defenses … and any other defenses Tenant may have in any action brought by Landlord for … failure to pay rent."); and (ii) even if the defense of frustration of purpose was not precluded by the sublease language, inability to secure flood insurance in the months following Hurricane Sandy was not "unforeseeable" at the time the parties negotiated the sublease in the aftermath of the storm. 759 Fed. App'x at 29.

Additionally, the standard for frustration of purpose requires that the frustration must be **complete** for the duration of the underlying contract. *See PPF Safeguard, LLC*, 85 A.D.3d at 508 ("'For a party to a contract to invoke frustration of purpose as a defense for nonperformance, the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense.'") (citation omitted); *Gander Mt. Co. v. Islip U-Slip LLC*, 923 F. Supp. 2d 351, 359 (N.D.N.Y. 2013) (Under New York law, frustration of purpose discharges a duty to perform under a contract where "an unforeseen event has occurred, which, **in the context of the entire transaction**, destroys the underlying reasons for performing the contract, even though performance is possible.") (emphasis added) (citation and quotation marks omitted); *Robitzek Investing Co. v. Colonial Beacon Oil Co.*, 265 A.D. 749, 753 (1st Dep't 1943) ("Where there is complete frustration of performance of a contract by act of the government, cancellation is permissible. … Here there is not complete frustration. Defendant could have continued to operate the gasoline station at the demised premises within the terms of the lease though the volume of its business might have suffered substantial diminution because of the Federal regulatory measures."). *See also Walden Fed. S&L Ass'n v. Slane Co.*, No. 09 Civ. 1042 (DLC), 2011 U.S. Dist. LEXIS 37010, at *3 (S.D.N.Y. Apr. 5, 2011) ("New York courts do not recognize the defense of temporary commercial impracticability.").

Here, it is undisputed that COVID-19 related closures will not be permanent for the duration of many long-term commercial leases. Indeed, state and federal officials are moving towards gradual reopening of the economy. The foreseeable re-opening is in contrast to the cases where frustration of purpose has been found and contracts rescinded by New York courts: cases in which the entire purpose of the lessee or "the context of the **entire** transaction" was frustrated. *See Jack Kelly Partners LLC v. Zegelstein*, 140 A.D.3d 79, 81, 85 (1st Dep't 2016) (terminating lease on grounds of frustration of purpose where tenant leased space for an office building but it was later discovered that certificate of occupancy "required that the leased premises be used only for residential purposes"). Additionally, in most instances related to the COVID-19 pandemic, it is tenant's **continuous operation** of its business that is being frustrated; however, the payment of its lease mandated **rent obligations** is not being frustrated, especially with the government's stimulus package available to tenants, and especially where the tenant is a large, well-funded public company. As noted above, financial inability is not a ground for asserting frustration of purpose. Moreover, restaurant tenants are either implementing or have the ability to avail themselves of delivery or curb-side pickup, and frustration of purpose cannot be considered complete in their circumstance.

As with impossibility, the case law supports the argument that government-mandated closures due to the COVID-19 pandemic were not completely unforeseeable as is required to assert a defense of frustration of purpose under the standard enunciated by New York courts. Not only is financial hardship occasioned by a crisis an invalid ground to seek frustration of purpose, but the key inquiry in the foreseeability analysis is whether closures due to COVID-19 were foreseeable, not whether COVID-19 itself was foreseeable. *See Sage Realty*, 1998 U.S. Dist. LEXIS 15756, at *8 n.2 (distinguishing between the total collapse of Yugoslavia as irrelevant to the frustration of purpose inquiry and the imposition of government sanctions as the proper consideration). As history and cases like *Phelps* and *Crane* illustrate, biological pandemic-related closures have occurred before and could have been carved-out as exceptions to lease terms that otherwise require payment of rent by commercial tenants. *See Phelps*, 302 Ill. at 197–98 (noting that school board could have protected itself by including a provision in the contract and stating "[i]t works no hardship on

anyone to require school authorities to insert in the contract of employment a provision exempting them from liability in the event of the school being closed on account of a contagious epidemic."). Also, as *Axginc* illustrates, unambiguous lease terms governing the payment of rent will be strictly construed and will preclude impossibility of performance from being raised when the terms are clear that rent must be paid without mitigation. 759 Fed. App'x at 29. Finally, the doctrine requires complete, not merely temporary, frustration of purpose during the duration of a lease term, which is difficult to meet in the present circumstances where tenants will be able to resume normal operations in the aftermath of the COVID-19 crisis, and it is only the tenant's ability open its store to the general public that is being frustrated, not payment of rent.

Conclusion

New York courts treat the common law doctrines of impossibility of performance and frustration of purpose narrowly, applying them in only limited circumstances, with the former requiring "objective impossibility" and the latter requiring complete frustration of purpose for the duration of a lease term. In both instances, New York courts have made clear that economic hardship or financial difficulty, even if severe, are insufficient to excuse the performance of obligations under a lease. Additionally, the successful application of both doctrines requires that the event in question is wholly unforeseeable. Here, the historical example of the 1918 influenza epidemic highlights the extent to which the instant COVID-19 pandemic could possibly meet this standard. Moreover, New York courts have declined to apply these doctrines to relieve commercial tenants of their contractual obligations to pay rent in circumstances as dire as the September 11 terrorist attacks, the 2008 global financial crisis, and Hurricane Sandy. Finally, cases from the 1918 influenza have noted that parties could have drafted carve-outs to certain contract provisions to protect themselves from such an occurrence. Clear contractual language requiring rent to be paid without "offset, abatement, or deduction whatsoever" only strengthens the position that rent obligations cannot be avoided. Based on the foregoing, as well as for the general principles enunciated above, it is not likely that a commercial tenant would be able to avail itself of the defenses of impossibility or frustration of purpose to avoid paying rent due to the COVID-19 pandemic.

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* This memorandum does not deal with force majeure that is governed by the contractual language agreed to by the parties.