Whose Risk? Impossibility and Frustration of Purpose in Michigan Leases

November 2, 2023

Following the COVID-19 pandemic, many parties and jurisdictions grappled with how shutdown orders affected their private contract rights. **Our commentary from March 2020** is still a good starting point for evaluating these issues. Earlier this month, in *National Retail Properties, LP v Fitness International, LLC* [1], the Michigan Court of Appeals held that a lease provision where the tenant agreed to "comply with all applicable statutes, ordinances, rules, regulations, orders, covenants and restrictions of record" at its cost meant that the tenant assumed all risk that government regulations might later bar or limit its intended use of the property.

The tenant operated two fitness facilities at properties owned by the landlord. After Michigan issued orders preventing gyms from operating during the pandemic, the tenant withheld rent for two months. This lawsuit ensued, with the landlord seeking to collect past-due rent and the tenant seeking abatement for a longer period.

Initially, the tenant won; but the Michigan Court of Appeals reversed. Its decision centered on the tenant defenses of frustration of purpose and impossibility. Both seek to excuse nonperformance; but the latter is more restrictive, only applying when performance is objectively impossible.

The Court of Appeals reasoned that because the tenant agreed to comply with governmental orders regulating the use of the premises at its sole expense, it cannot claim frustration of purpose. The doctrine of frustration of purpose only applies if the party asserting the doctrine did not assume the risk on which the claim is based. Similarly, the doctrine of impossibility does not apply where a party assumes the risk of performance despite potential impracticability. The tenant expressly agreed to comply with governmental orders regulating its use at its sole cost, and thus is barred from claiming impossibility.

The court also explained that when impossibility is based on a government order, "[t]he regulation or order must directly affect a party's performance[.]" [2] Here, the orders did not prohibit the act of paying rent; so, performance was not legally impossible. Factually, the tenant relied on "unsupported claims" that paying rent while shutdown orders prevented it from earning revenue would cause the tenant an extreme or unreasonable loss. Absent evidence that the tenant lacked financial wherewithal to pay rent, this was insufficient to support either impossibility or frustration of purpose.

Critically, the outcome in this case depended on the specific language in the lease. Please contact the authors or your Miller Canfield attorney with further questions about how these and related principles may apply to your circumstances.

[1] *National Retail Properties, LP v Fitness International, LLC*, unpublished per curiam opinion of the Court of Appeals, issued October 12, 2023 (Docket No. 363909).

[2] Restatement (Second) of Contracts § 264, comment b.