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Florida Appellate Court Says Tenant Cannot Use Force Majeure Clause as Weapon Against Landlord

Article
05.22.2023

Last week, Florida's Second District Court of Appeal handed down a pro-landlord decision arising out of the COVID-19 pandemic. See *Fitness International, LLC v. 93FLRPT, LLC, No. 2D22-1182, May 10, 2023*. One week later Florida's Third District Court of Appeal reversed a summary judgment in favor of the same tenant involving the same force majeure clause in a lease with a different landlord and remanded the case to the trial court to enter judgment for landlord. *See Vereit Real Estate, L.P. v. Fitness International, LLC, No. 3D22-1273, May 17, 2023.*

While both decisions turn in large part on the specific language of the leases at issue, the Second District Court of Appeal's analysis (the Third District Court of Appeal's analysis is similar) is instructive and could have far-reaching implications for any commercial property landlord, not just in Florida. It provides guidance for drafting leases, specifically with regards to the "use" provisions and the force majeure clause. In particular, because force majeure clauses excuse performance and are not "opt-out" clauses, the court expressly rejected the tenant's attempt to use the force majeure clause offensively to support affirmative relief against the landlord.

The case involved LA Fitness, as tenant, who sued the landlord for breach of the lease and declaratory relief seeking a refund of rent paid during the 75-day government-mandated shutdown of health clubs in Florida. LA Fitness alleged the force majeure clause in the lease and the common law doctrines of impossibility, impracticability, and frustration of purpose excused the obligation

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to pay rent during the shutdown. To support the claims, LA Fitness relied on the lease (i) "use" provision by which the landlord "warranted" LA Fitness had the right to operate a health club in the leased premises, and (ii) force majeure clause, which LA Fitness maintained excused the payment of rent because the landlord could not fulfill that warranty. Alternatively, LA Fitness claimed the government shutdown orders were restrictive laws that prevented LA Fitness from performing under the lease and the pandemic and resulting governmental orders were not foreseeable, vitiated the essential purpose of the lease, and made payment of rent an "impracticable" financial burden.

LA Fitness and the landlord filed competing motions for summary judgment and the court granted the landlord's motion. LA Fitness appealed and the appellate court, recognizing that all of LA Fitness' arguments hinged on the premise that the landlord breached the lease because the landlord warranted LA Fitness would have the continuous right to operate a health club on the premises, disagreed with that premise and rejected all of LA Fitness' arguments. Declining to rewrite the parties' lease and finding the lease language unambiguous when read together as a whole, the court concluded neither the force majeure clause nor the common law doctrines excused LA Fitness from paying rent. Accordingly, the appellate court affirmed the judgment in favor of landlord.

Central to the court's analysis of the force majeure clause was its interpretation of the use provision in the lease. On appeal, LA Fitness argued that under that use provision, the landlord warranted and guaranteed LA Fitness the right to operate a health club throughout the term of the lease and assumed a duty to ensure such right to operate without restrictions. Thus, LA Fitness argued, the landlord breached that duty by failing to refund the rent paid during the shutdown. Reading the use provision together with other provisions addressing LA Fitness' use of the premises, including that LA Fitness could "change" the use, choose not to open at all, or once open, could "cease operating," the court determined that the landlord "warranted" only that LA Fitness' use of the premises as a health club would not violate any exclusive use rights of any existing or future tenant.

In fact, the court found nothing in the plain language of the various provisions addressing "use" in the lease guaranteed that LA Fitness could operate a "health club" or use the premises without the risk of government restrictions. Instead, the court found the lease merely guaranteed LA Fitness the right to operate the premises for any of the "uses permitted" under the lease – i.e., "any" use as long as such use was not "illegal" -- and did not conflict with other tenant's exclusive use rights or no use at all. Thus, the court concluded the landlord performed because the landlord provided LA Fitness with possession and any restricted use of the premises was imposed by the government, not the landlord.

Next, the court considered whether the force majeure clause excused LA Fitness' obligation to pay rent. The specific clause in the lease excused the performance of any "act required" under the lease when "either party is delayed or hindered in or prevented from performing such "act" by "restrictive laws," but expressly excluded delays or failure to perform due to inability to pay (i.e., "lack of funds") or that were curable by payment of money. The quoted language was critical to the court's conclusion that the force majeure event, the government-mandated restrictions, did not delay or hinder or prevent the landlord

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from performing any "act required" of the landlord under the lease because the landlord did not warrant, and had no duty to ensure, any particular use by LA Fitness under the lease.

Likewise, even though the government-mandated restrictions were "restrictive laws," the restrictive laws did not delay, hinder, or prevent LA Fitness from performing any act required under the lease. First, as the court explained, the lease did not require LA Fitness to operate a health club. Rather, the lease simply stated a health club is a "permissible" use. Secondly, the restrictive laws did not prevent LA Fitness from paying rent. Indeed, LA Fitness paid the rent.

In the court's reasoning: (i) LA Fitness (not the landlord) assumed the risk that the primary use could become difficult or impossible; (ii) the landlord did not guarantee LA Fitness' ability to operate a health club continuously during the term; and (iii) the landlord did not agree to forgive LA Fitness' obligation to pay rent if restrictive laws prevented LA Fitness's intended use. Under the plain language of the lease read as a whole, the court refused to rewrite the lease to relieve LA Fitness from effects of a foreseeable risk.

Turning from the lease, the court also rejected LA Fitness' arguments for relief under the common law doctrines of impossibility, impracticability, and frustration. The court found that LA Fitness' obligation to pay rent was not impossible or impracticable because LA Fitness paid the rent and at most the government-mandated restrictions made such obligation to pay merely "inconvenient, profitless, and expensive," which are insufficient to satisfy the legal requirements of impossibility and/or impracticability. And, because landlord was not responsible for the disruption, the landlord did not frustrate LA Fitness' right to operate a health club throughout the term without restrictions. Any frustration was due to government-mandated restrictions over which the landlord had no control; and such frustration was foreseeable since under the lease, restrictive laws and government restrictions did not relieve either LA Fitness or the landlord from performing the lease.

Synthesizing the case down, this court's decision is a strong reminder that the whole lease is relevant to, and may affect, how a court construes a force majeure clause. In fact, the court found little precedential value, and gave no weight, to decisions from other state and bankruptcy courts addressing tenants' claims for relief from governmental restrictions arising from the COVID-19 pandemic. Here are some takeaways from the court's decision for landlords as they draft leases:

1. Landlords may consider "permissive" use language in the lease, permitting a variety of uses, rather than requiring and guarantying a specific fixed use. Alternatively, the landlord should provide the tenant with a right to "change" the use on prior notice and consent (not to be unreasonably withheld), or to "go dark" as long as rent is paid.
2. Landlords should make clear in the lease that a tenant's obligation to pay rent is not conditioned on the tenant's ability to operate the intended use continuously from the premises. The obligation to pay rent is an independent covenant of the tenant not tied to any obligation of the landlord in the lease; and

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3. Consider a narrow force majeure clause like the landlord's clause in the LA Fitness lease and avoid language that may be construed broadly to allow a tenant to do more than be excused from performance of a required obligation or opt-out from such performance. The force majeure clause should not include language enabling a tenant to use the clause as a "weapon," i.e., supporting an affirmative claim against the landlord, such as, obtaining a refund of rent as LA Fitness sought to do. Limit the clause to serve as a shield only, excusing performance of a required act when a specified or designated event occurs.

Of course, while the foregoing recommendations must be considered on a case-by-case basis and will be affected by the specifics of the property and the parties' needs and requirements, this case certainly provides opportunities for landlords to use the "whole of" the lease to protect in the future against the effect of occurrences similar to the recent pandemic.