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Landlord/Tenant Disputes During COVID-19: Who Has the Upper Hand?

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By Chamberlain Hrdlicka's Stephanie Frieze and Jennifer Garner

Many workplaces shut down for the COVID-19 pandemic, and WeWork took some heat for keeping its buildings open. Many WeWork tenants feel obligated to pay rent – even though they’re abiding by the social distancing guidelines. Chamberlain Hrdlicka’s Stephanie Friese and Jennifer Garner, a law firm in Atlanta, share insights into how WeWork’s contract works as it relates to force majeure



Friese

provisions, typical protections afforded to renters, how the pandemic is raising other issues for landlords; and potential legal implications or claims against landlords for allowing common areas and co-working environments to remain open.

Q: What terms/provisions do not excuse the payment of rent?

A: In the context of COVID-19, there are very few, if any, lease provisions that would excuse the payment of rent. At the outset of COVID-19, many tenants were claiming reliance on force majeure clauses. These clauses excuse non-performance of some lease obligations if an unforeseeable circumstance occurs and if that circumstance renders the party unable to perform, despite its best efforts. However, a force majeure clause does not excuse non-performance based on claims of economic hardship and changing economic conditions. As such, if the clause does not specifically contemplate worsening economic conditions as a “force majeure” event, a provision of this type will not typically relieve a party from a payment obligation.

Q: Will typical protections afforded to renters apply?

A: In the commercial context, absent a bargained-for benefit in the lease, such as a termination clause or abatement right, there are few protections afforded to commercial tenants with respect to financial obligations under the lease. Most jurisdictions adhere to the common law doctrine of independent covenants, meaning the landlord’s obligations under a lease and a tenant’s obligation to pay rent are independent of one another, and

therefore, even if the landlord fails to uphold some of its responsibilities under the lease, that failure does not excuse the tenant's obligation to pay rent. Instead of offsetting rent, a tenant must seek redress in a separate action.



Garner

A: What other issues is the pandemic raising for landlords?

A: The hot topic this week has been how to respond to tenant requests for rent relief. Landlords are struggling to balance the lack of any legal obligation to grant rent relief, with the desire to have portfolios as stable as possible. They want tenants to be viable businesses and to inspire loyalty in tenants when renewal dates come around. Therefore, there is

recognition that landlords and tenants, along with lenders, are all “partners” in this economic catastrophe, and we all need to work together to get through this. So, if a tenant can demonstrate that it truly needs relief, and that it is not being opportunistic and using COVID as an excuse to restructure unfavorable lease terms, many landlords are willing to give deferrals. None of my clients are willing to agree to a complete forgiveness of rent, but they might defer it and amortize it back into the rent for repayment at a later date. Or, landlords may agree to draw down on letters of credit or security deposits and agree that tenant can replenish them later in the lease term. Or landlord's may agree to abate rent if tenants agree to extend the term of their leases or delete existing termination rights in the lease. This allows landlords to provide temporary relief while still enhancing, or at least stabilizing, their portfolios. The other overarching theme in what I am hearing is that it's too early for the parties to really assess the total damage. Most clients are collecting 85-90% of rents for April. We need to see what May looks like. We need to see the impact on retail tenants as stay-in-place orders are lifted. Many believe May will be more telling than April.



A: What are some potential legal implications or negligence claims that could arise for those who remain open?

A: Under premises liability law, a landlord is not required to insure the safety of a tenant or invitee, because under a lease, a landlord relinquishes possession to the tenant, so the tenant is presumed to have the requisite control over the premises to keep itself safe. There are exceptions to this rule if the landlord has superior knowledge of latent conditions. For example, if a landlord knows of a defect in the building, or if the building is contaminated with asbestos, the landlord may have a duty to disclose; and a landlord usually has a duty to undertake reasonable precautions to make premises safe. In the context of COVID-19, the virus is ostensibly spread by persons using the premises but is not a physical condition of the building. The landlord is likely in the best position to determine whether an infected person has been in the building, to notify other tenants of a known reported case, and to supplement janitorial services; but beyond these reasonable precautions, it is unlikely that the landlord has other superior knowledge to the general public, and therefore, negligence will be difficult to prove.

Since a landlord has greater control over common areas, as opposed to premises leased exclusively to a tenant, the landlord may be well-advised to take additional precautions in common areas, such as posting signs reminding invitees of social distancing measures, amending its rules and regulations to require patrons/tenants to wear masks while in common areas of the building, recommending only one person in an elevator at a time, providing hand sanitizer, closing areas of the building where patrons are likely to gather (such as cafés, gym facilities, and common area seating areas), and requiring waivers where access to common spaces is permitted.

Additionally, a landlord should be careful not to make itself the arbiter of whether a particular tenant business is an essential business. Such a determination is for the tenant itself, or for law enforcement, to determine.

And, as always, the landlord must balance its obligation to allow the tenant quiet enjoyment of the premises, while also taking reasonable precautions to protect health, safety, and welfare of other occupants where the landlord is in the better position to do so.

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