



News & Types: Client Advisories

# Court Rules COVID-19 Order Constitutes Force Majeure Partially Excusing Tenant's Rent Obligations

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Practices: Real Estate

As the COVID-19 pandemic began to unfold in the United States in early 2020, governors across the country issued executive orders forcing businesses to shutter in order to mitigate the spread of the disease. Many businesses turned to their leases, and specifically the force majeure provisions thereof, in search of relief from their rent payment obligations during the shutdown. Due to the unprecedented nature of the pandemic and subsequent shutdowns, there was little relevant case law to guide these businesses or their lawyers on this topic. However, in *In re: Hitz Restaurant Group*, the U.S. Bankruptcy Court for the Northern District of Illinois recently held that a lease's force majeure clause partially excused a tenant-debtor's obligation to pay rent as a result of Illinois Governor J.B. Pritzker's executive order prohibiting restaurants from serving food for on-premises consumption in response to the COVID-19 crisis.<sup>1</sup>

Hitz Restaurant Group ("Hitz") filed for Chapter 11 bankruptcy on February 24, 2020. On March 16, Governor Pritzker issued an executive order providing that "[a]ll businesses in the State of Illinois that offer food or beverages for on-premises consumption—including restaurants, bars, grocery stores, and food halls—must suspend service for and may not permit on-premises consumption."<sup>2</sup> As a result, Hitz was forced to shut down its operations and did not pay rent for the months of February, March, April, May or June 2020.

In *In re: Hitz Rest. Grp.*, the court considered whether the force majeure clause in Hitz's lease excused the tenant's obligation to pay rent coming due after Governor Pritzker's order went into effect (i.e., rent for the months of April through June). The force majeure clause provided as follows:

'Landlord and Tenant shall each be excused from performing its obligations or undertakings provided in this Lease, in the event, but only so long as the performance of any of its obligations are prevented or delayed, retarded or hindered by... laws, governmental action or inaction, orders of government... Lack of money shall not be grounds for Force Majeure.'<sup>3</sup>

The court found that this clause, identifying "government action" and "orders" as events excusing performance of obligations under the lease, "unambiguously applies, at least in part, to the rental payments which became due"<sup>4</sup> after Governor Pritzker's initial order shutting down restaurants and that the order was "unquestionably the proximate cause"<sup>5</sup> of Hitz's inability to pay rent for such months, as it prohibited Hitz from operating its restaurant for on-premises consumption.

The court rejected the creditor's argument that Hitz's failure to pay rent was the result of a "lack of money" and was therefore not excused by the force majeure clause. It explained that Hitz's argument was that *the governor's executive order*, and not a lack of money, was the proximate cause of its inability to generate revenue and pay rent. The court also noted that, contrary to another of the creditor's arguments, nothing in the force majeure clause requires a party to borrow money or otherwise find alternative sources of revenue when adversely impacted by government orders. Nevertheless, since Governor Pritzker's executive order "permitted and encouraged"<sup>6</sup> restaurants to serve food for off-premises consumption, the court held that Hitz is required to pay rent "in proportion to its reduced ability to generate revenue,"<sup>7</sup> which the court preliminarily determined to be 25% of the rent payments for April through June.

Although the *Hitz* decision is not binding on other courts, it provides much needed guidance to businesses and their lawyers, and persuasive authority to courts, grappling with force majeure clauses in the COVID-19 era. Furthermore, the case highlights the need for clarity and comprehensiveness in drafting force majeure provisions in the future. Tenants should be sure to include any "law, government order, including without limitation any executive order, government action or government inaction" in the list of events that excuse performance of the tenants' obligations under their leases. Time will tell whether other courts will follow the *Hitz* court's lead, but in the meantime this ruling sheds some welcome light on a murky area of the law.

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<sup>1</sup> *In re: Hitz Rest. Grp.*, Case No. 20-05012, 2020 WL 2924523 (Bankr. N.D. Ill. June 3, 2020).

<sup>2</sup> Ill. Exec. Order 2020-7

<sup>3</sup> See *In re: Hitz Rest. Grp.*, Case No. 20-05012, 2020 WL 2924523 at \*2 (Bankr. N.D. Ill. June 3, 2020).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Ill. Exec. Order 2020-7

<sup>7</sup> *In re: Hitz Rest. Grp.*, Case No. 20-05012, 2020 WL 2924523 at \*3 (Bankr. N.D. Ill. June 3, 2020).