

# To Our Clients and Friends

# Memorandum

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## *New York Court Issues Two New Decisions Rejecting Impossibility of Performance and Frustration of Performance as COVID Lease Defenses*

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In a prior client alert entitled *New York Court Rejects Impossibility of Performance as COVID Lease Defense* (Aug. 11, 2020), we identified two recent decisions in which New York courts at a preliminary stage rejected commercial tenants' arguments that conditions precipitated by the COVID-19 pandemic excused the tenant's payment of rent obligations under the impossibility of performance doctrine. In two recent cases decided on the merits, *1140 Broadway LLC v. Bold Food, LLC, KBFK Restaurant Corp.* (Index No. 652674/2020) (the "Bold Foods Case") and *35 East 75<sup>th</sup> Street Corporation v. Christian Louboutin L.L.C.* (Index No. 154883/2020) (the "Christian Louboutin Case"), a New York court has again rejected commercial tenants' defenses under the frustration of purpose and impossibility of performance doctrines, ultimately holding that commercial tenants remain on the hook for unpaid rent despite the impacts of the COVID-19 pandemic on their businesses.<sup>1</sup>

### **The Bold Foods Case**

On November 24, 2020, the New York County Supreme Court (Justice Arlene Bluth) granted the plaintiff landlord's motion for summary judgment as to liability with respect to the defendant tenant's obligation to pay rent during the COVID-19 pandemic. The landlord had sued tenant Bold Food, a hospitality group founded by Bobby Flay that leased office space at 1140 Broadway, and the lease guarantor, seeking damages for breach of the lease by failing to pay rent in February 2020 and thereafter and by vacating the space on June 30, 2020.

The tenant claimed that performance under the lease was objectively impossible due to the shutdown of tenant's hospitality business, and that, as a result, any default was excusable. Defendants also relied on the frustration of purpose doctrine, alleging that Bold Food's "primary services involve managing and

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<sup>1</sup> A similar result was also reached by the judge overseeing the bankruptcy of the parent company of Chuck E. Cheese in Texas, who denied the company's motion to abate rent payments at locations closed by state government shutdown orders in North Carolina, Washington, and California, holding that neither the leases nor applicable state laws allowed the company to abate or reduce its rent obligations. See *In re: CEC Ent. Inc.*, Case No. 20-33163 (S.D. Tex. Dec. 14, 2020), Dkt. No. 1482. The judge held that the applicable leases prohibited the company from delaying their rent obligations on account of a *force majeure*, and that the frustration of purpose doctrine was not available in any of the applicable states to excuse the payment of rent.

consulting for a group of restaurants” and the shutdown of restaurants “renders its business model unprofitable.” The Court rejected defendants’ arguments and held that the doctrine of frustration of purpose does not apply to generic office space “where the tenant rented office space, the tenant’s industry experienced a precipitous downfall and the tenant to no longer be able to pay the rent.” The Court also rejected defendants’ arguments under the impossibility of performance doctrine, noting that the tenant’s business of providing consulting services “was not shut down by any public health directives” ordering that all restaurants must close. The Court also acknowledged that “an industry [can change] overnight” and, as a result, the mere fact that a business is no longer useful or profitable does not allow a tenant to invoke the impossibility of performance defense.

### **The Christian Louboutin Case**

Similarly, in the *Christian Louboutin* Case, on December 8, 2020, Justice Bluth applied the same reasoning to a lease for retail space and granted the plaintiff landlord’s motion for summary judgment, finding that the COVID-19 pandemic did not excuse the defendant tenant’s performance under the commercial lease for retail space on Madison Avenue and East 75<sup>th</sup> Street. After the tenant stopped paying rent on March 3, 2020, the landlord sued the tenant, seeking damages for unpaid rent and additional rent under the lease. The tenant argued that the ongoing pandemic implicates the frustration of performance and impossibility of performance doctrines and “absolves defendant of its obligations under the lease.”

Although the Court acknowledged that the pandemic “has made it nearly impossible for some business to pay the rent,” and while it empathized “with the difficulties facing these establishments,” the Court ultimately granted the landlord’s motion for summary judgment. With respect to the frustration of purpose doctrine, the Court held that “unforeseen economic forces, even the horrendous effects of a deadly virus, do not automatically permit the Court to simply rip up a contract signed between two sophisticated parties.” The Court noted that such doctrine has no applicability where a defendant’s leased space still exists and the defendant is not prohibited from selling its products. Likewise, the Court found that the doctrine of impossibility of performance was inapplicable, “as the subject matter of the contract—the physical location of the retail store—is still intact” and the defendant “is permitted to sell its products.” The Court also noted that the parties contracted to include a *force majeure* clause that specifically provided that the defendant would not be excused from paying rent.

Unlike the cases discussed in our prior alert, these two decisions were decided on the full merits rather than at a preliminary stage. The decisions suggest that the doctrines of impossibility of performance and frustration of performance, which historically have been narrowly applied by courts, will not benefit tenants in the context of the COVID-19 pandemic, and commercial tenants will remain obligated to pay rent under their existing leases despite any negative impact to their businesses.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its contents. If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or an attorney listed below:

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