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Is The COVID-19 Pandemic an Excuse To Break a Contract?

**By Jarrett M. Behar**

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As we are all aware, at the beginning of the COVID-19 pandemic in March, Governor Cuomo issued an Executive Order that directed all “non-essential” businesses statewide to terminate their in-office personnel functions. Since then, even while businesses reopen, there are drastic restrictions on their ability to operate.

This unprecedented situation has created numerous legal questions, and many relate to contracts that were entered into pre-COVID and at a time where no one could have reasonably anticipated how COVID would fundamentally change the way that the entire world operates. While there are still no concrete answers to many of these questions given the relative newness of the pandemic, it is helpful to look at past circumstances to anticipate how these issues may play out in the business disputes that are sure to emerge from this situation. One such issue is the claim that a party's performance under a contract should be excused because that performance has become functionally or legally “impossible.”

About General Contract Law

General contract law in New York (and most places) provides that even when unforeseen circumstances make performance burdensome, parties to a contract have an obligation to perform. Think of a contract as an arm's length allocation of risks between parties. As a result, the defense that performance has become “impossible” has

been typically applied very narrowly by the courts. New York's highest court, after all, has recognized that this is an extreme defense that should only be made available if the subject matter of the contract has been truly destroyed or performance has been made objectively impossible. In addition, the event that produced the impossibility must not have been something that could have been foreseen or guarded against in the contract.

COVID-19 Contracts and The Foreseeable Future

In a general sense, the COVID-19 pandemic was not foreseeable to parties that entered into contractual agreements through most of 2019. Can the same be said about contracts that were entered into after the first case of COVID-19 was reported in China around December 31, 2019 or after the first case was reported in the United States around January 21, 2020? These questions will undoubtedly have to be answered by the courts as businesses become unable to perform their contractual obligations as a result of the COVID-19 pandemic and the ensuing governmentally-ordered restrictions.

One case resulting from a governmental act occurred in Orange County, New York. The purchaser in a real property sale contract attempted to rescind the contract after the relevant jurisdiction enacted a moratorium on subdivision approvals and then enacted a revised zoning code that prohibited the type of subdivision intended in the agreement. It was ultimately held that it was not unforeseeable that the town would change its zoning code in a manner rendering the planned subdivision impossible. The court said that this was especially true where sophisticated developers should either anticipate such a change or guard against it in the terms of the underlying contract.

In a similar situation, a prospective purchaser attempted to use the impossibility of performance defense based on the loss of almost all his personal assets as a result of the

Bernie Madoff scandal. The court found that the default should not be excused, and that the seller was entitled to retain the purchaser's down payment as liquidated damages for the breach.

Does the Law Protect Actions That Render Performance Impossible?

This is not to say that there is not law to support the use of the defense when an action truly renders performance impossible. In one case, a transportation company contracted with the City of New York to furnish, among other things, tugboat services for sanitation barges. When a port-wide strike occurred, there was no practical way for the company to provide the contracted for tugboat services to the City. As a result, the court found that the transportation company may not be liable to the City for its failure to provide the services as result of the impossibility of its performance.

Another example is one that arose from the September 11th tragedy. A court held that the untimely cancellation of an African safari could be excused by the impossibility of performance defense. It based its holding on the claim that it would be impossible to communicate the cancellation from Staten Island in a timely fashion in the immediate aftermath of the terrorist attacks.

Can COVID-19 Be Used as an Excuse?

While it will certainly be a reasonable claim that the COVID-19 pandemic was not foreseeable, it seems clear that the financial consequences of the pandemic will not, standing alone, be enough to excuse performance under a contract. If the performance is truly and objectively rendered impossible by a business closure that could not operate as a result of the Governor's various executive orders, then contractual performance may be excused, or, at the very least, the time to perform may be tolled until performance is no longer impossible.