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## THE REGISTER CITIZEN

# Today's Business: Landlords and tenants — Tug of war

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Business tenants and their landlords are confused about their rights and responsibilities resulting from the COVID-19 pandemic.

Many tenants have suffered a decline in revenue. Some have been restricted from operating altogether. With rent as a significant portion of overhead, tenants are looking to reduce their rent obligations and are asking whether they have a legal right to not pay during the pandemic.

Conversely, landlords depend on the rental income for their own obligations, including to their mortgage lenders.

This is a tough and unprecedented time for both landlords and tenants. There is no similar scenario — a global pandemic that has shut down society to such an extent — to use as a guide.

The parties should check their written lease agreement, if one exists. Many times, the parties anticipated disruptive events with a so-called “force majeure” provision. This is a legal term for when unforeseeable circumstances prevent a party from fulfilling a contract. This provision should be reviewed carefully to see whether a pandemic can be construed as a covered event, often listed among events such as unforeseen labor disputes, war and acts of God.

Even if a “force majeure” provision is in the lease, some provisions expressly do not excuse nonpayment of rent, even if an event qualifies as “force majeure.” It is likely that any court deciding whether a tenant’s nonpayment is justified will look to that provision and the contract as a whole, compelling the parties to adhere to their lease.

But what if the lease lacks such a provision? A tenant still may assert common law defenses to excuse payment of rent. “Impracticability” and “frustration of purpose” have similar elements that tenants would have to prove.

A tenant seeking to avoid requirements of its commercial lease might argue that performance, specifically the payment of rent, has been rendered impracticable. Under the doctrine of impracticability, a party claiming that a supervening event or contingency has prevented, and thus excused, a promised performance must demonstrate that:

- The event made the performance impracticable.
- The nonoccurrence of the event was a basic assumption on which the contract was made.
- The impracticability resulted without the fault of the party seeking to be excused.
- The party has not assumed a greater obligation than the law imposes.

The central inquiry to a claim of impracticability is whether the nonoccurrence of the alleged impracticable condition (here, a global pandemic) was a basic assumption on which the contract was made. This doctrine might be invoked when performance can only be accomplished at an excessive or unreasonable cost, for which the parties had not bargained.

An impracticability defense has a high bar. While it may be easier to invoke for a business facing extreme disruption, such as a restriction on accessing the premises, courts may be reluctant to

discharge a party's contractual obligations under a lease merely when additional financial burdens made the payment of rent more difficult.

"Frustration of purpose" differs slightly in that the performance of the promise, rather than being impossible or impracticable, is instead pointless.

Here, too, it may not be easy to prove. This defense goes to the entirety of the lease, rather than a specific obligation, and so the pandemic must be proven to substantially frustrate the principle purpose of the lease, not just one aspect of it.

Even with the effects of a pandemic, these defenses may not succeed. For some businesses, the fundamental purpose of the lease, usually defined in a "use" provision, may not have been frustrated. There may be a reduction in revenue, but the business may not be prevented from accessing the premises or running its business. Even those businesses forced to partially close may have been able to continue to generate some revenue with reduced staff.

So, the parties are left with uncertainty as to how a court might rule on their ultimate rights and responsibilities.

Barring a consensual resolution, these matters may need to be litigated. A landlord may choose to start an eviction suit or a collection suit — or both. A court will then decide whether and to what extent the payment of rent is truly excused.

The stakes are high.

Meanwhile, it is anticipated that courts will process these cases slowly, especially with the expected limitations on people physically accessing courthouses and the backlog of cases caused by the pandemic.

As a result, many landlords and tenants may opt to resolve these matters themselves with the assistance of legal counsel, avoiding both the delays and uncertainty of litigation. That may be the best solution for all parties.

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