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## **SOUTHERN DISTRICT OF NEW YORK FINDS COVID-19 PANDEMIC IS A 'FORCE MAJEURE' EVENT PERMITTING TERMINATION OF AGREEMENT**

*By: Steven T. Keppler, Esq.*

Recently, the Southern District of New York held, in *JN Contemporary Art LLC v. Phillips Auctioneers, LLC* (1:20-cv-04370-DLC), that an art dealer could not enforce its contract with an auction house where the auction house cancelled the auction of the dealer's high-priced painting due to the ongoing Covid-19 pandemic. The contract in question was entered in the summer of 2019, before the pandemic was a blip on either parties' radar, with a contemplated sale in May 2020, during what was the height of the pandemic in New York City and the surrounding environs. The artwork, a painting by artist Rudolf Stringel, had a minimum listing price of \$5,000,000, of which plaintiff was assured 20% commission.

In the wake of the pandemic, and its significant (and deadly) impact on the world in general, and the New York City area in particular, then-Gov. Cuomo and other, area governors, issued numerous executive orders restricting the movement of people and goods, shutting down all non-essential businesses (or forcing them to operate remotely): the auction house was not immune to these executive orders. As a result, the auction house attempted to negotiate with the plaintiff dealer on a future date and offered to honor its commitment when the auction could be safely held.

At issue in this litigation was the *force majeure* clause in the agreement, which permitted the defendant to terminate the agreement if the auction was "postponed for circumstances beyond our or your reasonable control, including, without limitation, as a result of a natural disaster..." The agreement further permitted the defendant to terminate the agreement with no further obligation to the plaintiff, for so long as termination was accomplished in accord with the terms of the agreement, including the *force majeure* clause. Utilizing these provisions, the defendant terminated the agreement June 1, 2020. One month later, on July 2, 2020, the defendant held a delayed, virtual auction during which it sold numerous artworks, but not plaintiff's Stringel. The dealer sued, seeking an order compelling the sale and the minimum \$5,000,000. The Southern District granted the defendants' motion to dismiss, finding that the global pandemic was a "natural disaster" which triggered the termination provision under the *force majeure* clause, finding the pandemic and related governmental restrictions were events beyond the parties' ability to control.

The Southern District explained that, while New York state and federal courts had not yet determined whether the Covid-19 pandemic, specifically, was a "natural disaster," the

Second Circuit had previously held “disease” was a natural disaster (*Badgley v. Varelas*, 729 F.2d 894, 902 (2d Cir. 1984)), and two Pennsylvania district courts had found the Covid-19 pandemic was a “natural disaster” and a *force majeure* event. See *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 370 (Pa. 2020) (“We have no hesitation in concluding that the ongoing COVID-19 pandemic equates to a natural disaster.”); *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 889 (Pa. 2020).

Buttressing this finding, the Southern District explicitly referenced publicly available information such as the aforementioned executive orders issued by New York, New Jersey, and Connecticut’s governors, and a FEMA “major disaster declaration” under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, § 42 U.S.C. 5121 *et seq.* The Court’s necessary inquiry into whether a pandemic in general, and Covid-19 in particular, was a “natural disaster” was certainly aided by the State of New York and the federal government’s own declarations that the Covid-19 pandemic was a “natural disaster,” and the court found this information so persuasive that it viewed this publicly available, extrinsic evidence as necessary to performing its function on the motion to dismiss.

Looking broadly, and as the Southern District observed in *JN Contemporary Art*, other courts are making similar findings. As Marks & Klein observed and reported on June 30, 2020, the United States Bankruptcy Court for the Northern District of Illinois determined that governmental restrictions imposed to combat the spread of the novel coronavirus qualify as a *force majeure* event and represent a valid reason for a business to suspend performance of its contractual obligations during the pandemic and ongoing governmental restrictions placed on many businesses.<sup>1</sup> That decision, the first of its kind, has certainly not been, and will not be, the last.

Another Southern District of New York matter, *E2W, LLC v. KidZania Operations, S.a.r.l* (1:20-cv-02866-JPC), featured a franchisee who suspended operations of its kid-centric, franchised amusement park outlet due to pandemic-related government restrictions. In that matter, the Southern District entered a requested TRO preventing the termination of the franchise agreement, but the order was not written down and, subsequently, the matter was settled between the parties, meaning this matter may not offer significant guidance. That said, at least one court has granted a franchisee an injunction against the loss of its business in the face of the pandemic, and others may follow suit.

Concerns about the Covid-19 pandemic are manifest, and whether franchisees and franchisors can rely upon governmental disaster declarations to suspend, or even terminate, their franchise agreements will remain a fact-sensitive inquiry. As ever, careful drafting is essential: if a broadly applicable *force majeure* clause is desired, then the language chosen should reflect that aim. If the converse is required, again, careful drafting is necessary. It is clear that courts will first look to the specific language of the *force majeure* provision to determine its metes and bounds. That said, it is also likely necessary for litigants seeking to utilize, or contest the use of, a *force majeure* clause to terminate a franchise agreement (or simply suspend performance) to review publicly available declarations from local, state, and even the federal government when crafting their arguments.

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[https://www.franchising.com/articles/court\\_upholds\\_force\\_majeure\\_defense\\_for\\_nonpayment\\_of\\_rent\\_related\\_to\\_covid.htm](https://www.franchising.com/articles/court_upholds_force_majeure_defense_for_nonpayment_of_rent_related_to_covid.htm)

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