



COVID-19 pandemic is a natural disaster for purpose of a contractual *force majeure* provision, says Southern District of New York

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In a case of first impression in New York, United States District Judge Denise Cote held this week that “it cannot be seriously disputed that the COVID-19 pandemic is a natural disaster” and thus within the scope of a *force majeure* provision permitting termination of a contract for postponements as “a result of natural disaster”¹ Other courts have examined whether the current pandemic falls within specific statutory or regulatory definitions of disasters, but Judge Cote’s opinion in *JN Contemporary Art LLC v. Phillips Auctioneers LLC* appears to be the first to find that under New York contract law, the pandemic fits the term “natural disaster.” The decision could have far-reaching implications for other *force majeure* disputes.

Overview

JN Contemporary Art LLC (“JN”) entered into several agreements with Phillips Auctioneers LLC (“Phillips”) for the sale of two paintings. One painting was sold at a public auction the same day. The contract for the second painting — by artist Rudolf Stingel — was to be offered at an auction scheduled for May 2020. This contract (the “Stingel Agreement”) contained a *force majeure* provision that permitted termination “in the event that the auction is postponed for circumstances beyond our or your reasonable control, including, without limitation, as a result of natural disaster, fire, flood, general strike, war, armed conflict terrorist attack[,] or nuclear or chemical contamination”² After Governor Andrew Cuomo declared a State Disaster Emergency under the New York Executive Law, and issued a series of Executive Orders in March restricting and eventually prohibiting non-essential business activities, Phillips announced that it was postponing all of its auctions in the United States and around the globe.

JN and Phillips discussed alternatives to the May 2020 auction for the sale of the Stingel painting, but did not reach an understanding. On June 1, 2020, Phillips sent a letter to JN terminating the

¹*JN Contemporary Art LLC v. Phillips Auctioneers LLC*, 20cv4370 (DLG), 2020 U.S. Dist. LEXIS 237085, at *6, 17 (S.D.N.Y. Dec. 16, 2020).

²*Id.* at *6.

Stingel Agreement. Phillips referred to the pandemic and related government regulations as the cause of the postponement and, based on the postponement, invoked the *force majeure* provision in the contract without additional explanation.

JN promptly sued Phillips in federal court. It initially sought injunctive relief to require Phillips to offer the Stingel painting at its next auction. After the Court denied that request, JN filed an amended complaint with multiple claims for damages and other relief. Phillips then moved to dismiss, which the Court granted as to each of JN's claims.

Discussion and implications

There have been limited opportunities thus far for courts to examine whether COVID-19 and its consequences fall within the scope of typical contractual *force majeure* provisions that do not mention pandemics. Most courts that have been called upon to classify the pandemic have done so as a matter of statutory or regulatory interpretation, whether examining the authority of state executives to impose restrictions within their state or interpreting election requirements.

The Court in *JN Contemporary Art*, however, had only contract language to address. It began by finding that the circumstances that led to the postponement of the May 2020 auction were beyond the control of the parties. Noting that the list of specific circumstances mentioned (“natural disaster, fire, flood, general strike, war, armed conflict terrorist attack or nuclear or chemical contamination”) was not exclusive, the Court forcefully concluded that it “cannot be seriously disputed that the COVID-19 pandemic is a natural disaster.”³

For this point, the Court leaned heavily on the *Black's Law Dictionary* definitions of “natural,” which refers to “[b]rought about by nature as opposed to artificial means,” and “disaster” as “[a] calamity; a catastrophic emergency.” But the Court also looked to several other sources.

One of those sources was Pennsylvania decisions interpreting Pennsylvania statutes. In *Friends of Danny DeVito v. Wolf*, for example, the Pennsylvania Supreme Court had to interpret the provision for “disaster” in its state's Emergency Code.⁴ That provision defined “disaster” as “[a] man-made disaster, natural disaster or war-caused disaster.”⁵ “Natural disaster” was further defined as a “hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, landslide, mudslide, snowstorm, drought, fire, explosion[,] or other catastrophe which results in substantial damage to property, hardship, suffering[,] or possible loss of life.”⁶

The Pennsylvania court concluded that the “the COVID-19 pandemic is unquestionably a catastrophe that ‘results in ... hardship, suffering[,] or possible loss of life,’” and therefore it was a “natural disaster” for purposes of the Emergency Code.⁷ Albeit without examining this reasoning or the variance between the statutory definition and the language of the Stingel Agreement (which contained no reference to catchall language similar to the Pennsylvania statute), Judge Cote found support in these Pennsylvania decisions for her conclusion that the COVID-19 pandemic is a natural disaster.

³*Id.* at *17.

⁴ See 227 A.3d 872, 889 (Pa. 2020); accord *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 370 (Pa. 2020) (relying in part on *Friends of Danny DeVito* to interpret the Pennsylvania Election Code).

⁵35 Pa. Cons. Stat. § 7102 (2020).

⁶*Id.*

⁷227 A.3d at 888–89.

Judge Cote buttressed this conclusion by reference (as noted above) to the non-exclusive nature of the list of *force majeure* events in the Stingel Agreement. The relevant provision mentions “natural disaster” as just one example of “circumstances beyond our or your reasonable control.”⁸ While some of the other listed examples (such as “general strike, war, armed conflict, terrorist attack[,] or nuclear or chemical contamination”) might not be generally understood to result from natural causes, they are — like the pandemic — beyond the control of the parties.

The Judge also found support in the language of Governor Cuomo’s Executive Orders declaring a “state disaster emergency,”⁹ and pointed to the President’s “major disaster declaration” under the Stafford Act (which defines a “major disaster” to include “any natural catastrophe”¹⁰). In the end, however, Judge Cote seemed to stress most that the pandemic must be a natural disaster because “[i]t is a worldwide health crisis that has taken untold lives and upended the world’s economy.”¹¹

In contrast to Judge Cote’s certainty, other courts have left open the question of whether the pandemic is, in fact, a natural disaster. For example, in a recent lengthy opinion discussing material adverse effect (“MAE”) clauses, the Delaware Chancery Court summarized the testimony of an expert who had examined 144 publicly available transaction documents. Some of those documents distinguished pandemics from natural disasters, some included pandemics as a co-equal with natural disasters, and some included pandemics as a subtype of natural disasters, sometimes joined with natural *or* manmade disasters.¹²

The Delaware court ultimately did not have to resolve whether a pandemic was a natural disaster because it concluded that the COVID-19 pandemic and its effects fell within the plain meaning of a “calamity,” which was a separate contractual exception from the definition of an MAE.¹³

Conclusion

This decision in *JN Contemporary Art* could have broad implications well beyond the facts of the case. In particular, courts have not yet grappled meaningfully with whether the pandemic and its consequences are an “Act of God” — an event commonly included in contracts as a *force majeure* event. *Black’s Law Dictionary* defines an Act of God as “[a]n overwhelming, unpreventable event caused *exclusively* by forces of nature, such as an earthquake, flood, or tornado”¹⁴ (emphasis added). If it cannot be seriously disputed that the pandemic is a natural disaster, this would tend to support an argument that it is also an “event caused exclusively by forces of nature” and thus an Act of God.

⁸See *JN Contemporary Art*, 2020 U.S. Dist. LEXIS 237085, at *18.

⁹*Id.* at *18. The New York Executive Law, on which the Governor relied in issuing the Executive Orders, defines “disaster” as the “occurrence or imminent threat of wide spread or severe damage, injury, or loss of life or property resulting from any natural or man-made causes, including, but not limited to . . . epidemic . . .” N.Y. Exec. Law § 20(2)(a) (2020). This is, therefore, not perfect support for Judge Cote’s argument.

¹⁰42 U.S.C. § 5122(2) (2020). There is room to argue whether the current pandemic is similar to the express examples of a “natural catastrophe” in the Stafford Act, but the point is that the President interpreted it to include the pandemic.

¹¹*Id.* at *21.

¹²*AB Stable VIII LLC v. Maps Hotels & Resorts One LLC*, C.A. No. 2020-0310-JTL, 2020 Del. Ch. LEXIS 353, at *164–67 (Del. Ch. Nov. 30, 2020).

¹³*Id.* at *155-56.

¹⁴*Black’s Law Dictionary* (11th ed., 2019) (emphasis added).

The Court's analysis of the meaning of "natural disaster" here did not, however, attempt to distinguish between the COVID-19 virus, which was arguably created by natural forces, on the one hand, and the consequences of rampant uncontrolled transmission, on the other. The latter has certainly been exacerbated by the acts and decisions of human beings, and has led to directives prohibiting certain activities, issued by government officials. Whether these distinctions have legal consequence will, perhaps, be left to the next chapter of litigation over *force majeure* provisions.

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