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"Ground *Nero*" for retail and restaurant landlords

By David B. Allswang

The onset of the coronavirus (COVID-19) pandemic and the subsequent closing of many retail establishments, including restaurants, either as required by law or as a result of economic realities, brought attention to how these leases, in general, treat such closures and whether tenants are entitled to abatement or deferral, whole or partial, during such pandemic-related closures.

While retail leases differ significantly, they are generally silent about a tenant's right to receive abatement or deferral during these closures, regardless of whether such leases contain a force majeure or Act of God clause. Further, such silence is often interpreted as an obligation for a tenant to continue paying rent during these closures, since most leases require a tenant to pay rent except to the extent of an express provision to the contrary.

Many retail tenants have balked at this understanding and have argued that abatement or deferral is equitable regardless of any particular lease term. In an effort to retain tenants, many landlords have agreed to provide some amount of abatement or deferral for a limited duration.

Italian-style coffee house Caffé Nero and its landlord, UMNV 205-207 Newbury, LLC (UMNV) did not come to any such agreement and on February 8, 2021, the Massachusetts Superior Court Business Litigation Session, in the matter of *UMNV 205-207 Newbury, LLC v. Caffé Nero Americas, Inc.* (2084CV01493-BLS2), ruled that, based on the doctrine of frustration of purpose, Caffé Nero was entitled to abatement of rent during the period when the restaurant operator was barred from allowing customers to eat and drink inside the premises.

The Memorandum and Order of Plaintiff's Motion for Partial Summary Judgment details UMNV's unwillingness to negotiate alternative terms despite the pandemic. In particular, UMNV rejected Caffé Nero's request in April 2020, for a waiver of rent during the closure and demanded full payment. After not receiving said payment, UMNV sent another notice in May, which purportedly terminated the lease. Upon reopening outdoors, Caffé Nero sent a notice, which was also rejected, offering to pay a certain percentage of gross sales, in lieu of all other rental amounts due.

While this might be an isolated decision, other courts could also embrace the common law doctrine of frustration of purpose. If other courts use a similar reasoning across the country, retail tenants will potentially have a powerful tool to use as a defense against the obligation to pay rent during governmentally mandated closure periods. Landlords, in turn, may view this case as a judicial

suggestion to collaborate with tenants to find a mutually acceptable compromise. Accordingly, as a result of the *Caffé Nero* decision, landlords and tenants will be more likely to incorporate provisions in leases, or amendments thereto, that directly address, and allocate risk related to, pandemic-caused business interruption or other similar events.

Nixon Peabody will continue to monitor the courts, as well as federal, state, and local regulations, on issues involving commercial lease disputes and offer guidance to retail landlords and tenants who are navigating these concerns.

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