CONTRACTS: RECENT DEVELOPMENTS IN FORCE MAJEURE, FRUSTRATION OF PURPOSE, AND IMPOSSIBILITY

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INTRODUCTION

While we may never rid society of COVID-19, the lockdown-filled pandemic phase of the virus seems to have passed us by. Of course, the virus's impacts will continue to be felt. This is particularly true in the courtroom as pandemic-era disputes are only now being resolved.

Not surprisingly, many litigants are relying on the pandemic to justify nonperformance of contractual obligations. But what law are these litigants relying on? Has it been successful?

This article will assess recent developments regarding force majeure clauses and the common law doctrines of frustration of purpose and impossibility. We explore how and when courts applying New York law have excused performance on these bases in both the COVID and non-COVID contexts.

I. APPLICABLE LAW

A. Force Majeure

"A force majeure clause's primary purpose is to 'relieve a party from its contractual duties when its performance has been prevented by a force beyond its control or when the purpose of the contract has been frustrated.'"[1] "Force majeure clauses are to be interpreted in accord with their purpose, which is 'to limit damages in a case where the reasonable expectation of the parties and the performance of the contract have been frustrated by circumstances beyond the control of the parties.'"[2]

"[W]hen the parties have themselves defined the contours of force majeure in their agreement, those contours dictate the application, effect, and scope of force majeure."[3] Conversely, when they have not—whether by neglect or conscious choice—courts "may not add or

1. JN Contemp. Art LLC v. Phillips Auctioneers LLC, 29 F.4th 118, 123 (2d Cir. 2022) (quoting Phillips Puerto Rico Core, Inc. v. Tradax Petroleum, Ltd., 782 F.2d 314, 319 (2d Cir. 1985).

2. Constellation Energy Servs. of N.Y., Inc. v. New Water St. Corp., 46 N.Y.S.3d 25, 27 (App. Div. 1st Dep't. 2017) (quoting United Equities Co. v. First Nat'l City Bank, 383 N.Y.S.2d 6, 9 (App. Div. 1st Dep't 1976).

3. *Id.* (quoting Route 6 Outparcels, LLC v. Ruby Tuesday, Inc., 931 N.Y.S.2d 436, 438 (App. Div. 3d Dep't 2011)).

imply such a clause."[4] "New York law requires courts to construe force majeure clauses narrowly, so that 'only if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused.'"[5] "A narrow construction also applies when the force majeure clause contains a 'catchall,' such as 'or other similar causes beyond the control of such party,' cabining the meaning to 'things of the same kind or nature as the particular matters mentioned.'"[6] As discussed in greater detail below, where the parties' contract includes a force majeure clause applicable to the circumstances, they are often "precluded from asserting the doctrines of frustration of purpose and impossibility of performance," as they are held to the agreed upon allocation of risk regarding force majeure events.[7]

B. Frustration of Purpose

The frustration of purpose doctrine has its roots in early 20th century England.[8] In *Krell v. Henry*, the defendant agreed to rent an apartment from plaintiff along the route of King Edward VII's and Queen Alexandra's coronation proceeding.[9] King Edward became ill, the coronation procession never occurred, and the defendant refused to pay.[10] The court found that "the coronation procession was the foundation of this contract, and that the non-happening of it prevented the performance of the contract," and thus defendant's performance was excused.[11]

New York courts, however, have construed the doctrine more narrowly.[12] "In order to invoke the doctrine of frustration of purpose, the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have

4. Fives 160th, LLC v. Zhao, 164 N.Y.S.3d 427, 427 (App. Div. 1st Dep't 2022) (citing Morlee Sales Corp. v. Mfrs. Tr. Co., 172 N.E.2d 280, 282 (N.Y. 1961)).

5. *JN Contemp. Art*, 29 F.4th at 124 (quoting Kel Kim Corp. v. Cent. Mkts., 519 N.E.2d 295, 296 (N.Y. 1987)).

6. *Id.* (quoting *Kel Kim Corp.*, 519 N.E.2d at 296).

7. CW A&P Mamoroneck LLC v. PFM WC-1, LLC, No. 57571/2021, slip op. at 5 (Sup. Ct. Westchester Cnty. Mar. 16, 2022).

8. *In re* Fontana D'Oro Foods, 472 N.Y.S.2d 528, 532 (Sup. Ct. Richmond Cnty. 1983).

9. Krell v. Henry, 2 K.B. 740, 740 (Eng. 1903).

10. *Id.*

11. *Id.* at 751.

12. Noble Ams. Corp. v. CIT Grp./Equip. Fin., Inc., No. 602269/2009, slip op. at 5 (Sup. Ct. N.Y. Cnty. 2009).

made little sense."[13] The doctrine "applies 'when a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract.'"[14] Frustration of purpose is applicable when "[b]oth parties can perform but, as a result of unforeseeable events, performance by party X would no longer give party Y what induced him to make the bargain in the first place."[15]

Courts require that "there must be complete destruction of the basis of the underlying contract; partial frustration such as a diminution in business, where a tenant could continue to use the premises for an intended purpose, is insufficient to establish the defense as a matter of law."[16] "It is not enough that the transaction will be less profitable for an affected party or even that the party will sustain a loss."[17]

Finally, frustration of purpose will not be available when the parties could have, or in fact did, account for the event in the contract. "[F]rustration of purpose . . . is not available where the event which prevented performance was foreseeable and provision could have been made for its occurrence."[18] "[T]he frustration doctrine is unavailing when the parties' contract made provision for the particular calamity that eventually befell the parties. . . . [F]orce majeure provisions can be fatal to a frustration of purpose defense."[19]

C. Impossibility

Impossibility predates frustration of purpose, but New York courts apply it just as narrowly.[20] "Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible."[21] "[T]he law is well-established that economic inability to

13. Ctr. for Specialty Care, Inc. v. CSC Acquisition I, LLC, 127 N.Y.S.3d 6, 14 (App. Div. 1st Dep't 2020).

14. PPF Safeguard, LLC v. BCR Safeguard Holding, LLC, 924 N.Y.S.2d 391, 394 (App. Div. 1st Dep't 2011) (quoting RESTATEMENT (SECOND) OF CONTS. § 265 cmt a (AM. L. INST. 1981).

15. U.S. v. Gen. Douglas MacArthur Senior Vill., Inc., 508 F.2d 377, 381 (2d Cir. 1974).

16. A/R Retail LLC v. Hugo Boss Retail, Inc., 149 N.Y.S.3d 808, 822 (Sup. Ct. N.Y. Cnty. 2021) (citing Robitzek Investing Co. v. Colonial Beacon Oil Co., 40 N.Y.S.2d 819, 822 (App. Div. 1st Dep't 1943)).

17. *In re* Condado Plaza Acquisition LLC, 620 B.R. 820, 839–40 (Bankr. S.D.N.Y. 2020).

18. *Ctr. for Specialty Care*, 127 N.Y.S.3d at 14.

19. *A/R Retail LLC*, 149 N.Y.S.3d at 822.

20. *Kel Kim Corp*, 519 N.E.2d at 296.

21. *Id.*

perform contractual obligations, even to the extent of insolvency or bankruptcy, is simply not a valid basis for excusing compliance."[22] "Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract."[23]

II. RECENT DEVELOPMENTS

A. Force Majeure

The following cases, while a small sample size, suggest that, during the survey period, New York courts and federal courts applying New York law typically found that the COVID-19 pandemic and resulting government shutdown orders fit within the scope of the force majeure provisions at issue. In some instances, the force majeure provision operated to release a party from contractual obligations, and at other times it inured to the benefit of the alleged breaching party, justifying nonperformance.

Overall, these cases demonstrate that courts analyzing force majeure provisions under New York law tended to find that the COVID-19 pandemic and resulting government orders fit within the scope of such clauses and thus deferred to the allocation of risk contemplated by the parties.[24]

1. JN Contemporary Art LLC v. Phillips Auctioneers LLC [25]

Plaintiff JN Contemporary Art LLC (JN), a company that buys, sells, and exhibits artwork, and Phillips Auctioneers LLC (Phillips), an auction house that accepts works of art on consignment for auction, entered into a contractual relationship in which the relevant agreements contemplated, *inter alia*, that JN would consign certain artwork

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22. Stasyszyn v. Sutton E. Assocs., 555 N.Y.S.2d 297, 299 (App. Div 1st Dep't 1990) (citing 407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp., 244 N.E.2d 37, 41 (N.Y. 1968)).

23. Comprehensive Bldg. Contractors, Inc. v. Pollard Excavating, Inc., 674 N.Y.S. 2d 869, 871 (App. Div. 3d Dep't 1998).

24. *But see* Amy Sparrow Phelps, *Contract Fixer Upper: Addressing the Inadequacy of the Force Majeure Doctrine in Providing Relief for Nonperformance in the Wake of the COVID-19 Pandemic*, 66 VILL. L. REV. 647, 669 (2021) (arguing that "[i]n most cases, the common law excuses [for non-performance] provide more relief than force majeure clauses in the wake of a global crisis like the COVID-19 pandemic.").

25. *See* JN Contemp. Art LLC v. Phillips Auctioneers LLC, 29 F.4th 118 (2d Cir. 2022).

to Phillips for which Phillips would hold an auction.[26] The relevant agreement contained the following force majeure clause:

> 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, we may terminate this Agreement with immediate effect. In such event, our obligation to make payment of the Guaranteed Minimum shall be null and void and we shall have no other liability to you.[27]

"In March 2020, in response to the COVID-19 pandemic, then-New York Governor Andrew Cuomo issued a series of executive orders that eventually banned nearly all nonessential in-person business activities, including art exhibitions and auctions."[28] On June 1, 2020, Phillips terminated its agreement with JN to hold an auction, citing the COVID-19 pandemic and these government orders.[29] JN subsequently brought suit.

In *JN*, the Second Circuit reviewed the district court's conclusion that the COVID-19 pandemic fell within the ambit of the relevant agreement's force majeure clause—a ruling based upon the lower court's analysis that "[i]t cannot be seriously disputed that the COVID-19 pandemic is a natural disaster."[30]

On appeal, JN argued that (1) it is an unsettled question whether the virus is manmade or natural; and (2) "natural" disasters are usually geographic (*i.e.*, flood, hurricane, etc.) in nature and short-lived.[31] Thus, JN argued, the district court erred in concluding that the COVID-19 pandemic and resulting government orders fell within the scope of the force majeure clause at issue.[32]

The Second Circuit found that it need not resolve these specific questions to affirm the district court's dismissal of JN's complaint:

> We need not address these arguments to decide this appeal. We hold that the COVID-19 pandemic and the orders issued by New York's governor that restricted how nonessential businesses could conduct their affairs during the pandemic,

26. *Id*. at 121.
27. *Id.*
28. *Id.* at 121–22.
29. *Id.* at 122.
30. *JN Contemp. Art LLC*, 29 F.4th at 123 (quoting JN Contemp. Art LLC v. Phillips Auctioneers LLC 507 F. Supp. 3d 490, 501 (S.D.N.Y. 2020)).
31. *Id.*
32. *Id.*

> constituted "circumstances beyond our or your reasonable control," Thus, we affirm the district court's dismissal of the second amended complaint on that ground without resolving the question of whether COVID-19 is a natural disaster within the meaning of the force majeure clause.[33]

In reaching this conclusion, the court noted that the COVID-19 pandemic, "coupled with the state government's orders restricting the activities of nonessential businesses, constitute an occurrence beyond the parties' reasonable control, allowing Phillips to end the [ ] Agreement."[34] In addition, the court's conclusion that the force majeure clause permitted Phillips to terminate the agreement was based on its analysis that (1) the force majeure clause contained a broad catch-all phrase that the enumerated list of force majeure events was not exhaustive; and (2) the pandemic and resulting government orders, like the enumerated force majeure events, caused "large-scale societal disruption" that was "beyond the parties' control, and are not due to the parties' fault or negligence."[35] To rule otherwise, the court noted, "would render meaningless both the catchall phrase and the force majeure clause's explicit statement that the non-exhaustive list of events following the catchall phrase did not limit it"—which would violate principles of contract interpretation under New York law.[36]

Ultimately, the *JN* court's ruling in favor of Phillips endorsed a finding that a force majeure clause need not explicitly make provision for a "pandemic" or "government orders" to be interpreted under New York law to cover such an event. Instead, the fact that the clause (1) contemplated events that were "beyond our or your reasonable control"; (2) contained the catch-all provision that the enumerated force majeure events was non-exhaustive (*i.e.*, "including, without limitation . . ."); and (3) specifically enumerated events that were, like the COVID-19 pandemic, "large-scale societal disruptions," was sufficient to permit Phillips to terminate the contract based upon the pandemic.[37]

33. *Id.* at 123–24 (quoting Thyroff v. Nationwide Mut. Ins. Co., 460 F.3d 400, 405 (2d Cir. 2006)) (internal citations omitted).
34. *Id.* at 124.
35. *JN Contemp. Art LLC*, 29 F.4th at 124.
36. *Id.*
37. *Id.* at 121, 124.

2. 850 Third Avenue Owner, LLC v. Discovery Communications, LLC [38]

In *850 Third Avenue Owner, LLC v. Discovery Communications, LLC* (*850 Third Avenue*), plaintiff landlord sought relief from the trial court's denial of its summary judgment motion through which plaintiff sought to recover "unpaid rent/holdover rent under a now expired lease."[39]

In considering whether summary judgment in favor of plaintiff had been properly denied, the appellate division found that defendant had "a colorable defense" that the force majeure provision operated to extend defendant's time to remove its property from the premises at issue.[40] That provision excused the requirement that the tenant remove its property within five days for "other causes beyond the reasonable control of the performing party." [41]

The appellate division noted the recent decision, discussed *infra*, in *JN Contemporary Art LLC v. Phillips Auctioneers LLC* in which the Second Circuit, applying New York law, "held that 'the COVID-19 pandemic and the orders issued by New York's governor that restricted how nonessential businesses could conduct their affairs during the pandemic constituted "circumstances beyond our or your reasonable control"' under a contractual force majeure clause."[42]

Unlike the Second Circuit's analysis in *JN*, the appellate division did not discuss an enumerated list of force majeure events in the lease that were akin to a global pandemic and government shutdown orders. Nor did it base its decision on a "catch-all" provision that some specifically contemplated events were listed "without limitation." Instead, the fact that the pandemic and resulting shutdown orders were "beyond the reasonable control of the performing party"—one of the factors that influenced the *JN* court's decision as well—proved

38. *See* 850 Third Ave. Owner, LLC v. Discovery Commc'ns, LLC, 169 N.Y.S.3d 39 (App. Div. 1st Dep't. 2022).

39. *Id.* at 40.

40. *Id.*

41. *Id.* The Appellate Division did not resolve the question of whether the requirement that Defendant remove its property from the premises within 5 days applied to both termination *and expiration* of the lease. *See id.* at 40–41. Regardless, it is the Appellate Division's interpretation of the force majeure provision and its application to the COVID-19 pandemic that is of interest for present purposes.

42. *850 Third Avenue Owner, LLC*, 169 N.Y.S.3d at 40 (quoting JN Contemp. Art LLC v. Phillips Auctioneers LLC, 29 F.4th 118, 123–24 (2d Cir. 2022)).

sufficient to, at the very least, permit defendant to avoid summary judgment in plaintiff's favor.

3. Banco Santander (Brasil), S.A. v. American Airlines, Inc.[43]

In *Banco Santander (Brasil), S.A. v. American Airlines, Inc.* (*Banco Santander*), the United States District Court for the Eastern District of New York, applying New York law, considered whether the plaintiff Banco Santander was permitted to terminate its agreement with the defendant American Airlines based on plaintiff's failure to perform for ninety days due to a force majeure event.[44]

The contractual relationship was based upon an airline miles program for credit cardholders.[45] Plaintiff "offer[ed] a credit card co-branded with American Airlines, Inc."[46] In turn, "[c]ardholders earn[ed] miles in [defendant] American Airlines' frequent-flier program through their purchases."[47] Under the agreement, plaintiff, "pa[id] the airline for those mile" and the bank was required to "buy a minimum number of miles each year, regardless of how many miles cardholders earn through their spending."[48]

As a result of the COVID-19 pandemic, defendant "temporarily suspended flights between Brazil and the United States."[49] In response, plaintiff sought to terminate their agreement.[50] When defendant disputed plaintiff's right to terminate, plaintiff brought suit, arguing that "it was entitled to terminate the parties' contract based on a clause permitting such termination if the airline failed to perform or delayed performance under the contract for more than 90 days due to a force majeure event."[51] Defendant moved to dismiss.

In relevant part, the parties' agreement provided that

> The bank may end the agreement by providing written notice to American [Airlines] if pursuant to Section 23 American [Airlines] delays performance or fails to perform due to a Force Majeure Event, and such delay continues for a period of ninety (90) days. Section 23, in turn, defines a Force Majeure

43. *See* Banco Santander, S.A. v. Am. Airlines, Inc., No. 20-CV-3098, 2021 U.S. Dist. LEXIS 199225 (E.D.N.Y 2021).

44. *Id.* at *1–*2.

45. *Id.*

46. *Id.* at *1.

47. *Id.*

48. *Banco Santander*, 2021 U.S. Dist. LEXIS 199225 at *2.

49. *Id.* at *4.

50. *Id.*

51. *Id.* at *9–*10.

> Event as any act of God, war, strike, labor dispute, work stoppage, fire, act of government, act or attempted act of terrorism or any other cause, whether similar or dissimilar, beyond the control of that Party, including, with respect to American, and without limitation, any incident, accident or hijacking or attempted hijacking involving any aircraft of American or any of its Affiliates or any other airline carrier.[52]

The court considered these contractual provisions and concluded that plaintiff had failed to state a claim "that it is entitled to terminate the agreement pursuant to the *force majeure* termination provision."[53] The court did not question whether the pandemic qualified as a "Force Majeure Event" under the agreement—*i.e.*, "any act of God, war, strike, labor dispute, work stoppage, fire, act of government, act or attempted act of terrorism or any other cause, whether similar or dissimilar, beyond the control of that Party."[54]Rather, the determinative issue was that the contract's force majeure termination provision, which plaintiff relied on to terminate the contract due to defendant's alleged non-performance, only applied if defendant "delays *performance* or fails to *perform* due to a Force Majeure Event."[55] Thus, the court reasoned, the force majeure termination provision was not "triggered" by defendant suspending flights between the United States and Brazil due to COVID-19 because,

> The contract flatly state[d] that the airline "shall not be deemed to have made any representation, warranty or covenant or to have assumed any obligation . . . to the Bank under this Agreement with respect to flight activity, including any suspension, reduction or termination of flights by an AA Carrier."[56]

The court reasoned that this "broad and unequivocal statement" made it "clear that the airline ha[d] not undertaken any obligation to continue flights between the United States and Brazil"—meaning defendant continuing to operate flights was not required performance under the contract.[57]

Thus, regardless of whether the COVID-19 pandemic would have qualified as a force majeure *event* under the agreement, plaintiff's ability to terminate the contract for defendant's non-performance due to

52. *Id.* at *12 (internal citations omitted) (internal quotation marks omitted).
53. *Banco Santander*, 2021 U.S. Dist. LEXIS 199225 at *12.
54. *Id.* at *4.
55. *Id.* at *11 (emphasis added).
56. *Id.* at *12.
57. *Id.*

such an event was premised on defendant failing to perform some obligation actually required under the contract.[58] For this reason, the court dismissed plaintiff's claim based upon the force majeure provision but permitted its claim to go forward under the frustration of purpose doctrine.[59]

4. Williamsburg Climbing Gym Company, LLC v. Ronit Realty LLC [60]

In *Williamsburg Climbing Gym Company, LLC v. Ronit Realty LLC* (*Williamsburg Climbing Gym*), plaintiffs sought to construct and open a rock-climbing gym in Brooklyn, New York and entered into a 10-year lease with defendant realty company "for approximately 30,500 square feet of interior space and approximately 3,000 square feet of outdoor terrace space."[61] The base rent for the lease was $1,957,500 per year.[62]

In early March of 2020, before the gym had opened for business, then-Governor of New York Andrew Cuomo "issued an executive order that required gyms to cease operations because of the COVID-19 pandemic."[63] In early May of 2020, plaintiffs informed defendant that they were terminating the lease and, on May 5, 2020, they filed suit "seeking a declaratory judgment that [this] termination and recission of the Lease was lawful."[64] Defendant filed counterclaims.[65]

The parties cross-moved for summary judgment on the issue of liability. In ruling on defendant's cross-claim for breach of contract, the court examined the lease's force majeure clause, which stated:

> In the event that either party shall be delayed or hindered in or prevented from the performance of any covenant, agreement, work, service, or other act required under this Lease to be performed by such party, other than the payment of Fixed Rent or Additional Rent by Tenant, and such delay or hindrance is due to strikes, lockouts, failure of power or other utilities, injunction or other court or administrative order, governmental law or regulations which prevent or substantially interfere with the

58. *See Banco Santander*, 2021 U.S. Dist. LEXIS 199225 at *10.
59. *See id.* at *11.
60. *See* Williamsburg Climbing Gym Co., LLC v. Ronit Realty LLC, No. 1:20-cv-2073, 2022 LEXIS 2146 (E.D.N.Y. Jan. 5, 2022).
61. *Id.* at *1.
62. *Id.*
63. *Id.* at *2.
64. *Id.*
65. *Williamsburg Climbing Gym*, 2022 LEXIS 2146 at *3.

> required performance, condemnations, riots, insurrections, martial law, civil commotion, war, fire, flood, earthquake, or other casualty, acts of God, or other causes not within the control of such party, the performance of any covenant, agreement, work, service, or other act, other than the payment of Fixed Rent or Additional Rent by Tenant, shall be excused for the period of delay and the period for the performance of the same shall be extended by the period.[66]

The court found that, despite the disruption caused by the COVID-19 pandemic and resulting government shut-down orders, this clause "plainly provides that [plaintiffs'] obligation to pay rent is not abrogated by 'governmental law or regulations which prevent or substantially interfere with the required performance,' and that is what the Governor's order is."[67] Thus, the pandemic and resulting government orders fit within the scope of the force majeure provision and inured to defendant's benefit as plaintiff was required to continue to pay rent despite this disruption.

Ultimately, the court denied plaintiff's motion for summary judgment and granted summary judgment as to liability in favor of defendant.

5. Avamer 57 Fee LLC v. Gorgeous Bride, Inc. [68]

In *Avamer 57 Fee LLC v. Gorgeous Bride, Inc.*, plaintiff, the owner and landlord of a commercial property, entered into a lease with defendant, a tenant.[69] The New York County Supreme Court considered plaintiff's motion for summary judgment and dismissal of defendant's defense and counterclaims.[70]

In April 2020, defendant ceased making rent payments.[71] Defendant argued, *inter alia*, that "the parties could not have possibly anticipated the 'devasting effects of the novel coronavirus.'"[72] Based upon the lease's force majeure clause, the court found this assertion to be "simply untrue."[73]

66. *See id.* at *10.
67. *Id*. at *10–*11.
68. *See* Avamer 57 Fee LLC v. Gorgeous Bride, Inc., No. 655648/2021, 2022 N.Y. Misc. LEXIS 2250 (Sup. Ct. N.Y. Cnty. 2022).
69. *See generally id.* at *1.
70. *Id.*
71. *Id.*
72. *Id.* at *6.
73. *See Avamer 57 Fee*, 2022 N.Y. Misc. LEXIS 2250, at *6.

Like the *Williamsburg Climbing Gym* court, the court in this case found that the pandemic did not excuse a tenant's obligation to pay rent. Here, the force majeure clause

> [S]pecifically provide[d] that Tenant's right to pay rent is not affected, impaired or excused because the Landlord is unable to fulfill its obligations under the Lease due to, among other things, government preemption due to a National emergency or by reason of any rule, order or regulation of any government agency.[74]

In considering whether this clause operated to continue to obligate defendant to pay rent despite the pandemic, the court reasoned that,

> As a negotiated agreement between sophisticated parties, Tenant could have requested an exemption from paying rent due to a pandemic, National Emergency or by reason of any rule, order or regulation of any government agency. Tenant points to no provision of the lease that suspends its obligation to pay rent. Instead, the lease specifically requires Tenant to pay rent each month without any set of or deduction whatsoever.[75]

Based upon this analysis, the court ruled in favor of plaintiff and dismissed defendant's counterclaim premised on the force majeure clause.

6. M.S.T. General Contracting Restoration, Inc. v. N.Y.C. Housing Authority [76]

In *M.S.T. General Contracting Restoration, Inc. v. New York City Housing Authority*, defendant New York City Housing Authority (NYCHA) hired plaintiff "to perform certain fire escape restoration work at various NYCHA buildings located throughout New York City."[77]

After the outbreak of the COVID-19 pandemic, NYCHA "drafted emergency shut-down protocols to be followed if a contractor or NYCHA had to shut down a jobsite due to the pandemic."[78] On March 25, 2020, plaintiff shut down work on its current project under the contract "due to inability to obtain masks for its subcontractors, who

74. *Id*. at *6–*7.

75. *Id.* at *7.

76. *See* M.S.T. Gen. Contracting Restoration v. N.Y.C. Hous. Auth., No. 158154/2020, slip op. (Sup. Ct. N.Y. Cnty. Mar. 8, 2022).

77. *Id.*

78. *Id.* at 3.

were refusing to work without them in the small spaces required for fire escape restoration."[79]

Defendant granted plaintiff an extension of the deadline to complete the project and agreed with plaintiff that plaintiff would resume work on May 15, 2020.[80] However, the day before construction was set to resume, plaintiff "informed [defendant] that they would be unable to remobilize on time and proposed a new commencement date of June 1, 2020."[81] Defendant denied plaintiff's request for a further extension.[82] Regarding the extra costs associated with the delay, defendants asserted that "[p]laintiff had assumed the risk of delay damages caused by COVID-19 or due to the actions of third parties, and was in any event responsible under the contract for providing sufficient protective equipment for its workers."[83]

The New York County Supreme Court considered which party should be responsible for the extra costs associated with the delay, reasoning as follows:

> Indeed, plaintiff specifically agreed that in the event of a delay caused by Acts of God, government' action, and/or quarantine restrictions, it would not make any claims for damages, maintain any action for same, and would be "fully compensated for by an extension of time to complete performance". Plaintiff does not deny that it received [such] an extension. Plaintiff contends that the exculpatory clause should not be applied here, as neither party could have predicted or contemplated the coronavirus pandemic. However, the exculpatory clause specifically mentions quarantine restrictions and the sovereign acts of any governmental entity, both of which are alleged to have caused the delay in completing the work. It is settled law that such clauses are enforceable.[84]

The court found that this force majeure clause, which applied where "the delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of [plaintiff]," did not favor plaintiff.[85]

79. *Id.* at 4.
80. *Id.* at 3–4.
81. *M.S.T. Gen. Contracting Restoration*, slip op. at 4.
82. *Id.*
83. *Id.*
84. *Id.* at 6 (citing Kalisch-Jarcho v. N.Y.C., 448 N.E.2d 413, 416 (N.Y. 1983)) (internal citations omitted).
85. *Id.* at 2.

The contract provided specific examples of force majeure events which included "Acts of God, acts of NYCHA in its sovereign or contractual capacity, acts of another contractor, various natural disasters, and quarantine restrictions."[86] Thus, the court concluded that plaintiff was not entitled to recover for costs associated with the delay since the contract contemplated that plaintiff's "full[ ] compensation" for a qualifying force majeure event was "an extension of time to complete performance"—which plaintiff received. And the scope of the language which defined force majeure events specifically mentioned "quarantine restrictions and the sovereign acts of any governmental entity" so there was no question that the provision itself applied to the pandemic and resulting government orders.

B. Frustration of Purpose and Impossibility

While litigants have succeeded relying on force majeure provisions to rescind contracts or excuse nonperformance, they have had no such luck with frustration of purpose or impossibility. Recent cases reiterate the high burden litigants must meet in order to obtain the benefit of either of those defenses. Whether relying on the circumstances imposed by COVID-19 or other, unrelated events, litigants continue to be unable to meet that standard.

1. 45-47-49 Eighth Avenue LLC v. Conti [87]

45-47-49 Eighth Avenue LLC v Conti involved a landlord-tenant relationship at a property in New York City where the tenant operated a restaurant.[88] In April 2020, following Governor Cuomo's executive order 202.3 closing restaurants in New York State, tenant informed landlord that it would vacate and surrender the premises in six months.[89] Tenant then stopped paying rent the following month in May 2020.[90] In June 2020, landlord served the tenant with a notice of termination, and tenant vacated the premises in July 2020.[91] The landlord then sued the tenant in August 2020 and moved for summary

86. *M.S.T. Gen. Contracting Restoration*, slip op. at 6.
87. *See* 45-47-49 Eighth Ave., LLC v. Conti, No. 654033/2020, slip op. at 1 (Sup. Ct. N.Y. Cnty. July 23, 2021).
88. *See id.*
89. *Id.* at 1–2.
90. *Id.* at 2.
91. *Id.*

judgment to collect unpaid lease obligations totaling $1,827,750.20 and attorney's fees.[92]

The tenant asserted both frustration of purpose and impossibility defenses, relying on the pandemic and the executive order prohibiting on-premises service of food and beverage at restaurants.[93] The tenant-defendant was not entitled to either defense.[94] First, the court emphasized that tenant was not entirely prohibited from operating a restaurant, as the restaurant could still offer take-out and delivery services.[95] Second, the court emphasized that the government restrictions were only temporary.[96] The court explained that the issue was not whether tenant was excused from operating a restaurant but whether tenant was excused from performing its financial obligations pursuant to the terms of the lease.[97] While "the changes in tenant's operations necessitated by the executive order disrupted tenant's business . . . the subject matter of the contract—the restaurant premises—remained intact and usable."[98] Given these factors, the executive order "did not frustrate the overall purpose of this 10-year lease" and "[t]he defenses of impossibility and frustration of purpose are unavailing."[99]

2. Gap v. 44–45 Broadway Leasing Co. LLC.[100]

The court reached a similar result in a dispute between clothing store Gap and its landlord. In *Gap v. 44–45 Broadway Leasing Co. LLC*, the tenant store owner sought to use frustration of purpose and impossibility as a sword rather than a shield when it sued its landlord seeking recission of its lease or, in the alternative, abatement of rent.[101] The tenant argued that various government shutdown orders and restrictions imposed when reopening was allowed terminated the tenant's lease as a matter of law.[102] The court dispatched with tenant-plaintiff's frustration of purpose and impossibility arguments in short

92. *45-47-49 Eighth Ave.*, slip op. at 1.
93. *See id.* at 2–3.
94. *See id.* at 2.
95. *Id.* at 3.
96. *See id.*
97. *45-47-49 Eighth Ave.,* slip op. at 3.
98. *Id.*
99. *Id.*
100. *See* The Gap, Inc. v. 44–45 Broadway Leasing Co. LLC, 171 N.Y.S.3d 466 (App. Div. 1st Dep't. 2022).
101. *Id.* at 466.
102. *Id.* at 467.

order.[103] As in *45-47-49 Eighth Avenue LLC*, the court emphasized that the store was allowed to continue operating through curbside and in-store pickups.[104] Moreover, as early as June 22, 2020, the store could reopen, albeit with capacity restrictions and mandatory masking.[105] "Contrary to plaintiffs' contention, 'frustration of purpose is not implicated by *temporary* governmental restrictions on *in-person* operations.'"[106] Addressing impossibility specifically, the court added that "even if the reopening restrictions made plaintiffs' ability to provide a flagship store experience more difficult, the pandemic did not render their performance impossible, as 'the leased premises were not destroyed.'"[107] The First Department affirmed the supreme court's dismissal of plaintiff's claims.[108]

3. Amherst II UE LLC v. Fitness International, LLC

A health club tenant in *Amherst II UE LLC v. Fitness International, LLC* fared no better.[109] In that case, the tenant operated the leased premises as "an indoor health club and fitness facility" and had invested millions of dollars to construct the health facilities.[110] The tenant was forced to close its business for extended periods of time in 2020.[111] Unlike restaurants and stores, however, the health club was closed entirely with no ability to operate in any limited capacity.[112] Additionally, even when the club was able to reopen, it was not able to offer a full slate of amenities to its members.[113] Landlord sued the tenant health club for rent and other charges that the tenant did not pay during the periods of full shutdown.[114]

Notwithstanding the existence of an applicable force majeure clause that did not relieve the health club from its obligation to pay rent, the court went on to address frustration of purpose and

103. *Id.* at 466.

104. *Id.*

105. *See 44–45 Broadway Leasing Co.*, 171 N.Y.S.3d at 467.

106. *See id.* at 466 (emphasis added) (quoting Valentino U.S.A., Inc. v. 693 Fifth Owner LLC, 160 N.Y.S.3d 858, 859 (App. Div. 1st Dep't 2022).

107. *Id.* at 467 (quoting *Valentino,*160 N.Y.S.3d at 858).

108. *Id.*

109. *See generally* Amherst II UE v. Fitness Int'l, LLC*,* No. 806643/2021, slip op. (Sup. Ct. Erie Cnty. 2021).

110. *Id.* at 2.

111. *Id.*

112. *Id.*

113. *Id.*

114. *See Amherst II UE,* 157 N.Y.S.3d at 2.

impossibility.[115] Despite the fact that the health club was forced to close down *entirely*, as opposed to the restricted operations of the restaurant and retail store in New York City, the court found that neither frustration of purpose or impossibility was available.[116] For both its frustration of purpose and impossibility analysis, the court noted that the government-ordered closures covered only a small portion of the lease period.[117] Thus, the health club's performance was not "*completely* impossible," and the contract not been rendered "completely valueless."[118]

4. Weinig v. Weinig

Litigants looking to events other than the global pandemic to support their frustration of purpose and impossibility defenses fared no better. This includes the husband in *Weinig v. Weinig*, a divorce case.[119] The husband worked at and partially owned a hedge fund.[120] After the husband and wife settled the divorce, the hedge fund collapsed, and husband sought to reduce his payment obligations to his former wife.[121] But frustration of purpose did not provide him a basis to do so.[122]

The court found that the purpose of the settlement agreement was to resolve the outstanding issues of the couple's divorce, including equitable distribution and support.[123]

> The fact that the parties' interest in the hedge fund, perhaps their most valuable asset, lost its value does not frustrate that broad purpose. Moreover, although the specific sum of the distributive award makes less sense in light of the hedge fund's lost value, it cannot be said that the hedge fund's lost value makes the entire stipulation, or the distributive award, nonsensical.[124]

Thus, the First Department affirmed the supreme court's denial of the husband's motion.[125]

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115. *Id.* at 4–5.
116. *Id.* at 6.
117. *Id.*
118. *Id.*
119. *See* Weinig v. Weinig, 156 N.Y.S.3d 144, 146 (App. Div. 1st Dept. 2021).
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Weinig*, 156 N.Y.S.3d at 146.
125. *Id.*

5. Zai v. RoGallery Image Makers Inc.[126]

In *Zai v. RoGallery Image Makers Inc.*, Zai, an art collector, had a contract with RoGallery to sell Zai's paintings.[127] Pursuant to that agreement, around May 2013, Zai consigned fifteen paintings to RoGallery to be displayed and auctioned on a cruise ship.[128] Two years later, Zai requested that the gallery return the paintings, as they had not been sold.[129] At that point, RoGallery informed Zai that the paintings had been "lost at sea," though the court noted that "the fate of the fourteen missing paintings remains unclear."[130] Zai sued, and RoGallery asserted impossibility, claiming that "the loss of the paintings was unforeseeable and unanticipated and could not been guarded against in the contract."[131]

The court concluded that the "record simply does not support an impossibility defense."[132] First, after reiterating that impossibility is available "when the destruction of the subject matter of the contract makes performance objectively impossible," the court noted that there was a question of fact as to whether the paintings were actually destroyed.[133] Notwithstanding that fact,

> [I]t is not unforeseeable that goods can go missing or be destroyed during transit, or when in the possession of a bailee, and insurance can be purchased to guard against this loss. Thus, the Court cannot conclude that the loss of the paintings could not have been anticipated and guarded against in the contract.[134]

Accordingly, RoGallery's motion for summary judgment was denied.[135]

CONCLUSION

These, and other recent decisions from courts applying New York law suggest that parties to a contract can best manage risk within the

126. *See* Zai v. RoGallery Image Makers Inc., No. 151145/2016, slip op. (Sup. Ct. Richmond Cnty. June 15, 2022).
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 3.
131. *Zai*, slip op. at 4.
132. *Id.* at 8.
133. *Id.*
134. *Id.*
135. *Id*. at 9.

four corners of the contract. COVID-19 litigation has shown that parties who have bargained for and allocated risk within a contract are most likely to obtain the relief they seek. Litigants who are forced to fall back on common law defenses like frustration of purpose and impossibility face a much tougher road to success. Indeed, recent cases analyzing those doctrines show that they are rarely available.