

Practice Update

COVID-19 Impact on Commercial Leases and Implications of Various State Laws

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The COVID-19 pandemic and the United States' efforts to "flatten the curve" and slow the spread of the disease present considerable issues for commercial tenants and landlords. For instance, the Governors of New York, New Jersey, Illinois, California and other states announced "shelter-in-place" type mandates, and ordered that all non-essential businesses must close. Other states will likely follow suit in the coming days and weeks. These shelter-in-place orders are understood to mean that states are shutting down all but the most critical operations. Businesses that attract clusters of people, such as gyms, nightclubs or bars, have had to close down. Schools have closed. Restaurants must serve only take-out or delivery orders.

So what does this mean for commercial tenants and landlords? As COVID-19 continues to spread throughout the United States and the world, commercial tenants and landlords will encounter challenges in meeting contractual obligations posed by the government's continuing and strengthened efforts at containment. COVID-19 has already and will continue to impact the ability of businesses to continue operations and generate revenue. For instance, in New York and California, as well as many other states, restaurants were ordered to shut down all dine-in services and are relegated to delivery and take-out. For many restaurants, this

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reality is fatal. The restauranteur Alex Stupak commented, “[w]e went from a little money in the bank to bled dry. It was not a slow, steady decline — it was a straight drop.” Without the ability to generate revenue, many of these businesses will no longer be able to pay the rent on their commercial spaces and will likely seek to be excused from performing their contractual obligations. Commercial landlords will be faced with the issue of whether to excuse their tenants’ performance, enter into formal lease amendments, or pursue immediate defaults and associated judicial remedies.

Landlords that elect to pursue defaults and associated judicial remedies will undoubtedly be faced with claims of force majeure, and the defenses of impossibility of performance, impracticability of performance and frustration of purpose on the part of the tenant. However, landlords and tenants should be aware that most commercial and retail leases obligate the tenant to continue to pay rent even during a force majeure event.

New York

Force Majeure:

The main purpose of a force majeure clause 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 events typically enumerated in contracts include: acts of God, such as severe acts of nature or weather events including floods, fires, earthquakes, hurricanes or explosions; war, acts of terrorism and epidemics; acts of governmental authorities such as expropriation, condemnation, and changes in laws and regulations; strikes and labor disputes; and certain accidents.^[2] Economic hardship alone typically is not enough to qualify as a force majeure event.^[3] Determining whether a force majeure clause can be invoked is a fact intensive inquiry, as it depends on the specific language of a contract, because force majeure

clauses are interpreted narrowly.[4] “[T]he general words are not to be given expansive meaning; they are confined to things of the same kind or nature as the particular matters mentioned.” [5] Thus, force majeure clauses are interpreted in light of 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.” [6] “[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.” [7]

Under New York law, a key issue in determining whether a party can successfully invoke a force majeure clause is whether the clause lists the specific event claimed to be preventing performance. [8] As noted previously, some force majeure clauses list “epidemics” or “pandemics” as force majeure events.[9] If a contract at issue lists epidemics or pandemics as a force majeure event, the claiming party could argue that the COVID-19 qualifies in light of the fact that it has been officially declared a pandemic by the World Health Organization. If a force majeure clause does not list epidemics or pandemics as triggering events, it is also possible that COVID-19 could be covered under an act of governmental authority, given that the governments of many states and cities in the United States have ordered that all non-essential businesses must close in order to slow the spread of the coronavirus.[10]

Additionally, New York law requires that the force majeure event be unforeseeable and that it could not have been accounted for or prevented in the contract.[11] Businesses seeking to invoke the force majeure clause of their contracts due to COVID-19 may argue that the coronavirus pandemic is an unforeseen event, unless the parties entered into the contract after the outbreak.

Moreover, some contracts additionally require that the claiming party give the other contractual parties

notice before invoking a force majeure clause. If the claiming party does not give proper notice as set forth in the contract, it could preclude successful invocation of a force majeure clause.[12]

Impossibility:

In general, the doctrine of impossibility excuses a party's performance only when the subject matter of the contract or the means of performance renders performance objectively impossible. The impossibility must be the result of an unforeseen event that could not have been protected against in the contract.[13] However, the financial difficulty or economic hardship of the promisor, even to the extent of insolvency or bankruptcy, does not establish impossibility sufficient to excuse performance of a contractual obligation.[14] The defense of impossibility is applied narrowly "due in part to judicial recognition that the purpose of contract law is to allocate the risks that might affect performance and that performance should be excused only in extreme circumstances such as when destruction of the subject matter of the contract by an act of God or by law makes performance objectively impossible.[15] New York courts have considered several factors to determine whether the impossibility doctrine is a viable defense, including "the foreseeability of the event occurring, the fault of the nonperforming party in causing or not providing protection against the event occurring, the severity of harm, and other circumstances affecting the just allocation of the risk." [16]

Impracticability:

Similarly, financial difficulty or economic hardship is also not enough to establish the defense of impracticability. For example, in *Urban Archaeology Ltd. v. 207 E. 57th St. LLC*, the court held that the defendant was not entitled to excuse its performance due to impracticability even where it sought a "reasonable extension during a time of severe

economic crisis” because, if such argument prevailed, “every debtor in a country suffering economic distress could avoid its debts.”[17]

Frustration of Purpose:

The defense of frustration of purpose “applies when the frustrated purpose is so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense.”[18] The frustrating event must be unforeseen.[19] For example, in *Jack Kelly Partners LLC v. Zegelstein*, a lease provided that a premises may only be used for commercial purposes and prohibited any use that violated the Certificate of Occupancy, and the Certificate of Occupancy prohibited commercial use. The court held that “without the ability to use the premises as an office, the transaction would have made no sense, and the inability to lawfully use the premises in that manner combined with defendants’ alleged failure and refusal to correct the CO constitutes a frustration of purpose entitling plaintiff to terminate the lease.”[20] Commentators have observed that the narrowness of the doctrines of impossibility and frustration of purpose, “underscores the need for counsel negotiating and drafting contracts to include contingency clauses providing for foreseeable possibilities—which are outside the scope of the impossibility doctrine—and language making clear the contract’s purpose.”[21]

Florida

Force Majeure:

In Florida, “events covered by a force majeure clause depend on the specific language of the contract, but generally, an event must be both outside of the control of the parties and unforeseeable.”[22] However, under Florida law, “force majeure clauses that include foreseeable events and events that merely frustrate performance (rather than render performance impossible) are permissible.”[23] But, these types of events must be specifically provided

for in the contract.[24] In addition, courts have said that there cannot be any fault or negligence on the part of the claiming party.[25]

Impossibility/Impracticability:

Impossibility of performance refers to situations where the purpose of the contract has, on one side, become impossible to perform.[26] “Although impossibility of performance can include extreme impracticability of performance, courts are reluctant to excuse performance that is not impossible but merely inconvenient, profitless, and expensive to the lessor.”[27] In addition, if the relevant risk was foreseeable at the time the contract was entered into, and it could have been the subject of an express provision of the agreement, the defense of impossibility is not available.[28] Moreover, economic difficulty is not enough to establish that performance is impossible.[29] For example, in *Home Design Center--Joint Venture v. County Appliances of Naples, Inc.*, the court found that though the purpose of the lease at issue was for County Appliance to operate an appliance store, and though County Appliance could not obtain property insurance as required under the floor plan agreement, performance was not “impossible,” because it could still operate an appliance store, even though it would have required more capital than County Appliances possessed.[30]

Frustration of Purpose:

Frustration of purpose occurs when “one of the parties finds that the purpose for which it bargained, and which purposes were known to the other party, have been frustrated because of the failure of consideration, or impossibility of performance by the other party.”[31] This defense does not apply where the “intervening event was reasonably foreseeable and could and should have been controlled by provisions of the contract.”[32] Frustration is a difficult defense to establish because “courts have been careful not to find commercial

frustration if it would only result in allowing a party to withdraw from a poor bargain.”[33] In *La Rosa Del Monte Exp., Inc. v. G.S.W. Enterprises Corp.*, the court found that a lease was frustrated due to the fact that La Rosa Del Monte leased the premises for the purpose of operating a moving and storage business, the lease limited its activities to those “necessary to the operation of a moving and storage business” and “[i]t was uncontradicted at trial that the use of the property as prescribed in the lease was in violation of Miami’s zoning ordinances.”[34] On the other hand, the court in *BRE Mariner Marco Town Center, LLC v. Zoom Town, Inc.* found that the purpose of the lease at issue was not frustrated when Zoom Tan’s permit for a tanning salon was denied, as tanning salons were not prohibited by the relevant zoning code, and therefore Zoom Tan could have appealed the denial and chose not to based on a lack of “interest in spending money on attorneys.”[35] The court highlighted that, in order for a the purpose of a contract to be frustrated, it must be due to circumstances beyond the parties’ control.[36]

Texas

Force Majeure:

Under Texas law, unless expressly included in a contract, parties seeking to invoke a force majeure clause to excuse non-performance are not required to exercise reasonable diligence to perform or overcome the force majeure event.[37] If the parties contracted for this, however, determining whether a party exercised reasonable diligence is fact intensive, and must be assessed on a case-by-case basis.[38] “Reasonable diligence” is defined under Texas law as “such diligence that an ordinarily prudent and diligent person would exercise under similar circumstances.”[39]

Impossibility/Impracticability/Frustration of Purpose:

“The impossibility defense has been referred to by Texas courts as impossibility of performance, commercial impracticability, and frustration of purpose.”[40] The defense is based upon section 261 of the Second Restatement of Contracts, “which excuses a party’s performance due to supervening circumstances which make performance impossible.”[41] Specifically, the Second Restatement of Contracts states:

Where, after a contract is made, a party’s performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.[42]

In addition, impossibility of performance which occurs after a contract is entered into will not excuse a party’s performance “if the impossibility might have reasonably been anticipated and guarded against in the contract.”[43] Moreover, economic impracticability is not enough to establish this defense in Texas.[44] “The impossibility defense generally applies in three instances: (1) the death or incapacity of a person necessary for performance, (2) the destruction or deterioration of a thing necessary for performance, and (3) prevention by governmental regulation.”[45] In *Huffines v. Swor Sand & Gravel Co.*, the court found that the “[f]act that a sand and gravel mining lessee’s lease performance became more burdensome when county imposed weight limit on road used by lessee’s trucks did not warrant avoidance of lessee’s contractual obligations.”[46] Specifically, the court found that the lessee “failed to establish that performance under the lease was a physical impossibility or that the weight limit change was not reasonably foreseeable before the lease was made.”[47]

Illinois

Force Majeure:

Under Illinois law, there is an implied duty on the party seeking to invoke a force majeure clause to make an effort to attempt to resolve the event causing delay or inability to perform under the contract before invoking a force majeure clause. This duty is “related to the duty of good faith [and] is read into all express contracts unless waived.”[48]

Impossibility/Impracticability:

Under Illinois law, the doctrine of impossibility is a recognized defense “where performance is rendered objectively impossible due to destruction of the subject matter of the contract or by operation of law.”[49] In addition, “the defense of impossibility of performance provides that if the continued existence of a particular person or thing is necessary for the performance of the contract, death or destruction of that person or thing will excuse performance.”[50] The doctrine is applied narrowly, and “performance should be excused only in extreme circumstances.”[51] The party seeking to invoke the impossibility of performance defense must show that the events causing the impossibility of performance were not reasonably foreseeable at the time the contract was formed.[52] If the event could have been foreseen or protected against in the contract itself, the impossibility defense fails.[53] In sum, a party seeking to invoke an impossibility impracticability defense must show: “(1) an unanticipated circumstance, (2) that was not foreseeable, (3) to which the other party did not contribute, and (4) to which the party raising the defense has tried all practical alternatives.”[54]

In *Exec. Prop. Mgmt., Inc. v. Watson*, the defendant, the lessee’s father who executed the lease on behalf of the lessee, argued that the lease was entered into with the purpose being “the possession and use of the plaintiff’s apartment for [the lessee] and his family,” which included an unborn child at the time. The defendant argued that the child was born with

disabilities and had medical needs that prevented the family from living in the apartment, and they should therefore be able to rescind the lease due to the defense of impossibility of performance. The defendant also argued that there were no acts by the lessee or his family that participated in the cause of them being unable to live in the premises.[55] The court found that because the lessee was the only person listed on the lease, and it did not also include the names of his family members, the lease was not truly impossible to perform, and the impossibility defense was therefore rejected.[56]

Commercial Frustration:

Additionally, Illinois recognizes the defense of commercial frustration. The doctrine of commercial frustration excuses performance “if a party’s performance under the contract is rendered meaningless due to an unforeseen change in circumstances.”[57] This defense requires the claiming party to establish: “(1) a frustrating event not reasonably foreseeable, that (2) totally or almost totally destroys the value of the party’s performance.”[58] As with the defense of impossibility, the doctrine of commercial frustration is applied narrowly.[59] In *Smith v. Robert*, the court found a contract to be sufficiently frustrated when the leased premises at issue, meant to be used for a men’s clothing store, was completely destroyed by a fire.[60]

California

Force Majeure:

Under Californian law, force majeure is the equivalent of the common law defense of impossibility, discussed in more detail below.[61] Force majeure in California is not limited to the equivalent of an act of God.[62] The law requires that a party to a contract seeking to invoke a force majeure clause must show “that, in spite of skill, diligence and good faith on his part,

performance became impossible or unreasonably expensive” due to the force majeure event.[63] The party seeking to invoke force majeure must also show that the force majeure event was the proximate cause of the party’s inability to perform.[64]

Impossibility/Impracticability:

Under California law, a party’s performance under a contract can be excused under an impossibility defense. In California, “a thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost.”[65] However, this should not be interpreted to mean that a party’s performance can be excused “simply because it is more costly than anticipated or results in a loss.”[66] In addition, the impossibility must not exist at the time the agreement is made.[67]

Commercial Frustration:

In addition, California recognizes the commercial frustration defense. The doctrine of commercial frustration applies when “performance remains possible, but the reason the parties entered the agreement has been frustrated by a supervening circumstance that was not anticipated, such that the value of performance by the party standing on the contract is substantially destroyed.”[68] To successfully invoke the commercial frustration defense, the claim party must establish: “1) the basic purpose of the contract, which has been destroyed by the supervening event, must be recognized by both parties to the contract; 2) the event must be of a nature not reasonably to have been foreseen; and the frustration must be so severe that it is not fairly to be regarded as within the risks that were assumed under the contract; and 3) the value of counterperformance to the promisor seeking to be excused must be substantially or totally destroyed.”[69]

Conclusion

As COVID-19 continues to spread and countries enact harsher measures to slow and contain the pandemic, courts will be faced with unique and novel questions in handling commercial lease disputes. In analyzing the COVID-19 issues in the commercial landlord/tenant context, all commercial tenants and landlords should carefully review their lease provisions and applicable state law to determine the consequences of and available remedies for failure to perform contractual obligations due to the impacts of COVID-19.

First, parties to commercial leases should consider whether the lease contains a force majeure clause that is specific to the current situation, i.e., does it list epidemics, pandemics and/or acts of governmental authority as force majeure events? It is important to note again that many commercial leases exclude the payment of rent from force majeure clauses. This means that a tenant may still be required to pay rent under their lease even during a force majeure event. Parties should therefore look for any language to that effect in their leases. Notably, if a force majeure clause does not provide the necessary relief, there may be other common lease provisions like “quiet enjoyment” that one could consider for this situation.

Second, commercial landlords and tenants should review their specific factual situations to determine if the common law defenses of impossibility, impracticability, and frustration of purpose may apply. Parties should also consider whether the current situation was truly unforeseeable and whether the difficulties they are experiencing involve more than just economic hardship.

[1] *Rochester Gas & Elec. Corp. v. Delta Star, Inc.*, 2009 WL 368508 at *7 (W.D.N.Y. Feb. 13, 2009) (quoting *Phillips Puerto Rico Core, Inc. v. Tradax Petroleum, Ltd.*, 782 F.2d 314, 319 (2d Cir.1985)).

[2] General Contract Clauses: Force Majeure, Practical Law Standard Clauses 3-518-4224; *see also Kel Kim Corp. v. Cent. Markets, Inc.*, 70 N.Y.2d 900, 902 (1987); *Rochester Gas & Elec. Corp. v. Delta Star, Inc.*, 2009 WL 368508 at *2.

[3] *See Rochester Gas & Elec. Corp. v. Delta Star, Inc.*, 2009 WL 368508 at *7.

[4] *Kel Kim Corp. v. Cent. Markets, Inc.* 70 N.Y.2d at 902.

[5] *Id.* at 903 (citing 18 Williston, Contracts § 1968 (3d ed. 1978)).

[6] *Constellation Energy Servs. of New York, Inc. v. New Water St. Corp.*, 146 A.D.3d 557, 558 (1st Dep't 2017) (quoting *United Equities Co. v First Natl. City Bank*, 52 A.D.2d 154, 157 (1st Dep't 1976), *affd on op below* 41 N.Y.2d 1032 (1977)).

[7] *Constellation Energy Servs. of New York, Inc.*, 146 A.D.3d at 558 (quoting *Route 6 Outparcels, LLC v Ruby Tuesday, Inc.*, 88 A.D.3d 1224, 1225 (3d Dep't 2011)).

[8] *Phibro Energy, Inc. v. Empresa De Polimeros De Sines Sarl*, 720 F. Supp. 312, 318 (S.D.N.Y. 1989) (citing *Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d at 902-03).

[9] *Aukema v. Chesapeake Appalachia*, 904 F. Supp. 2d 199, 206 (N.D.N.Y. 2012).

[10] *See Harriscom Svenska, AB v. Harris Corp.*, 3 F.3d 576, 580 (2d Cir. 1993) (Finding that a party's performance under the contract was excused when the United States government banned the defendant's sale of goods to Iran because the parties' contract contained a force majeure provision listing "governmental interference" as a force majeure event);

[11] *See Rochester Gas & Elec. Corp. v. Delta Star, Inc.*, 2009 WL 368508 at *7 (quoting *Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d at 902).

[12] *Toyomenka Pac. Petroleum, Inc. v. Hess Oil Virgin Islands Corp.*, 771 F. Supp. 63, 68 (S.D.N.Y. 1991) (Discussing whether a notice requirement in a force majeure clause is a condition precedent to invoking the force majeure clause).

[13] *Kel Kim Corp. v. Cent. Markets, Inc.*, 70 N.Y.2d 900, 902, 519 N.E.2d 295, 296 (1987); *Kolodin v. Valenti*, 115 A.D.3d 197, 198, 979 N.Y.S.2d 587 (2014); *Estates At Mountainview, Ltd. v. Nakazawa*, 38 A.D.3d 828, 829, 833 N.Y.S.2d 550 (2007).

[14] *See, 407 E. 61st Garage v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 281 (1968); *Stasyszyn v. Sutton E. Assocs.*, 161 A.D.2d 269, 271, 555 N.Y.S.2d 297 (1st Dep't 1990).

[15] *See Kel Kim Corp. v. Cent. Markets, Inc.*, 70 N.Y.2d 900, 902, 519 N.E.2d 295, 296 (1987)); *see also 407 E. 61st Garage, Inc.*, 23 N.Y.2d at 281.

[16] *D & A Structural Contractors Inc. v. Unger*, 25 Misc. 3d 1211(A), 901 N.Y.S.2d 898 (Sup. Ct. 2009).

[17] *Urban Archaeology Ltd. v. 207 E. 57th St. LLC*, 34 Misc. 3d 1222(A), 951 N.Y.S.2d 84 (Sup. Ct.), *aff'd*, 68 A.D.3d 562, 891 N.Y.S.2d 63 (2009)

[18] *Jack Kelly Partners LLC v. Zegelstein*, 140 A.D.3d 79, 85, 33 N.Y.S.3d 7, 10 (1st Dep't 2016), *leave to appeal dismissed*, 28 N.Y.3d 1103, 45 N.Y.S.3d 364, 68 N.E.3d 92 (2016).

[19] *Sage Realty Corp. v. Jugobanka, D.D.*, 1997 WL 370786, at *2 (S.D.N.Y. July 2, 1997) (noting that Executive Order issued by President Clinton was “an unforeseen event that, by preventing [tenant] from conducting business in its rental space at 437 Madison, destroyed [tenant’s] underlying reason for entering into the lease,” but denying summary

judgment to resolve factual issues of foreseeability of Executive Order's issuance).

[20] *Jack Kelly Partners LLC v. Zegelstein*, 140 A.D.3d at 85.

[21] Hall, Defenses of Impossibility of Performance and Frustration of Purpose, 10/19/2017 N.Y.L.J.

[22] *In re Flying Cow Ranch HC, LLC*, 2018 WL 7500475, at *2 (Bankr. S.D. Fla. June 22, 2018), *leave to appeal denied sub nom. Flying Cow Ranch HC, LLC v. McCarthy*, 2019 WL 1258780 (S.D. Fla. Mar. 19, 2019).

[23] *Id.*

[24] *Id.*

[25] *Fru-Con Const. Corp. v. U.S.*, 44 Fed. Cl. 298, 314 (1999); *CJP Contractors, Inc. v. United States*, 45 Fed. Cl. 343, 372 (1999).

[26] *Crown Ice Machine Leasing Co. v. Sam Senter Farms, Inc.*, 174 So. 2d 614, 617 (Fla. 2d DCA).

[27] *Valencia Ctr., Inc. v. Publix Super Markets, Inc.*, 464 So. 2d 1264, 1269 (Fla. 3d DCA 1985).

[28] *Shore Inv. Co. v. Hotel Trinidad, Inc.*, 158 Fla. 682, 29 So. 2d 696, 697 (1947).

[29] *See Home Design Ctr.--Joint Venture v. Cty. Appliances of Naples, Inc.*, 563 So. 2d 767, 770 (Fla. Dist. Ct. App. 1990).

[30] *Id.*

[31] *Crown Ice*, 174 So. 2d at 617.

[32] *Hilton Oil Transport v. Oil Transport Co., S.A.*, 659 So. 2d 1141, 1147 (Fla. 3d DCA 1995).

[33] *See Valencia Center, Inc. v. Publix Super Markets, Inc.*, 464 So. 2d at 1269 (quoting *Perry v. Champlain Oil Co.*, 101 N.H. 97, 98, 134 A.2d 65, 67 (1957)).

[34] *La Rosa Del Monte Exp., Inc. v. G.S.W. Enterprises Corp.*, 483 So. 2d 472, 473 (Fla. Dist. Ct. App. 1986).

[35] *BRE Mariner Marco Town Ctr., LLC v. Zoom Tan, Inc.*, 682 F. App'x 744, 747 (11th Cir. 2017).

[36] *Id.*

[37] *See Sun Operating Ltd. P'ship v. Holt*, 984 S.W.2d 277, 283-84 (Tex. App. 1998) (“there is no need for us to provide further remedy by implying into every force majeure clause the requirement that the lessee exercise diligence to overcome the effects of force majeure once it occurs”).

[38] *El Paso Field Servs., L.P. v. Mastec N. Am., Inc.*, 389 S.W.3d 802, 808 (Tex. 2012).

[39] *Id.* at 808-09.

[40] *Key Energy Servs., Inc. v. Eustace*, 290 S.W.3d 332, 339 (Tex. App. 2009) (citing *Tractebel Energy Mktg., Inc. v. E.I. Du Pont de Nemours & Co.*, 118 S.W.3d 60, 64 n. 6 (Tex.App.-Houston (14th Dist.) 2003, pet. denied)).

[41] *Paveway Concrete Prod., Inc. v. Lee Sicilio Ltd. Three*, No. 2004 WL 1799856, at *4 (Tex. App. Aug. 12, 2004) (citing *Centex Corp. v. Dalton*, 840 S.W.2d 952, 954 (Tex.1992)).

[42] *Paveway Concrete Prod., Inc.*, 2004 WL 1799856, at *4.

[43] *Huffines v. Swor Sand & Gravel Co.*, 750 S.W.2d 38, 40 (Tex. App. 1988)

[44] *Id.*

[45] *Key Energy Servs., Inc.*, 290 S.W.3d at 340.

[46] *See Huffines v. Swor Sand & Gravel Co.*, 750 S.W.2d 38 (Tex. App. 1988).

[47] *Id.* at 40.

[48] *Commonwealth Edison Co. v. Allied-Gen. Nuclear Servs.*, 731 F. Supp. 850, 859 (N.D. Ill. 1990).

[49] *YPI 180 N. LaSalle Owner, LLC v. 180 N. LaSalle II, LLC*, 403 Ill. App. 3d 1, 6 (2010).

[50] *Exec. Prop. Mgmt., Inc. v. Watson*, 2011 WL 10069467, at *3 (Ill. App. Ct. Mar. 29, 2011).

[51] *YPI 180 N. LaSalle Owner, LLC*, 403 Ill. App. 3d at 6 (quoting *Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d at 902).

[52] *YPI 180 N. LaSalle Owner, LLC*, 403 Ill. App. at 6–7 (quoting *Illinois–American Water Co. v. City of Peoria*, 332 Ill.App.3d 1098, 1106 (2002)).

[53] *YPI 180 N. LaSalle Owner, LLC*, 403 Ill. App. 3d 1, 6–7.

[54] *Bank of Am., N.A. v. Shelbourne Dev. Grp., Inc.*, 732 F. Supp. 2d 809, 827 (N.D. Ill. 2010) (citing *Blue Cross Blue Shield of Tenn. v. BCS Ins. Co.*, 517 F.Supp.2d 1050, 1056 (N.D.Ill.2007); *Illinois–Am. Water Co. v. City of Peoria*, 332 Ill.App.3d 1098, 1106, 266 Ill.Dec. 277, 774 N.E.2d 383, 391 (Ill.App.Ct.2002)); *see also Ner Tamid Congregation of N. Town v. Krivoruchko*, 638 F. Supp. 2d 913, 933 (N.D. Ill. 2009), *as amended* (July 9, 2009).

[55] *Exec. Prop. Mgmt., Inc.*, 2011 WL 10069467, at *6.

[56] *Id.*

[57] *Sunshine Imp & Exp Corp. v. Luxury Car Concierge, Inc.*, 2015 WL 2193808, at *5 (N.D. Ill. May 7, 2015).

[58] *Id.*

[59] *Id.*

[60] *See Smith v. Roberts*, 54 Ill. App. 3d 910, 912 (1977).

[61] *Citizens of Humanity, LLC v. Caitac Int'l, Inc.*, 2010 WL 3007771, at *14 (Cal. Ct. App. Aug. 3, 2010).

[62] *Pac. Vegetable Oil Corp. v. C. S. T., Ltd.*, 29 Cal. 2d 228, 238 (1946).

[63] *Jin Rui Grp., Inc. v. Societe Kamel Bekdache & Fils S.A.L.*, 621 F. App'x 511 (9th Cir. 2015)(quoting *Oosten v. Hay Haulers Dairy Emps. & Helpers Union*, 45 Cal.2d 784 (1955)); *Pac. Vegetable Oil Corp. v. C. S. T., Ltd.*, 29 Cal. at 238 (“The test is whether under the particular circumstances there was such an insuperable interference occurring without the party’s intervention as could not have been prevented by the exercise of prudence, diligence and care.”)

[64] *Hong Kong Islands Line Am. S.A. v. Distribution Servs. Ltd.*, 795 F. Supp. 983, 989 (C.D. Cal. 1991), *aff'd*, 963 F.2d 378 (9th Cir. 1992).

[65] *Habitat Tr. for Wildlife, Inc. v. City of Rancho Cucamonga*, 175 Cal. App. 4th 1306, 1336 (2009) (quoting *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 293, 156 P. 458 (1916)).

[66] *Id.*

[67] *Bonfare Markets, Inc. v. Penterra Marina Bay LLC*, 2001 WL 1571284, at *6 (Cal. Ct. App. Dec. 10, 2001).

[68] *Habitat Tr. for Wildlife, Inc.*, 175 Cal. App. 4th at 1336.

[69] *See Peoplesoft U.S.A., Inc. v. Softeck, Inc.*, 227 F. Supp. 2d 1116, 1119–20 (N.D. Cal. 2002).

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