

Second Circuit Holds that COVID-19 Excused Defendant from Performance Pursuant to Force Majeure Clause

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Commercial Litigation Alert
3.30.22

"Being good in business is the most fascinating kind of art. Making money is art and working is art and good business is the best art"
– Andy Warhol

Over the past two years, there has been a fair amount of litigation surrounding the enforceability of force majeure provisions in response to the pandemic. A force majeure clause is a contractual provision that excuses one or both parties' performance obligations when circumstances beyond the parties' control arise and make performance impracticable or impossible. Such provisions ordinarily cover natural disasters such as hurricanes, earthquakes, and floods. Other circumstances that may trigger force majeure provisions and relieve parties of liability include war, acts of terrorism, labor strikes and epidemics. With respect to COVID-19, courts around the country have generally construed force majeure provisions narrowly to find that, absent specific pandemic-related language, the pandemic does not trigger force majeure provisions. Other courts have decided that the COVID-19 pandemic falls within the more general definitions of "natural disaster." Last week, a Federal Court of Appeals weighed in for the first time on the issue.

In June 2020, JN Contemporary Art LLC (JN) sued Phillips Auctioneers LLC (Phillips) in the Southern District of New York for breach of a contract which obligated Phillips to sell a painting on behalf of JN at a live auction. Phillips moved to dismiss the complaint, invoking the force majeure clause to terminate its agreement to sell the painting on behalf of JN, citing the COVID-19 pandemic and state government orders requiring nonessential businesses to cease in-person operations. The terms of the force majeure clause contained in the agreement provided: "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." Judge Denise Cote of Southern District of New York granted the motion to dismiss filed by Phillips, finding that the COVID-19 pandemic is a "natural disaster" and that the pandemic constituted "a circumstance beyond the parties' reasonable control" as contemplated by their agreement. JN appealed and just last week the Second Circuit affirmed the dismissal. See *JN Contemporary Art LLC sued Phillips Auctioneers LLC*, 2022 U.S. App. LEXIS 7652, 2022 WL 852293 (2d Cir. March 23, 2022).

JN first argued on appeal that the district court erred in finding as a matter of law, without the benefit of any discovery, that the COVID-19 pandemic is a natural disaster, as it is debatable whether COVID-19 is a naturally occurring virus or one created by man. JN next argued that Phillips did not have to sell the painting at a live auction, but could have sold it online or delayed a live auction sale to some point in the future. The Second Circuit disagreed. The Second Circuit stated that it did not need to rule on the finding by the district court that the COVID-19 pandemic is a "natural disaster" as it could decide the case on other grounds. The Second Circuit stated that the primary 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." The Second Circuit held that the COVID-19 pandemic and the orders issued by the government restricting nonessential businesses constituted circumstances beyond the reasonable control of the parties. In addition, the Second Circuit held that the agreement only required sale at a live auction and that when a defendant is excused from performance by force majeure, a defendant is not required to provide substitute performance.

Much has been written over the last year or two about courts interpreting force majeure clauses narrowly and strictly and not excusing performance due to COVID-19, and many parties are now excluding COVID-19 from their force majeure clauses altogether. The decision last week by Second Circuit in *JN Contemporary Art LLC vs. Phillips Auctioneers LLC* stands in contrast to many prior court decisions for two reasons. First, the Second Circuit interpreted the force majeure clause at issue more broadly and excused performance due to COVID-19. Second, it appears to be the first decision by a Federal Court of Appeals on this issue.

If you have questions or would like more information, please contact Scott H. Casher (cashers@whiteandwilliams.com; 475.977.9316).

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