Greenbaum Litigators Prevail in Consequential Ruling Involving Force Majeure and Doctrines of Impossibility and Impracticability in Commercial Lease Agreements

Announcement

10.18.20

Since the start of the COVID-19 pandemic, both landlords and tenants have been wrestling with the impact of force majeure provisions in their lease agreements, as well as common law notions of impossibility and impracticability. In recent months, the firm's attorneys have found themselves counseling clients on both sides of this pressing and highly case-specific issue.

On October 2, 2020, Greenbaum attorneys **Robert J. Flanagan III** and **Conor J. Hennessey** faced these arguments head-on and prevailed on behalf of a commercial landlord who commenced an action against its tenant and the lease guarantor. Due to the inability to secure a judgment for possession at this time, Mr. Flanagan and Mr. Hennessey strategically commenced a monetary claim for unpaid rent. The tenant and guarantor moved to dismiss the claim, arguing that the tenant's business was ordered closed under New Jersey Governor Phil Murphy's March 16, 2020 Executive Order 104. Consequently, the tenant and guarantor argued that the failure to pay rent during this time was excused - either by the force majeure clause of the lease or the doctrines of impossibility and impracticability.

A loss of this motion would have resulted in severe consequences for commercial landlords throughout New Jersey. Indeed, the Court noted that many landlords and tenants, as well as other businesses, will face the very issues of this case for some time to come. Mr. Flanagan and Mr. Hennessey, however, prevailed and the motion to dismiss was denied.

Denying the defendants' motion, the Court agreed with the arguments advanced by Mr. Flanagan and Mr. Hennessey. The Court found that without a full record, the Court was unable to properly evaluate whether the terms of the force majeure clause as written were applicable and, if so, what impact the principle of quantum meruit or other equitable considerations should have in the Court's determination of the dispute. In addition, the Court determined that several other issues required examination, including whether the tenant obtained any business interruption insurance or any emergency loans from the Small Business Administration, whether the

landlord is entitled to compensation for maintaining the property, and whether the tenant should be deemed to have use of the premises in light of the fact that the tenant continued to store its equipment and trade fixtures in the space during the shutdown order.

Due to the unprecedented circumstances presented by the COVID-19 pandemic, force majeure clauses, and the related doctrines of impossibility and impracticability, will be hotly litigated by both landlords and tenants for the foreseeable future. Based upon the ruling in this case, a landlord should not simply accept a tenant's non-payment of rent position without first consulting with legal counsel and exploring all of the multi-faceted issues involved in the doctrines of force majeure, impossibility and impracticality. Conversely, tenants need to creatively assess the use of their property and evaluate the variety of complex issues that COVID-19 presents in order to assess the applicability of the doctrines of force majeure, impossibility and impracticability to their particular situation.

Mr. Flanagan is a partner in the firm's **Litigation Department**, where he concentrates his practice in commercial litigation and community association law. His work encompasses all aspects of both state and federal civil and criminal litigation, including pre-trial, trial, and appellate practice. His experience is focused in the areas of commercial litigation, banking and creditors' rights, white collar criminal defense, landlord-tenant disputes, personal injury and debt collection. Mr. Hennessey, an associate in the Department, focuses his practice in civil litigation, including the representation of private businesses and public entities in state and federal court commercial matters, business disputes and personal injury cases.

Related Attorneys

Conor J. Hennessey

Partner

732.476.2482

Email