

## Landlords get aggressive and tenants get creative as litigation during Covid continues

By Monroe Moxness Berg

**A**T THIS POINT IT IS NO SECRET that the Covid-19 pandemic has had an enormous impact on the commercial real estate market in general and restaurants in particular.

During the summer and fall of 2020, many restaurant tenants have been unable to keep current on rent payments due to Covid-19 restrictions and closures. Unlike the spring of 2020 when it appeared that a number of landlords were willing to work out accommodations with tenants and forego legal action, in recent months landlords have become more assertive and less forgiving of lease defaults.

One current case involving the Mall of America and the Hard Rock Café illustrates the point. Mall of America owner, Triple Five Group, is cracking down on tenants who stopped paying rent as a result of government-ordered shut-downs of restaurants and a general lack of revenue.

In its lawsuit against Hard Rock, the Mall of America seeks to recover nearly \$550,000 of back rent and fees related to the restaurant's closure since early March. Hard Rock was forced to shutter its doors in March due to Executive Orders related to the pandemic, and did not re-open once restrictions were eased in July.

Attorneys for the Mall of America argue that Hard Rock should have reopened and paid rent after dining indoors at 50 percent occupancy was allowed.

Hard Rock contends it should not be

liable for the amount since it cannot operate its business as usual, and likely will not be able to in the near future, given rising rates of infection within Minnesota, along with other government restrictions that burden the restaurant industry.

Further, according to Hard Rock, even with recently relaxed restrictions, less than 60 percent of its first-floor dining space would be eligible to reopen. Hard Rock considers itself discharged from its lease obligations "because of the unforeseen global Covid-19 pandemic and resulting Executive Orders."

Based on these circumstances, Hard Rock has asserted a number of interesting defenses to the Mall of America's lawsuit, including:

- The pandemic and Executive Orders constitute a "casualty" that rendered the premises partially or entirely untenantable;

- Executive Orders effected an eminent domain "taking" of the premises; and
- Hard Rock has not received the promised consideration under the lease (use of the premises) and therefore did not have to pay rent.

Whether some or all of these defenses gain any traction with the Court remains to be seen. But any restaurant tenant looking for rent relief should carefully examine the specific provisions of its lease and consider all potential defenses to a landlord's claim for back rent.

### Other Cases of Relief

Relatedly, several bankruptcy courts in other jurisdictions have exercised their equitable powers to offer some relief to commercial tenants that have filed bankruptcy petitions because of the Covid-19 pandemic.

### Quick landlord tips for a possible next round of Covid shutdowns

1. Go back to your landlord immediately and discuss rent relief.
2. Assess your cash position to determine to what level and how long you can keep the business going once you have to close your doors or cut back on capacity.
3. Meet with your employees to assess their needs in the case of a layoff.
4. Contact your bank to apprise them of your situation and see what they can do to help you. Some possible outcomes may be interest-only or suspension of payments for a set timeframe, etc.
5. We're hopeful that we will see a government-relief package like we did the first time with PPP and other loans. Keep your eyes open for deadlines and requirements for assistance programs.

For instance, courts administering the bankruptcy cases of retailers J.C. Penney Company, Pier 1 Imports and Modell's Sporting Goods all extended the time for performance of the debtors' lease obligations under the Bankruptcy Code.

In the Pier 1 Imports case, the court approved a deferment of rent payment obligations until the debtors filed a notice of intent to reopen, after which debtors were directed by the court to make "reasonable best efforts" to pay the deferred rent. A bankruptcy court in Maryland granted a debtor's financing order containing a proposal to pay "only critical expenses" for a six-week period, which did not include the payment of rent to the debtor's landlord.

Each case turns on its own facts and equities of the situation, but the willingness of these bankruptcy courts to provide various forms of rent relief may signal a growing willingness both within and outside bankruptcy law to provide some relief to tenants. [FSN](#)

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