

## Pennsylvania Superior Court Holds that Doctrines of Frustration of Purpose and Impracticability/Impossibility of Performance are Inapplicable to Commercial Lease Default Arising Out of COVID-19 Closures

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- Christopher W. Cahillane, ccahillane@tuckerlaw.com, (412) 594-5552
- Andrew J. Salemme, asalemme@tuckerlaw.com, (412) 594-3952

In the first Pennsylvania appellate case addressing the effects of government-ordered business closures due to the Covid-19 pandemic on a commercial lease default, the Pennsylvania Superior Court has held that the traditional common law doctrines of frustration of purpose and impracticability/impossibility of performance do not absolve a commercial tenant of lease default for non-payment of rent which allegedly occurred as a result of being ordered closed by Pennsylvania's governor.

In **9795 Perry Highway Management, LLC vs. Walter Bernard and Wynton Bernard**, 2022 Pa. Super. 52 (Mar. 29, 2022), the tenant operated an escape-room entertainment facility at landlord's building. The tenant defaulted on its lease in April 2020 by failing to pay rent — shortly after Pennsylvania Governor Tom Wolf ordered the closure of non-essential businesses due to the Covid-19 pandemic. The lease did not contain a force majeure provision allocating the risk of loss in the event of unforeseen events. The tenant notified Landlord that it was unilaterally terminating the lease on the same date that non-essential businesses were permitted to re-open in a limited capacity—June 5, 2020. Landlord ultimately filed a Complaint in Confession of Judgment in July 2020, after which the tenant filed a Petition to Open or Strike the confessed judgment, arguing that it should be absolved from paying any further rent due to the Commonwealth's Covid-19 closure order of March 2020 and the doctrines of frustration of purpose and impracticability/impossibility of performance.

Affirming the trial court's refusal to open or strike the confessed judgment, the Superior Court noted that there was no Pennsylvania authority directly addressing whether temporary, government-ordered business closures arising out of the Covid-19 pandemic triggered the doctrines of frustration of purpose and impracticability/impossibility of performance as they relate to the breach of a commercial lease for non-payment of rent. The Court cited approvingly, however, several New York cases which held that the doctrines were inapplicable to lease defaults involving a tenant's non-payment of rent due to Covid-19 closures. *See, e.g., Hugo Boss Retail, Inc. v. A/R Retail, LLC*, 71 Misc.3d 1222(A), at \*2 (N.Y. Co. Sup. Ct. May 19, 2021); *Gap v. Ponte Garde New York LLC*, 524 F.Supp.3d 224, 232-39 (S.D.N.Y. 2021); *35 East 75th Street Corp. v. Christian Louboutin L.L.C.*, 2020 WL 7315470, at \*2 (N.Y. Co. Sup. Ct. Dec. 9, 2020); *Greater New York Auto. Dealers Ass'n, Inc. v. City Spec, LLC*, 70 Misc.3d 1209(A), at \*9 (N.Y. Civ. Ct. 2020).

Further noting the fact that the tenant was more than two years into a six-year lease “when the COVID-19 pandemic caused the relatively short-term, approximately 78-day closure,” the Superior Court held that since the escape room could have reopened on June 5, 2020 (albeit at a reduced 50% capacity), it was hardly a “substantial frustration” sufficient to allow for the application of the doctrine of frustration of purpose. While the tenant’s business may have been “less profitable,” that does not support a frustration of purpose defense. The trial court’s refusal to open the confessed judgment was therefore affirmed.

The allocation of losses arising out of the Covid-19 pandemic will likely be a hot topic for our courts years into the future. The Superior Court’s decision in **9795 Perry Highway Management** is an initial victory for commercial landlords who, often like their tenants, are small businesses with obligations to mortgagees and other creditors.

LAW360 also covered this case. Click the link to read the article:

<https://www.law360.com/articles/1478735/covid-closure-didn-t-cancel-escape-room-s-rent-court-says>

If you are a commercial landlord with questions relating to the effects Covid-19 may have on the enforceability of your leases, we would welcome the opportunity to speak with you.

Christopher W. Cahillane, [ccahillane@tuckerlaw.com](mailto:ccahillane@tuckerlaw.com) Andrew J. Salemme, [asalemme@tuckerlaw.com](mailto:asalemme@tuckerlaw.com)

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