"FRUSTRATION" IN THE FLORIDA APPELLATE COURT: A COMMERCIAL LANDLORD'S BATTLE TO DEFEAT A TENANT'S EXCUSE FOR NON-PERFORMANCE

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A recent Florida appellate opinion is likely to have a material impact on how future commercial real estate leases are drafted. Florida landlords wishing to avoid tenants' defenses for nonperformance based on the doctrines of frustration of purposes, impracticality, or impossibility of performance should now more carefully assess how particular future events can affect a tenant's performance and assign that risk to tenants in a lease.

In *Genuinely Loving Childcare, LLC v. Bre Mariner Conway Crossings, LLC*, Case No. 5D15-4168, 2017 WL 127645 (Fla. 5th DCA Jan. 13, 2017), a landlord sued its tenant for possession of a commercial leased property located in Orlando, Florida, damages for breach of the lease, including accelerated rent, and damages for breach of guaranty agreements executed by two individual defendants.

The lease specified that the tenant leased the premises "for the purpose of the operation of a child day care center for children" and obligated the tenant to pay minimum monthly rent and the tenant's proportionate share of the common area expenses, real estate taxes and insurance. The lease also required the tenant to obtain "any and all licenses, permits and approvals necessary for the operation" of its child day care center at the premises, and also stated that the requirement that the tenant could only operate a child day care center at the premises "shall not be deemed or construed to constitute a representation or warranty by Landlord that such business may be conducted in the [] Premises,... or is otherwise permitted by law."

The tenant asserted that its performance under the lease was excused due to certain actions taken by the Department of Children and Families ("DCF"), the state agency responsible for licensing child day care centers. Specifically, the tenant alleged that even though they it "met and complied with all requirements of both rule and statute for a child care center to have indoor play space," performance under the lease became impossible when DCF denied the tenant the requisite license to operate a child day care center due to the lack of outdoor play space at the premises. Based on these facts, the tenant asserted the affirmative defenses of impossibility of performance, impracticality, frustration of purpose, and commercial frustration.

The landlord moved for final summary judgment asserting there was no genuine issue of material fact regarding each the following four key issues: (i) the landlord and the tenant entered into a valid and enforceable lease, (ii) the tenant failed to pay rent and other charges due and owing under the lease, (iii) the guarantors failed to pay the landlord as required by the guaranty agreements, and (iv) the landlord was damaged because of the tenant's failure to pay rent and other charges due and owing under the lease.

The landlord addressed the legal insufficiency of the tenant's affirmative defenses arguing that the tenant's inability to obtain a non-provisional license from DCF did not excuse its performance under the lease, because

the lease made clear that it was solely the tenant's responsibility to obtain the requisite license to operate its child day care center business, and the landlord made no representations regarding the tenant's ability to do so. The landlord argued that the tenant had elected to execute the lease while being familiar with Florida's law and rules governing the minimum standards for outdoor play space and while being familiar with the premises and knowing there was no outdoor play space available there. The trial court agreed with the landlord and granted summary judgment. The tenant appealed.

On appeal, the tenant argued the trial court erred when it granted summary judgment for the landlord because the landlord failed to disprove the tenant's affirmative defenses or establish that they were insufficient as a matter of law. The landlord asserted the lease agreement was clear that the tenant was responsible for obtaining the appropriate licensure and there was no representation or warranty by the landlord as to the fitness of the premises.

The appellate court reversed the final summary judgment for the landlord and held that a fact issue remained whether it was foreseeable the tenant would be denied licensing approval to operate a child day care center at the premises. The appellate court found the lease did not explicitly allocate the risk that DCF would deny the tenant's request, and therefore a disputed issue of fact precluded summary judgment. The case was remanded for further proceedings on the tenant's liability for damages for past and future rent due.

The Fifth District Court of Appeal's decision in *Genuinely Loving* is an important opinion for attorneys and parties drafting leases governed by Florida law which allocate risk between the landlord and the tenant. Although the landlord in *Genuinely Loving* realized that a particular future event could affect the tenant's performance, the appellate court found that the lease provisions were not adequately specific and overturned the landlord's summary judgment. Because of *Genuinely Loving,* more thought and detail will be needed to address foreseeable events through provisions, such as clauses addressing indemnity, warranties and representations, and risk of loss, to avoid a tenant's potential claims of frustration of purpose, impracticability, and impossibility of performance.

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