

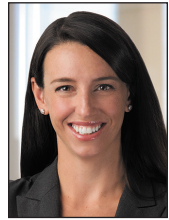
COVID ruling roils commercial leasing bar

Caffé's obligation to pay rent excused by shutdown orders

By Pat Murphy

pmurphy@lawyersweekly.com

Commercial leasing attorneys have been awaiting judicial clarification on the impact state-ordered shutdowns have on a business's obligation to pay rent since the COVID pandemic hit early last year.



MARTIN
Lawyer for
Caffé Nero

That wait is over — at least in terms of one judge's take on the issue.

Superior Court Judge Kenneth W. Salinger ruled that the "frustration of purpose" doctrine applied to excuse a Boston café's obligation to pay

rent for any period that government orders issued in response to the COVID-19 crisis prohibited the consumption of food and beverages on the premises.

"The undisputed facts establish that Caffé Nero's continuing obligation to pay rent was discharged at least from March 24 to June 22, 2020, because the entire purpose of the Lease was completely frustrated while the governor's COVID-19 orders barred restaurants from serving customers indoors," the Business Litigation Session judge wrote in *UMNV 205-207 Newbury, LLC v. Caffé Nero Americas, Inc.* (Lawyers Weekly No. 09-006-21).

Boston attorney Andrea L. Martin, who represents the tenant in *Caffé Nero*, thinks Salinger's decision is the first "tenant-favorable" ruling on the issue in Massachusetts. According to Martin, the case was a straightforward application of the frustration of purpose doctrine.

"The lease provided for a narrow use of the space, and that very narrow purpose became frustrated with the government's order," Martin said.

Caffé Nero has sent shockwaves through the bar. And since most commercial leasing lawyers represent both landlords and tenants, the decision is being greeted with a mix of emotions.

"From a tenant's perspective, you're very happy with this decision," said Thomas Bhisitkul, who co-chairs the Commercial Leasing Section of the Real Estate Bar Association. "But from a landlord's perspective, it's very troubling."

Joshua M. Bowman, a commercial real estate attorney in Boston, echoed that sentiment, calling *Caffé Nero* a "total game changer" for both landlords and tenants.

"This is a sweeping decision that opens the door to a lot more litigation in Massachusetts," Bowman said. "A lot of attorneys who represent tenants are cheering this decision and getting ready to make the same argument that was made in this case."

Contract language matters

Martin, a defense attorney, said the result in the case was dictated by the express terms of the parties' lease. Specifically, the lease provided that the tenant could use the leased premises "solely" for the operation of a Caffé Nero-themed café and "for no other purpose."

Bowman said use provisions like the



one at issue in *Caffé Nero* are commonplace in commercial leases.

"Sophisticated landlords draft these highly specific use clauses in almost all of their leases," Bowman said. "In this situation, the court used the specificity of that clause to find Gov. Baker's executive order frustrated the purpose of the lease."

The defendant operated a caffè on Newbury Street under a 15-year lease that commenced on June 1, 2017. In response to the pandemic, Gov. Charlie Baker issued an order — effective March 24, 2020 — under which all restaurants and cafés in the state were barred from allowing any "on-premises" consumption of food or beverages.

Bhisitkul pointed out that, under the executive order at issue in the case, Baker shut down all businesses in Massachusetts, not just cafés.



"You could take the rationale of this *Caffé Nero* case and apply it to every single tenant who had to shut down because of Gov. Baker's order."

— Thomas Bhisitkul, REBA

"If you weren't on a select list of essential services, then you had to shut down as of March 24, 2020," Bhisitkul said. "You could take the rationale of this *Caffé Nero* case and apply it to every single tenant who had to shut down because of Gov. Baker's order."

In response to the governor's order, Caffé Nero requested that its landlord, UMN 205-207 Newbury, LLC, waive its rent for April. According to the defendant, it was unable to pay rent while its business remained closed by the order.

On April 8, 2020, the landlord notified the defendant that it refused to waive rent and that the tenant would be in default unless it paid the April rent within five days. After the defendant missed May's rent payment, the plaintiff notified the tenant that it was in default and ordered Caffé Nero to "quit and surrender" the premises.

The defendant reopened its café on June 8 under the governor's order allowing

outside table service and takeout. A short time later, it opened for indoor dining.

On June 29, the landlord filed a summary process action in Boston Municipal Court seeking the defendant's eviction. It followed up that action by suing the defendant for breach of contract in Superior Court.

According to the plaintiff's complaint, under the terms of the lease the defendant owed \$13,500 in "fixed minimum rent" and \$7,200 in "additional rent" for the month of April, and the same amounts for May. At the time, the landlord sought more than \$133,000 in unpaid rent — including "holdover" rent — plus liquidated damages, interest and attorneys' fees.

Unable to resolve the dispute, the defendant vacated the premises on Oct. 29, having paid no rent from April to October 2020.

Frustration of purpose

Under his order denying the plaintiff's motion for summary judgment and granting the defendant summary judgment, Salinger found the tenant's obligation to pay rent under the parties' lease was discharged under the doctrine of frustration of purpose from March 24 to June 22, as well as any other period it was barred by government order from serving customers indoors.

Further, the judge declared that the defendant was not in default of its lease, meaning the plaintiff's May 19 notice of termination was ineffective.

Framingham real estate attorney Richard D. Vetstein said he raised the frustration of purpose defense on behalf of a tenant, but the judge in his client's case did not reach that issue. Vetstein said he was not surprised by the judge's treatment of the doctrine in *Caffé Nero*.

"This was a once-in-a-hundred-year global pandemic," Vetstein said. "I don't

think anyone could have contracted around it or the governor's shutdown for three months. [The doctrine] should be narrowly defined, but this fits within it."

Salinger drew the principles for Massachusetts' doctrine of frustration of purpose primarily from the Supreme Judicial Court's 1991 decision in *Chase Precast Corp. v. John J. Paonessa Co., Inc.*

In that case, the SJC held that the doctrine applies under circumstances in which a party to a lease or other contract is excused from performing its obligations "when an event neither anticipated nor caused by either party, the risk of which was not allocated by the contract, destroys the object or purpose of the contract, thus destroying the value of performance."

Salinger concluded that the doctrine applied squarely to the case before him.

"Since the Lease limited the permissible use of the leased space to a single purpose, it cannot be disputed that Caffé Nero's continued ability to operate a café at the leased premises, and the absence of government orders barring all restaurants from serving customers inside, was a basic assumption underlying the Lease," Salinger wrote.

Unfair result?

Vetstein foresees the frustration of purpose defense being raised by health clubs, movie theaters, bars and live music venues.

"The problem really is that the shutdown wiped these businesses out completely," Vetstein said. "So it's not just the three months they were shut down; it's the aftermath — whether or not the landlords can collect all that back rent once [the tenants] go out of business."

Bhisitkul does not see *Caffé Nero* as having a limited application because of the specific contract language at issue in the case. To the contrary, Bhisitkul said that Caffé Nero's lease was "pretty typical" in the industry.

The ultimate impact of *Caffé Nero* will depend on whether the case is upheld on appeal and how narrowly or broadly other judges interpret the decision, he added.

"This could very well be a case that the SJC takes up on direct appellate review," Bhisitkul said.

While Bowman said that Salinger was "spot on" in terms of his legal analysis, he questioned whether the decision is a good result from a policy perspective.

"This is a terrible decision for landlords," Bowman said. "The government has come in and prohibited the use allowed in the lease, which is a clear case of frustration of purpose."

Bhisitkul agrees that the decision is unfair to landlords because it places the risk of government regulation entirely on the landlord.

"It was the tenant's business affected by a governmental order, which the landlord has no control over," he said. "By relieving the tenant of the obligation to pay rent, that places all the risk on the landlord."

The plaintiff landlord in *Caffé Nero* is represented by Wayne F. Dennison. The Boston attorney did not respond to a request for comment prior to deadline.