June 16, 2020
Litigation Issues Concerning the Phased-In Plan to Re-Open New York
3:00 to 4:00 PM

a. Settlement of Matters - what to expect
    1. Who to initiate a possible settlement in LLT matters, commercial leases
    2. Looking to commercial (v residential) leases
    3. Ambiguity interpreted as against the Drafter

b. New Law re Personal Guaranties in NYC

c. Hoylman Act - no warrants during Covid, only money judgments

d. Tenant Default during Covid as a trigger re default and no renewal option in Lease (litigation involving this)
    1. Tenants might need the protection of a written agreement of deferral of rent

e. Landlord's Modification of it's Lease - and it's implications w Lenders, etc.

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Outline

I. IMPOSSIBILITY OF PERFORMANCE

A. Town of N. Hempstead v Pub. Serv. Corp. of Long Is., 107 Misc 19 [Sup Ct 1919], affd, 192 AD 924 [2d Dept 1920]

1. FACTS: Defendant violated contract concerning operations of gas lines arguing that as a result of WWI, it has been unable and is still unable to get sufficient material and labor to lay an additional three miles of pipe.

2. LAW: Performance must be rendered impossible by the act of God, the law, or the other party

3. HOLDING: Increase of difficulty, expense, and time in securing pipe resulting from WWI is not deemed "impossible".

4. DICTUM: A law prohibiting purchase pipe would have deemed the contract illegal, thus, the defendant would have been excused from performance.

B. Port Aux Quilles Lbr. Co. v Meigs Pulp Wood Co., 204 AD 541 [1st Dept 1923].

1. FACTS: Defendant violated contract concerning delivery of wood due to drought.

2. LAW: In addition that performance was rendered impossible by act of God, it must shown that the thing contracted to be done cannot by any means be performed.

3. HOLDING: Defendant violated the contract since the logs did not have to come from any particular tract, or any particular part of Canada.

C. Lantino v Clay LLC, 1:18-CV-12247 (SDA), 2020 WL 2239957 [SDNY May 8, 2020].

1. FACTS: Defendant gym entered into settlement agreement with plaintiff employees concerning payroll issues. In April 2020, employees requested judgment for breach of the gym's settlement agreement.

2. ISSUE: Is the gym excused from performance upon the doctrine of impossibility because of its inability to pay resulting from the COVID-19 pandemic and Governor Cuomo's PAUSE Executive Order.

3. LAW: Where impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused.

4. HOLDING: Court entered judgment against the gym for $923,913.51.

II. FRUSTRATION OF PURPOSE

A. Rockland Dev. Assoc. v Richlou Auto Body, Inc., 173 AD2d 690 [2d Dept 1991]

1. FACTS: Plaintiff landlord signed a lease agreement with a competitor of defendant tenant causing defendant tenant to go out of business.

2. ISSUE: Is defendant tenant's performance under the lease excused because it could not compete with other tenant?

3. LAW: The doctrine of frustration of purpose does not apply unless the frustration is substantial. It is not enough that the transaction has become less profitable for the affected party or even that he will sustain a loss.

4. HOLDING: Since defendant tenant merely alleges that he has sustained a loss, the doctrine of frustration of purpose is inapplicable.

B. Jack Kelly Partners LLC v Zegelstein, 140 AD3d 79 [1st Dept 2016]

1. FACTS: Lease stated that tenant shall use demised premises for general offices of an executive recruiting firm. Certificate of occupancy for the building required that it only be used for residential purposes.

2. ISSUE: Should the lease be terminated on the ground of frustration of purpose?

3. LAW: The frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense.

4. HOLDING: "[W]ithout the ability to use the premises as an office, the transaction would have made no sense, and the inability to lawfully use the premises in that manner combined with defendants' alleged failure and refusal to correct the CO constitutes a frustration of purpose entitling plaintiff to terminate the lease."

New York Official Reports

107 Misc. 19, 176 N.Y.S. 621

TOWN OF NORTH HEMPSTEAD, Plaintiff,
v.
PUBLIC SERVICE CORPORATION OF LONG ISLAND, Defendant.

Supreme Court, Nassau Special Term.
April, 1919.

CITE TITLE AS: Town of N. Hempstead v Public Serv. Corp. of Long Is.

***19 Franchise**

Acceptance of --- Contracts --- Gas companies --- Highways --- Control of material by war industries board not a good defense --- Liquidated damages

A franchise to lay, maintain and operate gas mains along the public highways of a town and in public places therein, when accepted, becomes a contract between the parties and is to be construed and governed by the general principles regulating contracts.

Conditions either precedent or subsequent which regulate, limit or control the exercise of a franchise, if reasonable and not prohibitive, may properly be exacted and their performance becomes obligatory upon the grantee of the franchise as a contractual obligation.

In an action by the town to recover liquidated damages for the non-performance by defendant of certain terms and conditions contained in its franchise, it is no defense that performance of said conditions was rendered impossible because by the official action of the war industries board, in controlling iron and steel production and the utilization thereof primarily for war purposes, defendant was and still is unable to get sufficient material and labor to lay an additional three miles of pipe or any part thereof along or through certain streets of the town.

The rules and regulations of the war industries board, while greatly increasing the difficulty and expense of securing pipe, did not excuse performance on the part of the defendant; the emergency thus created stands in no other or different category than if produced by any other cause or unforeseen contingency against which provision might have been made in the franchise.

The exceptions to the general rule that performance of a contract is excused when rendered impossible by the act of 'the law' considered, and *held,* that the present case did not come within any of said exceptions, and that as the conditions of the franchise had not been rendered physically impossible, ***20** nor forbidden nor characterized as illegal by any act of 'the law,' plaintiff was entitled to judgment against the defendant for the full amount claimed, with interest and costs.

ACTION to recover liquidated damages for the non-performance of a contract.

Dowsey, Parsons & Berliner, for plaintiff.
Caldwell & Murphy, for defendant.

ASPINALL, J.

This is an action brought by the plaintiff against the defendant to recover the sum of $1,000, as liquidated damages for the non-performance, upon the part of the defendant, of certain terms and conditions contained in a contract dated June 17, 1912, whereby the town of North Hempstead granted to the defendant the right to operate gas mains along public highways and in public places in said town.

The defendant in its amended answer interposed four separate and distinct defenses to said action.

At the close of the trial, counsel for the plaintiff moved to strike out all of the evidence introduced under paragraph 8 of the defendant's amended answer, which constituted its third separate defense, upon the ground that the same was incompetent, irrelevant and immaterial. The third separate defense reads as follows: 'That on or about the 6th day of April, 1917, the United States of America duly declared a state of war existing between the Imperial Government of Germany and the United States; and on December 7, 1917, declared a state of war existing between the United States and Austria, and the Government of the United States, after April 6th, 1917, took control and supervision of and over, and still has control and supervision of and over the steel ***21** and pipe distribution and industries of the United States and created a Priorities Board and a War Industries Board, and these Boards made no provision for the purchase of pipe to lay the same in the Town of North Hempstead, and that

without such a provision no such pipe is to be procured by this defendant for laying in the Town of North Hempstead, and the plaintiff made no application to said Priorities Board or to the War Industries Board for a priority order, although the plaintiff well knew or should have known that the rules of the Government required them to make such an application, and because of that condition and others, this defendant has been unable and is still unable to get sufficient material and labor to lay an additional three miles of pipe or any part thereof, along or through Bayview Avenue to the end of Travers Lane in the Town of North Hempstead or any part thereof.'

I am of the opinion that the evidence so introduced is incompetent, irrelevant and immaterial, and that the defendant cannot successfully avail itself of this third specific defense; but in order that the entire controversy may be decided upon the merits, I deny the plaintiff's motion to strike out said evidence. Upon this proposition, I have the following comment to make: The defendant wholly failed to prove its defense as set forth in paragraph 8 of the amended answer and, even if it had proved the same, it would not have been a bar to this action, under the authorities.

The privilege conferred upon the defendant to lay, maintain and operate its gas mains and pipes along and through the public highways of the town of North Hempstead constitutes a franchise which emanates from the sovereign power through the exercise of lawfully delegated powers (***22** *Beekman v. Third Ave. R. R. Co.,* 153 N. Y. 144, 152; *California v. Pacific Railroad Co.,* 127 U. S. 1, 40), and the rights and privileges so conferred by the sovereign power and called a franchise, when accepted, becomes a contract between the sovereign power and the individual, to be construed and governed by the same principles regulating contracts generally, and which is as obligatory upon the parties as any other contract. *Trustees of Southampton v. Jessup,* 162 N. Y. 122, 126; *People v. O'Brien,* 111 id. 1, 49; *Thompson v. People ex rel. Taylor,* 23 Wend. 537, 552, 553, 554, 573, 579; *Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co.,* 32 Barb. 358, 364.

Since a franchise confers rights, privileges and powers of public concern, not within the domain of individual rights, the granting of the same may be, and usually is accompanied by conditions, either precedent or subsequent, which regulate, limit or control the exercise of the rights and privileges so conferred. Such conditions, if reasonable in character and not prohibited, may properly be exacted and, if the acceptance of a franchise with the accompanying conditions constitutes a contract, the performance of the conditions becomes obligatory upon the grantee of the franchise as a contractual obligation. It stands in the same category as any provision in any other contract which one of the parties has agreed to perform. *People ex rel. West Side Street Railway Co. v. Barnard,* 110 N. Y. 548, 553, 557; *Gaedeke v. Staten Island Midland R. R. Co.,* 43 App. Div. 514, 528; Joyce Franchises, § 342; *Wilson v. Tennent,* 32 Misc. Rep. 273, 278; *Interstate Railway Co. v. Massachusetts,* 207 U. S. 79, 84.

The contract made between the plaintiff and the defendant contained certain terms and conditions for the non-performance of which this action has been ***23** instituted and, as an excuse for such non-performance, the defendant interposed as one of its defenses the impossibility of performance, as specified and contained in its third separate defense, which in my judgment cannot possibly defeat the plaintiff's claim, for the following reasons:

The provisions of a franchise are to be considered as any other contractual provisions in a contract between individuals. The leading case upon this proposition, and the one most often quoted, is *Paradine v. Jane,* Alleyn, 26, quoted in *The Harriman,* 76 U. S. (9 Wall.) 161, 172.

The rule is well stated in a New York case, as follows: 'If a party enter into an absolute contract without any qualification or exception, and receives from the party with whom he contracts the consideration of such engagement, he must abide by the contract, and either do the act or pay the damages.' *Beebe v. Johnson,* 19 Wend. 499, 500, and it has also been held in the United States courts, as follows: 'It is a well-settled rule of law, that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him.' *Dermott v. Jones,* 69 U. S. (2 Wall.) 1, 7, and in a later New York case the rule is also reiterated as follows: 'While as a general rule, where the performance of a duty created by law is prevented by inevitable accident, without the fault of a party, the default will be excused, yet when a person by express contract engages absolutely to do an act not impossible or unlawful at the time, neither inevitable accident, nor other

unforeseen contingency not within his control, will excuse him, for the reason that he might have provided against them ***24** by his contract.' *Wheeler v. Connecticut Mutual Life Insurance Co.,* 82 N. Y. 549, 550. This also is the rule as stated in the following cases: *Cameron-Hawn Realty Co. v. City of Albany,* 207 N. Y. 377, 381; *Jones v. United States,* 96 U. S. 24, 29; *Harmony v. Bingham,* 12 N. Y. 99, 107; *Carnegie Steel Co. v. United States,* 240 U. S. 156, 165; *Jacksonville M. P. Railway & Navg. Co. v. Hooper,* 160 id. 514, 527; *Richards & Co., Inc., v. Wreschner,* 174 App. Div. 484; *Cobb v. Harmon,* 23 N. Y. 148, 150.

I am clearly of the opinion that this action is in all respects within the general rule as laid down in the above quoted authorities.

I am well aware that there are several exceptions to the general rule as previously stated, but the principal exception is usually couched in the following language: 'Unless its performance is rendered impossible by the Act of God, the law or the other party.' *Labaree Co. v. Crossman,* 100 App. Div. 499, 502.

The contention of the defendant is that by reason of the activities of the war industries board of the council of national defense in controlling iron and steel production and the utilization thereof primarily for war purposes, performance of the provision of the franchise in question was rendered impossible by act of 'the law' within the meaning of the above quoted exception to the general rule. In my opinion the defendant is mistaken in this respect. The exception relating to performance rendered impossible by act of the law seems to be confined to cases where some duly authorized legal action, or some process of law, has made performance physically impossible, as in the case of *People v. Bartlett,* 3 Hill, 570, or where the impossibility results from the destruction of the corpus or thing by act of the law, as in ***25** *Lorillard v. Clyde,* 142 N. Y. 456; or, generally, where the law either directly or indirectly, by legislative enactment or by some court action, in effect abrogates the contract, or excuses performance, or prevents, prohibits, or renders illegal the performance of the act contracted to be performed. *People v. Globe Mutual Life Ins. Co.,* 91 N. Y. 174, 178; *Buffalo E. S. R. R. Co. v. Buffalo Street R. R. Co.,* 111 id. 132, 139; *Jones v. Judd,* 4 id. 411; *Brick Presbyterian Church v. New York,* 5 Cow. 538. I am fully satisfied that the present case does not come within any of the exceptions to the general rule. The purpose of the council of national defense was, briefly stated, to secure the 'Co-ordination of industries and resources for the national security and welfare.' Fed. Stat. Anno., 1918 Supp. 975.

It may be conceded that the rules and regulations of the war industries board greatly increased the difficulty, and probably the expense, of securing pipe, but the difficulty so created stands in no other or different category than if created by any other cause or unforeseen contingency, such as scarcity of labor, strikes, increased taxation or demands in excess of the supply. The controlling consideration is that neither the acquisition nor the use of the pipe for the purpose of fulfilling the obligation assumed by the defendant was forbidden or rendered illegal by any act of 'the law.' Official action increased the difficulty of performance but imposed thereon no taint of illegality, and I am of the opinion that none of the cases hold that performance is excused by such a situation as is disclosed in this case. On the contrary, it has been held that increased difficulty and expense of performance, occasioned by a law enacted after the execution of a contract, never excuses performance. *Baker v. Johnson,* 42 N. Y. 126, 131.

***26** Whether or not an application for a priority order, if made, would have been granted or refused, or whether or not the rules and regulations at any particular time did or did not specifically provide for a priority order in such a case as this, are considerations beside the question. The important fact is that the power to grant such an order was at all times in the priorities board or the war industries board. Such action was not prohibited nor rendered illegal. If, in the exercise of a wise precaution, the defendant had previously acquired a surplus supply of pipe, the use thereof was never prohibited nor rendered illegal. Neither was the acquisition of pipe from private sources ever prohibited nor declared illegal. The performance of the requirements of the franchise was, therefore, never rendered impossible by any act of 'the law' within the meaning of the exception to the general rule.

The most that can be said is that the defendant was confronted by unforeseen contingencies against which it might have provided in the contract. Not having done so, it is liable because performance, while possibly rendered more difficult and expensive by the unforeseen contingency, has not been rendered physically impossible, nor forbidden or characterized as illegal by any act of 'the law.' *Mawhinney v. Millbrook Woolen Mills,* 105 Misc. Rep. 99.

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In my opinion the remaining separate defenses have not been sustained by the defendant, and I therefore find that the plaintiff, upon the whole case, is entitled to judgment against the defendant for the full amount claimed, with interest and costs.

Judgment accordingly.

New York
Official Reports

204 A.D. 541, 198 N.Y.S. 563

PORT AUX QUILLES LUMBER
CO., INC., Respondent,
v.
MEIGS PULP WOOD COMPANY, INC., Appellant.

Supreme Court of New York,
Appellate Division, First Department.
March 2, 1923.

CITE TITLE AS: Port Aux Quilles Lbr.
Co., Inc. v Meigs Pulp Wood Co., Inc.

***541 Sales**

Action to recover balance due on partial delivery of rossed pulp wood ---Contract provided that neither party should be liable for failure to perform which was caused by floods, strikes, acts of God, etc. ---Plaintiff's plant was operated in part by water power --- If act of God rendered performance impossible, duty to perform did not revive on termination of conditions --- Unusual drought where plaintiff's plant was located was act of God --- Though drought was act of God, plaintiff was not relieved if contract could be otherwise performed --- Error to reject evidence by defendant that plaintiff could have purchased wood elsewhere to fulfill contract --- Error to instruct jury to disregard other means of performance

In an action to recover the balance due on a partial delivery of rossed pulp wood, it appeared that the contract of sale provided that neither party should be held responsible for damages caused by delay or failure to perform, if such delay or failure was due to fires, strikes, floods, acts of God, legal acts of the public authorities or delays caused by public carriers which could not reasonably be provided against; that plaintiff's mill was operated, in part, by water power, and that during the summer while the contract was in course of performance there occurred an unusual and extraordinary drought in the section of the country where plaintiff's mill was located, which deprived it of the necessary water power to operate its plant.

Held, that if an act of God prevented the performance of the contract within the time specified therein, the plaintiff was relieved of its obligations entirely, and those obligations did not revive at the close of the existence of conditions attributable to an act of God, which was not until the time specified in the contract for delivery had terminated, and require the plaintiff to complete the contract.

***542** An unprecedented and long-continued drought is an act of God on the same theory that an unusual supply of water called a flood is within that category.

But, assuming that there was a drought as found by the jury, and that such drought was an act of God, the plaintiff cannot be relieved from the performance of its obligations unless it is shown that it was impossible for it to fulfill its contract in any other manner than that contemplated by the contract.

The contract did not require that the plaintiff should be limited in its fulfillment to the use of wood prepared at its plant, and, therefore, it was error for the court to reject evidence to the effect that the plaintiff might have purchased wood from other sources and performed its contract.

It was error also to instruct the jury to disregard the possibility of other means of performance of the contract by the plaintiff, either by the installation of modern machinery in its plant or, if that were impracticable, by procuring the wood from another source through purchase.

APPEAL by the defendant, Meigs Pulp Wood Company, Inc., from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 1st day of December, 1921, upon the verdict of a jury, and also from an order entered in said clerk's office on the same day denying defendant's motion for a new trial made upon the minutes.

Sparks, Fuller & Stricker [*Leonard J. Reynolds* of counsel; *Frederick W. Sparks* with him on the brief], for the appellant.
Elkus, Gleason, Vogel & Proskauer [*Joseph M. Proskauer* of counsel; *Wesley S. Sawyer* and *Frank L. Weil* with him on the brief], for the respondent.

MCAVOY, J.:

The contract sued upon obligates seller to deliver to the buyer, and the buyer to accept, seven to eight thousand cords of four-foot machine rossed pulpwood; the wood was to be delivered piled in tiers on boats of the buyer or those of the Cornwall Terminal Company in Oswego; deliveries to begin on August 1, 1919, and to continue in as nearly equal monthly quantities as possible until the entire quantity should be delivered, with

the understanding that all wood sold should be delivered to the buyer on or before November 1, 1919. The process of rossing is the cutting away from the pulpwood the bark, knots and dirt thereof. The plaintiff did deliver to defendant prior to October 30, 1919, 1,043.9 cords of pulpwood at the contract price of $19.50 a cord, and in January, 1920, defendant paid plaintiff $5,000 on account of the wood that was delivered, and the balance of $15,365.05 is the sum for which the plaintiff brought suit, claiming as hereinafter outlined, that the delivery of the balance of the pulpwood provided for in the contract was excused by the inclusion of this clause in the contract: '8.--It is mutually understood and agreed that neither party hereto shall be held responsible for damages caused by delay ***543** or failure to perform hereunder when such delay or failure is due to fires, strikes, floods, acts of God, legal acts of the public authorities or delays of [*sic*] defaults by public carriers which cannot reasonably be forecasted or provided against.'

We are to consider whether article 8 relieved the plaintiff from its obligation by reason of the condition which the evidence shows and which was found by the jury existed at plaintiff's plant during August, September and October preceding the date of fulfillment of the contract.

The appellant asserts that the nature of the conditions which prevailed at plaintiff's plant during the period in question did not call into play any of the provisions of this clause of the contract, assuming that the contract can be entirely avoided if such conditions did exist there. But from the proof here, it might be found as a fact that there was such an unusual and unprecedented drought in the vicinity of the plaintiff's plant, which was partly operated by water power, as made it impossible to carry out the contract at that particular place, and if the product was under the contract solely for manufacture, and within the contemplation of the parties to be performed at that plant and the agreement for goods limited to plaintiff's product machined thereat, the plaintiff would be relieved of performance, provided that a drought of an unusual nature is included within the term 'an act of God,' and that such act of God is not delimited by association with the terms, 'fires,' 'strikes' and 'floods,' which it may be assumed cannot reasonably be forecasted or provided against.

It is impossible to agree with the defendant that the seller is only relieved by the clause quoted from a failure to deliver the balance of the wood due under the agreement's terms until such time thereafter as the duration of the act of God persists and normal operations may be resumed. The context does not permit of that interpretation. The gist of inquiry is whether the failure to perform the balance of the contract by delivery of the wood was excused by a drought, since drought there was under the finding of the jury. That an unprecedented and an unusually long-continued drought is an act of God, on the same theory that an unusual supply of water called a flood is within that category, cannot be denied. While a flood and a drought are opposite conditions in effect, the one is not exclusive in thought to the other; but each connotes an act of God having to do with the frustration of an adventure by rendering the tangible means of performance impotent through a fortuitous interference with the water source or supply.

But even assuming that there was a drought and that such ***544** drought was an act of God, it must in addition be shown that the thing contracted to be done cannot by any means be performed. (*Cameron-Hawn Realty Co. v. City of Albany,* 207 N. Y. 377; *Krulewitch v. National Importing & Trading Co., Inc.,* 195 App. Div. 544.)

Hardship and expense or loss to the party required to perform will not be considered, nor will the uselessness of the result to the other be regarded. The act of God, as Mr. Justice PAGE says in *Woodruff v. Oleite Corporation* (199 App. Div. 773), is one 'which exempts from liability' because it 'operates without any aid or interference of man, and when the loss occasioned is the result in any degree of human aid or interference, or if an act of human negligence contributed to the injury, or, though the injury proceed directly from natural causes, if it might have been avoided by human prudence and foresight, it cannot be considered the act of God.' It seems obvious that even though this drought be an act of God and this provision of the contract for exemption be not limited to floods and may be abrogated entirely upon the happening of an event in the nature of an act of God, other than those mentioned specifically, nevertheless, it is not shown, as the language of the contract recited that the catastrophe which caused the failure to perform was not such as could not have been provided against, in so far as this contract was concerned, by the use of other means of manufacture or production, or the procurement of the commodity to fulfill the terms of the contract at some other place.

198 N.Y.S. 563

It may be that in certain contracts their inherent nature shows that it was contemplated by the parties when they were made that their fulfillment would be dependent upon the continuance or existence, at the time for performance, of certain things or conditions essential to their execution. Then in the event they cease, before default, to exist or continue, and thereby performance becomes impossible without the promisor's fault, the contractor is, by force of the implied condition to which his contract is subject, relieved from liability for the consequences of his failure to perform. (*Harmony v. Bingham,* 12 N. Y. 107; *People v. Bartlett,* 3 Hill, 570; *Dexter v. Norton,* 47 N. Y. 62; *Booth v. Spuyten Duyvil Rolling Mill Co.,* 60 id. 491; *Taylor v. Caldwell,* 3 B. & S. 826.)

But this contract cannot be so construed. Even plaintiff pointed out to defendant where similar wood to supply the deficit might be obtained, but did nothing to obtain it for furnishing the means of its own performance.

The contract contains no provision that the logs should come from any particular tract or any particular part of Canada, although there is an indication that the wood should come from Canada, ***545** because there is provision therein that, in the event that the seller should be required to comply with the official requirements as to the export of pulpwood from Canada, the buyer agrees to do such necessary things as will conform thereto. Nor is the seller limited in the manner in which the wood is to be obtained. The contemplation of the parties is not evidenced as requiring this wood at all events to be machined at plaintiff's plant. It must then have been error to remove from the jury the question whether the plaintiff might not have fulfilled the balance of the order by the simple installation of modern machinery in its plant, or if that were impracticable, whether it might not have procured the commodity from another source through purchase elsewhere.

Such evidence was offered and rejected, and the jurors were instructed to disregard the possibility of other means of performance of the contract.

The judgment and order, therefore, should be reversed and a new trial ordered, with costs to appellant to abide the event.

CLARKE, P. J., PAGE, MERRELL and FINCH, JJ., concur. Judgment and order reversed and a new trial ordered, with costs to appellant to abide the event.

2020 WL 2239957
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Michael LANTINO and Joanne Cabello, on behalf of themselves and all others similarly situated, Plaintiffs,
v.
CLAY LLC et al., Defendants.

1:18-cv-12247 (SDA)
|
Signed May 8, 2020

Attorneys and Law Firms

Orit Goldring, The Goldring Firm, New York, NY, for Plaintiffs.

Douglas Brian Lipsky, Sara Jacqueline Isaacson, Lipsky Lowe LLP, New York, NY, for Defendants.

OPINION AND ORDER

STEWART D. AARON, UNITED STATES MAGISTRATE JUDGE:

***1** Pending before the Court is a motion by Plaintiffs Michael Lantino ("Lantino") and Joanne Cabello ("Cabello") (collectively, "Plaintiffs") for entry of a Consent Judgment against Defendants The Gym at Greenwich, LLC; The Gym at Port Chester, Inc.; and The Gym at Union Square, Inc. (collectively, the "Corporate Gym Defendants"), as well as individual Defendants Seth Hirschel ("Hirschel"), Stefan Malter ("Malter") and Barnet Liberman ("Liberman") (collectively, the "Individual Defendants"). (Pl. 4/29/20 Not. of Mot., ECF No. 98.) Defendants resist entry of the Consent Judgment, claiming that their performance under the Settlement Agreement that permits entry of the Judgment was rendered impossible by the COVID-19 pandemic and the resultant "New York State on PAUSE" Executive Order signed by New York Governor Andrew M. Cuomo that became effective on March 22, 2020 (the "PAUSE Executive Order"). For the reasons set forth below, Plaintiffs' motion is GRANTED.

BACKGROUND

This case, which was commenced on December 27, 2018, alleged violations of the Fair Labor Standards Act ("FLSA") and the New York Labor Law.[1] (Compl. ¶ 1.) Plaintiffs asserted that the Corporate Gym Defendants and the Individual Defendants routinely and knowingly operated their fitness businesses without sufficient funds to cover employee payroll. (*See id.* ¶¶ 49-57.) They alleged that Defendants routinely paid their employees later than their regularly scheduled pay date and, on many occasions, because the corporate bank account was not sufficiently funded, employees' paychecks would bounce, leaving employees with no timely payment of wages and a bounced check fee. (*See id.*) They also alleged that at some point Defendants altogether stopped paying their employees for their time worked. (*See id.* ¶¶ 44-48.)

After the Complaint was filed by Lantino and Cabello, 38 other employees filed Consents to Sue in order to opt-in as Plaintiffs to assert FLSA claims against Defendants, and Plaintiffs filed a motion for conditional certification, pursuant to 29 U.S.C. § 216(b). (Pl. 6/19/19 Not. of Mot., ECF No. 70.) While this motion was pending, the parties appeared before me for a settlement conference on September 9, 2019 and reached a settlement in principle.

On September 9, 2019, an Order was issued on the parties' consent, pursuant to 28 U.S.C. § 636(c), referring all proceedings in this case to me, including the entry of judgment. (Order of Reference, ECF No. 84.) On October 3, 2019, Plaintiffs submitted a letter to me with regard to the fairness of the proposed settlement, along with the proposed Settlement Agreement (which had not yet been fully executed). (Pl. 10/3/19 Ltr., ECF No. 90.) In their letter, Plaintiffs explained that, although they had calculated the total damages for the named and opt-in Plaintiffs to be $3,686,515.98, they had agreed to a total settlement fund in the amount of $300,000.00, to be paid out over 25 months, but, in the event of a default, the settlement amount would be

increased to $1,000,000.00, pursuant to a Consent Judgment. (*Id.* at 1-2.)

***2** On October 4, 2019, the Court entered an Order preliminarily approving the settlement, stating that final approval must await submission of a fully executed Settlement Agreement. (10/4/19 Order, ECF No. 91.) On November 5, 2019, the Settlement Agreement was filed with the Court, executed by the 40 Plaintiffs and opt-in Plaintiffs, as well as the Corporate Gym Defendants and Individual Defendants. (Settl. Agmt., ECF No. 92.)

The Settlement Agreement provides that Defendants shall pay the $300,000.00 Settlement Amount by an initial payment of $50,000.00, plus monthly installments of $8,695.65 (less applicable withholdings) for 23 months. (Settl. Agmt. at 2.) The Settlement Agreement has annexed to it a form of Consent Judgment executed by the Corporate Gym Defendants and the Individual Defendants. (Settl. Agmt. Ex. A, ECF No. 92, at 50 to 53 of 57.) In the event of default in payments under the Settlement Agreement, the Consent Judgment provides for the entry of judgment in the amount of $1,000,000.00, less any payments previously made. (*See id.*) The Settlement Agreement states that, if Defendants are in default, "Plaintiffs' Counsel may enter the Consent Judgment, without further notice." (Settl. Agmt. at 3.)

On April 17, 2020, Plaintiffs filed their form of Consent Judgment without any supporting letter or motion. (Consent Order, ECF No. 94.) On April 20, 2020, Defendants filed a letter requesting a conference regarding the Consent Judgment "to address why Defendants did not make the required settlement payment" (Def. 4/20/20 Ltr., ECF No. 95, at 1), and the Court scheduled a telephone conference for April 28, 2020. (4/20/20 Order, ECF No. 96.) After the April 28 conference, the Court entered an Order providing that Plaintiffs were to file their motion for entry of the Consent Judgment by April 29, 2020; that Defendants were to file their opposition by May 6, 2020; and that Plaintiffs were to file any reply by May 8, 2020.[2] (4/28/20 Order, ECF No. 97.)

On April 29, 2020, Plaintiffs timely filed their motion for entry of the Consent Judgment, which is the motion presently pending before the Court. (*See* Pl. 4/29/20 Not. of Mot.; Goldring Decl., ECF No. 99.) Plaintiffs submitted evidentiary proof that Defendants had paid to date the sum of $76,086.49,[3] but that the Defendants were in default under the Settlement Agreement. (*See* Goldring Decl. ¶¶ 10-12.) Plaintiffs thus seek entry of the Consent Judgment in the amount of $923,913.51 (*i.e.*, $1,000,000.00 less the $76,086.49 previously paid). (*See id.* ¶ 14.)

***3** On May 6, 2020, Defendants filed their papers in opposition to Plaintiffs' motion. Their papers included an opposition memorandum of law (Opp. Mem., ECF No. 103), as well as Declarations from each of the three Individual Defendants, *i.e.*, Hirschel, Malter and Liberman, regarding their financial condition. (Declarations, ECF Nos. 104-06.) Defendants do not contest that they are in default under the Settlement Agreement, but argue that their performance should be excused based upon the doctrine of impossibility because of their inability to pay, ostensibly as a result of the COVID-19 pandemic and Governor Cuomo's PAUSE Executive Order. (*See* Opp. Mem. at 7-10.)

On May 7, 2020, Plaintiffs filed their reply. (Reply, ECF No. 107.) In their reply, Plaintiffs note that the Individual Defendants' Declarations make no "mention of their net worth, of their assets, of any trusts they control or are beneficiaries of, [of] companies they control, or [of] assets of companies they control." (*Id.*)

LEGAL STANDARDS

"A settlement agreement is a contract that is interpreted according to general principles of contract law." *Omega Eng'g, Inc. v. Omega, S.A.*, 432 F.3d 437, 443 (2d Cir. 2005) (citations omitted). "[U]nder New York law,[4] impossibility (which is treated synonymously with impracticability) is a defense to a breach of contract action 'only when ... performance [is rendered] objectively impossible ... by an unanticipated event that could not have been foreseen or guarded against in the contract.' " *Axginc Corp. v. Plaza Automall*, Ltd., 759 F. App'x 26, 29 (2d Cir. 2018) (alteration in original) (quoting *Kel Kim Corp. v. Cent. Mkts., Inc.*, 70 N.Y.2d 900, 902 (1987)).

"[T]he excuse of impossibility of performance is limited to the destruction of the means of performance by an act of God, vis major,[5] or by law." *407 E. 61st Garage,*

Inc. v. Savoy Fifth Ave. Corp., 23 N.Y.2d 275, 281 (1968). "Thus, where impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused." *Id.*; *see also Ebert v. Holiday Inn*, 628 F. App'x 21, 23 (2d Cir. 2015) ("Economic hardship, even to the extent of bankruptcy or insolvency, does not excuse performance.").

DISCUSSION

It is undisputed that Defendants are in default under the Settlement Agreement. They failed to make a payment when due under the Settlement Agreement after notice and an opportunity to cure. (*See* Goldring Decl. ¶ 12.) By the express terms of the Settlement Agreement, Plaintiffs were entitled to entry of the Consent Judgment without even providing notice to the Defendants. (*See* Settl. Agmt. at 3.) At best, Defendants have established financial difficulties arising out of the COVID-19 pandemic and the PAUSE Executive Order that adversely affected their ability to make the payments called for under the Settlement Agreement. As such, Defendants' performance under the Settlement Agreement is not excused. *See Ebert*, 628 F. App'x at 23.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion is GRANTED. The Court shall forthwith enter the Consent Judgment in the amount of $923,913.51.

SO ORDERED.

All Citations

Slip Copy, 2020 WL 2239957

Footnotes

1 Although the Complaint purports to bring claims on behalf of a class of persons similarly situated, pursuant to Fed. R. Civ. P. 23 (*see* Compl., ECF No. 1, ¶¶ 34-42), no motion for Rule 23 class certification was filed prior to this case being settled, and it was settled as an FLSA collective action, and not on behalf of a Rule 23 class. (*See* 10/4/19 Order, ECF No. 91.)

2 Defendants were granted a slight modification of the briefing schedule due to the personal circumstances of one of the Individual Defendants, *i.e.*, Malter. (5/4/20 Order, ECF No. 102.) The Court ordered that (1) Defendants' opposition was to be filed by May 6, 2020, as previously scheduled and that, thereafter, no later than May 7, 2020, Malter could file a declaration regarding his financial condition, as well as a supplemental letter setting forth any additional arguments he wished to make, and (2) Plaintiffs reply was to be filed no later than May 9, 2020, at 12 noon, but could be filed earlier. (*See id.*) As set forth below, Malter filed his opposition declaration on May 6, 2020, and Plaintiffs filed their reply on May 7, 2020.

3 Plaintiffs offer two different figures as to the total amounts previously paid by Defendants. In paragraph 14 of the Goldring Declaration (*see* Goldring Decl. ¶ 14), and Plaintiffs' previously-submitted form of Consent Judgment (*see* Consent Order at 2), Plaintiffs state that Defendants paid a total of $76,086.95. However, in paragraph 10 of the Goldring Declaration, Plaintiffs state that Defendants paid a total of $76,086.49. (*See* Goldring Decl. ¶ 10.) The total of the four payments made by Defendants, as set forth in subparagraphs 10(a) through 10(d), is $76,086.49. Thus, the Court uses this lower amount to calculate the amount due under the Consent Judgment. In addition, the Court notes that subparagraphs 10(c) and 10(d) erroneously refer to certain payments having been made in calendar year 2019, when they in fact were made in 2020.

4 The Settlement Agreement provides that it is governed by New York law. (Settl. Agmt. at 5.)

5 “Vis major” means a “greater or superior force; an irresistible force.” *Black’s Law Dictionary*, at 1410 (5th ed. 1979).

New York
Official Reports

173 A.D.2d 690, 570 N.Y.S.2d 343

Rockland Development Associates, Respondent,
v.
Richlou Auto Body, Inc., Appellant.

Supreme Court, Appellate Division,
Second Department, New York
2365E
(May 28, 1991)

CITE TITLE AS: Rockland Dev.
Assoc. v Richlou Auto Body

173A.D27

LANDLORD AND TENANT
LEASE

(1) In action to recover damages for nonpayment of rent, order which granted plaintiff's motion for partial summary judgment dismissing defendant's counterclaim affirmed --- Plaintiff owns two-building premises and leased space to defendant in one of buildings to be used as auto-body repair shop; lease provided tenant would not compete with services to be offered by other tenants within two-building complex; plaintiff later leased space in same two buildings to another auto-body repair shop, effect of which was to drive defendant out of business; defendant ceased paying rent to plaintiff and vacated demised premises; this action was commenced shortly thereafter; defendant counterclaimed, averring plaintiff had violated noncompetition clause and frustrated purpose of lease between parties by entering subsequent lease with another auto-body repair shop --- Language of lease is unmistakably clear; it is defendant, not plaintiff, who agreed not to compete; defendant cannot impose reciprocal obligation on plaintiff to refrain from leasing other part of his property to another tenant engaged in same business; restrictive covenants will not be extended by implication; doctrine of frustration of purpose does not apply unless frustration is substantial; it is not enough that transaction has become less profitable for affected party or even that he will sustain loss.

In an action to recover damages for nonpayment of rent, the defendant appeals, as limited by its brief, from so much of an order of the Supreme Court, Rockland County (Meehan, J.), dated October 24, 1989, as granted the plaintiff's motion for partial summary judgment dismissing the defendant's counterclaim.

Ordered that the order is affirmed insofar as appealed from, with costs.

The plaintiff is the owner of a two-building premises located in West Nyack, New York. On December 23, 1986, the plaintiff leased to the defendant 3,600 square feet in one of its buildings to be used as an auto-body repair shop. The lease provided as follows: “Tenant agrees not to compete with the services to be offered by other tenants within the two-building complex, to include transmission repairs, muffler installation, tire sales, rust- proofing, fast oil change and lubrication, general engine repairs, tune-up services and related work”.

Sometime after the lease between the plaintiff and the defendant was executed, the plaintiff leased space in the same two buildings to another auto-body repair shop, the effect of which was to drive the defendant out of business. The defendant ceased paying rent to the plaintiff and vacated the demised premises. This action was commenced shortly thereafter.

The defendant counterclaimed, averring that the plaintiff had violated the noncompetition clause and frustrated the purpose of the lease between the parties by entering into a ES(1 subsequent lease with another auto- body repair shop. The plaintiff then moved for summary judgment dismissing the defendant's counterclaim for failure to state a cause of action. The Supreme Court granted the plaintiff's motion. We affirm.

The language of the lease is unmistakably clear. It is the defendant, not the plaintiff, who agreed “not to compete with the services to be offered by the other tenants within the two-building complex”. Yet, the defendant seeks to impose a reciprocal obligation on the plaintiff to refrain from leasing any other part of his property to another tenant engaged in

the same business. The language of the lease, however, is not reasonably capable of such a construction, and restrictive covenants will not be extended by implication *(see,* 74 NY Jur 2d, Landlord and Tenant, §89).

The doctrine of frustration of purpose does not apply unless the frustration is substantial. It is not enough that the transaction has become less profitable for the affected party or even that he will sustain a loss *(see,* Restatement [Second] of Contracts § 265, comment a). The defendant merely alleges that he has sustained a loss. Thus, the doctrine of frustration of purpose is inapplicable.

We have examined the defendant's remaining contention and find it to be without merit.

Thompson, J. P., Eiber, Miller and Ritter, JJ., concur.

New York
Official Reports

140 A.D.3d 79, 33 N.Y.S.3d
7, 2016 N.Y. Slip Op. 03820

**1 Jack Kelly Partners LLC, Appellant,

v

Elsa Zegelstein et al., Respondents.

Supreme Court, Appellate Division,
First Department, New York
16647, 600351/08
May 12, 2016

CITE TITLE AS: Jack Kelly
Partners LLC v Zegelstein

1400A.D

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Wanting to do it "my way," Michael A. Markowitz created his own law firm in 1991. His way emphasizes listening and not dictating to his clients. Sometimes a client's option may be protracted litigation. Sometimes a client's option is to do nothing. Either way, Mike attempts to educate before following a client's informed decision.

Mike graduated in 1986 from Washington University in St. Louis and was admitted to practice law in 1989. His firm concentrates in litigation (real property, commercial and complex), commercial transactions, real estate transactions, probate, and surrogate court litigation.

Mike was previously on the board of directors for the Nassau County Bar Association and is presently a house delegate for the New York State Bar Association. When not working, Mike likes to ski and practices of yoga.

NCBA Dean's Hour – June 16th, 2020
"Litigation Issues Concerning the Phased-In Reopening of New York"
Liability and Insurance Issues

Ira S. Slavit
Levine & Slavit, PLLC

I. STANDARDS OF CARE

A. Reference Standards and Guidelines

1. New York State Bar Association - Working Group Guidance On Re-Opening Law Firms: https://nysba.org/app/uploads/2020/05/NYSBA_GUIDANCE-ON-RE-OPENING-LAW-FIRMS.pdf

2. Centers for Disease Control and Prevention – Guidelines for Businesses and Workplaces:
https://www.cdc.gov/coronavirus/2019ncov/community/organizations/businesses-employers.html;
Guidance on Preparing Workplaces for COVID-19:
https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html

3. OSHA – Highlights of OSHA standards and directives (instructions for compliance officers) and other related information that may apply to worker exposure to the novel coronavirus, SARS-CoV-2, that causes Coronavirus Disease 2019 (COVID-19): https://www.osha.gov/SLTC/covid-19/standards.html;
Guidance on Preparing Workplaces for COVID-19:
https://www.osha.gov/Publications/OSHA3990.pdf

4. New York State - Office-Based Work Guidelines for Employers and Employees (Mandatory and Best Practices)
https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/OfficesSummaryGuidelines.pdf

   NY Forward Safety Plan Template - Each business or entity, including those that have been designated as essential under Empire State Development's Essential Business Guidance, must develop a written Safety Plan outlining how its workplace will prevent the spread of COVID-19. A business may fill out this template to fulfill the requirement, or may develop its own Safety Plan. This plan does not need to be submitted to a state agency for approval but must be retained on the premises of the business and must made available to the New York State Department of Health (DOH) or local health or safety authorities in the event of an inspection.
   https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYS_BusinessReopeningSafetyPlanTemplate.pdf

Lawyers may continue to perform all work necessary for any service so long as it is performed remotely. Any in-person work presence shall be limited to work only in support of essential businesses or services; however, even work in support of an essential business or service should be conducted as remotely as possible. "Guidance For Determining Whether A Business Enterprise Is Subject To A Workforce Reduction Under Recent Executive Orders", Updated: June 11, 2020; https://esd.ny.gov/guidance-executive-order-2026

5. New York City - COVID-19 Guidance for Business Owners and FAQs; https://www1.nyc.gov/site/sbs/businesses/covid19-business-tips-faqs.page

Recognize that there are rules for prevention and rules for when someone has tested positive for the infection.

Negligence per se vs. evidence of negligence
As a rule, violation of a State statute that imposes a specific duty constitutes negligence per se, or may even create absolute liability (*see, Van Gaasbeck v. Webatuck Cent. School Dist. No. 1,* 21 N.Y.2d 239, 243). By contrast, violation of a municipal ordinance constitutes only evidence of negligence (*see, Martin v. Herzog,* 228 N.Y. 164, 169). *Elliott v City of New York*, 95 NY2d 730, 734 [2001].

The violation of a rule of an administrative agency or of an ordinance of a local government, lacking the force and effect of a substantive legislative enactment, is merely some evidence which the jury may consider on the question of defendant's negligence. *Bauer v Female Academy of Sacred Heart*, 97 NY2d 445, 453 [2002].

The violation of OSHA regulations provides only evidence of negligence. "The alleged violations of Occupational Safety and Health Administration (hereinafter OSHA) regulations (29 CFR 1910 *et seq*.), the Occupational Health and Safety Act of 1970 (29 USC § 651 *et seq*.), specifically 29 USC § 654(a), and Labor Law § 27–a do not constitute negligence per se. The violation of OSHA regulations provides only evidence of negligence." *Campanelli v Long Is. Light. Co.*, 164 AD3d 1416, 1418 [2d Dept 2018].

An example of a State statute being applied to the Covid-19 emergency is Governor Andrew M. Cuomo's Executive Order 202.16 of April 12, 2020: Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency:

For all essential businesses or entities, any employees who are present in the workplace shall be provided and shall wear face coverings when in direct contact with customers or members of the public. Businesses must provide, at their expense, such face coverings for their employees. ***This provision may be enforced by local governments or local law enforcement as if it were an order pursuant to section 12 or 12-b of the Public Health Law****.*

Public Health Law Section 12, titled "Violations of health laws or regulations; penalties and injunctions", provides:

> Violations of health laws or regulations; penalties and injunctions. * 1. (a) Except as provided in paragraphs (b) and (c) of this subdivision, any person who violates, disobeys or disregards any term or provision of this chapter or of any lawful notice, order or regulation pursuant thereto for which a civil penalty is not otherwise expressly prescribed by law, shall be liable to the people of the state for a civil penalty of not to exceed two thousand dollars for every such violation

PHL Section 12-B, titled "Wilful violation of health laws", provides:

> 1. A person who wilfully violates or refuses or omits to comply with any lawful order or regulation prescribed by any local board of health or local health officer, is guilty of a misdemeanor; except, however, that where such order or regulation applies to a tenant with respect to his own dwelling unit or to an owner occupied one or two family dwelling, such person is guilty of an offense for the first violation punishable by a fine not to exceed fifty dollars and for a second or subsequent violation is guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars or by imprisonment not to exceed six months or by both such fine and imprisonment.
>
> * 2. A person who wilfully violates any provision of this chapter, or any regulation lawfully made or established by any public officer or board under authority of this chapter, the punishment for violating which is not otherwise prescribed by this chapter or any other law, is punishable by imprisonment not exceeding one year, or by a fine not exceeding ten thousand dollars or by both. Effective on and after April first, two thousand eight the comptroller is hereby authorized and directed to deposit amounts collected in excess of two thousand dollars per violation to the patient safety center account to be used for purposes of the patient safety center created by title two of article twenty-nine-D of this chapter.
> * NB Effective until April 1, 2023
>
> * 2. A person who wilfully violates any provision of this chapter, or any regulation lawfully made or established by any public officer or board under authority of this chapter, the punishment for violating which is not otherwise prescribed by this chapter or any other law, is punishable by imprisonment not exceeding one year, or by a fine not exceeding two thousand dollars or by both.
> * NB Effective April 1, 2023

Query: Would failure to comply with these statutes provide a private cause of action? https://www.law.com/newyorklawjournal/2020/04/07/establishing-a-private-right-of-action-in-personal-injury-cases/

Expert witness evidence will be required to establish industry standards and non-compliance with them.
"Defendants failed to submit an expert affidavit opining that the subject stairs complied with the applicable building code on the day of the accident even though the complaint and bill of particulars allege that Bela's injuries were proximately caused by the fact that it had inadequate and/or missing handrails." *Bako v Zaman*, 2020 NY Slip Op 03065 [1st Dept May 28, 2020].

Courts are the final arbiter of industry standards, not the industry itself.
It is clear that despite the CDC's recommendation that donor screening procedures and blood tests be instituted, it did not become standard practice to do so until late 1984 or early *961 1985. However, if the entire industry itself was slow to recognize changes and adopt appropriate precautions, such failure cannot inure to its benefit. See *Hoemke v. New York Blood Center, supra* at 552 ("of course, if a given industry lags behind in adopting procedures that reasonable prudence would dictate be instituted, then we are free to hold a given defendant to a higher standard of care than that adopted by the industry." See *The T.J. Hooper,* 60 F.2d 737, 740 (2d Cir.1932), *cert. den. sub nom., Eastern Transp. Co. v. Northern Barge Corp.,* 287 U.S. 662, 53 S.Ct. 220, 77 L.Ed. 571.) Although the CDC had made its recommendations just a month or two before Nicole Gilmore received her first transfusion, a triable issue of fact has been raised as to whether Memorial Hospital was negligent in not instituting more vigorous screening procedures of donors and/or in not performing surrogate blood tests. *Gilmore v Mem. Sloan Kettering Cancer Ctr.*, 159 Misc 2d 953, 960-61 [Sup Ct 1993].

There are, no doubt, cases where courts seem to make the general practice of the calling the standard of proper diligence; we have indeed given some currency to the notion ourselves. Ketterer v. Armour & Co. (C. C. A.) 247 F. 921, 931, L. R. A. 1918D, 798; Spang Chalfant & Co. v. Dimon, etc., Corp. (C. C. A.) 57 F.(2d) 965, 967. Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission. *The T.J. Hooper*, 60 F2d 737, 740 [2d Cir 1932].

II. CAUSATION

Basic Principles:

1. There can be more than one proximate cause of an incident.
2. The substantial factor need not be the only cause which produces the injury.
3. A plaintiff is not required to exclude every other possible cause, but need only offer evidence from which proximate cause may be reasonably inferred.
4. Plaintiff's burden is to prove that it is more probable than not that the defendant's negligence was a substantial factor in causing the plaintiff's injury.

The substantial factor need not be the only cause which produces the injury. A plaintiff is not required to eliminate every other possible cause. That another possible cause concurs with a defendant's negligent act or omission to produce an injury does not relieve a defendant from liability if the plaintiff "shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred." (*Ingersoll v. Liberty Bank of Buffalo,* 278 N.Y. 1, 7.) However, "where an [injury] is one which might naturally occur from causes other than a defendant's negligence the inference of his negligence is not fair and reasonable." (*Cole v. Swagler,* 308 N.Y. 325, citing *Foltis, Inc., v. City of New York,* 287 N.Y. 108, 117; *Galbraith v. Busch,* 267 N.Y. 230, 233–234; *Tortora v. State of New York,* 269 N.Y. 167) The burden, of course, of proving causation always remains with the plaintiff. If conflicting inferences may be drawn, the choice of inference is for the jury. (*Foltis, supra,* at 118.) *Mortensen v Mem. Hosp.*, 105 AD2d 151, 158 [1st Dept 1984].

A plaintiff is not required to exclude every other possible cause, but need only offer evidence from which proximate cause may be reasonably inferred (*Schneider v. Kings Highway Hosp. Ctr.,* 67 N.Y.2d 743, 744–745; *Humphrey v. State of New York,* 60 N.Y.2d 742, 744; *Wragge v. Lizza Asphalt Constr. Co.,* 17 N.Y.2d 313, 321). Plaintiff's burden of proof on this issue is satisfied if the possibility of another explanation for the event is sufficiently remote or technical "to enable the jury to reach its verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence. *Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 550 [1998].

Although plaintiff may in her attempt to meet that burden include proof tending to negate the significance of other possible causes (*see, Spett v. President Monroe Bldg. & Mfg. Corp.,* 19 N.Y.2d, at pp. 204–205), we have on numerous occasions upheld or reinstated a jury's verdict where the logic of common experience itself, as applied to the circumstances shown by the evidence, led to the conclusion that defendant's negligence was the cause of plaintiff's injury. *Schneider v Kings Highway Hosp. Ctr., Inc.*, 67 NY2d 743, 744-45 [1986].

To establish a prima facie case, plaintiff need not eliminate entirely all possibility that defendant's conduct was not a cause, but only offer sufficient evidence from which reasonable men may conclude that it is more probable than not that the injury was caused by the defendant. *Kennedy v Peninsula Hosp. Ctr.*, 135 AD2d 788, 792 [2d Dept 1987].

Language from the Workers' Compensation Board on causation may be pertinent to personal injury actions: "Most workers will never be able to point to the moment or method of exposure to COVID-19, but workers can demonstrate the significantly elevated risk in their workplace by demonstrating the nature and extent of their work in an environment where exposure to COVID-19 was prevalent." http://www.wcb.ny.gov/content/main/TheBoard/covid-19-workers-compensation-q-a-june-2020.pdf

As in personal injury actions, a workers' compensation claimant must present medical proof of infection with Covid-19 and a relationship to the workplace.

In medical malpractice actions, a plaintiff's evidence of proximate cause may be found legally sufficient even if his or her expert is unable to quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased the injury, as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased [the] injury. *Gaspard v Aronoff*, 153 AD3d 795, 796-97 [2d Dept 2017].

III. POTENTIAL DEFENSES

A. IMMUNITY FROM SUIT

On or about March 3, 2020, the New York State Legislature amended Section 29-a of Article 2-B of the Executive Law to expand respondent Governor Cuomo's powers to combat the current COVID-19 pandemic by temporarily suspending or modifing any statute, local law, ordinance, order, rule, or regulation, or parts thereof, of any agency during a State disaster emergency

According to that amended statute, the governor "by executive order, may issue any directive during a state disaster emergency declared" during an "epidemic" or "disease outbreak." Paragraph two of § 29-a lists the "standards and limits" applicable to any suspension or directive issued by the governor. In particular, any "suspension order or directive shall provide for the *minimum deviation* from the requirements of the statute, local law, ordinance, order, rule or regulation suspended consistent with the goals of the disaster action deemed necessary." *Quinn v Cuomo*, 2020 NY Slip Op 20115 [Sup Ct May 18, 2020], *affd as mod,* 2020 NY Slip Op 03047 [2d Dept May 27, 2020].

Pursuant to that authority, the Governor issued Executive Order 202.10:

Subdivision (2) of section 6527, Section 6545, and Subdivision (1) of Section 6909 of the Education Law, to the extent necessary to provide that all physicians, physician assistants, specialist assistants, nurse practitioners, licensed registered professional nurses and licensed practical nurses shall be immune from civil liability for any injury or death alleged to have been sustained directly as a result of an act or omission by such medical professional in the course of providing medical services in support of the State's response to the COVID-19 outbreak, unless it is established that such injury or death was caused by the gross negligence of such medical professional.

The immunization of physicians, nurses, hospitals, nursing homes, administrators, board members and other health care workers from claims of ordinary negligence provided in Executive Order 202.10 was codified on April 3, 2020 when Governor Cuomo signed the Emergency Disaster Treatment Protection Act (Public Health Law Article 30-D) as part of the state's fiscal year 2021 enacted budget. The statute took effect immediately upon its enactment and applies retroactively to acts or omissions that took place on March 7, 2020 and will continue in effect until the COVID-19 crisis abates.

Section 3082 of the Emergency or Disaster Treatment Protection Act provides:

Section 3082 Limitation of liability

1. Notwithstanding any law to the contrary, except as provided in subdivision two of this section, any health care facility or health care professional shall have immunity from any liability, civil or criminal, for any harm or damages alleged to have been sustained as a result of an act or omission in the course of arranging for or providing health care services, if:

(a) the health care facility or health care professional is arranging for or providing health care services pursuant to a COVID-19 emergency rule or otherwise in accordance with applicable law;

(b) the act or omission occurs in the course of arranging for or providing health care services and the treatment of the individual is impacted by the health care facility's or health care professional's decisions or activities in response to or as a result of the COVID-19 outbreak and in support of the state's directives; and

(c) the health care facility or health care professional is arranging for or providing health care services in good faith.

2. The immunity provided by subdivision one of this section shall not apply if the harm or damages were caused by an act or omission constituting willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm by the health care facility or health care professional providing health care services, provided, however, that acts, omissions or decisions resulting from a resource or staffing shortage shall not be considered to be willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm.

3. Notwithstanding any law to the contrary, a volunteer organization shall have immunity from any liability, civil or criminal, for any harm or damages irrespective of the cause of such harm or damage occurring in or at its facility or facilities arising from the state's response and activities under the COVID-19 emergency declaration and in accordance with any applicable COVID-19 emergency rule, unless it is established that such harm or damages were caused by the willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm by the volunteer organization.

The following are links to some interesting articles in the *New York Law Journal* on the topic of immunity laws:
https://www.law.com/newyorklawjournal/2020/05/22/coronavirus-and-the-courts-challenges-faced/
https://www.law.com/newyorklawjournal/2020/06/01/liability-shield-will-not-lead-to-a-safer-reopening/
https://www.law.com/2020/04/08/as-more-doctors-immunized-from-liability-what-happens-to-medical-malpractice-lawsuits/
https://www.law.com/newyorklawjournal/2020/03/30/covid-19-gov-cuomos-executive-order-and-other-legal-measures/

B. RELEASE AND WAIVER

Releases from liability for negligence are unenforceable in a variety of businesses that serve the public (e.g., landlords [General Obligations Law, § 5-321]; caterers [§ 5-322]; building service or maintenance contractors [§ 5-323]; those who maintain garages or parking garages [§ 5-325]; or pools, gymnasiums or places of public amusement or recreation [§ 5-326]). *Gross v Sweet*, 49 NY2d 102, 107 [1979]. Even where not prohibited, courts will not give effect to exculpatory agreements that do not clearly demonstrate an intention to absolve a party of claims arising from its own negligence.

It has been repeatedly emphasized that unless the intention of the parties is expressed in unmistakable language, an exculpatory clause will not be deemed to insulate a party from liability for his own negligent acts *(Van Dyke Prods. v Eastman Kodak Co.,* 12 NY2d 301, 304, supra.; [must be "absolutely clear"]; *Ciofalo v Vic Tanney Gyms,* 10 NY2d 294, 297, supra.; ["sufficiently clear and unequivocal language"]; *Boll v Sharp & Dohme,* 281 App Div 568, 570-571, affd 307 NY 646 ["clear and explicit language"]). Put another way, it must appear plainly and precisely that the "limitation of liability extends to negligence or other fault of the party attempting to shed his ordinary responsibility" *(Howard v Handler Bros. & Winell,* 279 App Div 72, 75-76, affd 303 NY 990). Not only does this stringent standard require that the drafter of such an agreement make its terms unambiguous, but it mandates that the terms be understandable as well. *Gross v Sweet*, 49 NY2d 102, 107 [1979].

A release will be viewed as wholly void where it purports to grant exemption from liability for willful or grossly negligent acts or where a special relationship exists between the parties such that an overriding public interest demands that such a contract provision be rendered ineffectual. *Lago v Krollage*, 78 NY2d 95, 100 [1991].

C. WORKERS' COMPENSTION EXCLUSIVITY

Workers' Compensation is an exclusive remedy that generally prohibits a worker from bringing a personal injury lawsuit against his or her employer or a co-employee. *Workers' Compensation Law §29(6)*. An intentional tort may give rise to a cause of action outside the ambit of the Workers' Compensation Law but only if an intentional or deliberate act by the employer is directed at causing harm to this particular employee. *Pereira v St. Joseph's Cemetery*, 54 AD3d 835, 836 [2d Dept 2008].

As is the case in other circumstances, the exclusivity of workers' compensation does not prohibit a worker from suing negligent third-parties.

IV. LIABILITY TO FAMILY MEMBERS AND OTHER THIRD-PARTIES

In very rare circumstances, a physician's duty of care has been extended to a patient's family members and others. Although it is uncertain whether these cases can be analogized to Covid-19 transmission cases, the following are some Court of Appeals decisions on the topic in situations including where a live vaccine was administered to plaintiff's child and a failure to warn a patient of side-effects from a medication resulted in the patient causing a head-on motor vehicle collision:

Landon v. New York Hosp., 101 A.D.2d 489, 490, *affd.* 65 N.Y.2d 639 [1985]

Tenuto v. Lederle Laboratories, 90 N.Y.2d 606 [1997]

Cohen v Cabrini Med. Ctr., 94 NY2d 639, 642-43 [2000]

McNulty v City of New York, 100 NY2d 227, 234 [2003]

Davis v S. Nassau Communities Hosp., 26 NY3d 563, 574 [2015]

V. INSURANCE COVERAGE

Personal liability coverage is a standard component of most homeowner's insurance policies. Coverage may be afforded to policyholders and members of their household even for occurrences that do not take place on the insured premises. Such coverage may be afforded in endorsements to the policy or in a personal umbrella policy.

The exact language in the policy is controlling. The general rule that ambiguities in an insurance policy are to be construed against the insurer, particularly when found in an exclusionary clause. *Breed v Ins. Co. of N. Am.*, 46 NY2d 351, 353 [1978].

It is also the rule that exclusions or exceptions from coverage must be specific and clear in order to be enforced". *Hudson Shore Assoc., L.P. v. Praetorian Ins. Co.,* 172 A.D.3d 830, 831 [2d Dept 2019]. Ambiguities in an insurance policy are to be construed against the insurer, particularly when found in an exclusionary clause. *Ain v Allstate Ins. Co.*, 181 AD3d 875 [2d Dept 2020].

Disclosure of the insurance policy, not just the declarations page and the coverage limits, is mandated in CPLR §3101(f) if a demand for it is made:

> Contents of insurance agreement. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or

> reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purpose of this subdivision, an application for insurance shall not be treated as part of an insurance agreement.

Thus it is of the utmost importance that counsel obtain the entirety of all relevant insurance policies be obtained. For example, inasmuch as Covid-19 is a virus it may be dispositive if an exclusion refers to communicable diseases instead of bacterial infections.

Respectfully submitted,

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BIO

Ira S. Slavit is a member of Levine & Slavit, PLLC a third-generation law firm representing plaintiffs in personal injury and medical malpractice litigation with offices in Mineola and Manhattan. He is presently Chair of the NCBA Plaintiff's Personal Injury Committee and an NCBA Delegate to the NYSBA House of Delegates, and is a past NCBA Director and Chair of the Community Relations and Public Education Committee. He is a member of the New York, New Jersey and Florida Bars.

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Jaime D. Ezratty is a partner of the Nassau County law firm of Horing Welikson & Rosen, PC, where he engages in the practice of real estate and landlord-tenant law. He received his BA degree, *cum laude*, from Brandeis University and his J.D. Degree from the Fordham University School of Law. Mr. Ezratty is a member of the New York State Bar Association, Real Property Section on Landlord-Tenant Practice, where he served as a program coordinator. In that capacity, he edited and revised the NYS Bar Association manual on landlord-tenant law. Mr. Ezratty is also a member of the Nassau County Bar Association, where he served on its Board of Directors from 2007 to 2009, and then again re-appointed to the Board of Directors in 201 and 2020. He has served as the Chair of the District Court Committee from 2004 to 2006, then again from 2009 to 2011, and currently serves as its Chair. He served as the vice chair of the District Court Committee from 2011 to 2013, and served as the Chair of the Real Property Law Committee of the Nassau County Bar Association from 2012 to 2014. In addition, he has implemented and organized the Nassau County Landlord-Tenant Mediation program, which is currently

in place in the Nassau County District Court. Mr. Ezratty represents clients with properties located in Nassau, Suffolk, Queens and New York Counties, as well as Cooperative Boards and Housing Authorities, including the Rockville Centre Housing Authority. Mr. Ezratty is also special trial Counsel to the Town of Oyster Bay Housing Authority.

Mr. Ezratty currently sits on various charitable and professional Boards of Directors, including the Hewlett-East Rockaway Jewish Centre Board of Directors, and he is the immediate past Dean of the Nassau Academy of Law Advisory Board, the legal education branch of the Nassau County Bar Association. Mr. Ezratty has lectured and participated in numerous seminars and panels regarding various aspects of real estate law. Many cases that Mr. Ezratty has been involved in have been published in the New York Law Journal. Every year, he mentors an East Meadow middle school student at risk, and is also a past president of the Brandeis University Alumni Association, Long Island Chapter. He resides in East Rockaway with his wife and three (3) sons, who attend public school in the Lynbrook School system.