CADWALADER

Summer's Coming

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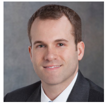
One Way Out: New York’s One-Action Rule



By Kevin Sholette
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This article is a brief refresher on the basics of New York’s one-action rule. Following an event of default, typical commercial real estate loan documents give the lender the right to pursue alternative remedies simultaneously, or in any order it chooses. For example, if a borrower is in default on a mortgage loan beyond any applicable notice and cure periods, the mortgage usually provides the lender the right to foreclose its mortgage while simultaneously suing on the note or, if applicable, a guaranty. However, every lender needs to be aware that some states have enacted so-called “one-action rules” which, in many circumstances, restrict a lender’s right to simultaneously pursue multiple legal actions to recover the debt. We would note that one-action rules can vary greatly from state to state, and this article specifically focuses on New York’s application of the rule.

In the State of New York, N.Y. Real Prop. Actions Law § 1301(3) states that “[w]hile the action is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought.” The result of this statute is that if a lender wants to exercise remedies to recover debt secured by a lien on Property located in the State of New York, then it must choose between pursuing an action at law to recover on the note (and, if applicable, any guaranty) or to pursue an action in equity to foreclose on the mortgage.[1] This restriction forces the lender to select its exercise of remedies carefully in order to maximize its recovery and avoid several potential pitfalls.

When choosing its remedies, one of the most obvious concerns for the lender is simply one of timing. Pursuant to § 1301(1), if a lender elects to enforce the note and/or guaranty and obtains a money judgment against the defendant, the lender must first exhaust its collection efforts on the judgment by executing against the defendant’s property in the appropriate county, before it is permitted to foreclose on its mortgage.[2] This process could be time consuming, resulting in opportunity costs for the lender as well as the risk that the value or condition of the collateral deteriorates in the interim. For this reason, it is most common for lenders in New York to choose a foreclosure action over seeking a money judgment.

Pursuing a foreclosure in New York is not without its own potential pitfalls. In many cases, the winning bid in the foreclosure sale, whether by the lender as a credit bid or a third party, ends up being less than the lender’s outstanding debt (including interest and costs). If the value of the property does not exceed the outstanding amount of the debt, the lender is going to be the most likely winner at the foreclosure sale, as there is unlikely to be a third party willing to match its credit bid. In such situations, the lender must apply with the court for a deficiency judgment in order to try to recover the difference between the sale price and the outstanding debt. Unfortunately for the lender, though, the deficiency judgment will not necessarily equal the difference between the sale price and its outstanding debt. Rather, the deficiency judgment will be equal to the difference between the

outstanding debt and the greater of (a) the fair market value of the property, as determined by the court, and (b) the sale price of the property.[3] Notably, then, the court can find that the sale price was not representative of the true market value of the property, resulting in a deficiency judgment that is less than the difference between the sale price and the outstanding amount of the debt.[4] This rule was intentionally designed to protect mortgagors from lenders that might otherwise be incentivized to suppress the bidding at the foreclosure sale, purchase the property at a bargain price and then obtain the benefit of an exaggerated deficiency judgment.[5] Therefore, the rule applies regardless of whether the lender or a third party is the winning bidder at the foreclosure sale.[6]

Another concern for lenders in electing to pursue a foreclosure action in New York is that once a foreclosure action has been commenced, any claim on a guaranty can't be pursued until the foreclosure is completed, and the recovery thereunder will be limited to the amount of the deficiency judgment, which, as noted above, may not be sufficient to make the lender whole.[7] In contrast, if the lender were to sue on the guaranty instead of foreclosing, the lender would potentially be able to obtain a judgment against the guarantor for the full amount of the guaranteed obligations.[8]

Second, if a lender chooses to bring a foreclosure action, it must be careful to name any parties that are responsible for the debt, including any guarantors, in such foreclosure action or else they risk losing the ability to make a claim against such parties altogether.[9] This rule is codified in § 1371(1), which makes an obligor's liability for a deficiency judgment conditioned on the obligor being named as a defendant in the foreclosure suit.

Third, the lender must also make sure to apply for a deficiency judgment against all appropriate parties, including any guarantors. Pursuant to § 1371(3), if no motion for a deficiency judgment is made following a foreclosure sale, the proceeds of the sale (regardless of the amount) will be deemed to fully satisfy the mortgage debt, and the lender will have no further right to recover any deficiency in any action or proceeding. Furthermore, "when mortgage debt is deemed satisfied, so also is the liability of the guarantor of that debt."[10]

Between the one-action rule set forth in RPAPL §1301 and the limitations on deficiency judgments set forth in RPAPL §1371, lenders in New York that want to exercise remedies need to carefully consider their litigation strategy in order to maximize the efficiency and amount of their recovery.

[1] *Trustco Bank v. Pearl Mont Commons, L.L.C.*, 47 N.Y.S.3d 644, 649 (Sup. Ct. 2016) (quoting *Gizzi v. Hall*, 767 N.Y.S.2d 469, 471 (App. Div. 2003)) ("A foreclosure plaintiff 'may proceed at law to recover on the note or proceed in equity to foreclose on the mortgage, but must only elect one of these alternate remedies.'")

[2] *See Simms v. Soraci*, 675 N.Y.S.2d 295, 295 (App. Div. 1998).

[3] N.Y. Real Prop. Acts. Law § 1371(2) (Consol. 2021).

[4] *See id.*

[5] *Sanders v. Palmer*, 499 N.E.2d 1242, 1243-45 (N.Y. 1986).

[6] *Id.* at 1245.

[7] *Id.*; *Letchworth Realty, L.L.C. v. LLHC Realty, L.L.C.*, No. 6:15-CV-06680-FPG, 2020 U.S. Dist. LEXIS 163220, at *3 (W.D.N.Y. Sep. 6, 2020).

[8] Note that any such judgment would be unsecured and, as mentioned above, the lender would have to first execute against the judgment and be able to show that it was unable to satisfy the judgment, before being able to make a claim on its mortgage.

[9] *Sanders*, 68 N.Y.2d at 1245-46; *Letchworth*, 2020 U.S. Dist. LEXIS 163220, at *4-*5; *Merchs. Nat'l Bank v. Wagner*, 402 N.Y.S.2d 936, 939 (Sup. Ct. 1978).

[10] *Trustco v. Pearl Mont Commons*, 47 N.Y.S.3d 644, 650 (N.Y. Sup. Ct. 2016).

A Further Blow to the Landlords? The Virgin Active Case and the New Restructuring Plan Regime

By **Duncan Hubbard**
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It's not news that the COVID-19 pandemic has exacerbated losses in sectors that are reliant on footfall – namely, the retail and leisure industry. Prior to the pandemic, the general weakness in the "bricks and mortar" retail industry has given rise to a series of company voluntary arrangements, and companies struggling to meet fixed rent have used CVA as a tool to renegotiate reductions for fixed rent leases, and in some cases, completely overhauling the fixed rent to turnover-based measurements. Due to the pandemic, along with measures announced by the Government on a stop on forfeiture over non-payment of rent, it wouldn't be uncommon for businesses to be sitting on a debt pile of unpaid rent arrears since March 2020.

Last week, the High Court handed down a momentous judgment on a rescuing plan presented by Virgin Active which relies on wiping out the majority of the rent arrears. It was a test case on the new rules around scheme of arrangement introduced last year, which no longer requires 75% votes from all creditors to be obtained, provided certain conditions are met.

This article revisits the current rules around pre-insolvency restructuring and how this could affect landlords, as well as the implications of the Virgin Active case.

The Rise and Rise of CVA

Until last year, tenants who are not yet insolvent but are nevertheless struggling with cash flow pressures have looked at company voluntary arrangements ("CVA"), which is a procedure undertaken between a company and its creditors under Part I of the *Insolvency Act 1986* ("IA 1986"). The CVA is not a formal insolvency arrangement, but is a tool companies could use in restructuring their unsecured debts.

CVA does not compromise claims of secured creditors and only involves unsecured creditors (such as landlords) and, amongst other criteria, once passed by 75% of all unsecured creditors (measured by value of the aggregate debt) the arrangement binds all unsecured creditors. Due to the recent decline in the retail sector, which was exacerbated by the pandemic, companies in the retail industry have been increasingly using this strategy as a tool to renegotiate rent reductions and/or write-offs of rent arrears with landlords. Recent examples include the New Look CVA, where the CVA included moving rents to turnover rents and 3-year rent concession periods.

For more discussion on the use of CVA and how this could affect landlords, please see our earlier article here.

New Rules for Scheme of Arrangement

In addition to the above, *The Corporate Insolvency and Governance Act 2020* ("CIGA"), which came into place on 26 June 2020, provided an additional restructuring tool which is seen to be favourable for companies with respect to Restructuring Plans. Prior to CIGA, the scheme of arrangement under Part 26A of the Companies Act 2006 provides under s901F that the Restructuring Plan may be approved if a number representing 75% in value of the creditors or class of creditors or members or class of members have voted for the Restructuring Plan. With the introduction of CIGA, however, a new restructuring process is introduced under s901G Companies Act 2006, which provides that, if the Restructuring Plan has not been approved by 75% of the creditors, provided that the following two conditions are met, then the court may sanction the Restructuring Plan *notwithstanding* such Restructuring Plan was not endorsed by 75% of the creditors. These two conditions are:

Condition (A) – the court is satisfied that, if the Restructuring Plan was to be sanctioned, none of the dissenting class would be ***worse off*** than they would be compared to the ***relevant alternative***; and

Condition (B) – the Restructuring Plan was agreed to by over 75% of ***one class of creditors*** who are in the class of creditors ***who would receive a payment or have a genuine economic interest*** in the company if the company was to be subject to the ***relevant alternative***.

There are two key factors here (highlighted in bold above):

- the conditions require a satisfaction of a "no worse off" test by the dissenting creditors, when compared to the likely outcome in the "relevant alternative." The relevant alternative is the situation the court considers as most likely to occur if the Restructuring Plan were not to be sanctioned; and

- the Restructuring Plan can be sanctioned so long as over 75% of one class of creditors who, if the relevant alternative were to occur, would be "in the money" (and therefore have a genuine economic interest) and would receive a payment, have endorsed the Restructuring Plan.

If these two conditions are met, the court may, in its absolute discretion, decide whether or not to invoke s901G to sanction the Restructuring Plan.

The Virgin Active Case – A Test Case for s901G

This provision has been tested twice since its introduction: in *DeepOcean 1 UK Limited [2021] EWHC 138 (Ch)*, and *Virgin Active Holdings Ltd & Ors, Re [2021] EWHC 1246 (Ch)* ("Virgin Active"), the latter which is of most relevance to landlords.

In Virgin Active, Virgin Active Holdings Limited and Virgin Active Health Clubs Limited (together, Virgin Active) sought court sanction of a Restructuring Plan pursuant to 901F of the Companies Act 2006.

The Restructuring Plan in short consisted of, amongst other things, certain recapitalisation and injection of new money by the shareholders, and also a

substantial reduction of certain classes of rental arrears. The leases were split into different classes according to the importance of the premises to the revival of the business and revenue, with Class A leases classified as most important. The Restructuring Plan was approved by over 75% of secured creditors and also over 75% of landlords of Class A leases. It was largely opposed by the rest of the landlords and other unsecured creditors.

It was submitted and accepted by the court that, if the Restructuring Plan was not approved, the relevant alternative in this instance was administration for around 6 weeks with an objective to sell certain arms of the business (Scenario 1) or liquidation of the companies (Scenario 2). It was further submitted and accepted by the court that Scenario 1 will achieve a return for the secured creditors in the region of 84.6 p/£ for Scenario 1, and only 21.8 p/£ for Scenario 2.

The court found that the liquidity crisis facing the companies is so acute that administration (Scenario 1) is the relevant alternative in this instance if the Restructuring Plan was not sanctioned (therefore satisfying Condition A). It follows that if the administrators pursue on an accelerated sale, it is highly likely that the claims by the landlords which were in dissent of the Restructuring Plan are unlikely to recover any payment. This is because, in an administration, the commercial negotiation of any assignment of any lease as part of a sale of a business is likely to require the landlord to agree to a rent that is less than the contractual amount and a write-off of any arrears. Therefore, it was the view of the court that Condition B is also satisfied.

Finally, the court is within its discretion to decide whether to apply s901G to sanction the Restructuring Plan, and the court was satisfied that the legislation was sufficiently wide to allow it to exercise such discretion and would exercise such discretion in this instance.

The Implication for Landlords and Their Lenders

The implication for landlords from the introduction of s901G Companies Act 2006 and the judgment in Virgin Active provides that the size of the claim of the landlord (which would be relevant for voting rights in CVA) is less relevant and the question is whether such claim is likely going to result in a payment in the relevant alternative, which often in practice is administration or liquidation. This new regime and the court cases have effectively diminished the voting powers of unsecured creditors in situations where the company is closer to formal insolvency processes.

For the lenders, the movement towards a more favourable restructuring regime for companies (tenants) means that increasing focus should now be placed on the financial capability and financial performance of the underlying tenants, and in particular, those considered as “key tenants” who make up a material proportion of the rental income. This could include additional covenants on information reporting on certain tenants, and additional warning triggers relating to the tenants and adjustment of financial covenant thresholds to include additional buffers against adverse events.

COVID-19 Update: Governor Cuomo Extends Eviction and Foreclosure Moratorium until August 31

By **Steven M. Herman**
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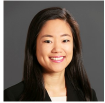
By **Eunji Jo**
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On May 5, 2021, New York Governor Andrew Cuomo signed a bill that extends the moratorium on evictions and foreclosures for residential tenants and small businesses to August 31, 2021. The previous moratorium expired May 1, 2021.

Specifically, the bill extends two separate laws: the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 (the "2020 Act") and the COVID-19 Emergency Protect Our Small Businesses Act of 2021 (the "2021 Act"). The 2020 Act, which was signed into law by Governor Cuomo on December 28, 2020, bans eviction proceedings against residential tenants who file a hardship declaration stating that the tenant is experiencing financial hardship due to COVID-19 or that moving would pose a significant health risk because of a high-risk household member. It also bans foreclosure proceedings against residential property owners who own ten or fewer dwelling units who file a hardship declaration. The 2020 Act further prohibits tax foreclosures and tax lien sales and credit discrimination against residential property owners who are granted a stay of foreclosure proceedings as a result of filing a hardship declaration.

The 2021 Act was signed by Governor Cuomo on March 9, 2021. It provides eviction protections for small businesses, *i.e.*, commercial tenants that are resident in New York, independently owned and operated, not dominant in their field and have fifty or fewer employees. The 2021 Act prohibits eviction proceedings against a small business that has filed a hardship declaration stating that it has lost significant revenue or had significantly increased necessary costs during the pandemic. It also prohibits foreclosure proceedings against small businesses that own ten or fewer commercial units if such small business files a hardship declaration. Similar to the 2020 Act, the 2021 Act prohibits tax foreclosures and tax lien sales and credit discrimination against small businesses that have been granted a stay of foreclosure proceedings as a result of filing a hardship declaration.

We will continue to keep you apprised of any further developments.

COVID-19 Update: Can't Lose What You Never Had: Court Rejects All Legal Theories Asserted by Retail Tenant

By **Steven M. Herman**
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The United States District Court for the Southern District of New York (the "Court") decided in *Gap Inc. v. Ponte Gadea N.Y. LLC* on March 8, 2021 that a retail tenant will not be able to use the COVID-19 pandemic as an excuse for not making rent payments under multiple legal theories.

This case is one of many cases now before New York courts in the aftermath of New York's decision to shut down non-essential businesses during the rise of the COVID-19 pandemic. The Gap Inc. (the "GAP") commenced the action against its landlord, Ponte Gadea New York LLC ("Ponte") claiming, among other things, breach of contract and unjust enrichment, and seeking a declaratory judgment, rescission and/or reformation of the lease. The case arose from a lease agreement for the premises located at the corner of 59th Street and Lexington Avenue in Manhattan. The GAP claims that as a result of the COVID-19 pandemic and the shutdown of retail business in New York City that followed the rise of COVID-19, including two stores operated by the GAP at 130 East 59th Street, New York, New York (the "Leased Premises"), the GAP should be released from its obligations to make rent payments under the lease. Ponte counter-claimed that the GAP is liable for payment of holdover rent as a result of its failure to vacate the premises after Ponte gave notice to the GAP that the lease had been terminated for non-payment of rent.

Background

The GAP entered into a lease agreement with Ponte's predecessor-in-interest for the Leased Premises in which it would operate a Banana Republic store and a Gap store (the "Lease"). The term of the Lease was extended until January 31, 2021, unless terminated or extended by the parties. In December of 2019 the COVID-19 virus began to spread worldwide causing major disruptions in New York State and New York City. On March 7, 2020, New York State declared a state of emergency, and on March 20, 2020, non-essential businesses were ordered to reduce their in-person staff by 100% in an effort to contain the spread of the virus, including the two stores operated by the GAP in the Leased Premises. Further, in response to the COVID-19 pandemic, the GAP decided to close all of its stores in the United States and Mexico. The GAP also decided, as disclosed in its Form 8-K filing dated April 23, 2020, that it would suspend rent payments under its leases for all of its stores in North America. In accordance with that decision, the GAP did not make any rent payments under the Lease after March of 2020.

On June 8, 2020, Ponte served the GAP with a Notice of Termination for failure to make rent payments and provided the GAP with a five (5)-business day cure period

before it exercised its rights to terminate the Lease and pursue an action against the GAP to recover the unpaid rent and other relief and remedies (the "Termination Notice"). Also on June 8, 2020, New York commenced its "phase one" reopening, which permitted retail stores to offer curbside pick-up. On June 12, the GAP began to offer curbside pick-up at its Banana Republic store at the Leased Premises. On June 22, 2020, New York commenced its "phase two" reopening, which permitted retail stores to allow customers to shop indoors at 50% capacity, subject to social distancing and mandatory masking. The GAP thereafter opened some of its stores in Manhattan, but it did not open its stores at the Leased Premises. However, the GAP did continue to offer curbside pick-up at the Banana Republic store at the Leased Premises until September 20, 2020 and offered curbside pick-up at the Gap store at the Leased Premises from August 27, 2020 to September 20, 2020. During this time, the GAP used the stores to fulfill online orders and to store merchandise. As of September 20, 2020, the GAP's senior director had stated that it was on track to vacate the Leased Premises by October 15, 2020.

Complaint

The GAP's complaint asserted, through six causes of action, that the Lease terminated (or should have been deemed terminated) as of March 19, 2020 due to the COVID-19 pandemic and the ensuing governmental restrictions on retail businesses and therefore the GAP had no rent payment obligations under the Lease as of that date. In its first cause of action, the GAP asserted that Ponte breached the Lease by demanding rent payments after March of 2020 and by continuing to treat the Lease as valid. In its second cause of action, the GAP sought a declaratory judgment that the Lease was terminated, rescinded or reformed as of March 2020 and that the parties had no liability under the Lease thereafter. In its third cause of action, the GAP sought to rescind the Lease, "as a result of the frustration of purpose of the Lease, the illegality, impossibility and impracticability of the Lease, and/or the failure of consideration." In its fourth cause of action, the GAP sought to reform the Lease, "to reflect the Parties' true intent that Tenant would have no obligation to pay rent once it was deprived of the use of the Premises," or, that "the amount of rent for the Term would have otherwise been adjusted to account for the portion of the Lease's term during which Tenant could not operate a retail store in the Premises." In its fifth and sixth causes of action, the GAP asserted claims for unjust enrichment and sought to recover money for rent and other consideration paid to Ponte during the period of time that it was not able to operate its businesses at the Leased Premises.

Counterclaim

In response, Ponte filed for summary judgment asserting three counterclaims. In its first counterclaim, Ponte sought a declaratory judgment stating (i) that the GAP's failure to make rent payments for April and May of 2020 was an "Event of Default" under the Lease; (ii) that the Lease terminated on June 15, 2020 pursuant to the Termination Notice; (iii) that the GAP thereafter became a holdover tenant by failing to vacate the Leased Premises, entitling Ponte to holdover rent payments; and (iv) that the GAP must therefore immediately vacate the Leased Premises. In its second counterclaim, Ponte asserted that the GAP breached the Lease by failing to make rent payments, by failing to surrender the Leased Premises after the termination of the Lease on June 15, 2020 pursuant to the Termination Notice, and

by failing to pay holdover rent. In its third counterclaim, Ponte asserted that if the Court were to decide that the Lease was indeed terminated as a result of a "casualty" pursuant to the Lease, the GAP still breached the Lease by failing to vacate the premises and pay holdover rent.

Thereafter, the GAP filed its own summary judgment motion on its complaint and Ponte's counterclaims. In its motion for summary judgment, the GAP argued (i) that the COVID-19 pandemic constituted a "casualty" under the terms of the Lease; (ii) that as a result of the COVID-19 pandemic, the primary purpose of the lease was "frustrated"; (iii) that performance under the Lease during the pandemic was "impossible, illegal or impracticable"; (iv) that there was a failure of consideration under the Lease; and (v) that the failure to address the possibility of a future pandemic in negotiating the terms of the Lease was a mutual mistake by the parties.

The Court addressed the GAP's five claims as follows:

Casualty: In describing a "casualty," the Court noted that the text of the Lease refers to a "fire and other casualty" that results in damage to the premises. The Lease also includes the manner in which the premises must be restored after such casualty. The Court read the text of the Lease as intending to cover only single incidents causing damage to the premises for which the tenant had the right to abate rent while the premises were being restored, which abatement period ended "on the date that Landlord Substantially Completes the restoration work." The Court also relied on recent Supreme Court decisions concluding that the COVID-19 pandemic is not a "casualty" under commercial leases (*i.e.*, *1140 Broadway LLC v. Bold Food*, *LLC* and *Dr. Smooth New York LLC v. Orchard Houston*, *LLC)*. The Court ultimately found that the language in the Lease clearly did not intend for a pandemic or the resulting governmental shutdown to constitute a "casualty" under the Lease and granted Ponte's counterclaim dismissing the GAP's claim for breach of contract as to the right to an abatement of rent due to a casualty.

Frustration: The Court concluded that the COVID-19 pandemic and the ensuing governmental shutdown of non-essential businesses did not amount to a frustration of the purpose of the Lease (*i.e.*, the GAP's operation of a retail store). Instead, the Court noted that closing its retail operation at the Leased Premises was a business decision made by the GAP, possibly due to a greater financial impact on those particular stores, while it chose to continue to operate its other retail stores in Manhattan. The Court stated that the possibility of an adverse financial impact on the retail stores operated at the Leased Premises did not constitute frustration of purpose under the Lease and granted Ponte's counterclaim dismissing the GAP's claim based on the theory that the Lease was terminated because the purpose of the Lease was frustrated.

Impossibility: When addressing the GAP's claim regarding impossibility of performance under the Lease, the Court noted that, under New York law, a defense of impossibility can only succeed if "performance is rendered objectively impossible…by an unanticipated event that could not have been foreseen or guarded against in the contract" (citing *Axginc Corp. v. Plaza Automall*, *Ltd*.). The Court found that the text of the Lease is proof that the conditions for which the GAP claims impossibility of performance (*i.e.*, the government's limitation of retail store businesses during the rise of the pandemic) was foreseeable. The Court

reasoned that the use of the defined term "Force Majeure"[1] in the Lease is evidence that the parties foresaw that governmental measures in response to a public emergency could affect the parties performance under the Lease. In addition, the Court noted that the GAP's claim of impossibility due to the COVID-19 pandemic is insufficient to raise an issue of material fact as the GAP did continue to operate its retail stores at the Leased Premises to offer curbside pick-up and continued to operate its other retail stores in Manhattan during the pandemic. Therefore, the Court concluded that the GAP's impossibility defense failed and granted Ponte's counterclaim dismissing the GAP's claim based on the theory of impossibility of performance under the Lease.

Failure of Consideration: When addressing the GAP's claim regarding failure of consideration under the Lease, the Court noted that the GAP has continued to occupy the Leased Premises and thus has continued to receive consideration under the Lease (*i.e.*, the lease of the Leased Premises for the retail operation of its stores) during the COVID-19 pandemic. Specifically, the GAP continued to remain in possession of the Leased Premises and to use the Leased Premises to store its merchandise and offer curbside pick-up. In addition, the GAP had the right, since June of 2020, to reinstate in-person shopping if it wished to do so. The Court also noted that even if the GAP could prove a "partial failure of consideration" due to the COVID-19 pandemic, partial failure of consideration would not serve as a basis for rescission (citing *CAB Bedford LLC v. Equinox Bedford Ave, Inc.*). Therefore, the Court granted Ponte's counterclaim dismissing the GAP's claim based on the theory of failure of consideration under the Lease.

Mutual Mistake: The GAP's last theory was that the parties made a mutual mistake in negotiating the Lease as both parties failed to address the possibility of a pandemic affecting performance under the Lease, thus the Lease should be reformed. The GAP argued in its motion for summary judgment that the parties made a mutual mistake by not properly defining the term "first class retail business" in the Lease, which the GAP maintains should have excluded the operation of the business during a pandemic, specifically the use of "Plexiglass barriers and face masks." The GAP asserted, through employee affidavits, that had that definition been specific to include these measures, the GAP would have never entered into the Lease. The Court concluded that the GAP failed to provide any facts to show that a mutual mistake existed at the time that the parties entered into the Lease. Further, the Court concluded that the parties' failure to predict a pandemic when they negotiated the Lease did not amount to a mistake entitling the GAP to a rescission of the Lease. Finally, the Court noted that the GAP's assertion that it would have negotiated different terms had it contemplated a future pandemic was not sufficient to overcome the presumption "that the plain language of the Lease" captured the intent of the parties. As a result, the Court granted Ponte's motion for summary judgment, dismissing the GAP's claim based on the theory of rescission and reformation as well as the GAP's claim for unjust enrichment, money had and received, and breach of contract.

In addition to the above, the Court granted Ponte's motion for summary judgment as to the GAP's liability under the Lease. The Court agreed with Ponte that the Lease had in fact terminated on June 15, 2020 and that Ponte was entitled to holdover rent payments from the GAP. The GAP's cross-motion for summary judgment was denied in its entirety.

[1] Force Majeure was defined in the Lease to mean "a strike or other labor trouble, fire or other casualty, governmental preemption of priorities or other controls in connection with a national or other public emergency or shortages of fuel, supplies or labor resulting therefrom, or any other cause beyond Tenant's reasonable control.

Recent Transactions

Here is a rundown of some of Cadwalader's recent work on behalf of our clients.

Recent transactions include:

- Represented the lender in a $1.2 billion mortgage loan secured by a major office complex in San Francisco’s financial district.
- Represented an issuer in the lodging and hospitality sector in an $86.25 million issuance of convertible notes.
- Restructuring and refinancing of a $255M loan on midtown Manhattan property with ground floor retail.
- Represented the lender on the origination of a mortgage and mezzanine loan to finance the borrower’s acquisition and future renovation of a flagged resort, which included a 274-key hotel room, a 77-slip marina, 18-hole golf course, tennis courts, restaurants and bar, meeting space and other amenities located in Florida.