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COVID-19's Aftermath: Contractual Nonperformance and Insurance Coverage Issues

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COVID-19's Aftermath: Contractual Nonperformance and Insurance Coverage Issues

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I. History of Force Majeure

a. Force Majeure

i. **Force Majeure** or ***vis major***, in Latin, is generally defined as a "superior force."

1. "An event which as between the parties and for the purposes of the matter in hand cannot be definitely foreseen or controlled." *See* Pollock on Contracts (3d Ed.) p. 535.
2. Force Majeure Provision: A traditional force majeure clause found in a contract excuses both parties from liability, or, a contractual obligation upon the occurrence of some extraordinary event or a circumstance beyond the control of the parties.
    a. Non-Exhaustive Examples: war, strike, riot, epidemic, criminal conduct, act of God (see below), or other specified event.
        i. Act of God: Earthquake, flood, volcanic eruption, hurricane, etc.
            1. Practice tip: First, analyze language employed by contract provision to determine whether force majeure or act of God event is explicitly listed.
                a. If so, then next determine whether limited in duration, as some clauses do not excuse non-performance indefinitely, but rather merely suspend performance during the specified force majeure event.
                b. Where the contract does not contain force majeure provision, or,

alternatively, if the event suspending performance is not listed (i.e., coronavirus), look to the common law doctrines of: impossibility, impracticability, and frustration of purpose.

ii. **Force Majeure Origins Date Back to English Common Law**

1. *Taylor v. Caldwell*, 3 B. & S. 8249 [1863]
    a. **Facts:** In South London in 1861, an event organizer contracted with a venue owner to rent out its facilities consisting of the world renowned Surrey Music Hall and the adjoining Royal Surrey Gardens, to host a four-day concert series. According to the contract's payment terms, the event organizer agreed to pay the venue operator an installment sum after each concert. However, prior to the first concert, a fire, which was deemed an accident, completely destroyed the Music Hall. The contract did not contain any force majeure clause.
    b. **Issue:** Whether the event organizer's losses were recoverable.
    c. **Holding:** Blackburn, J., "The principle seems to us to be, that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance, arising from the perishing of the person or thing, shall excuse the performance."
    d. **Reasoning:** "because from the *nature* of the contract, it is apparent that the parties contracted on the basis of the continued existence of the particular person or thing."
        i. Here, the *res* or subject matter (real property where the concert was to be held) was destroyed, rendering performance impossible.
        ii. Prior to *Taylor*, the doctrine of impossibility did not apply to executory contracts.
            1. **Executory contract**: a contract that has not yet been fully performed or fully executed. The parties still have important performance obligations outstanding.

a. Examples: Real Property Leases (both commercial and residential), Construction Contracts, Leases for Equipment or other personal property, and Licenses (Intellectual property, sporting events, etc.).

iii. As discussed below, following *Taylor*, the English Courts, as well as American Courts, began creating additional exceptions to excuse performance under principles of force majeure.

2. Across the pond, eight years later, in 1871, the New York Court of Appeals specifically extended the holding in *Taylor* to cover non-performance under force majeure to New York law. *See Dexter v. Norton*, 47 N.Y. 62 (1871) (**Exhibit 1**).

iii. **New York Adopts *Taylor***

1. New York's original Constitution was signed in 1777 in the City of Kingston – New York's first designated capital – because it was deemed safer than New York City and Albany, which were occupied by British troops.
2. New York's Constitution extended the extant common law rule (pre-*Taylor*) that inability to execute under an absolute executory contract, due to subsequent unforeseen accident or misfortune, without the fault of either party, did not excuse performance. *See* Const.1777, art. 35[1]
3. New York's 1777 Constitution, Article 35 provided in relevant part, as follows:

> And this convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and *declare that such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony…shall be and continue the law of this State*, subject to such alterations and provisions as the legislature of this State shall, from time to time, make concerning the same…And this convention doth further ordain, that the resolves or resolutions of the

[1] https://www.nycourts.gov/history/legal-history-new-york/documents/Publications_1777-NY-Constitution.pdf

congresses of the colony of New York, *and of the convention of the State of New York, now in force, and not repugnant to the government established by this constitution, shall be considered as making part of the laws of this State*; subject, nevertheless, to such alterations and provisions as the legislature of this State may, from time to time, make concerning the same.

(Emphasis supplied).

4. *Dexter v. Norton*, 47 N.Y. 62 (1871), *supra*
    a. **Facts:** On October 5, 1865, in New York City, a cotton merchant agreed to sell and deliver to a purchaser 607 bales of cotton at a specified price. The merchant only delivered 460 bales of cotton to the purchaser with the remaining 161 bales having been accidentally destroyed by fire without fault or negligence of the merchant. Cotton prices spiked in value after the sale, and purchaser subsequently sued seeking to recover the increase on the 161 bales that were never delivered. Similar to *Taylo*r, *supra*, the contract at issue did not contain any specific force majeure provision.
    b. **Issue:** Whether the doctrine of impossibility, which traditionally discharged performance in the event of death or the destruction of real property, should be extended to real property.
    c. **Holding:** There is an implied condition in every contract excusing performance where the subject matter of the contract is destroyed without fault of the party.

iv. **Further Expansion of Impossibility/Impracticability Doctrine**
1. In *The Tornado,* 2 S.Ct. 746 [1883], the United States Supreme Court extended the doctrine of impossibility.
2. **Facts:** On the February 24, 1878, a ship appropriately called the Tornado, while moored at the wharf in New Orleans, and bound on a voyage to Liverpool, England, caught fire in her hold before departing. The ship was contracted to deliver cotton, most of which was destroyed as a result of the fire and water damage. The contract did not include any force majeure provision.
3. **Holding:** The *Tornado* Court extended the impossibility doctrine enunciated under *Taylor* ruling that since the ship was destroyed

and could no longer deliver the cotton, the parties were excused from performance.

4. Court-created exceptions:
    a. Where legal impossibility arises from a change in the law (*Jones v. Judd*, 4 N. Y. 411; *Heine v. Meyer*, 61 N. Y. 171; *Labaree Co. v. Crossman*, 100 App. Div. 499, 92 N. Y. Supp. 565; the impossibility of performance arose from an order of the board of health of the city of New York prohibiting the landing of a cargo of coffee; *People v. Bartlett*, 3 Hill, 570; *Hildreth v. Buell*, 18 Barb. 107).
    b. Where the specific thing which is essential to the performance of the contract is destroyed (*Dexter v. Norton*, *supra*, *People v. Globe Mut. L. Ins. Co*., 91 N. Y. 174; *Lorillard v. Clyde*, 142 N. Y. 456, 37 N. E. 489, 24 L. R. A. 113; *Hayes v. Gross*, 9 App. Div. 12, 40 N. Y. Supp. 1098).
    c. Where by sickness or death personal services become impossible (*Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 388; *Clark v. Gilbert*, 26 N. Y. 279, 84 Am. Dec. 189; *Spalding v. Rosa*, 71 N. Y. 40, 27 Am. Rep. 7 (**See Exhibit 2)**; *Gaynor v. Jonas*, 104 App. Div. 35, 93 N. Y. Supp. 287; *Matter of Daly*, 58 App. Div. 49, 68 N. Y. Supp. 596).
        i. Conversely, the Court refused to extend the doctrine of impossibility where a boxer's bout was called off after a boxer's positive drug test. (*World of Boxing, LLC v. King*, 56 F.Supp.3d 507 (**Exhibit 3**)).
    d. Where conditions essential to performance do not exist (*Stewart v. Stone*, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215; *Dolan v. Rodgers*, 149 N. Y. 489, 44 N. E. 167; *Buffalo & Lancaster Land Co. v. Bellevue L. & I. C*o., 165 N. Y. 247, 59 N. E. 5, 51 L. R. A. 951; *Whipple v. Lyons Beet Sugar Refining Co*., 64 Misc. Rep. 363, 118 N. Y. Supp. 338; the impossibility of performance arose from drought and other climatic conditions which prevented the defendant from carrying out a contract to grow a certain number of acres of beets for a sugar company according to certain printed instructions.
        i. *Kinzer Const. Co. v. State of New York*, 125 N.Y.S. 46 (1910) (**See Exhibit 4**); while the contractor was excavating for one of the locks for a canal, an

extensive cave–in occurred, which revealed that the earth was of a "slippery greasy clay," insufficient to allow for the construction according to the contract, plans, and specifications. Accordingly, the *Kinzer* Court ruled that although the contract did not expressly cover this contingency, it rendered the performance of the contract impossible, as "the law will read into the contract an implied condition when it was made that such a contingency will terminate the entire contract."

1. Practice tip: Although the contract is terminated upon a finding of impossibility/impracticability, the contractor is still legally permitted to recover *quantum meruit* damages for the work and/or services provided up and until the date of termination.

II. The COVID-19 Pandemic

a. Destruction in the Wake of COVID-19

i. On the scale of pandemics, the novel coronavirus, commonly referred to as COVID-19[2] – which is currently ravaging the globe – is unprecedented, and ranks among one of the worst in human history, not only in terms of its virulence, but in economic destruction as well.

1. The virus, which apparently emerged from a seafood and poultry market in Wuhan, China, was first reported in December 2019.
    a. Since its discovery, the contagion has quickly spread throughout the world like a wildfire, over 200,000[3] people in its path. These figures are increasing prospectively around the world on a daily basis.
        i. According to recent reports from the U.S. National Institute of Allergy and Infectious Diseases, over 200,000-240,000 Americans may be killed by the virus with millions being infected.
        ii. While scientists hastily work towards developing a vaccine and antiviral drugs to combat COVID-19,

[2]On March 12, 2020, the World Health Organization ("WHO") announced the COVID-19 outbreak as a pandemic; http://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/news/news/2020/3/who-announces-covid-19-outbreak-a-pandemic

[3]https://www.google.com/search?q=coronavirus+deaths&oq=coronavirus+deaths&aqs=chrome..69i57j0l4j69i60l3.3304j0j9&sourceid=chrome&ie=UTF-8 (Figures current through April 24, 2020).

world leaders in the countries afflicted by the virus have imposed strict governmental lockdowns, barred travel, closed courts,[4] blocked tourism, and employed social distancing measures in an effort to stop the rapid spread of the pathogen.

iii. In addition to the major human death toll, COVID-19 has crippled economies around the globe, as world leaders have enacted strictly mandated lockdowns and social distancing policies in an effort to slow down its transmission.

b. *Economic Disaster*

i. In the State of New York, Governor Andrew M. Cuomo recently issued a string of Executive Orders[5] shuttering schools, courts, and nearly all businesses, with only a select few "essential" businesses being permitted to remain open, such as grocery stores and pharmacies.

1. Most other states have issued similar governmental orders transcending all business sectors, deleteriously impacting the U.S. economy on all levels.[6]
2. This is the first time in our history where every single state in the Union has declared a State of Emergency.
    a. Per Executive Order 202.10: "Non-essential gatherings of individuals of any size for any reason (e.g. parties, celebrations or other social events) are canceled or postponed at this time." (**See Exhibit 5**).
3. Similar business closures were adopted by other states across the country resulting in, among other things, a massive loss of jobs, an implosion of the healthcare system, and a precipitous debasing of the stock market, with a likely recession looming on the horizon.
    a. Consequently, on Friday, March 27, 2020, President Donald J. Trump signed into a law the Coronavirus Aid, Relief and Economic Security Act ("CARES"),[7] a $2 trillion emergency relief bill seeking to stimulate the devastation of the United States economy in the wake of COVID-19.

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[4] On March 12, 2020, the Supreme Court of the United States announced its indefinite closure amidst the COVID-19 pandemic, its first disease-related closure since the 1918 H1N1 Virus; https://www.supremecourt.gov/

[5] https://www.governor.ny.gov/keywords/executive-order

[6] *See, inter alia,* https://www.gov.ca.gov/category/executive-orders/; https://www.flgov.com/covid-19/; https://gov.texas.gov/coronavirus; https://web.csg.org/covid19/executive-orders/

[7] https://www.congress.gov/bill/116th-congress/senate-bill/3548/text

c. *Comparisons with the 1918 H1N1 Virus*[8]

i. The last time that our planet has witnessed a contagion of this magnitude was a century ago during the influenza of 1918 (the "1918 H1N1 Virus"), often mischaracterized as the Spanish Flu.[9]

1. Like the 1918 H1N1 Virus, COVID-19 has brought New York City, the epicenter of global commerce, to a screeching halt, with eerily similar quarantining regulations being implemented.[10]

a. Although only time will tell, experts believe that many New York City industries will be destroyed forever, particularly the brick and mortar establishments that are unable to adapt their businesses to virtual platforms, including the City's midmarket restaurants,[11] and that business interruption claims, along with bankruptcies, will continue to rise exponentially in the near term.[12]

III. Future COVID-19 Force Majeure and Business Interruption Cases

a. There are already a large number of businesses, particularly commercial tenants, who are exploring workout options, rental deferments, as well as outright lease rescission or full rental abatements from landlords.

i. Some of the larger publicly traded companies and national chains that have the financial wherewithal may be able to weather the storm, but the smaller businesses could very well be doomed if they are unable to renegotiate their leases.

1. The tenants that are unable to renegotiate better terms with their landlords will invariably seek court intervention to excuse their rental obligations, as a result of the government closures caused by COVID-19.

a. These litigations will be waged in courts as soon as they reopen, and barring interjection from the Legislature, they will be determined based upon the contract's plain language and meaning.

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[8] https://www.cdc.gov/flu/pandemic-resources/1918-commemoration/pdfs/1918-pandemic-webinar.pdf; see page 19.

[9] "There was nothing Spanish about the supremely contagious disease; it was rampant among all Europe's combatant armies and countries, but under reported, due to military censorship, except in neutral Spain, where coverage was unchecked;" https://www.nytimes.com/2020/03/20/opinion/coronavirus-1918-flu-pandemic-new-york.html; *see also* https://www.cdc.gov/flu/pandemic-resources/1918-commemoration/1918-pandemic-history.htm

[10] Wallace, Michael. *Greater Gotham: A History of New York City From 1989 to 1919*. Oxford UP, 2017.

[11] https://www.nytimes.com/interactive/2020/03/27/magazine/david-chang-restaurants-covid19.html

[12] https://www.economy.com/economicview/analysis/378872/Global-COVID19-Tracker-An-Economic-Counterpunch

i. Absent an explicit contractual force majeure provision in a contract, similar to how the courts developed exceptions post-*Taylor*, going forward, courts will be determining whether to extend force majeure to COVID-19 to excuse performance.

1. At the same time, insureds are seeking recovery to account for major business income losses under their policies of insurance due to government mandated closures
2. Unless the Legislature passes legislation providing that business interruption claims covering the COVID-19 pandemic, this battle too will be played out in courts over the course of the next several years, and its outcome will largely depend upon the plain language and meaning employed by the policy at issue.[13]

IV. The Language of the Contract Prevails

a. New York law is crystal clear that "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms;" these "considerations are all the more compelling in the context of real property transactions, where commercial certainty is a paramount concern, and where...the instrument was negotiated between sophisticated counseled business people negotiating at arms-length" *W.W.W. Associates, Inc. v. Gianconteri*, 77 N.Y.2d 157 (1990) (**See Exhibit 6**); *see also Vermont Teddy Bear Co., Inc. v. 538 Madison Realty Co.*, 1 N.Y.3d 470 (2004).

i. Accordingly, contracts are interpreted according to their plain and natural meaning. *Mercury Bay Boating Club Inc. v. San Diego Yacht Club*, 76 N.Y.2d 256 (1990).

1. Moreover, as the Court of Appeals recently held in *159 MP Corp. v. Redbridge Bedford, LLC*, 33 N.Y.3d 353 (2019) (**See Exhibit 7**), "[i]n keeping with New York's status as the preeminent commercial center in the United States, if not the world, our courts have long deemed the enforcement of commercial contracts

[13] https://www.restaurant-hospitality.com/legal/thomas-keller-sues-insurance-company-over-coronavirus-business-interruption-claim-his

according to the terms adopted by the parties to be a pillar of the common law."

a. Thus, unless the contract was entered into under duress, involves illegal activity or is contrary to public policy, "[f]reedom of contract prevails in an arm's length transaction between sophisticated parties..., and in the absence of countervailing public policy concerns there is no reason to relieve them of the consequences of their bargain." *quoting Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685 (1995).

b. The same principles guiding contractual interpretation discussed above apply to insurance contracts, which are construed in favor of the insured, and where "clear and unambiguous…must be given their plain and ordinary meaning."[14]

V. Does COVID-19 Qualify as an "act of God" to Suspend Performance of Contractual Obligations in the Commercial Context?

a. We must begin with the obvious premise that no one could have foreshadowed the present COVID-19 pandemic which is sweeping the globe so you will not see it appear in any force majeure provisions.

i. However, this does not mean that your contract's force majeure provision is not triggered.

1. If for example, your force majeure provision contains reference to a "pandemic," "epidemic," "virus," or "bacteria," the force majeure is covered.

a. Practice tip: When your force majeure provision is triggered, next look to see if performance is merely suspended, or, in the alternative, terminated. In some instances, even where force majeure is triggered, it may not abate the rent, so you must see whether your client can rely on other provisions within the contract in order to excuse performance (**See Appendix**).

b. Generally, an "act of God" reference is found in a contract's *force majeure* provision and if triggered, it allows for suspension of the contract, or, even outright termination in certain instances.

i. Under New York law, acts of God are defined as events that occur without any aid or interference of humankind and which cannot be "avoided by human prudence and foresight." *Merrit v. Earle*, 29 N.Y. 115 (1864) (**See Exhibit 8**); sinking of steamboat carrying horses on Hudson while traveling from Albany to New York City resulting from contact with the

[14] *United States Fid. & Guar. Co. v. Annunziata*, 67 N.Y.2d 229 (1986).

mast of a sloop which had been sunk, in a squall, two days before, not considered an act of God; *Michaels v. New York Cent. R. Co*., 30 N.Y. 564 (1864); *see also Read v. Spaulding*, 30 N.Y. 630 (1864); *Barnet v. New York Cent. & H.R.R. Co*., 222 N.Y. 195 (1918).

1. New York jurisprudence is also well-settled in that force majeure provisions are *narrowly* construed and only excuse nonperformance where "the force majeure clause *specifically* includes the event that actually prevents a party's performance." *Kel Kim Corp. v. Cent. Mkts., Inc*., 70 N.Y.2d 900 (1987) (**See Exhibit 9**); *see also 407 East 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275 (1968); *United Equities Company v. First National City Bank*, 395 N.Y.S.2d 640 (1977).
2. *Kel Kim Corp. v. Cent. Mkts., Inc*., 70 N.Y.2d 900 (1987)
3. **Facts:** In early 1980, Plaintiff Kel Kim Corporation leased a vacant supermarket in Clifton Park, New York, from Defendants. The lease was for an initial term of 10 years with two 5-year renewal options. The understanding of both parties was that Kel Kim would use the property as a roller skating rink open to the general public, and the lease required Kel Kim to "procure and maintain in full force and effect a public liability insurance policy or policies in a solvent and responsible company or companies...of not less than Five Hundred Thousand Dollars…to any single person and in the aggregate of not less than One Million Dollars...on account of any single accident." After the initial insurance policy lapsed, Kel Kim was unable to obtain a policy within the contractually specified parameters and sought declaratory relief to its breach based upon impossibility.
4. **Issue:** Where *force majeure* provision of the policy does not specifically include the inability to procure or maintain insurance, and does not fall within the catchall "or other similar causes beyond the control of such party," will a party's non-performance be excused based upon impossibility.
5. **Holding:** Impossibility excuses a party's performance only when the destruction of the subject matter of the contract makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract. Thus, only if the *force majeure* clause specifically includes the event that actually prevents a party's performance will that party be excused.

c. Some examples of force majeure events enumerated in commercial contracts are: (i) pandemics; (ii) quarantines; (iii) national emergencies; (iv) acts of God; (v) governmental orders; (vi) floods; (vii) earthquakes; and (viii) hurricanes.
    i. Therefore, where a parties' force majeure clause explicitly defines a specific event such as a "pandemic," "quarantine," "national emergency," or "governmental order," it will in all likelihood excuse performance as a consequence of the recent COVID-19 outbreak.
        1. This is because WHO previously declared COVID-19 a "pandemic," we are in the midst of not only a "national emergency," but a global one, and the Governor has issued decrees to "quarantine" the entire New York population to contain the virus.
            a. Conversely, there are leases which provide that the rent will not abate even in the event of a force majeure event such as a pandemic, and in those instances, the parties will probably be held to the benefit of the bargain, meaning that, for example, a commercial restaurant tenant will not be entitled to any rent abatement during the period of the shutdown.
                i. Notwithstanding, non-performing parties will predictably argue that because of the government's social distancing rules and bars against non-essential travel, their commercial spaces are unable to be accessed, thus negating their rental obligations.
d. Traditionally, "acts of God" cover natural disasters like Hurricane Katrina and Superstorm Sandy, as opposed to pandemics.
    i. For those contracts that fail to specify the events clearly triggering force majeure for COVID-19, but which instead merely refer to an "act of God," it will be interesting to see whether courts expand the definition of "act of God" to cover COVID-19 scenarios.
        1. Given the colossal economic destruction caused by the disease, it would be hard to imagine the courts not extending the definition of an act of God to COVID-19 force majeure claims.
            a. If courts do ultimately expand the "act of God" definition to cover COVID-19, it will be universally applied as a defense against breaches based upon nonperformance, and will also widely be used to renegotiate commercial contracts in COVID-19's aftermath.

VI. Business Interruption Claims

a. In particular, with regard to business interruption claims filed by an insured under their policy of insurance, such coverage is typically only applied when a suspension causes a direct physical loss or actual damage to the subject property.
    i. At present, there is no direct authority in New York holding that insurance business coverage is provided in instances where the property in question needed to be remediated using antiviral agents, such as the current case with COVID-19, and whether viral matter attached to surfaces within the property actually constitutes "damage to property."
        1. There is, however, authority in New York holding that coverage shall be provided to cover the relevant period of restoration of damaged property, but no cases have extended this restoration period to the eradication of bacteria or viruses.[15]

b. Insureds will invariably seek to extend business loss coverage for the period of time that it takes for their commercial spaces, many of which are unable to be accessed, to completely eradicate the virus and for social distancing orders to be lifted so that they can resume their business operations from the premises.
    i. Of course, if the Legislature does not interject, courts will need to determine whether COVID-19 equates to *damage to property* invoking business interruption coverage under an insurance policy.
    ii. Surely, carriers will be seeking to amend their policies of insurance to specifically disclaim business loss coverage for closures caused by pandemics going forward.
        1. Notably, on Friday, March 27, 2020, the New York Legislature introduced Assembly Bill No. A10226,[16] which expressly provides that an insurance policy's business interruption provision includes coverage "during a period of a declared state emergency due to the coronavirus disease 2019 (COVID-19) pandemic."
        2. If this bill, which is in committee, passes, it will take the determination of whether COVID-19 constitutes "damage to property" out of the hands of the courts and broadly apply coverage to all insureds who maintain a policy with business interruption.
            a. The enactment of this bill will then result in litigation by the carriers on constitutional grounds because it would retroactively alter the parties' contract, and therefore

[15] *Roundabout Theatre Co., Inc. v. Continental Cas. Co*., 302 A.D.2d 1 [1st Dep't 2002] (**Exhibit 10**).
[16] The State of New Jersey proposed similar legislation (New Jersey Assembly Bill A-3844), which was retracted prior to being submitted to the full assembly. https://www.njleg.state.nj.us/2020/Bills/A4000/3844_I1.HTM. (**Exhibit 11**); see also sample Endorsement excluding virus or bacteria from coverage (**Exhibit 12**).

carriers would argue that the law offends the Contracts Clause of the U.S. Constitution, Article I, § 10.

i. Interestingly, the Legislature did not enact legislation further clarifying business interruption claims and their application following the September 11 Terrorist Attacks, Hurricane Katrina or Superstorm Sandy, but, at the same token, the business closures resulting from COVID-19 are not only localized to the properties actually damaged by the casualty, and instead, mandate widespread indefinite closures.

c. Unlike damages caused by terrorist attacks and acts of God, which cause physical damage to structures that subsequently need to be repaired or rebuilt, with a pandemic, the virus needs to be totally eradicated from buildings and surrounding structures, and bans against public gatherings rescinded, before businesses can reopen.

i. Accordingly, the entire framework of the traditional damage to property analysis engaged in by courts to evaluate business interruption claims would need to be liberalized so that that a pandemic like COVID-19 qualifies as damage to property even though it may not result in an actual physical loss.

VII. The Doctrines of Impossibility and Frustration of Purpose

a. Even, assuming, *arguendo*, that courts hold that COVID-19 does not equate to an "act of God," litigants may still rely upon the common law doctrines of impossibility or frustration of purpose to circumvent their contractual obligations. *Nitro Powder Co. v. Agency of Canadian Car & Foundry Co*., 233 N.Y. 294 (1922); *Mawhinney v. Millbrook Woolen Mills*, 231 N.Y. 290 (1922); *see also* 14 Corbin on Contracts § 76.5.

i. According to the law of impossibility, "performance of a contract will be excused if such performance is rendered impossible by intervening governmental activities, but only if those activities are unforeseeable." *Kel Kim Corp., supra,* at 902.

ii. Specifically, a party seeking to rescind a contract must show that the intervening act was *unforeseeable*, even if the intervening act consisted of the actions of a governmental entity or the passage of new legislation. *Nash v. Board of Ed., Union Free School Dist. No. 13, Town of Islip*, 38 N.Y.2d 686 (1976); *see also* 10 NY Jur, Contracts, § 373.

iii. Under this rubric, litigants will argue that the Governor's orders restricting non-essential travel and shutting down most businesses certainly qualifies

as an unforeseeable event at the time of execution of the contract between the parties, as certainly no one could have possibly foreseen this pandemic, hence rendering contractual performance impossible. Courts may also take a liberal view under this doctrine when evaluating impossibility flowing from COVID-19 closures.

1. The frustration of purpose doctrine is an extremely narrow one, which is used as a defensive measure in breach of contract cases and is inapplicable "unless the frustration is substantial." *Farlou Realty Corporation v. Woodsam Associate*s, 294 N.Y. 846 (1945).
    a. In order to invoke this doctrine, 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. *see* Restatement (Second) of Contracts, § 265 [1981].
        i. Since the present governmental closures appear to be temporary in nature, and the ultimate purpose upon which contracts are based, will conceivably be restored once the government lifts the bans on travel, the virus is eradicated and businesses resume their operations, invoking this doctrine in the COVID-19 context will probably have a remote chance of success.

b. Many other states have similar laws regarding the doctrines of impossibility, impracticability, and frustration of purpose.
    i. Florida
        1. *Marathon Sunsets, Inc. v. Coldiron*, 189 So. 3d 235, 236 (Fla. 3d DCA 2016); *Harvey v. Lake Buena Vista Resort, LLC*, 568 F. Supp. 2d 1354, 1367 (M.D. Fla. 2008); Restatement § 261.
        2. *Am. Aviation, Inc. v. Aero–Flight Serv., Inc.*, 712 So. 2d 809, 810 (Fla. 4th DCA 1998).
        3. *Hopfenspirger v. West*, 949 So. 2d 1050, 1053–54 (Fla. 5th DCA 2006)
        4. *State v. Dempsey*, 916 So. 2d 856, 860 (Fla. 2d DCA 2005); see also Restatement § 265.
    ii. Nevada
        1. *Nebaco, Inc. v. Riverview Realty Co.*, 87 Nev. 55, 57-58, 482 P.2d 305, 307; Richard A. Lord, 30 Williston on Contracts § 77:31 (4th Ed.).
        2. *Graham v. Kim*, 111 Nev. 1039, 899 P.2d 1122 (1995) (quoting *Lloyd v. Murphy*, 25 Cal.2d 48, 153 P.2d 47, 50 (1944)).

3. *Cashman Equip. Co. v. W. Edna Assocs., Ltd.*, 132 Nev. 689, 702, 380 P.3d 844, 853 (2016); *see also Restatement (Second) of Contracts § 261* (1981).
4. *Restatement (Second) of Contracts § 265 (1981)*; *see also Graham v. Kim*, 111 Nev. 1039, 899 P.2d 1122 (1995).

iii. Texas

1. *Key Energy Services, Inc. v. Eustace*, 290 S.W.3d 332, 339–40 (Tex. App.—Eastland 2009, no pet.) (*citing Tractebel Energy Mktg., Inc. v. E.I. Du Pont de Nemours & Co.*, 118 S.W.3d 60, 64 n. 6 (Tex. App.—Houston [14th Dist.] 2003, pet. denied)).
2. *Tractebel Energy Mktg.*, 118 S.W.3d at 64.
3. Tex. Bus. & Com. Code § 2.615(1); see also *Tractebel Energy Mktg.*, 118 S.W.3d at 65.
4. *Tractebel Energy Mktg.*, 118 S.W.3d at 68; Restatement (Second) of Contracts, Sections 261, 264 (1981).

iv. California

1. *Mineral Park Land Co. v. Howard*, 172 Cal. 289 [156 P. 458, L.R.A. 1916 F 1]; *see also* 6 Williston on Contracts (rev.ed.) § 1931, pp. 5407-5411).
2. *City of Vernon v. City of Los Angeles*, 45 Cal. 2d 710, 719 [290 P.2d 841]; 12 Cal.Jur.2d, Contracts, § 238, pp. 461-462.); *see also* Rest., Contracts, § 467, pp. 882-884.
3. *Snow Mountain W. & P. Co. v. Kraner*, 191 Cal. 312, 324-325 [216 P. 589].
4. *Carlson v. Sheehan*, 157 Cal. 692, 697 [109 P. 29].

VIII. Conclusion

a. Although COVID-19 is still relatively nascent, the destruction that it has caused to human life and our economy is unprecedented.

i. Moreover, it has already begun to open the floodgates of litigation.

1. Throughout our history, catastrophic events have led to litigation which has ultimately helped shaped new laws and legal doctrines as will COVID-19.
2. In the event that Legislature does not step in to define force majeure or "acts of God," for purposes of nonperformance of commercial contracts under COVID-19, then the courts will be making these determinations within the framework discussed herein.

a. Similarly, catastrophic events lead to legal modifications within the insurance realm, and COVID-19 will be no different.
    i. Should the Legislatures not intervene to clarify whether business interruption is covered by our current pandemic, then the courts will be grappling over this issue and ultimately deciding whether COVID-19 extends to cover damage to property, thereby triggering a policy's business interruption coverage, alongside constitutional challenges.

APPENDIX

Casualty Clause

(b) *If the demised premises are partially damaged or rendered partially unusable* by fire or *other casualty, the damages thereto shall be repaired by and at the expense of Owner, and the rent and other items of additional rent*, until such repair shall be substantially completed, *shall be apportioned from the day following the casualty according to the part of the demised premises which is usable.* (c) If the demised premises are totally damaged or rendered wholly unusable by fire or other casualty, then the rent and other items of additional rent as hereinafter expressly provided shall be proportionately paid up to the time of the casualty and thenceforth shall cease until the date when the demised premises shall have been repaired and restored by Owner (or sooner reoccupied in part by the Tenant then rent shall be apportioned as provided in subsection (b) above).

(Emphasis supplied).

Force Majeure Clause

This lease and the obligation of Tenant to pay rent hereunder and perform all of the other covenants and agreements hereunder on part of Tenant to be performed shall in no way be affected, unpaired or excused because Owner is unusable to fulfill any of its obligations under this lease, or to supply, or is delayed in supplying, any service expressly or impliedly to be supplied, or is unable to make or is delayed in making, any repair, additions, alterations or decorations, or is unable to supply, or is delayed in supplying, any equipment, fixtures or other materials, if Owner is prevented or delayed from so doing by reason of strike or labor troubles, government preemption or restrictions, or by reason of any rule, order or regulation of any department or subdivision thereof of any government agency, or by reason of the conditions of which have been or are affected, either directly or indirectly by war or other emergency, or when, in the judgment of Owner, temporary interruption of such services is necessary by reason of accident, mechanical breakdown, or to make repairs, alterations or improvements.

Notably missing from the above-cited force majeure Lease (New York) provision is a pandemic. Furthermore, this provision explicitly does not apply when Landlord has an obligation to restore against a casualty as cited above.

Florida Lease Lacking a Force Majeure Provision

Unless such destruction was wholly or partially caused by the negligence or breach of the terms of this Lease by Tenant, its employees, licensees, subtenants or contractors, *the Minimum Rent, Common Area Charge, Tax Charge, Insurance Charge and Marketing Charge shall be abated proportionately* (i.e. in the same proportion that the Gross Leasable Area of the Demised Premises destroyed bears to the original Gross Leasable Area of the Demised Premises) *during any period in which, by reason of any such damage or destruction there is a substantial interference as* determined solely by Landlord with the operation of the business of Tenant in the Demised Premises, *having regard to the extent to which Tenant may be require do to discontinue its business in the Demised Premises,* and such abatement shall continue for a period commencing with such destruction or damage and ending with the completion by Landlord of such work or repair and/or reconstruction as Landlord is obligated to do.

(Emphasis supplied).

Nevada Lease with Force Majeure Provision Providing that Force Majeure does not Suspend Performance

Lease specifically defines "**Hazardous Material**" as "any chemical, *substance*, material or waste or component thereof which is now or later listed, defined or regulated as a hazardous, radioactive or toxic chemical, *substance*, material, or waste *or component thereof by any federal, state or local governing or regulatory body having jurisdiction, or which would trigger any employee or community "right-to-know" requirements adopted by any such body*, or for which any such body has adopted any requirements for the preparation or distribution of an MSDS, *including, without limitation*, any material, waste or substance which is (w) a petroleum product, crude oil or any fraction thereof; (x) asbestos; (y) polychlorinated biphenyls; and (z) known to cause cancer and/or reproductive toxicity, and/or mold." (Emphasis supplied).

Further, the Lease at Article 8, Section 8.9(d) explicitly provides in pertinent part, as follows:

> If at any time during the Term there shall be discovered in the Leased Premises any Hazardous Materials that were not introduced by Tenant or anyone claiming by, through or under Tenant, *then Landlord, at Landlord's expense, shall promptly remove or remediate the same as required by applicable laws. The Minimum Rental shall be abated for the period of time that Tenant is actually closed for business as a result of Landlord performing such removal or remediation*.
>
> (Emphasis supplied).

Texas Lease

Casualty Clause

> *…[I]f all or part of the Premises is rendered untenantable by damage* from fire *or other casualty* that in Landlord's opinion cannot be substantially repaired (employing normal construction methods without overtime or other premium) under applicable laws and governmental regulations within 180 days from the date of the fire or other casualty, *then either Landlord or Tenant may elect to terminate* this Lease as of the date of such casualty by written notice delivered to the other not later than ten (10) days after notice of such determination is given by Landlord.

Force Majeure Clause

> If either party is delayed or hindered in or prevented from performing any term, covenant or act required hereunder by reasons of strikes, labor troubles, inability to procure materials or services, power failure, restrictive governmental laws or regulations, riots, insurrection, sabotage, terrorism, act of the public enemy, rebellion, war, act of God, or other reason whether of a like nature or not that is beyond the control of the party affected, financial inability excepted, then the performance of that term, covenant or act is excused for the period of the delay and the party delayed shall be entitled to perform such term, covenant or act within the appropriate time period after the expiration of the period of such delay. Nothing in this Section, however, shall excuse Tenant from the prompt payment of any Rent or the obligation to open for business on the Commencement Date.

Notably missing from the above-cited force majeure Lease provision is a pandemic, and, as discussed, acts of God are generally not considered to constitute delays resulting from a pathogen, but rather apply to events such as earthquakes, floods and volcanic eruptions. If your client is the tenant, you will argue that it is impossible for Landlord to repair the Premises in order to render them safe from the viral matter that causes the coronavirus. Therefore, because Landlord is unable to restore the Premises, all of the rent has abated, and Tenant could elect to terminate this Lease, which would require determination by a court on whether the virus constitutes "damage," or "other casualty," and if so, whether the space can be timely repaired by landlord.

California Lease

Lease clause entitled "Interruption of Service," provides in relevant part, as follows:

> [I]f any such action of Landlord is done in a manner that will *adversely and unnecessarily affect access to, visibility of, or Tenant's operations conducted in the Premises such that Tenant cannot conduct its business for 3 business days*, and Landlord fails to remedy such condition within 3 business following notice from Tenant, *then Rent shall abate* from the date of Tenant's notice until Tenant's operations in the Premises are restored and can conduct its business.
>
> (Emphasis supplied).

Force Majeure Clause

> If, by reason of acts of God, governmental restrictions, strikes, labor, disturbances, shortages of materials or supplies of any other cause or event beyond Landlord's reasonable control, Landlord is (i) unable to furnish or is delayed in furnishing any utility or service required to be furnished by Landlord under this Lease, or (ii) unable to perform or make or is delayed in performing or making any installations, decorations, repairs, alterations, additions or improvements, required to be performed or made under this Lease…In the event of any such acts of God, governmental restrictions, strikes, labor disturbances, shortages of materials or supplies or any other cause or event beyond Landlord's reasonable control, Landlord shall use its diligent, good faith efforts to assist Tenant in continuing to operate the Premises for the uses contemplated in this Lease. *Notwithstanding the foregoing, Rent shall abate if Landlord fails to restore any interruption in utility or other services after 3 consecutive days of interruption to the extent the Premises should become unsuitable for Tenant's use as a consequence thereof.*
>
> (Emphasis supplied).

Notably missing from the above-cited force majeure Lease provision is a pandemic, and acts of God are generally not considered to constitute delays resulting from a pathogen, but rather apply to events such as earthquakes, floods and volcanic eruptions. Furthermore, this provision explicitly does not apply when Landlord has an obligation to restore business interruption during any consecutive 3 day period, and the clearly, the rent abates during this time, as alluded to above.

EXHIBITS

2 Sickels 62
Court of Appeals of New York.

GEORGE DEXTER, Appellant,
v.
EXTEIN NORTON et al., Respondents.

Argued Dec. 6th, 1871.
|
Decided Dec. 19th, 1871.

****1 *62** Where a contract is made for the sale and delivery of specified articles of personal property, under such circumstances that the title does not vest in the vendee, if the property is destroyed by an accident, without the fault of the vendor, so that delivery becomes impossible, the latter is not liable to the vendee in damages for the non-delivery.

APPEAL from a judgment entered upon an order of the General Term of the Supreme Court in the first judicial district, overruling plaintiff's exceptions, and directing judgment dismissing the complaint, in accordance with ruling of the court at circuit.

This action is brought to recover damages for a breach of a contract to sell and deliver cotton. Defendants, on the 5th day of October, 1865, at the city of New York, agreed to sell and deliver to the plaintiff 607 bales of cotton, bearing certain marks and numbers, specified in the contract, at the price of forty-nine cents per pound, and fourteen bales, bearing marks and numbers, specified in the written contract, at the price of forty-**three** cents per pound, the cotton to be paid for on delivery. Defendants delivered to the plaintiff 460 bales of the said cotton, the remaining 161 bales were accidentally destroyed by fire without fault or negligence of the defendants. Cotton rose in value after the sale, and plaintiff claimed to recover the increase on the 161 bales. The court dismissed the complaint, upon the ground that a fulfillment of the contract by the sellers had become impossible by the destruction, without their fault, of the subject-matter of the sale, and they were, therefore, excused from the obligation to perform their agreement. Plaintiff excepted.

West Headnotes (1)

[1] **Sales** Impossibility

Under a contract for the sale of specific personal property, if, before the title has vested in the purchaser, the property is destroyed, without the fault of the seller, so that delivery becomes impossible, the seller is not liable to the purchaser for damages for a breach of the contract. In such cases, a condition is implied in the contract itself, the effect of which is to relieve the party when performance has, without his fault, become impossible.

87 Cases that cite this headnote

Attorneys and Law Firms

James C. Carter, for appellant. The title had not passed, as to the goods not delivered, when they were destroyed, and the loss fell upon respondents. (***63** *Jogce v. Adams*, 8 N. Y., 291; *Rapelye v. Mackie*, 6 Cowen, 250;*Simmons v. Swift*, 5 B. & C., 857; *Rugg v. Minett*, 11 East, 210;*Benjamin's Sale of Personal Property*, 221; *Gerard v. Prouty*, 34 Barb., 454.) The destruction of the goods was not a sufficient excuse for the non-performance of the contract. (*Harmony v. Bingham*, 2 Kern., 90; *Tompkins v. Dudley*, 25 N. Y., 272;*Dermott v. Jones*, 2 Wallace U. S., 1; Story on Contracts, § 975, and cases cited; *Niblo v. Binnse*, 1st Dist., 44 Barb., 54; S. C., 1 Keyes, 476; Smith's Leading Cases, 6th Am. ed., p. 50, notes to *Cutter v. Powell; Cohen* v *Gaudet*, 3 F. & F., 462, n.; *Hadley v. Clark*, 8 Term Rep., 267; *Atkinson v. Ritchie*, 10 East, 530; *Airy v. Merrill*, 2 Curtis C. C., 8; *Hall v. Wright*, 1 Ellis B., and Ellis, 746; *Spence v. Chadwick*, 10 Q. B., 517; *Logan v. Le Messurier*, 6 Moore S. C., 116.)

Wm. W. McFarlane, for respondents. Where the subject-matter of a contract is destroyed by unavoidable misfortune, performance will be excused. (1 Rep., 98 Hale; *Williams v. Lloyd*, Sir Wm. Jones, 179; 3 Camp., 770;*Wood v. Bates*, Sir Wm. Jones, 171; *Carpenter v. Stevens*, 12 Wend., 589; *School Dist. v. Dauchy*, 25 Conn., 530; Pothier on Contracts of Sale, art. 4, § 1, p. 31; Pothier on Obligations, Evans' ed., p. 486; Damages Civil, by Strahan, p. 219, art., 335; p. 220, art., 337.)

Opinion

CHURCH, Ch. J.

****2** The contract was for the sale and delivery of specific articles of personal property. Each bale sold was designated by a particular mark, and there is nothing in the case, to show that these marks were used merely to distinguish the general kind or quality of the article, but they seem to have been used to describe the particular bales of cotton then in possession of the defendant. Nor does it appear that there were other bales of cotton in the market of the same kind, and marked in the same way. The plaintiff would not have been obliged to accept any other cotton than the bales specified in the bought note.

***64** The contract was executory, and various things remained to be done to the 161 bales in question by the sellers before delivery. The title, therefore, did not pass to the vendee, but remained in the vendor. (*Joice v. Adams,* 8 N. Y., 291.)

This action was brought by the purchaser against the vendor to recover damages for the non-delivery of the cotton, and the important and only question in the case is, whether upon an agreement for the sale and delivery of specific articles of personal property, under circumstances where the title to the property does not vest in the vendee, and the property is destroyed by an accidental fire before delivery without the fault of the seller, the latter is liable upon the contract for damages sustained by the purchaser.

The general rule on this subject is well established, that where the performance of a duty or charge created by law is prevented by inevitable accident without the fault of the party he will be excused, but where a person absolutely contracts to do a certain thing not impossible or unlawful at the time, he will not be excused from the obligations of the contract unless the performance is made unlawful, or is prevented by the other party.

Neither inevitable accident, nor even those events denominated acts of God will excuse him, and the reason given is that he might have provided against them by his contract. (*Paradine v. Tone,* Alleyn, 27; *Harmony v. Bingham,* 12 N. Y., 99; *Tompkins v. Dudley,* 25 N. Y., 272.)

But there are a variety of cases where the courts have implied a condition in the contract itself, the effect of which was to relieve the party when the performance had, without his fault, become impossible; and the apparent confusion in the authorities, has grown out of the difficulty in determining in a given case whether the implication of a condition should be applied or not, and also in some cases in placing the decision upon a wrong basis. The relief afforded to the party in the cases referred to, is not based upon exceptions to the general rule, but upon the construction of the contract.

For instance, in the case of an absolute promise to marry ***65** the death of either party discharges the contract, because it is inferred or presumed that the contract was made upon the condition that both parties should live.

****3** So of a contract made by a painter to paint a picture, or an author to compose a work, or an apprentice to serve his master a specified number of years, or in any contract for personal services dependent upon the life of the individual making it, the contract is discharged upon the death of the party, in accordance with the condition of continued existence, raised by implication. (2 Smith's Leading Cases, 50.)

The same rule has been laid down as to property: "As if A agrees to sell and deliver his horse Eclipse to B on a fixed future day, and the horse die in the interval, the obligation is at an end." (Benjamin on Sales, 424.) In replevin for a horse, and judgment of *retorno habendo,* the death of the horse was held a good plea in an action upon the bond. (12 Wend., 589.) In ***Taylor*** *v.* ***Caldwell*** (113 E. C. R., 824), A agreed with B to give him the use of a music hall on specified days, for the purpose of holding concerts, and before the time arrived the building was accidentally burned; held, that both parties were discharged from the contract. BLACKBURN, J., at the close of his opinion, lays down the rule as follows: "The principle seems to us to be, that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance, arising from the perishing of the person or thing, shall excuse the performance." And the reason given for the rule is, "because from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the particular person or thing."

In *School District, No.* 1 v. *Dauchy* (25 Conn., 530), the defendant had agreed to build a school-house by the first of May, and had it nearly completed on the twenty-seventh of April, when it was struck by lightning and burned; and it was held, that he was liable in damages for the non-performance of the contract. But the court, while enforcing that ***66** general rule in a case of evident hardship, recognizes the rule of an implied condition in case of the destruction of the specific subject-matter of the contract; and this is the rule of the civil law,

(Pothier on Contracts and Sale, art. 4, § 1, p. 31.) We were

referred to no authority against this rule. But the learned counsel for the appellant, in his very able and forcible argument, insisted that the general rule should be applied in this case. While it is difficult to trace a clear distinction between this case and those where no condition has been implied, the tendency of the authorities, so far as they go, recognize such a distinction, and it is based upon the presumption that the parties contemplated the continued existence of the subject-matter of the contract.

****4** The circumstances of this case are favorable to the plaintiff. The property was merchandise sold in the market. The defendant could, and from the usual course of business, we may infer, did protect himself by insurance; but in establishing rules of liability in commercial transactions, it is far more important that they should be uniform and certain than it is to work out equity in a given case. There is no hardship in placing the parties (especially the buyer) in the position they were in before the contract was made. The buyer can only lose the profits of the purchase; the seller may lose the whole contract price, and if his liability for non-delivery should be established, the enhanced value of the property. After considerable reflection, I am of the opinion that the rule here indicated of an implied condition in case of the destruction of the property, bargained without fault of the party, will operate to carry out the intention of the parties under most circumstances, and will be more just than the contrary rule. The buyer can of course always protect himself against the effect of the implied condition, by a provision in the contract that the property shall be at the risk of the seller.

Upon the grounds upon which this rule is based of an implied condition, it can make no difference whether the property ***67** was destroyed by an inevitable accident, or by an act of God, the condition being that the property shall continue to exist. If we were creating an exception to the general rule of liability, there would be force in the considerations urged upon the argument, to limit the exception, to cases where the property was destroyed by the act of God, upon grounds of public policy, but they are not material in adopting a rule for the construction of the contract so as to imply a condition that the property was to continue in existence. It can make no difference how it was destroyed, so long as the party was not in any degree in fault. The minds of the parties are presumed to have contemplated the possible destruction of the property, and not the manner of its destruction; and the supposed temptation and facility of the seller to destroy the property himself, cannot legitimately operate to affect the principle involved.

The judgment must be affirmed.

ALLEN, GROVER and RAPALLO, JJ., concur; PECKHAM and FOLGER, JJ., dissent.

Judgment affirmed.

All Citations

2 Sickels 62, 47 N.Y. 62, 1871 WL 9873, 7 Am.Rep. 415

New York Official Reports

26 Sickels 40, 71 N.Y. 40, 1877 WL 12089 (N.Y.), 27 Am.Rep. 7

GILBERT R. SPALDING, et al., Appellants,
v.
CARL ROSA, et al., Respondents.

Court of Appeals of New York.
Argued Sept. 26, 1877.
Decided Oct. 2, 1877.

CITE TITLE AS: Spalding v Rosa

***40** Contracts for personal services, whether of the contracting party or of a third person, requiring skill, and which can only be performed by the particular person named, are not, in their nature, of absolute obligation under all circumstances, but are subject to the implied condition that the person named shall be able to perform at the time specified; and if he dies, or without fault on the part of the covenantor becomes unable to perform, the obligation to perform is extinguished.

Defendants contracted with plaintiffs, who were proprietors of a theatre, to furnish the "Wachtel Opera Troupe" to give a certain number of performances, the parties to divide the receipts in certain specified proportions. The company so styled was well known by its name. Wachtel, from whom it took its name, was the leader and chief attraction. His connection with the company was the inducement to the plaintiffs to enter into the contract. Wachtel because of illness was unable to sing, and in consequence defendant did not perform. In ***41** an action to recover damages for breach of the contract, *held*, that the presence of Wachtel was the principal thing contracted for, and was of the essence of the contract; that plaintiff would not have been bound to accept the services of the troupe without him; and that the sickness and disability of Wachtel, it having occurred without the fault of defendants, constituted a valid excuse for non-performance and a good defense to the action.

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, in favor of defendants, entered upon an order overruling exceptions and directing a judgment upon an order on trial dismissing plaintiffs' complaint.

This action was brought by plaintiffs, who were the owners and managers of the Olympic Theatre, in St. Louis, to recover damages for an alleged breach of contract by defendants. By the contract, defendants agreed to furnish the "Wachtel Opera Troupe," to give four performances per week at plaintiffs' theatre for two weeks, commencing the 26th or 27th February, 1872, plaintiffs to receive twenty per cent. of the gross receipts, up to $1,800 per week, and defendants the balance. Prior to the time specified in the contract, Wachtel, who was the chief singer and attraction, and who gave the name to the troupe, was taken sick, and at the time was unable to sing. Defendants in consequence did not furnish the troupe at the time specified.

Further facts appear in the opinion.

The court at the close of the evidence directed a dismissal of the complaint, to which plaintiffs' counsel duly excepted. Exceptions were ordered to be heard at first instance at General Term.

P. Cantine, for appellants. The sickness of Wachtel was no excuse for a breach of the contract. (*Williams v. Vanderbilt*, 28 N. Y., 218; *White v. Mann*, 26 Me., 361; *Chapman v. Dalton*, Plowden, 284; 2 Pars. on Con., 185; *Gray v. Murray*, 3 J. Ch., 167; 1 Mac Q. H. of L. Cas., 668; ***42** *Gilpins v. Cousequa*, 1 Pet., 91; *Youqua v. Nixon*, Id., 221; *Paradine v. Jane*, Allyn, 26, 27; Story on Bail. § 36, and notes; *Rowland v. Phelan*, 1 Bosw., 43, 52, 57; *Wolfe v. Howe*, 20 N. Y., 197, 203; *Clark v. Gilbert*, 26 Id., 279, 283, 284; *Allen v. McKebbin*, 5 Mich., 449; *Patrick v. Putnam*, 27 Vt., 759; *Chase v. Barrett*, 4 Paige, 161, 162; *Blacksmith v. Fellows*, 3 Seld., 416; *Beebe v. Johnson*, 19 Wend., 500; *Harmony v. Brigham*, 2 Kern., 99, 107, 115; *Clark v. Glasgow As. Co.*, 1 Mac Q. Scotch App. Cas., 668; *West v. Steamer Uncle Sam*, McAl. [Cal.], 505; *Jemison v. McDaniel*, 25 Miss., 83; *Bunn v. Prather*, 21 Ill., 217; *M. D. Foundry v. Hovey*, 21 Mass., 430, 431; *Davis v. Smith*, 15 Mo., 467; *Hand v. Baynes*, 4 Whart., 213; *Dwight v. Williams*, 4 McL., 581; *The Haniman*, 9 Wal., 172; 1 Pars. on Con., 86, 94.)

Erastus Cooke, for respondents. Defendants were excused by the sickness of Wachtel from a performance of the contract. (*Wolfe v. Howes*, 20 N. Y., 197, 202; 24 Barb., 174; *Fahy v. North*, 19 Id., 344; *Clark v. Gilbert*, 32 Id., 576, 585; *People v. Manning*, 8 Cow., 297; *Ryan v. Dayton*, 25 Conn., 188; *Boast v. Firth*, 4 L. R. C. P., 1; *Taylor v. Caldwell*, 3 B. & S., 826; 32 L. J. [Q. B.], 164.)

ALLEN, J.

The contract of the defendants was for four performances per week for two weeks, commencing on the 26th or 27th of February, 1872, by the "Wachtel Opera Troupe," at the plaintiffs' theatre in St. Louis.

The "Wachtel Opera Troupe" was well known by its name as the company at the time of making the contract, performing in operas, under temporary engagements, at the principal theatres and opera houses in the larger cities of the United States, and composed of Wachtel as the leader and chief attraction, and from whom the company took its name, and those associated with him in different capacities, and taking the different parts in the operatic exhibitions for which they were engaged. The proof of the fact that there ***43** was a troupe or company known by that name, was competent, as showing what particular company was in the minds of the contracting parties, and intended, by the terms used; and as there was no controversy upon this subject, and no ambiguity arising out of the extrinsic evidence, there was no question of fact for the jury.

Wachtel had acquired a reputation in this country, as well as in Europe, as a tenor singer of superior excellence; and, in the language of the witnesses, had made a "decided hit" in his professional performances here. It was his name and capabilities that gave character to the company, and constituted its chief attraction to connoisseurs and lovers of music, filling the houses in which he appeared. His connection with the company was the inducement to the plaintiffs to enter into the contract, and give the troupe eighty per centum of the gross receipts of the houses, one-half of which went to Wachtel. Both the plaintiffs testified that it was Wachtel's popularity, and capabilities as a singer, upon which they relied to fill their theatre and reimburse themselves for their expenses and make a profit. The appearance of Wachtel in the operas was the principal thing contracted for, and the presence of the others of the company was but incidental to the employment and appearance of the "famous German tenor." The place of any other member of the company could have been supplied, but not so of Wachtel. His presence was of the essence of the contract, and his part in the performances could not be performed by a deputy or any substitute. The plaintiffs would not have been bound to accept, and would not have accepted the services of the troupe under the contract without Wachtel; it would not have been the "Wachtel Opera Troupe" contracted for without him. There is no dispute as to the facts. The only question, is one of law, as to the effect of the sickness, and consequent inability of Wachtel to fulfill the engagement, upon the obligations of the defendants. So far as this question is concerned, it must be treated as if the contract was for the performance by Wachtel alone; as if he ***44** was the sole performer contracted for. This follows from the conceded fact that his presence was indispensable to the performance of the services agreed to be rendered by the entire company. In this view of the case, the legal question is very easy of solution, and can receive but one answer. The sickness and inability of Wachtel occurring without the fault of the defendants, constitutes a valid excuse for the non-performance of the contract. Contracts of this character, for the personal services, whether of the contracting party or of a third person, requiring skill, and which can only be performed by the particular individual named, are not, in their nature, of absolute obligation under all circumstances. Both parties must be supposed to contemplate the continuance of the ability of the person whose skilled services are the subject of the contract, as one of the conditions of the contract. Contracts for personal services are subject to this implied condition, that the person shall be able at the time appointed to perform them; and if he dies, or without fault on the part of the covenantor becomes disabled, the obligation to perform is extinguished. This is so well settled by authority that it is unnecessary to do more than refer to a few of the authorities directly in point. (*People v. Manning,* 8 Cow., 297; *Jones v. Judd,* 4 N. Y., 411; *Clark v. Gilbert,* 26 N. Y., 279; *Wolfe v. Howes,* 24 Barb., 174, 666; 20 N. Y., 197; *Gray v. Murray,* 3 J. C. R., 167; *Robinson v. Davison,* L. R. 6 Excheq., 268; *Boast v. Frith,* Id; 4 Com. Pleas, 1.) The same principle was applied in *Dexter v. Norton* (47 N. Y., 62), and for the same reasons, to a contract for the delivery of a quantity of specified cotton destroyed by fire, without the fault of the vendor, intermediate the time of making the executory contract of sale and the time for the delivery.

The judgment must be affirmed.

All concur, except FOLGER, J., absent.

Judgment affirmed.

KeyCite Yellow Flag - Negative Treatment
Distinguished by Wilder v. World of Boxing LLC, 2nd Cir.(N.Y.), June 12, 2019

56 F.Supp.3d 507
United States District Court,
S.D. New York.

WORLD OF BOXING LLC, Vladimir Hrunov, and Andrey Ryabinskiy, Plaintiffs,
v.
Don KING and Don King Productions, Inc., Defendants.

No. 14–cv–3791 (SAS).
|
Signed Oct. 1, 2014.

Synopsis
Background: Russian boxing promoters brought breach of contract action against American promoter after bout was called off due to boxer's positive drug test. Plaintiffs moved for partial summary judgment.

Holdings: The District Court, Shira A. Scheindlin, J., held that:

[1] defendant breached contract, and

[2] breach was not excused by impossibility.

Motion granted.

West Headnotes (6)

[1] **Contracts** Matters annexed or referred to as part of contract

As a matter of New York law, if a contract makes reference to extraneous rules or regulations, the content of those rules or regulations is incorporated into the contract's terms.

1 Cases that cite this headnote

[2] **Contracts** Grounds of action

To prevail on a breach of contract claim under New York law, a plaintiff must show: (1) the existence of a contract between the plaintiff and the defendant; (2) performance of the plaintiff's obligations under the contract; (3) breach of the contract by the defendant; and (4) damages to the plaintiff caused by the defendant's breach.

1 Cases that cite this headnote

[3] **Contracts** Discharge by Impossibility of Performance

To sustain an impossibility defense to a breach of contract claim under New York law, the supervening event must have been unanticipated by the parties.

[4] **Contracts** Discharge by Impossibility of Performance

Under New York law, if a supervening event making performance of a contract impossible was foreseeable, it should have been provided for in the contract, and the absence of such a provision gives rise to the inference that the risk was assumed by the party whose performance was frustrated; in other words, an impossibility defense only excuses non-performance if the unanticipated event could not have been foreseen or guarded against in the contract.

1 Cases that cite this headnote

[5] **Contracts** Acts or Omissions Constituting Breach in General

Under New York law, boxing promoter breached contract requiring him to cause boxer to

participate in bout, where boxer was unable to participate in the bout after he failed drug test administrated by sanctioning body.

1 Cases that cite this headnote

[6] **Contracts**Discharge by Impossibility of Performance

Under New York law, boxer's failure to pass drug test before bout was not an unanticipated event, and thus promoter's breach of agreement requiring him to cause the boxer to participate in the bout was not excused by impossibility; boxer had previously tested positive for prohibited drug, and agreement's provision requiring pre-bout drug testing indicated that boxer's potential continued drug use was considered by the parties.

1 Cases that cite this headnote

Attorneys and Law Firms

***508** Kent A. Yalowitz, Esq., Matthew D. Grant, Esq., Arnold & Porter, LLP, New York, NY, for Plaintiffs.

T. Barry Kingham, Esq., Andrew B. Zinham, Esq., Curtis, Mallet–Prevost, Colt and Mosle LLP, New York, NY, for Defendants.

OPINION AND ORDER

SHIRA A. SCHEINDLIN, District Judge:

I. INTRODUCTION

Plaintiffs Vladimir Hrunov and Andrey Ryabinskiy are Russian boxing promoters who do business as World of Boxing ("WOB"). Defendant Don King ("King") is an American boxing promoter who does business as Don King Productions. On January 28, 2014, King and WOB entered into an Agreement In Principle ("Agreement"), in which King promised to produce Guillermo Jones ("Jones") for a bout against Denis Lebedev ("Lebedev") on April 25, 2014.[1] The day the bout was supposed to take place, Jones tested positive ***509** for furosemide, an illicit, performance-enhancing diuretic. The positive drug test precluded Jones from competing, and the bout was called off.

On May 28, 2014, WOB filed this suit. WOB alleges that King, by failing to produce a clean fighter, breached the Agreement.[2] King makes two arguments in his defense. *First*, he argues that the Agreement only required him to "do everything *within his control* ... to cause Jones's participation"[3]—because Jones's use of furosemide was not within King's control, it cannot be grounds for breach. *Second*, King argues that even if he *did* breach the Agreement, his failure to perform should be excused because performance was impossible. King has also filed two counterclaims, alleging that, in fact, WOB was the party responsible for violating the Agreement.[4]

On August 22, 2014, WOB moved for partial summary judgment on the question of contract liability. WOB seeks (1) a ruling that King is liable for breaching the Agreement, (2) dismissal of King's counterclaims, and (3) a judgment that WOB is entitled to reimbursement of funds from a disputed escrow account ("escrow funds").[5] For the reasons set forth below, WOB's motion is GRANTED as to liability, and GRANTED as to the dismissal of King's counterclaims. However, judgment on the escrow funds is reserved.[6]

II. BACKGROUND

The following facts are undisputed. On May 17, 2013, Jones and Lebedev fought in a Cruiserweight Title Fight in Moscow, sanctioned by the World Boxing Association ("WBA"), which Jones won by knockout in the eleventh round.[7] After the bout, however, Jones's urine tested positive for furosemide, prompting an investigation by the WBA. On October 17, 2013, the WBA found Jones guilty of using a banned substance, stripped him of the Cruiserweight title, and suspended him from WBA-sanctioned bouts for six months.[8]

On January 28, 2014, King and WOB finalized terms for a second administration of the Cruiserweight Title match between Lebedev and Jones. In the Agreement, King

represented that he "holds the exclusive promotional rights for Jones,"[9] and he promised to "cause Jones [ ] to participate" in the rematch.[10] The Agreement also imposed the following restrictions on Jones:

> Jones must arrive in Moscow a minimum of 7 days before the Event and shall remain in Moscow until the Event. Jones also undertakes to be subjected to drug testing before and after the fight, ***510** in compliance with the rules of the WBA and the [2013 WBA Resolution].[11]

The purpose of these provisions, as King has explained by affidavit, was to "preclude another [ ] positive drug test [from Jones]."[12]

The rematch was finalized for April 25, 2014. On April 23, 2014, urine samples were collected from both Jones and Lebedev and submitted for testing. On April 25, 2014—the day the bout was supposed to take place—a report was issued, finding that Lebedev's sample was clean but that Jones's sample tested positive for furosemide. When WOB and Lebedev learned of this news, Lebedev withdrew from the bout.[13] On April 28, 2014, the WBA issued a letter deeming Lebedev's withdrawal "justifiabl[e]" on the basis that "[t]he WBA would not, and could not, sanction a championship bout when it was aware of Jones' positive test as this would violate WBA rules, may cause unnecessary harm to [Lebedev], and would otherwise compromise the nature of WBA world title bouts."[14] On May 23, 2014, after reviewing the test results more carefully, the WBA issued a resolution (1) affirming the finding that Jones's urine contained furosemide, (2) suspending Jones from WBA-sanctioned bouts for two years, and (3) naming Lebedev Cruiserweight champion.[15]

On May 28, 2014, WOB brought the present suit. It argues that King, by failing to "cause Jones [ ] to participate" in the bout, breached the terms of the Agreement.[16] King has counterclaimed, asserting breach by WOB.[17] He argues that Lebedev's decision to "unilaterally" withdraw[18]—after learning of Jones's positive drug test—violated the terms of the Agreement.

*511 III. STANDARD OF REVIEW

Summary judgment is appropriate "where, construing all the evidence in the light most favorable to the [non-moving party] and drawing all reasonable inferences in that party's favor, there is 'no genuine issue as to any material fact and ... the [moving party] is entitled to judgment as a matter of law.' "[19] "A fact is material if it might affect the outcome of the suit under the governing law, and an issue of fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[20] In deciding a motion for summary judgment, "[t]he role of the court is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried."[21]

IV. APPLICABLE LAW

"Because this is a diversity action," the Court applies the law of "the forum in which [it] sits."[22] Here, the Agreement provides that it "shall be interpreted, construed, and enforced in accordance with the laws of the State of New York."[23] Therefore, New York law governs.

A. Breach of Contract

[1] Under New York law, contracts are given "the meaning intended by the parties, as derived from the language of the contract in question."[24] Contract construction is not simply a matter of examining "literal language."[25] It requires courts to consider what can be "reasonably implied" from the contract's language, in order to determine what "a reasonable person in the position of the promisee would be justified in understanding [the contract to] include[ ]."[26] As a matter of law, if a contract makes reference to extraneous rules or regulations, the content of those rules or regulations is incorporated into the contract's terms.[27]

[2] Breach of contract claims are subject to a four-part test. To prevail, a plaintiff must show: "(1) the existence of a contract between [the plaintiff] and [the] defendant; (2) performance of the plaintiff's obligations under the contract; (3) breach of the contract by [the] defendant; and (4) damages to the plaintiff caused by [the] defendant's breach."[28] Here, the only element in dispute is the third prong of the test.

B. The Defense of "Impossibility"

Breaches of contract normally carry ***512** "strict liability."[29] However, a breach can be excused—and liability extinguished—if the breaching party can show that performance was impossible on account of a "supervening event" whose "non-occurrence of that event [was] a 'basic assumption' on which both parties made the contract."[30]

[3] [4] To sustain an impossibility defense, the "supervening event" must have been "unanticipated" by the parties.[31] As the Supreme Court has explained, if an event "was foreseeable," it "should have been [provided] for it in the contract, and the absence of such a provision gives rise to the inference that the risk was assumed" by the party whose performance was frustrated.[32] In other words, an impossibility defense only excuses non-performance if the "unanticipated event [ ] could not have been foreseen or guarded against in the contract."[33]

V. DISCUSSION

A. King Breached the Contract

[5] The Agreement required King to "cause [Jones] to participate in a 12 Round WBA Cruiserweight World Title match [against Lebedev]."[34] King argues that this clause is ambiguous, and that its meaning depends on unresolved factual questions, making summary judgment inappropriate.

But the relevant facts are not in dispute. Under WBA rules—which the Agreement incorporates by reference—any boxer who tests positive for a banned, performance-enhancing substance is disqualified from WBA-sponsored bouts for no less than six months.[35] Both parties agree that Jones ingested furosemide,[36] and there is no question that having tested positive for furosemide, Jones could not participate in the bout.[37] This ends the inquiry. If Jones could not participate in the bout, it follows *a fortiori* that King could not have *caused* Jones to participate in the bout. Therefore, King breached the Agreement.[38]

***513** King protests that this interpretation of the Agreement yields "unreasonable and illogical" results.[39] It would require of King "nothing less than ... personal supervision of Jones's every action between the execution of [the Agreement] and the scheduled date of the [bout against Lebedev]."[40] Indeed, in order to avoid liability, King avers that he would have had "to *imprison* Jones to prevent him from having any access to a banned substance"[41]—clearly an untenable outcome.

While these arguments might have force, they are addressed to the wrong issue. King could be right: under the circumstances, it is possible that his contractual obligations *were* too onerous to be enforceable. But that question goes to whether King's failure to perform may be excused, not to whether King in fact failed to perform.[42] As to the latter, Jones's disqualification plainly put King in breach.

B. Impossibility Does Not Excuse King's Breach

[6] In general, "contract liability is strict liability."[43] Nevertheless, failure to perform can be excused if "destruction of ... the means of performance makes performance objectively impossible."[44] In this vein, King likens his plight to that of a singing troupe manager who signed a contract with a theater owner, promising that the troupe would play for two weeks, only to have the lead singer fall ill on the eve of the first show. When the theater owner sued for breach, the New York Court of Appeals excused the manager's non-performance on the grounds that "[c]ontracts for personal services"—contracts that require action by a specific person—"are subject to [the] implied condition[ ] that ... if [the person] dies, or without fault on the part of the covenantor becomes disabled, the obligation to perform is extinguished."[45] Likewise here, argues King: by ingesting furosemide, Jones "disabled" himself from participating in a WBA-sponsored bout, thereby "extinguishing" King's obligation to perform.

New York law is very clear, however, that an impossibility defense is only available if the frustration of performance was "produced by an unanticipated event that ***514** could not have been foreseen or guarded against in the contract."[46] In this case, two key facts compel the conclusion that Jones's ingestion of furosemide was not "unanticipated"—i.e., that King should have foreseen the possibility of Jones testing positive and guarded against it in the contract. *First*, Jones had a history of doping. The result of the first Cruiserweight Title match between Jones and Lebedev—in May 2013—had to be vacated because Jones tested positive for furosemide after the fact.[47] *Second*, the Agreement provided for mandatory pre-bout drug testing,[48] as required by the 2013 WBA Resolution.[49]

King tries to turn these facts around. Noting how "stunned" and "shocked" he was to learn of the positive drug test on April 25, 2014,[50] King reports that "it defie[d] belief, that Jones, aware that he would be subjected to pre-bout drug testing due to his previous positive result, *would again test positive* for the same banned substance."[51] Put otherwise, King "believed that the mandatory drug testing provision ... would preclude another potential positive drug test, because [Jones] knew that [he] would be subject to random [ ] testing."[52] Therefore, in King's view, he should not be punished for failing to foresee such a "plainly remote and

unlikely event."[53]

While King's dismay is understandable—it *is* stunning that Jones was foolish enough to test positive for the same drug twice—his argument misconstrues the term "unanticipated event." King casts the question in terms of probability: an event is "unanticipated," in his view, if it is unlikely to occur. What the case law has in mind, however, are not improbable events, but events that fall outside the sphere of what a reasonable person would plan for.[54] Even assuming that King is right about the likelihood of a second positive test, it strains credibility to call the event "unanticipated."

King's own testimony proves the point. By way of explaining why the Agreement was silent about what to do in the event of a second positive test, King admits that he thought the "mandatory drug testing provision" would "preclude" Jones from ingesting furosemide.[55] No doubt he did. From this testimony, however, no one could reasonably conclude that King had not anticipated the possibility of a second positive test. Rather, the inescapable conclusion is that King *had* anticipated such a possibility—and having anticipated it, he believed the threat of a mandatory drug test would ward it off. That King's belief turned out to be mistaken is no basis for relieving him of his contract obligations.

In essence, King argues that he should not be held liable because Jones's decision to take furosemide was outside of King's ***515** control: short of "imprison[ing] Jones,"[56] there was no way for him to perform. But this argument ignores what *was* in King's control: the decision not to bargain for more protective contract terms.

After all, WOB could *also* invoke the "imprisonment" logic—in support of the opposite view. If I were to rule that Jones's ingestion of furosemide effectively dissolved the Agreement, and that King's failure to perform was therefore excused, WOB might reasonably object that *it* had no way—short of imprisoning Jones—to avoid the economic loss of that outcome. Ultimately, the reality is that Jones's poor decision-making was costly to both parties. The question is which party—King or WOB—should have to shoulder those costs. The law makes it clear that the answer is King. As the party who promised to secure Jones's participation, King "assumed the risk" of foreseeable events that might frustrate his ability to make good on that promise.[57] Because the risk of a second positive test was foreseeable—so foreseeable, in fact, that the Agreement set out a mandatory testing provision to lessen its likelihood—King's breach cannot be excused.

C. King's Counterclaims Fail

Both of King's counterclaims rest on the proposition that Lebedev's decision to withdraw from the bout constituted either a breach or a dissolution of the Agreement, releasing King from his obligations. This proposition is wrong. Once Jones tested positive, WOB and Lebedev were entitled to "treat the entire contract as broken," because Jones's participation (which the positive test rendered impossible) was the centerpiece of the agreement.[58] In other words, King's argument that Lebedev breached the Agreement necessarily fails, because the Agreement had *already* been breached—by King—when Lebedev withdrew. King's counterclaims are therefore dismissed.

VI. CONCLUSION

For the foregoing reasons, WOB's partial motion for summary judgment as to liability is GRANTED. The Clerk of the Court is directed to close this motion (Dkt. No. 26), and the parties are directed to submit briefings as to damages in accordance with the following schedule: WOB's moving papers (15 pages) should be filed by October 10; King's opposition (15 pages) should be filed by October 17; and WOB's reply (5 pages) should be filed by October 24.

SO ORDERED.

All Citations

56 F.Supp.3d 507

Footnotes

1 *See* Agreement In Principle ("Agreement"), Exhibit ("Ex.") A to 7/22/14 Declaration of Olga Korobova, Custodian of Records for the World Boxing Association ("Korobova Decl.").

2 *See* Plaintiffs' Complaint and Demand for Jury Trial ("Complaint"), ¶¶ 36–47.

3 Defendants' Memorandum in Opposition to Summary Judgment ("Def. Mem."), at 11 (emphasis added).

4 *See* Defendants' Answer ("Answer") ¶¶ 28–40.

5 *See* Plaintiffs' Motion for Partial Summary Judgment, at 1.

6 Accordingly, facts having exclusively to do with the creation and disposition of the escrow account are omitted here. A schedule for briefing on damages is set out at the end of this Opinion.

7 *See* Complaint ¶ 14.

8 See WBA Resolution of October 17, 2013 ("2013 WBA Resolution"), Ex. B to 8/22/14 Declaration of Michael A. McAleenan, General Counsel to the WBA ("McAleenan Decl.") § IV ¶ B.

9 Agreement § III ¶ 1.

10 *Id.*

11 *Id.* § III ¶ 6. These terms were slightly modified in an addendum on March 17, 2014, but not in any way that impacts this case. *See* Addendum to Prior Agreement, Ex. B to Korobova Decl.

12 9/11/14 Affidavit of Don King ("King Aff."), ¶ 8.

13 The parties have a dispute about the significance of various events leading up to Lebedev's decision to withdraw. King submits—and for the purposes of this Opinion, I will accept as true—that immediately after the positive test, Carlos Chavez, the WBA supervisor in Moscow in charge of the bout, "ruled" that the urine test was unofficial and that "the [bout] should take place as scheduled." Defendants' Counterclaim ("Counterclaim") ¶ 23. In response, WOB counters—and once again, I will accept this as true—that after Chavez ordered the bout to go forward, Gilbert Mendoza, Jr., the President of the WBA, reversed Chavez's decision and deemed the bout cancelled. *See* McAleenan Decl. ¶¶ 21–22.
For the reasons set forth during the August 15, 2014 conference, this dispute is irrelevant. As I put it then, because "it is not in dispute that [Jones] took a prohibited substance, [there is no reason to] care about Chavez and Mendoza. [Jones] could not have fought [the] bout. There is no question that [King] could not produce him. The only [ ] question is [whether King was obligated to produce him, and if so] whether the breach was excused." 8/15/14 Transcript of Premotion Conference ("Conf. Tr."), at 3.

14 4/28/14 Letter from McAleenan, on Behalf of the WBA, Ex. E to Korobova Decl., at 2. The WBA rule referenced in the letter is C.45, which provides, in relevant part, that "[n]o boxer who has tested positively for prohibited substances can be rated, retain a title, *or be permitted to fight in a sanctioned bout* for a period of no less than six (6) months from the date of the positive test." Rules of World of Boxing Association ("WBA Rules"), Ex. A to McAleenan Decl. § C ¶ 45 (emphasis added).

15 *See* WBA Resolution of May 23, 2014, Ex. E to Complaint, at 3.

16 *See* Complaint ¶¶ 36–47.

17 *See* Counterclaim ¶¶ 28–40.

18 *Id.* ¶ 25.

19 *Rivera v. Rochester Genesee Reg'l Transp. Auth.,* 743 F.3d 11, 19 (2d Cir.2014) (quoting Fed.R.Civ.P. 56(c)) (some quotation marks

omitted).

20 *Windsor v. United States,* 699 F.3d 169, 192 (2d Cir.2012), *aff'd,* —— U.S. ——, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013) (quotations and alterations omitted).

21 *Brod v. Omya, Inc.,* 653 F.3d 156, 164 (2d Cir.2011) (quotation marks and citations omitted).

22 *Ash v. Richards,* 572 Fed.Appx. 52, 53 (2d Cir.2014).

23 Agreement § III ¶ 9.

24 *Duane Reade v. Cardtronics,* 54 A.D.3d 137, 140, 863 N.Y.S.2d 14 (1st Dep't 2008).

25 *Sutton v. East River. Sav. Bank,* 55 N.Y.2d 550, 555, 450 N.Y.S.2d 460, 435 N.E.2d 1075 (1982).

26 *Id.*

27 *See This Is Me, Inc. v. Taylor,* 157 F.3d 139, 144 (2d Cir.1998) (applying New York law).

28 *Diesel Props S.r.l. v. Greystone Bus. Credit II LLC,* 631 F.3d 42, 52 (2d Cir.2011) (applying New York law).

29 Restatement (Second) of Contracts ("Second Restatement"), Introductory Note to Chapter 11 ("Intro, to Chap. 11") (1981).

30 *Id.* § 261(b).

31 *Kel Kim, Corp. v. Central Mkts., Inc.,* 70 N.Y.2d 900, 902, 524 N.Y.S.2d 384, 519 N.E.2d 295 (1987). *Accord U.S. v. Winstar Corp.,* 518 U.S. 839, 905 n. 53, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996) (citing *Kel Kim* and compiling other sources).

32 *Winstar,* 518 U.S. at 905, 116 S.Ct. 2432 (internal citations omitted).

33 *Kel Kim,* 70 N.Y.2d at 902, 524 N.Y.S.2d 384, 519 N.E.2d 295. *Accord 407 East 61st Garage v. Savoy Fifth Ave. Corp.,* 23 N.Y.2d 275, 296 N.Y.S.2d 338, 344, 244 N.E.2d 37 (1968); *Ogdensburg Urban Renewal Agency v. Moroney,* 42 A.D.2d 639, 345 N.Y.S.2d 169, 171 (N.Y.1973). This is not necessarily true in every jurisdiction—the Second Restatement suggests that "[t]he fact that the event was foreseeable, or even foreseen, does not *necessarily* compel a conclusion that its non-occurrence was not a basic assumption." Second Restatement § 261(b) (emphasis added). But New York law is crystal clear: the supervening event must have been "unanticipated" for an impossibility defense to prevail.

34 Agreement § III ¶ 1.

35 *See* WBA Rules § C ¶ 45.

36 Conf. Tr. at 2.

37 *See* WBA Rules § C ¶ 45.

38 King's efforts to paint his obligations as "ambiguous" fail. According to King, in addition to the interpretation adopted here, it is also possible to read the Agreement as requiring King to "do everything within his control and ability to cause Jones's

participation." Def. Mem. at 11. But a promise to do something, and a promise to *try* to do something, are fundamentally different. The parties were free, of course, to negotiate contract terms that would only have required King to "do everything within his control and ability to cause Jones's participation." Such terms are common. *See* Restatement, Intro. to Chap. 11 ("The obligor who does not wish to undertake [a strict liability] obligation may contract for a lesser one by using one of a variety of common clauses: he may agree only to use his 'best efforts'; he may restrict his obligation to his output or requirements; he may reserve a right to cancel the contract; [and so on]."). But the terms the parties *actually* negotiated were more stringent. Under the Agreement as written, King is required to cause Jones to participate—not merely to make his best effort to cause Jones to participate. Because the "cause to participate" clause "convey[s] a definite meaning," no further fact-finding is required. *Topps Co. v. Cadbury,* 526 F.3d 63, 68 (2d Cir.2008) (applying New York law).

39 Def. Mem. at 9 n. 9.

40 *Id.* at 8.

41 *Id.* (emphasis added).

42 The error in King's reasoning is particularly apparent when he argues that interpreting the contract to "unconditionally require[ ] [him] to [ ] cause Jones to engage in the bout ... would leave [him] no recourse if Jones were to die, become injured, refuse to fight, or otherwise become incapable of participating in a WBA-sanctioned championship bout." Def. Mem. at 11. That is simply not true. Under those circumstances, King's "recourse" would be to raise an impossibility defense—just as he has.

43 Second Restatement, Intro. to Chap. 11.

44 *Kel Kim,* 70 N.Y.2d at 902, 524 N.Y.S.2d 384, 519 N.E.2d 295.

45 *Spalding v. Rosa,* 71 N.Y. 40, 44 (1877).

46 *Kel Kim,* 70 N.Y.2d at 902, 524 N.Y.S.2d 384, 519 N.E.2d 295. *Accord East 61st Garage,* 296 N.Y.S.2d at 344, 244 N.E.2d 37; *Ogdensburg,* 345 N.Y.S.2d at 171.

47 *See* Complaint ¶¶ 16–18.

48 *See* Agreement § C ¶ 6.

49 *See* 2013 WBA Resolution § IV ¶ E.

50 King Aff. ¶ 22.

51 Def. Mem. at 13 (emphasis added).

52 King Aff. ¶ 8.

53 Def. Mem. at 13.

54 *See, e.g., Kel Kim,* 70 N.Y.2d at 902, 524 N.Y.S.2d 384, 519 N.E.2d 295 (emphasizing that the proper question is whether the performance-frustrating event should have been "foreseen and guarded against in the contract").

55 King Aff. ¶ 8.

56 Def. Mem. at 8.

57 *See Winstar,* 518 U.S. at 905, 116 S.Ct. 2432.

58 *ESPN, Inc. v. Office of Comm'r of Baseball,* 76 F.Supp.2d 383, 388 (S.D.N.Y.1999) (quoting *Inter–Power of New York, Inc. v. Niagara Mohawk Power Corp.,* 259 A.D.2d 932, 686 N.Y.S.2d 911, 913 (3d Dep't 1999)).

125 N.Y.S. 46
Court of Claims of New York.

KINZER CONST. CO.
v.
STATE.

September 26, 1910.

Synopsis
Action by the Kinzer Construction Company against the State of New York. Judgment for plaintiff.

West Headnotes (11)

[1] **Contracts** Discharge by Impossibility of Performance

The common-law rule that inability to execute an absolute executory contract, due to subsequent unforeseen accident or misfortune, without the fault of either party, does not excuse performance, operative in New York by Const.1777, art. 35, subject to alterations as may be made from time to time, is subject to exceptions, and does not apply where a legal impossibility arises from a change in the law, or where the specific thing which is essential to the performance of the contract is destroyed, or where by sickness or death personal services become impossible, or where conditions essential to performance do not exist, and each of such contingencies will terminate the contract.

4 Cases that cite this headnote

[2] **Contracts** Discharge by Impossibility of Performance

Where, in the construction of a canal of the state, natural conditions of soil unexpectedly appear which render performance as planned impossible, and which make necessary substantial changes in the nature and cost of the contract and which substantially affect the work remaining under the contract, the law will read into the contract an implied condition that the contingency will terminate it, and the state may not compel performance, and the contractor may not ask the state to proceed with the work, but both parties are excused from further performance.

1 Cases that cite this headnote

[3] **Contracts** Discharge by Impossibility of Performance

Conditions which render performance of a contract impossible do not terminate the contract ab initio, and vitiate what has been done and what remains to be done that is capable of execution, but the conditions may be of such an extent as to amount to a substantial abrogation of the entire contract, or they may relate to an insignificant part thereof, and excuse performance only to the extent to which performance is impossible.

2 Cases that cite this headnote

[4] **Contracts** Discharge by Impossibility of Performance

Where, in the course of the construction by a contractor of a canal of the state, natural conditions of soil unexpectedly appeared, so that performance is impossible, the state can relet the completion of the work at its expense, and the contractor cannot recover for any prospective profits of the work remaining to be done.

[5] **Contracts** Right to Recover for Partial Performance in General

A contractor for the construction of a canal can recover interest on the amount due on the contract and material delivered at the time of the termination of the contract before completion of

the work because of the discovery of conditions preventing performance.

[6] **Contracts**Right to Recover for Partial Performance in General

The contractor cannot recover for the cost of a change in the tracks of a railroad, where the work was covered by the contract.

[7] **Contracts**Right to Recover for Partial Performance in General

The contractor can recover for material on hand and delivered on the work at the time of the termination of the contract.

[8] **Contracts**Excuse for Failure to Fully Perform

A contractor for the construction of a canal of the state cannot, on the termination of the contract, before performance, because of the discovery of natural conditions of soil rendering performance impossible, recover the premium on its surety bond; that being a part of the expense of the work considered in determining the profits of the contractor, had the state breached the contract.

[9] **Contracts**Excuse for Failure to Fully Perform

The contractor can recover the damages resulting from a stop order issued by the state, which resulted in the contractor maintaining its plant in idleness for a time, but not for team work where no team work could have been done during the period covered by the stop order.

[10] **Contracts**Excuse for Failure to Fully Perform

Where, in the construction of a canal of the state, natural conditions of soil unexpectedly appear which render performance as planned impossible and which make necessary substantial changes in the nature and cost of the contract and which substantially affect the work remaining under the contract, the contractor may recover for the work done and for the benefits received by the state under the contract to the time of the discovery of the conditions, both parties being excused from further performance.

1 Cases that cite this headnote

[11] **Damages**Breaches of Contract

A contractor for the construction of a canal of the state who is entitled to unliquidated damages resulting from a stop order issued by the state is not entitled to interest on the damages awarded.

Attorneys and Law Firms

***48** Kellogg & Rose, for claimant.

Edward R. O'Malley, Atty. Gen., Daniel E. Brong, A. E. Tuck, and M. H. Quirk, for the State.

Opinion

RODENBECK, J.

The claimant made a contract with the state of New York to construct 3.76 miles of the improved Champlain Canal which is a part of the so–called Barge Canal system of the

state now in progress of construction; and while the work was in progress, and claimant was excavating for one of the locks, an extensive cave–in occurred, which revealed the fact that for the balance of the contract the earth was of a "slippery greasy clay," with not sufficient resistency to permit of the construction according to the contract, plans, and specifications of the lock and substantially the remainder of the work. The state issued a stop order while it was investigating and determining what to do under these unexpected conditions, and this order remained in force for six months, when an alteration order which involved extensive changes in the construction of the remainder of the work was submitted by the state to the claimant for the completion of the contract. The claimant refused to accept these alterations, insisting that they constituted a fundamental change in the contract and amounted to a breach of the contract by the state, and thereupon the state proceeded to advertise for bids for the completion of the work, and let it to other contractors, and the claimant filed this claim for the work done and not paid for, and for damages including loss of profits on the portion of the work uncompleted, amounting, in all, to $370,525.41. The total amount of the contract, including previous alteration orders, was $968,296.11, and there was uncompleted at the time that the stop order was issued $521,954.42, and of this amount $398,612 was eliminated and new work was added, aggregating $153,584.50, so that the work to be done there was a reduction of $245,027.50 or a decrease of about 25 per cent. of the contract price, and ***49** upon these facts, and upon the terms of its contract, the claimant insists that the state violated its contract and justified its course in refusing to complete the contract; while the state claims that the construction of the work when the cave–in occurred revealed the fact that the subsoil was so treacherous that the lock could not be constructed in that section of claimant's contract at all, and made necessary the other changes in the plans and specifications, and also that the alterations were authorized by the contract, and that claimant was guilty of a breach of its contract in refusing to complete it as directed by the alteration order. The claimant had agreed in its contract that it had satisfied itself by its own investigation and research regarding "all the conditions affecting the work," and that its conclusion to execute the contract was based upon such investigation and research, and not upon any information prepared by the state engineer.

If the contention of the claimant is sustained, the state will be obliged, not only to pay to the claimant the amount of work done and not paid for under the contract and profits which claimant estimates at $210,490.84 besides other damages, but to other contractors the profits, if any, which they will make upon the completion of the work under the reletting; while, if the position of the state is upheld that under the clause in the contract reserving to it the right to make necessary alterations in the plans it was authorized to make the changes which it did, the claimant not only loses the profits which it claims, but it must pay the state any damages caused by its failure to perform the contract including the increased cost, if any, of completing the work. The contention of the claimant is based upon the interpretation that it places upon the clause in the contract relating to alterations in the plans and specifications, and it insists that the changes proposed by the state were fundamental alterations of the contract, and were not contemplated when the contract was made, and constituted a breach thereof. This claim provides that the state may make such alterations in the plans and specifications as may be "necessary."

The case, however, does not turn upon the construction of this clause in the contract, but rests upon another proposition growing out of the conditions that were found when the attempt was made to construct lock No. 7. When this part of the work was reached, a condition of the soil was found which made it impossible to construct the lock as planned, and made it impracticable to build it within the limits of the remainder of the contract. When the excavation for the foundation of the lock had been carried to a depth of 10 or 12 feet, it was found that the underlying stratum was a greasy slippery clay with no grit in it—"just like axle grease," as one witness put it. Claimant's expert said that he had never seen any soil like it, and that it would not be good engineering to build a lock in such material at all. Under this condition of things, the case falls within that line of decisions where the contract is regarded as at an end and performance is excused because of the failure of conditions the existence of which are necessary to the performance of the contract. The early rule upon impossibility as an excuse for the performance of a contract was that inability to execute an absolute executory contract due to subsequent unforeseen accident or misfortune without the fault of either party ***50** will not excuse performance. Paradine v. Jane, Aleyn, 26. This rule which was promulgated in English Jurisprudence as early as the year 1178 was based upon the ground as stated in this case that:

> "Where the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."

By the language of the Constitution of the state of New York, this rule with the remainder of the common law of England and Great Britain became operative in this state subject to such alterations as might be made from time to time. State Const. 1777, art. 35. There are many illustrations of the adoption and application of the rule in this state (Harmony v. Bingham, 12 N. Y. 99, 62 Am. Dec. 142; Tompkins v. Dudley, 25 N. Y. 272, 82 Am. Dec. 349; Wheeler v. Conn. Mut. Life Ins. Co., 82 N. Y. 543, 37 Am. Rep. 594; Booth v. Spuyten Duyvil Rolling Mill Co., 60 N. Y. 487), but exceptions began to creep in as a strict enforcement of the rule seemed to work out an inequitable result.

In England the rule prevailed in all its severity down to the middle of the last century (Hall v. Wright, E. B. & E. [1857]), but since then the courts both here and in England have modified it to a large extent upon the theory that the event which rendered the performance impossible should be implied as a matter of law as one of the conditions of the contract (Taylor v. Caldwell, 3 B. & S. 8249 [1863]; Bailey v. De Crespigny, L. R. 4 Q. B. 185), thus carrying out the supposed intention of the parties, and placing such contingencies as excuse performance upon the same basis as an act of God which Pollock defines as:
"An event which as between the parties and for the purposes of the matter in hand cannot be definitely foreseen or controlled." Pollock on Contracts (3d Ed.) p. 535.

These exceptions have been growing so that now there are at least four well–recognized modifications of the early rule, while the courts seem to be groping for a rule broad enough to include all of the exceptions. Three of these exceptions have long since been firmly established in the jurisprudence, not only of this country, but of England, and the fourth has been adopted in many cases of recent date in this state where the existing rules did not equitably meet the peculiar facts. The rule that performance is excused where legal impossibility arises from a change in the law or where the specific thing which is essential to performance is destroyed, or where there is an incapacity by sickness or death in the case of a contract for personal services, are of long standing, but quite recently a fourth and broader rule has grown up which is applicable to the case at bar.

One writer in the Columbia Law Review, in discussing the tendency toward a broader rule to meet cases of impossibility in the performance of contracts, says:
"If the contingency which makes the contract impossible of performance is such that the parties to the contract, had they actually contemplated it, would ***51** probably have regarded it as so obviously terminating the obligation as not to require expression, failure of performance should be excused." Volume 1, p. 533.

Another writer in the Harvard Law Review, criticising the proposed rule, suggests another:
"A proper rule, it is suggested, is that impossibility should be recognized as a defence wherever it seems reasonable that, had the contingency which renders performance impossible been contemplated by the parties, they would have both agreed that its introduction into the contract as a condition terminating the obligation would be just." Volume 15, p. 419.

A third writer in the same Review, after referring to the general rule and its exceptions, says:
"The New York court, however, has of late been more liberal and in a somewhat indefinite way has laid down the doctrine that impossibility is an excuse when caused by the noncontinuance either of the subject–matter of the contract or of the conditions essential to its performance." Volume 15, p. 63.

There is abundant warrant in the decided cases in this state for these attempts to state the broad rule that the courts are now following in relation to this subject and to justify the statement that the "modern tendency seems to be toward a more lenient construction. More regard is paid to what must have been the intention of the parties." American Law Register 1909, p. 570.

In Stewart v. Stone, 127 N. Y. 500, 507, 28 N. E. 595, 596 (14 L. R. A. 215), the factory at which milk delivered by plaintiff and his assignor was to be manufactured into cheese and butter burned, and with it a quantity of butter and cheese and some milk which had not been converted into cheese and butter. Judge Bradley says in the course of his opinion:

> "It is true that, where an absolute executory contract is made, the contractor is not excused by inability to execute it caused by unforeseen accident or misfortune, but must perform or pay damages unless he has protected himself against such contingency by stipulation in his contract. Harmony v. Bingham, 12 N. Y. 99 [62 Am. Dec. 142]; Tompkins v. Dudley, 25 N. Y. 272 [82 Am. Dec. 349]; Wheeler v. Conn. Mut. L. Ins. Co., 82 N. Y. 543 [37 Am. Rep. 594]. But there may be in the nature of a

> contract an implied condition by which he will be relieved from such unqualified obligation, and when, in such case, without his fault, performance is rendered impossible it may be excused. That is so when it inherently appears by it to have been known to the parties to the contract, and contemplated by them when it was made, that its fulfillment would be dependent upon the continuance or existence at the time for performance of certain things or conditions essential to its execution. Then in the event they cease, before default, to exist or continue, and thereby performance becomes impossible without his 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. People v. Bartlett, 3 Hill, 570; Dexter v. Norton, 47 N. Y. 62 [7 Am. Rep. 415]; Booth v. S. D. R. Mill Co., 60 N. Y. 491; Taylor v. Caldwell, 3 B. & S. 826."

In Lorillard v. Clyde, 142 N. Y. 456, 462, 37 N. E. 489, 491 (24, L. R. A. 113), the defendant was relieved from paying dividends, which he has agreed to do, because the corporation out of whose earnings they were to come had been involuntarily dissolved. Chief Judge Andrews says in his opinion:

> ***52** "The general doctrine that when a party voluntarily undertakes to do a thing, without qualification, performance is not excused, because, by inevitable accident or other contingency not foreseen, it becomes impossible for him to do the act or thing which he agreed to do is well settled. This doctrine protects the integrity of contracts, and one of the reasons assigned in its support in the early case of Paradine v. Jane (Aleyn Rep. 26) is that as against such contingencies the party could have provided by his contract. See Harmony v. Bingham, 12 N. Y. 99 [62 Am. Dec. 142]; Ford v. Cotesworth L. R. (4 Q. B.) 134; Jones v. U. S., 96 U. S. 24 [24 L. Ed. 644]. But it is now well settled that when performance depends on the continued existence of a given person or thing, and such continued existence was assumed as the basis of the agreement, the death of the person or the destruction of the thing puts an end to the obligation. Executory contracts for personal services, for the sale of specific chattels, or for the use of a building are held to fall within this principle. Dexter v. Norton, 47 N. Y. 62 [7 Am. Rep. 415]; People v. Globe Mutual Ins. Co., 91 N. Y. 174; Taylor v. Caldwell, 113 Eng. C. L. 826. These cases are not exceptions to the rule that contracts voluntarily made are to be enforced, but the courts in accordance with the manifest intention construe the contract as subject to an implied condition that the person or thing shall be in existence when the time of performance arrives. So if after a contract is made the law interferes and makes subsequent performance impossible the party is held to be excused. Jones v. Judd, 4 N. Y. 412. It must be conceded that it is difficult to draw the line and to determine the exact limitations of the principle. When the executory contract relates to specific chattels, and the subject–matter is destroyed without fault of the party, the implied condition arises and excuses performance. But where the contract is based on the assumed existence and continuance of a certain condition, or upon the continuance of a subject–matter which, however, is not the direct object of the contract, is the principle in such cases excluded? The present case illustrates what we have in mind. The contract in question was not with the corporation whose life was extinguished by the judgment of dissolution. But the guaranty assumed that the corporation would continue in existence during the seven–year period. The liability which the defendants assumed was in consideration of the benefits which might accrue to them from the

> management of the transportation business of the corporation during that period. Upon the assumption that the death of the corporation was brought about without their fault, were they thereafter bound? Is the doctrine of implied condition less applicable than it would be if the contract had been between the defendants and the corporation? If in the one case the contract, so far as it was unexecuted, would be terminated, did not the happening of the same event terminate the engagement of these parties, based on the assumed continuance of the corporation in life?"

In Dolan v. Rodgers, 149 N. Y. 489, 493, 44 N. E. 167, 168, the event which rendered further performance of the contract impossible was the interference of a railroad company for whom the defendants were constructing a road under a contract under which they had sublet a part of the work to the plaintiff in violation of a clause in the contract forbidding subletting without consent. In his opinion Judge Vann says:

"There are many cases holding that the continued existence of the means of performance or of the subject–matter to which the contract relates is an implied condition, and the rule seems to rest on the presumption that the parties necessarily intended an exception, and, as said in Dexter v. Norton. 47 N. Y. 62, 66 [7 Am. Rep. 415], it operated 'to carry out the intention of the parties under most circumstances, and is more just than the contrary rule.' Tone v. Doelger, 6 Rob. 251, 256; Walker v. Tucker, 70 Ill. 527; Thomas v. Knowles, 128 Mass. 22; Field v. Brackett, 56 Me. 121; Scully v. Kirkpatrick, 79 Pa. 324, 332 [21 Am. Rep. 62]; Shear v. Wright, 60 Mich. 159 [26 N. W. 871]; Howell v. Coupland, L. R. (L. Q. B. D. 528); Robinson ***53** v. Davison, 40 L. J. Ex. 172; Appleby v. Myers, 36 L. J. P. 331, 336. The effect of the rule is to excuse both parties from further performance of the contract without giving to either the right to recover damages for the part not performed. Id. In England the rule seems to go no farther in its effect than to relieve both parties from any obligation under an entire contract, with reference either to the future or the past. In this country, however, there may be a pro rata recovery for part performance by the one party, at least where what has been done is of benefit to the other. Jones v. Judd, 4 N. Y. 412; Cleary v. Sohier, 120 Mass, 210; Butterfield v. Byron, 153 Mass, 517 [27 N. E. 667, 12 L. R. A. 571, 25 Am. St. Rep. 654]; Cook v. McCabe, 53 Wis. 250, 258 [10 N. W. 507, 40 Am. Rep. 765]; Schwartz v. Saunders, 46 Ill. 18; Hollis v. Chapman, 36 Tex. 1; Niblo v. Binsse, *40 N. Y. 476."

In Herter v. Mullen, 159 N. Y. 28, 40, 53 N. E. 700, 704, 44 L. R. A. 703, 70 Am. St. Rep. 517, the defendant was relieved from liability for a year's rent by reason of holding over after the expiration of his term on account of the sickness of a member of his family. Judge O'Brien says:

> "Legal rules may sometimes be pushed to a point where they accomplish the grossest injustice, and it then becomes the duty of the courts to limit their application to cases that are within their true scope and fair meaning."

In Buffalo & Lancaster Land Co. v. Bellevue L. & I. Co., 165 N. Y. 247, 254, 59 N. E. 5, 7, 51 L. R. A. 951, the plaintiff failed to secure relief for an alleged breach of a contract for the construction of an electric road under which the defendant had agreed to operate cars certain hours each day, and was prevented from doing so on certain days in the winter by storms of unusual severity. In the course of his opinion, Judge O'Brien says:

> "It is a well–settled rule of law that, where a party by his own contract absolutely engages to do an act, it is his own fault and folly that he did not thereby provide against contingencies and exempt himself from responsibility in certain events. In such cases performance is not excused by inevitable accident, or other contingency, although not foreseen, or under the control of the party. When the contract is absolute, the vis major is not an excuse for nonperformance. Ward v. H. R. B. Co., 125 N. Y. 230 [26 N. E. 256]: Harmony v. Bingham, 12 N. Y. 99 [62 Am. Dec. 142]. But there are many contracts from which by their very nature a condition may be implied that a party will be relieved from the consequences of nonperformance in some slight particular, where the obligation is qualified, or when performance is rendered impossible without his fault,

> and we think the contract in question belonged to that class. Stewart v. Stone, 127 N. Y. 500 [28 N. E. 595, 14 L. R. A. 215]; Dexter v. Norton, 47 N. Y. 62 [7 Am. Rep. 415]; Worth v. Edmonds, 52 Barb. 40; Lorillard v. Clyde, 142 N. Y. 456 [37 N. E. 489, 24 L. R. A. 113]; Taylor v. Caldwell, 113 Eng. Com. Law, 826; C., M. & St. P. Ry. Co. v. Hoyt, 148 U. S. 1 [13 Sup. Ct. 779, 37 L. Ed. 625]; Clifford v. Watts, L. R. (5 C. P.) 557."

In Labaree Co. v. Crossman, 100 App. Div. 499, 504, 92 N. Y. Supp. 565, 567, the impossibility of performance arose from an order of the board of health of the city of New York prohibiting the landing of a cargo of coffee. The court, adopting the opinion of the referee who tried the case, says:

> "In my opinion the doctrine of implied condition is applicable to the case, and the parties must be deemed to have contracted upon the condition that there would be no legal interference with the admission of the coffee to the storehouses of the city, or rather that, if performance was rendered impossible by the act of the law, the contract would be dissolved."

***54** In Whipple v. Lyons Beet Sugar Refining Co., 64 Misc. Rep. 363, 365, 118 N. Y. Supp. 338, 340, the impossibility of performance arose from drought and other climatic conditions which prevented the defendant from carrying out a contract to grow a certain number of acres of beets for a sugar company according to certain printed instructions. Judge Pound says:

> "The reasonable inference is that it was the performance of these conditions only, that the parties had in mind when the stipulation for liquidated damages was made, and that the contract is one for a crop to be raised according to defendant's specific instructions and is subject to the implied condition that, if the seeds planted failed to grow on a portion of the land selected in accordance with such instructions by reason of drought or other climatic conditions over which the plaintiff had no control, performance would be excused."

From these cases, it will be seen that a fourth exception must be made to the general rule that accident or an unforeseen contingency arising without the fault of either party will not excuse performance of an absolute executory contract, and the four exceptions may now be stated broadly as follows: First, where the legal impossibility arises from a change in the law (Jones v. Judd, 4 N. Y. 411; Heine v. Meyer, 61 N. Y. 171; Labaree Co. v. Crossman, 100 App. Div. 499, 92 N. Y. Supp. 565; People v. Bartlett, 3 Hill, 570; Hildreth v. Buell, 18 Barb. 107); second, where the specific thing which is essential to the performance of the contract is destroyed (Dexter v. Norton, 47 N. Y. 62, 7 Am. Rep. 415; People v. Globe Mut. L. Ins. Co., 91 N. Y. 174; Lorillard v. Clyde, 142 N. Y. 456, 37 N. E. 489, 24 L. R. A. 113; Hayes v. Gross, 9 App. Div. 12, 40 N. Y. Supp. 1098); third, where by sickness or death personal services become impossible (Wolfe v. Howes, 20 N. Y. 197, 75 Am. Dec. 388; Clark v. Gilbert, 26 N. Y. 279, 84 Am. Dec. 189; Spalding v. Rosa, 71 N. Y. 40, 27 Am. Rep. 7; Gaynor v. Jonas, 104 App. Div. 35, 93 N. Y. Supp. 287; Matter of Daly, 58 App. Div. 49, 68 N. Y. Supp. 596); and fourth, where conditions essential to performance do not exist (Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215; Dolan v. Rodgers, 149 N. Y. 489, 44 N. E. 167; Buffalo & Lancaster Land Co. v. Bellevue L. & I. Co., 165 N. Y. 247, 59 N. E. 5, 51 L. R. A. 951; Whipple v. Lyons Beet Sugar Refining Co., 64 Misc. Rep. 363, 118 N. Y. Supp. 338). From these considerations the rule may be deduced fairly in the present case that where in the course of the construction of a canal natural conditions of soil unexpectedly appear which contingency the contract does not in express terms cover, and which render the performance of the contract as planned impossible, and make necessary substantial changes in the nature and cost of the contract and substantially affect the work remaining under the contract, the law will read into the contract an implied condition when it was made that such a contingency will terminate the entire contract.

These terms are implied in the contract by force of the law itself, and not because the parties had them in mind. Whether we approve of their insertion upon the theory that had the attention of the parties been called to the conditions giving rise to the application of the rule, they would have omitted any reference to them because obviously ***55**

covered by the law (1 Columbia Law Review, p. 533), or upon the theory that they would have regarded them as just provisions to have inserted (15 Harvard Law Review, p. 419).

In the eyes of the law being a part of the terms of the contract, the conditions that rendered performance impossible do not terminate the contract ab initio, and vitiate what has been done and what remains to be done that is capable of execution. The conditions may be of such an extent as to amount to a substantial abrogation of the entire contract, or they may relate to an insignificant part of the contract, but they excuse performance only to the extent to which performance is impossible, and leave what has been done valid permitting a recovery therefor, and may not excuse performance of the remaining work. No general rule can be laid down which will apply to all cases, but each case must be decided upon its own facts, and that this course can be taken and justice done according to the facts in each case unhampered by written rules is due to the great flexibility of the common law which is its chief merit. Applying this rule to the case at bar, it will be seen to work out an equitable result. The state was not in a position to compel performance of an impossibility, and likewise the claimant could not ask the state to proceed with the contract. It would not have been fair of the state to insist upon the literal performance of its contract, and place the loss upon the claimant for the failure to perform, nor would it have been just for the claimant to insist that the state must carry out its contract as planned or suffer the penalty of paying damages, including prospective profits for the breach of the contract. It is better to regard the contract as at an end, and treat both parties as having been excused from further performance allowing the claimant to recover for work done and for benefits received by the state under the contract down to the time of the discovery of the conditions which rendered performance impossible, and for such damages as may have resulted to it from the stop order issued by the state. Both of the parties were in the same situation at the time that the conditions were discovered, and the rule applied leaves both of them to share the responsibilities for these conditions which were not anticipated when the contract was made thus carrying out the spirit of the state Constitution, which provides that, if for any unforeseen cause the terms of any contract prove to be unjust and oppressive, the canal board may upon the application of the contractor cancel the contract. State Const. art. 7, § 9. The state, therefore, had the right to relet the completion of the work, but must bear the increased expense resulting therefrom, while the claimant is not entitled to recover for any prospective profits on the work remaining to be done. Rhodes v. Hinds, 79 App. Div. 379, 79 N. Y. Supp. 437; Snyder v. City of New York, 74 App. Div. 421, 77 N. Y. Supp. 637; Sickels v. United States, 1 Ct. Cl. 214.

The claimant is not entitled to recover the premium on its surety bond, as that is part of the expense of doing the work which would be considered in determining the profits to which the claimant would be entitled had the state been guilty of a breach of its contract. It does not differ from other items of expense for which the claimant cannot recover, such as the purchase of its plant for the performance of the ***56** contract. Beckwith v. City of New York, 121 App. Div. 464, 106 N. Y. Supp. 175.

The claimant is not entitled to recover for the cost of the one one three slope order involving a change in the tracks of the Delaware & Hudson Railroad, since that work was covered by the terms of its contract, and would have been required irrespective of the one on three slope order.

The state is not entitled to recover upon its alleged counterclaim a construction which the state itself placed upon the contract when it paid for restoring navigation on the Champlain Canal after the previous cave–in.

The claimant is entitled to recover the amount of work done and unpaid for at the time that the cave–in occurred amounting to $41,718.63. This amount is somewhat less than that submitted by the claimant, and is the amount conceded by the state having been made up from actual measurements by the state in the usual way that previous estimates and payments under the contract had been made.

The claimant is entitled to recover for material on hand and delivered on the work at the time that the termination of the contract occurred. This material, although not actually put in place in constructed work, occupied the same position under the contract as such material, since it was delivered and ready for use. The amount allowed for foundation piles delivered is $8,741.40, for sheet piling delivered made up $5,214.76, for sheet piling delivered not made up $579.84. These several amounts are taken rather than the amounts shown upon the trial by the claimant, because they were testified to by state witnesses from actual count on the ground. There should also be allowed for material on hand $4,760.33 claimed by the claimant and conceded by the state and for filet on hand $129.20, a slight reduction from the amount claimed. The sum of these items of material delivered is $19,425.53.

The claimant is also entitled to recover for two small items, one for derrick delay damages and another for pile driver damages, amounting together to $253.80, the amount claimed by the claimant and conceded by the state.

The claimant is also entitled to recover for damages resulting from the stop order issued by the state. The liability of the state is placed upon the ground that instead of acting upon the conditions as they arose, and treating the

contract as terminated at that time, the state issued an order requiring the claimant to maintain its plant in idleness for a period of six months. The claimant is not entitled to all of the damages claimed under this head. An allowance for rental of plant is made for 151 days at $50 a day, amounting to $7,550, as against $9,200 claimed by the claimant, which latter amount includes an allowance for the entire six months, including Sundays and holidays, which should be deducted. The item for team work, amounting to $6,277, is disallowed on the ground that no team work could have been done during the period covered by the stop order, and because the teams had gone into winter quarters. In place of the allowance of $5,454.68 for superintendence, $1,731.29 is allowed, which is the amount which was shown by the books of the claimant to be the actual cost of superintendence ***57** to the claimant. The sum of these items for damages resulting from the stop order is $9,281.29.

A summary of the disallowances is as follows:

Summary of Disallowances.

Profits	$210,490 84
Premium bond	3,836 70
One on three slope order	727 47
State's counterclaim	13,280 01
Total	$228,335 02

A summary of allowances made to the claimant is as follows:

Summary of Allowances.

Due on contract	$ 41,718 63
Material delivered	19,425 53
Derrick damages	108 80

Pile driver damages	145
Stop order damages	9,281 29
Total	$ 70,679 25

The claimant is entitled to recover interest on the amount due on the contract and material delivered amounting to $61,144.16, but is not entitled to interest on the unliquidated damages amounting to $9,535.09. Sweeny v. City of New York, 173 N. Y. 414, 66 N. E. 101.

The claimant should have judgment for $70,679.25, with interest on $61,144.16 from December 15, 1908.

Judgment entered accordingly.

All Citations

125 N.Y.S. 46

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Exhibit 5

State of New York

Executive Chamber

No. 202.10

EXECUTIVE ORDER

Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency

WHEREAS, on March 7, 2020, I issued Executive Order Number 202, declaring a State disaster emergency for the entire State of New York;

WHEREAS, both travel-related cases and community contact transmission of COVID-19 have been documented in New York State and are expected to be continue;

WHEREAS, ensuring the State of New York has adequate bed capacity, supplies, and providers to treat patients affected with COVID-19, as well as patients afflicted with other maladies, is of critical importance; and

WHEREAS, eliminating any obstacle to the provision of supplies and medical treatment is necessary to ensure the New York healthcare system has adequate capacity to provide care to all who need it;

NOW, THEREFORE, I, Andrew M. Cuomo, Governor of the State of New York, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to temporarily suspend or modify any statute, local law, ordinance, order, rule, or regulation, or parts thereof, of any agency during a State disaster emergency, if compliance with such statute, local law, ordinance, order, rule, or regulation would prevent, hinder, or delay action necessary to cope with the disaster emergency or if necessary to assist or aid in coping with such disaster, I hereby temporarily suspend or modify, for the period from the date of this Executive Order through April 22, 2020 the following:

- Section 2803 of the Public Health Law, and Parts 400, 401, 405, 409, 710, 711 and 712 of Title 10 of the NYCRR, to the extent necessary to permit and require general hospitals to take all measures necessary to increase the number of beds available to patients, in accordance with the directives set forth in this Executive Order;

- Section 3001, 3005-a, 3008, and 3010 of the Public Health Law to the extent necessary to modify the definition of "emergency medical services" to include emergency, non-emergency and low acuity medical assistance; to eliminate any restrictions on an approved ambulance services or providers operating outside of the primary territory listed on such ambulance service's operating certificate with prior approval by the Department of Health; to permit the Commissioner of Health to issue provisional emergency medical services provider certifications to qualified individuals with modified certification periods as approved; and to allow emergency medical services to transport patients to locations other than healthcare facilities with prior approval by Department of Health;

- Section 3002, 3002-a, 3003, and 3004-a of Public Health Law to the extent necessary to allow any emergency medical treatment protocol development or modification to occur solely with the approval of the Commissioner of Health;

- Sections 405.13 and 755.4 of Title 10 of the NYCRR to the extent necessary to permit an advanced practice registered nurse with a doctorate or master's degree specializing in the administration of anesthesia administering anesthesia in a general hospital or free-standing ambulatory surgery center without the supervision of a qualified physician in these health care settings;

- Paragraph 1 of Section 6542 of the Education Law and Subdivisions (a) and (b) of Section 94.2 of Title 10 of the NYCRR to the extent necessary to permit a physician assistant to provide medical services appropriate to their education, training and experience without oversight from a supervising physician without civil or criminal penalty related to a lack of oversight by a supervising physician;

- Paragraph 1 of Section 6549 of the Education Law and Subdivisions (a) and (b) of Section 94.2 of Title 10 of the NYCRR to the extent necessary to permit a specialist assistant to provide medical services appropriate to their education, training and experience without oversight from a supervising physician without civil or criminal penalty related to a lack of oversight by a supervising physician;

- Subdivision (3) of Section 6902 of Education Law, and any associated regulations, including, but not limited to, Section 64.5 of Title 10 of the NYCRR, to the extent necessary to permit a nurse practitioner to provide medical services appropriate to their education, training and experience, without a written practice agreement, or collaborative relationship with a physician, without civil or criminal penalty related to a lack of written practice agreement, or collaborative relationship, with a physician;

- Subdivision (15) of section 3001, and Sections 800.3, 800.15 and 800.16 of Title 10 of the NYCRR with approval of the department, to the extent necessary to define "medical control" to include emergency and non-emergency direction to all emergency medical services personnel by a regional or state medical control center and to permit emergency medical services personnel to operate under the advice and direction of a nurse practitioner, physician assistant, or paramedic, provided that such medical professional is providing care under the supervision of a physician and pursuant to a plan approved by the Department of Health;

- 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;

- Any healthcare facility is authorized to allow students, in programs to become licensed in New York State to practice as a healthcare professional, to volunteer at the healthcare facility for educational credit as if the student had secured a placement under a clinical affiliation agreement, without entering into any such clinical affiliation agreement;

- Notwithstanding any law or regulation to the contrary, health care providers are relieved of recordkeeping requirements to the extent necessary for health care providers to perform tasks as may be necessary to respond to the COVID-19 outbreak, including, but not limited to, requirements to maintain medical records that accurately reflect the evaluation and treatment of patients, or requirements to assign diagnostic codes or to create or maintain other records for billing purposes. Any person acting reasonably and in good faith under this provision shall be afforded absolute immunity from liability for any failure to comply with any recordkeeping requirement. In order to protect from liability any person acting reasonably and in good faith under this provision, requirements to maintain medical records under Subdivision 32 of Section 6530 of the Education Law, Paragraph (3) of Subdivision (a) of Section 29.2 of Title 8 of the NYCRR, and Sections 58-1.11, 405.10, and 415.22 of Title 10 of the NYCRR, or any other such laws or regulations are suspended or modified to the extent necessary for health care providers to perform tasks as may be necessary to respond to the COVID-19 outbreak;

- Section 405.45 of Title 10 of the NYCRR to the extent necessary to permit the Commissioner of Health to designate a health care facility as a trauma center, or extend or modify the period for which a health care facility may be designated as a trauma center, or modify the review team for assessment of trauma center;

- Sections 800.3, 800.8, 800.9, 800.10, 800.12, 800.17, 800.18, 800.23, 800.24, and 800.26 of Title 10 of the NYCRR to the extent necessary to extend all existing emergency medical services provider certifications for one year; to permit the Commissioner of Health to modify the examination or recertification requirements for emergency medical services provider certifications; to suspend or modify, at the discretion of the Commissioner of Health, any requirements for the recertification of previously certified emergency medical services providers; and, at the discretion of the Commissioner of Health, develop a process determined by the Department of Health, to permit any emergency medical services provider certified or licensed by another State to provide emergency medical services within New York state; at the discretion of the Commissioner of Health, to suspend or modify equipment or vehicle requirements in order to ensure sustainability of EMS operations;

- Paragraph (6) of subdivision (b) of part 405.4 of Title 10 of the NYCRR to the extent necessary to remove limits on working hours for physicians and postgraduate trainees;

- Subparagraph (ii) of paragraph (2) of subdivision (g) of 10 N.Y.C.R.R. section 405.4, to the extent necessary to allow graduates of foreign medical schools having at least one year of graduate medical education to provide patient care in hospitals, is modified so as to allow such graduates without licenses to provide patient care in hospitals if they have completed at least one year of graduate medical education;

- Subdivision (e) of section 405.2 of Title 10 of the NYCRR, to the extent necessary to permit general hospitals affected by the disaster emergency to maintain adequate staffing;

- Subdivision (b) of section 405.3 of Title 10 of the NYCRR, to the extent necessary to allow general hospitals to use qualified volunteers or personnel affiliated with different general hospitals, subject to the terms and conditions established by the Commissioner of Health;

- Section 3507 of the Public Health Law and Part 89 of Title 10 of the NYCRR to the extent necessary to permit radiologic technologists licensed and in current good standing in New York State but not registered in New York State to practice in New York State without civil or criminal penalty related to lack of registration;

- Sections 3502 and 3505 of the Public Health Law and Part 89 of Title 10 of the NYCRR to the extent necessary to permit radiologic technologists licensed and in current good standing in any state in the United State to practice in New York State without civil or criminal penalty related to lack of licensure;

- Sections 8502, 8504, 8504-a, 8505, and 8507 of the Education Law and Subpart 79-4 of Title 8 of the NYCRR, to the extent necessary to allow respiratory therapists licensed and in current good standing in any state in the United States to practice in New York State without civil or criminal penalty related to lack of licensure;

- Section 6502 of the Education Law and 8 NYCRR 59.8, to the extent necessary to allow physician's assistants licensed and in current good standing in New York State but not registered in New York State to practice in New York State without civil or criminal penalty related to lack of registration;

- Section 6502 of the Education Law and 8 NYCRR 59.8, to the extent necessary to allow registered professional nurses, licensed practical nurses and nurse practitioners licensed and in current good standing in New York State but not registered in New York State to practice in New York State without civil or criminal penalty related to lack of registration;

- Subdivision (2-b) of Section 4002 of the Public Health Law to the extent necessary to allow a hospice residence to designate any number of beds within such facility as dually certified inpatient beds;

- Title V of Article 5 of the Public Health Law and subparts 19 and 58 of Title 10 of the NYCRR, to the extent necessary to allow laboratories holding a Clinical Laboratory Improvement Acts (CLIA) certificate and meeting the CLIA quality standards described in 42 CFR Subparts H, J, K and M, to perform testing for the detection of SARS-CoV-2 in specimens collected from individuals suspected of suffering from a COVID-19 infection;

- Article 139 of the Education Law, Section 576-b of the Public Health Law and Section 58-1.7 of Title 10 of the NYCRR, to the extent necessary to permit registered nurses to order the collection of throat or nasopharyngeal swab specimens from individuals suspected of being infected by COVID-19, for purposes of testing; and

- Subdivision (1) of Section 6801 of the Education Law, Section 6832 of the Education Law and Section 29.7(a)(21)(ii)(b)(4) of Title 8 of the NYCRR, to the extent necessary to permit a certified or registered pharmacy technician, under the direct personal supervision of a licensed pharmacist, to assist such licensed pharmacist, as directed, in compounding, preparing, labeling, or dispensing of drugs used to fill valid prescriptions or medication orders for a home infusion provider licensed as a pharmacy in New York, compliant with the United States Pharmacopeia General Chapter 797 standards for Pharmaceutical Compounding – sterile preparations, and providing home infusion services through a home care agency licensed under Article 36 of the Public Health Law.

IN ADDITION, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to issue any directive during a disaster emergency necessary to cope with the disaster, I hereby issue the following directives for the period from the date of this Executive Order through April 22, 2020:

- Any healthcare facility is authorized to allow students, in programs to become licensed in New York State to practice a healthcare professional, to volunteer at the healthcare facility for educational credit as if the student had secured a placement under a clinical affiliation agreement, without entering into any such clinical affiliation agreement;

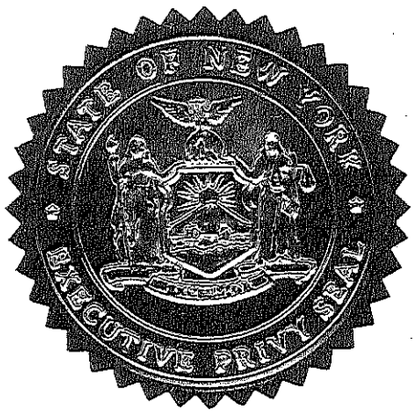
- The Commissioner of Health is authorized to direct, and shall so direct, all general hospitals, ambulatory surgery centers, office-based surgery practices and diagnostic and treatment centers to increase the number of beds available to patients, including by canceling all elective surgeries and procedures, as the Commissioner of Health shall define. General hospitals shall comply with such order by submitting COVID-19 Plans to the New York State Department of Health (NYSDOH), on a schedule to be determined by NYSDOH, to accomplish this purpose;

- The Commissioner of Health is authorized to suspend or revoke the operating certificate of any general hospital should they be unable to meet the requirements of the necessary capacity directives; and notwithstanding any law to the contrary the Commissioner may appoint a receiver to continue the operations on 24 hours' notice to the current operator, in order to preserve the life, health and safety of the people of the State of New York.

- No pharmacist shall dispense hydroxychloroquine or chloroquine except when written as prescribed for an FDA-approved indication; or as part of a state approved clinical trial related to COVID-19 for a patient who has tested positive for COVID-19, with such test result documented as part of the prescription. No other experimental or prophylactic use shall be permitted, and any permitted prescription is limited to one fourteen day prescription with no refills.

- Any licensed health insurance company shall deliver to the Superintendent, no later than March 24, 2020 a list of all persons who have a professional licensure or degree, whether physician's assistant, medical doctor, licensed registered nurse, licensed nurse practitioner or licensed practical nurse, and whether or not the person has a currently valid, or recently (within past five years) expired license in the state of New York. The Department of Financial Services shall poll such individuals to determine whether or not such professionals would serve in the COVID-19 response effort.

- Non-essential gatherings of individuals of any size for any reason (e.g. parties, celebrations or other social events) are canceled or postponed at this time.



GIVEN under my hand and the Privy Seal of the State in the City of Albany this twenty-third day of March in the year two thousand twenty.

BY THE GOVERNOR

Secretary to the Governor

New York Official Reports

77 N.Y.2d 157, 566 N.E.2d 639, 565 N.Y.S.2d 440

W.W.W. Associates, Inc., Respondent,
v.
Frank Giancontieri et al., Appellants.

Court of Appeals of New York
272
Argued November 19, 1990;
Decided December 27, 1990

CITE TITLE AS: W.W.W. Assoc. v Giancontieri

SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered December 13, 1989, which (1) reversed, on the law, an order and judgment (one paper) of the Supreme Court (Paul J. Baisley, J.), entered in Suffolk County, granting a motion by defendants for summary judgment, and dismissing the complaint, (2) reinstated the complaint, (3) upon searching the record pursuant to CPLR 3212 (b), granted summary judgment to plaintiff against defendants directing specific performance of a contract for the sale of real property, and (4) remitted the matter to Supreme Court, Suffolk County, for entry of an appropriate judgment.

W.W.W. Assocs. v Giancontieri, 152 AD2d 333, reversed.

HEADNOTES

Vendor and Purchaser
Contract for Sale of Real Property

Construction of Unambiguous Reciprocal Cancellation Provision--Extrinsic Evidence

([1]) In an action for specific performance of a contract to sell real property, an unambiguous reciprocal cancellation provision should not be read in the light of extrinsic evidence, as a contingency clause for the sole benefit of plaintiff purchaser, subject to its unilateral waiver. Clear, complete writings should generally be enforced according to their terms. Here, the contract, read as a whole to determine its purpose and intent, plainly manifests the intention that defendants, as well as plaintiff, should have the right to cancel pursuant to the subject provision, and that all prior understandings be merged into the contract, which expresses the parties' full agreement. Moreover, the face of the contract reveals a logical reason for the explicit provision that the cancellation right should run to the seller as well as to the purchaser. Extrinsic evidence should not be considered in order to create an ambiguity in the agreement which is complete and clear on its face.

Judgments
Summary Judgment

Action for Specific Performance of Contract to Sell Real Property

([2]) In an action for specific performance of a contract to sell real property which was canceled by defendant sellers pursuant to an unambiguous reciprocal cancellation provision stating that either party shall have the right to cancel the contract in the event certain litigation concerning the subject real property is not concluded by or before June 1, 1987, plaintiff's conclusory assertion of bad faith, supported only by its vice-president's statement that one of the defendants told the broker on the transaction, who then told him, that defendants were doing nothing to defend the action, ***158** waiting for June 2 to cancel, and suggesting that the broker might resell the property at a higher price, fails to raise a triable issue of fact sufficient to defeat defendants' motion for summary judgment.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Summary Judgment, §§ 5, 18, 27; Vendor and Purchaser, §§ 60, 61, 535.

Carmody-Wait 2d, Summary Judgment §§ 39:20, 39:21, 39:34.

NY Jur, Vendor and Purchaser, §§ 29, 32, 125.

ANNOTATION REFERENCES

See Index to Annotations under Affidavits; Sale and Transfer of Property; Summary Judgment.

POINTS OF COUNSEL

John G. Poli III for appellants.
I. The record amply demonstrates that this litigation contingency is for the benefit of both the purchaser and seller. *(Catholic Foreign Mission Socy. v Oussani,* 215 NY 1; *Satterly v Plaisted,* 52 AD2d 1074, 42 NY2d 933; *Bonavita & Sons v Quarry,* 126 AD2d 707, 69 NY2d 607; *Lieberman Props. v Braunstein,* 134 AD2d 55; *Praver v Remsen Assocs.,* 150 AD2d 540.)
II. On this record, the purchaser fails to properly raise a triable issue of fact in opposition to the sellers' motion for summary judgment. *(Friends of Animals v Associated Fur Mfrs.,* 46 NY2d 1065; *Accord Farmers Coop. v Levine,* 36 AD2d 656; *Nichols v Nichols,* 306 NY 490; *Mazzola v County of Suffolk,* 143 AD2d 734; *Long Is. R. R. Co. v Northville Indus. Corp.,* 41 NY2d 455; *Rodolitz v Neptune Paper Prods.,* 22 NY2d 383; *Cream of Wheat Co. v Crist Co.,* 222 NY 487; *Hutchinson v Ross,* 262 NY 381, 643; *Ferlita v Guarneri,* 136 AD2d 680; *Braten v Bankers Trust Co.,* 60 NY2d 155.)
Matthew Dollinger and *Michael J. Spithogiannis* for respondent.
I. A party to a real estate contract may waive a condition inserted for its benefit and compel specific performance. *(Catholic Foreign Mission Socy. v Oussani,* 215 NY 1; *South Shore Skate Club v Fatscher,* 17 AD2d 840; *Knight v Kitchin,* 237 App Div 506; *Matter of Liberty Mut. Ins. Co. v Lodha,* 131 Misc 2d 670; *Arndt v Leff,* 14 Misc 2d 677; *Weinprop, Inc. v Foreal Homes,* 79 AD2d 987; ***159** *Satterly v Plaisted,* 52 AD2d 1074, 42 NY2d 933.)
II. Reciprocal cancellation clauses can be waived by the party for whose benefit they were intended. *(De Freitas v Holley,* 93 AD2d 852; *BPL Dev. Corp. v Cappel,* 86 AD2d 591, 56 NY2d 506; *Laxrand Constr. Corp. v R.S.C.A. Realty Corp.,* 135 AD2d 685; *Weinprop, Inc. v Foreal Homes,* 79 AD2d 987; *Satterly v Plaisted,* 52 AD2d 1074, 42 NY2d 933; *Poteralski v Colombe,* 84 AD2d 887; *Praver v Remsen Assocs.,* 150 AD2d 540; *Holiday Mgt. Assocs. v New York Inst. of Technology,* 149 AD2d 462; *Oak Bee Corp. v Blankman & Co.,* 154 AD2d 3.)
III. A condition affecting the marketability of title is for the benefit of the purchaser and may be waived by the purchaser. *(Catholic Foreign Mission Socy. v Oussani,* 215 NY 1; *Jandorf v Smith,* 217 App Div 150; *New York Investors v Manhattan Beach Bathing Parks Corp.,* 229 App Div 593, 256 NY 162.)
IV. The determination of the court below was "on the law" and new arguments cannot be considered or findings of fact made. *(Persky v Bank of Am. Natl. Assn.,* 261 NY 212; *Telaro v Telaro,* 25 NY2d 433; *Ostrom v Greene,* 161 NY 353; *Ballen v Potter,* 251 NY 224; *Laxrand Constr. Corp. v R.S.C.A. Realty Corp.,* 135 AD2d 685; *BPL Dev. Corp. v Cappel,* 86 AD2d 591, 56 NY2d 506; *Lieberman Props. v Braunstein,* 134 AD2d 55; *Bonavita & Sons v Quarry,* 126 AD2d 707, 69 NY2d 607; *Poquott Dev. Corp. v Johnson,* 104 AD2d 442; *Catholic Foreign Mission Socy. v Oussani,* 215 NY 1.)
V. The record establishes that W.W.W. was the sole beneficiary of the litigation contingency clause and Kenneth S. Weinstein's affidavit was properly considered. *(Oak Bee Corp. v Blankman & Co.,* 154 AD2d 3; *BPL Dev. Corp. v Cappel,* 86 AD2d 591, 56 NY2d 506; *De Freitas v Holley,* 93 AD2d 852; *Laxrand Constr. Corp. v R.S.C.A. Realty Corp.,* 135 AD2d 685; *Poteralski v Colombe,* 84 AD2d 887; *Praver v Remsen Assocs.,* 150 AD2d 540.)
VI. Giancontieri's bad faith has never been disputed. *(Austin v Trybus,* 136 AD2d 940; *McKenna v Case,* 123 AD2d 517; *Norgate Homes v Central State Bank,* 82 AD2d 849; *Rowe v Great Atl. & Pac. Tea Co.,* 46 NY2d 62.)

OPINION OF THE COURT

Kaye, J.

([1]) In this action for specific performance of a contract to sell real property, the issue is whether an unambiguous reciprocal cancellation provision should be read in light of extrinsic evidence, as a contingency clause for the sole benefit of plaintiff purchaser, subject to its unilateral waiver. Applying ***160** the principle that clear, complete writings should generally be enforced according to their terms, we reject plaintiff's reading of the contract and dismiss its complaint.

Defendants, owners of a two-acre parcel in Suffolk County, on October 16, 1986 contracted for the sale of the property to plaintiff, a real estate investor and developer. The purchase price was fixed at $750,000--$25,000 payable on contract execution, $225,000 to be paid in cash on closing (to take place "on or about December 1, 1986"), and the $500,000 balance secured by a purchase-money mortgage payable two years later.

The parties signed a printed form Contract of Sale, supplemented by several of their own paragraphs. Two provisions of the contract have particular relevance to the present dispute--a reciprocal cancellation provision (para 31) and a merger clause (para 19). Paragraph 31, one of the provisions the parties added to the contract form, reads: "The parties acknowledge that Sellers have been served with process instituting an action concerned with the real property which is the subject of this agreement. In the event the closing of title is delayed by reason of such litigation it is agreed that closing of title will in a like manner be adjourned until after the conclusion of such

litigation provided, *in the event such litigation is not concluded, by or before 6-1-87 either party shall have the right to cancel this contract whereupon the down payment shall be returned and there shall be no further rights hereunder."* (Emphasis supplied.) Paragraph 19 is the form merger provision, reading: "All prior understandings and agreements between seller and purchaser are merged in this contract [and it] completely expresses their full agreement. It has been entered into after full investigation, neither party relying upon any statements made by anyone else that are not set forth in this contract."

The Contract of Sale, in other paragraphs the parties added to the printed form, provided that the purchaser alone had the unconditional right to cancel the contract within 10 days of signing (para 32), and that the purchaser alone had the option to cancel if, at closing, the seller was unable to deliver building permits for 50 senior citizen housing units (para 29).

The contract in fact did not close on December 1, 1986, as originally contemplated. As June 1, 1987 neared, with the litigation still unresolved, plaintiff on May 13 wrote defendants that it was prepared to close and would appear for ***161** closing on May 28; plaintiff also instituted the present action for specific performance. On June 2, 1987, defendants canceled the contract and returned the down payment, which plaintiff refused. Defendants thereafter sought summary judgment dismissing the specific performance action, on the ground that the contract gave them the absolute right to cancel.

Plaintiff's claim to specific performance rests upon its recitation of how paragraph 31 originated. Those facts are set forth in the affidavit of plaintiff's vice-president, submitted in opposition to defendants' summary judgment motion.

As plaintiff explains, during contract negotiations it learned that, as a result of unrelated litigation against defendants, a lis pendens had been filed against the property. Although assured by defendants that the suit was meritless, plaintiff anticipated difficulty obtaining a construction loan (including title insurance for the loan) needed to implement its plans to build senior citizen housing units. According to the affidavit, it was therefore agreed that paragraph 31 would be added for plaintiff's sole benefit, as contract vendee. As it developed, plaintiff's fears proved groundless--the lis pendens did not impede its ability to secure construction financing. However, around March 1987, plaintiff claims it learned from the broker on the transaction that one of the defendants had told him they were doing nothing to defend the litigation, awaiting June 2, 1987 to cancel the contract and suggesting the broker might get a higher price.

Defendants made no response to these factual assertions. Rather, its summary judgment motion rested entirely on the language of the Contract of Sale, which it argued was, under the law, determinative of its right to cancel.

The trial court granted defendants' motion and dismissed the complaint, holding that the agreement unambiguously conferred the right to cancel on defendants as well as plaintiff. The Appellate Division, however, reversed and, after searching the record and adopting the facts alleged by plaintiff in its affidavit, granted summary judgment to plaintiff directing specific performance of the contract. We now reverse and dismiss the complaint.

Critical to the success of plaintiff's position is consideration of the extrinsic evidence that paragraph 31 was added to the contract solely for its benefit. The Appellate Division made clear that this evidence was at the heart of its decision: "review of the record reveals that under the circumstances of ***162** this case the language of clause 31 was intended to protect the plaintiff from having to purchase the property burdened by a notice of pendency filed as a result of the underlying action which could prevent the plaintiff from obtaining clear title and would impair its ability to obtain subsequent construction financing." (152 AD2d 333, 336.) In that a party for whose sole benefit a condition is included in a contract may waive the condition prior to expiration of the time period set forth in the contract and accept the subject property "as is" *(see, e.g., Satterly v Plaisted,* 52 AD2d 1074, *affd* 42 NY2d 933; *Catholic Foreign Mission Socy. v Oussani,* 215 NY 1, 8; *Born v Schrenkeisen,* 110 NY 55, 59), plaintiff's undisputed factual assertions--if material--would defeat defendants' summary judgment motion.

We conclude, however, that the extrinsic evidence tendered by plaintiff is not material. In its reliance on extrinsic evidence to bring itself within the "party benefited" cases, plaintiff ignores a vital first step in the analysis: before looking to evidence of what was in the parties' minds, a court must give due weight to what was in their contract.

A familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing *(see, e.g., Mercury Bay Boating Club v San Diego Yacht Club,* 76 NY2d 256, 269-270; *Judnick Realty Corp. v 32 W. 32nd St. Corp.,* 61 NY2d 819, 822;

Long Is. R. R. Co. v Northville Indus. Corp., 41 NY2d 455; *Oxford Commercial Corp. v Landau*, 12 NY2d 362, 365). That rule imparts "stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses ... infirmity of memory ... [and] the fear that the jury will improperly evaluate the extrinsic evidence." (Fisch, New York Evidence § 42, at 22 [2d ed].) Such considerations are all the more compelling in the context of real property transactions, where commercial certainty is a paramount concern.

Whether or not a writing is ambiguous is a question of law to be resolved by the courts *(Van Wagner Adv. Corp. v S & M Enters.*, 67 NY2d 186, 191). In the present case, the contract, read as a whole to determine its purpose and intent *(see, e.g., Rentways, Inc. v O'Neill Milk & Cream Co.*, 308 NY 342, 347), ***163** plainly manifests the intention that defendants, as well as plaintiff, should have the right to cancel after June 1, 1987 if the litigation had not concluded by that date; and it further plainly manifests the intention that all prior understandings be merged into the contract, which expresses the parties' full agreement *(see*, 3 Corbin, Contracts § 578, at 402-403). Moreover, the face of the contract reveals a "logical reason" (152 AD2d, at 341) for the explicit provision that the cancellation right contained in paragraph 31 should run to the seller as well as the purchaser. A seller taking back a purchase-money mortgage for two thirds of the purchase price might well wish to reserve its option to sell the property for cash on an "as is" basis if third-party litigation affecting the property remained unresolved past a certain date.

Thus, we conclude there is no ambiguity as to the cancellation clause in issue, read in the context of the entire agreement, and that it confers a reciprocal right on both parties to the contract.

The question next raised is whether extrinsic evidence should be considered in order to *create* an ambiguity in the agreement. That question must be answered in the negative. It is well settled that "extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face." *(Intercontinental Planning v Daystrom, Inc.*, 24 NY2d 372, 379; *see also, Chimart Assocs. v Paul*, 66 NY2d 570, 573.)

Plaintiff's rejoinder--that defendants indeed had the specified absolute right to cancel the contract, but it was subject to plaintiff's absolute prior right of waiver--suffers from a logical inconsistency that is evident in a mere statement of the argument. But there is an even greater problem. Here, sophisticated businessmen reduced their negotiations to a clear, complete writing. In the paragraphs immediately surrounding paragraph 31, they expressly bestowed certain options on the purchaser alone, but in paragraph 31 they chose otherwise, explicitly allowing both buyer and seller to cancel in the event the litigation was unresolved by June 1, 1987. By ignoring the plain language of the contract, plaintiff effectively rewrites the bargain that was struck. An analysis that begins with consideration of extrinsic evidence of what the parties meant, instead of looking first to what they said and reaching extrinsic evidence only when required to do so because of some identified ambiguity, unnecessarily denigrates the contract and unsettles the law. ***164**

([2]) Finally, plaintiff's conclusory assertion of bad faith is supported only by its vice-president's statement that one of the defendants told the broker on the transaction, who then told him, that defendants were doing nothing to defend the action, waiting for June 2 to cancel, and suggesting that the broker might resell the property at a higher price. Where the moving party "has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure so to do." *(Zuckerman v City of New York*, 49 NY2d 557, 560.) Even viewing the burden of a summary judgment opponent more generously than that of the summary judgment proponent, plaintiff fails to raise a triable issue of fact *(see, Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1068).

Accordingly, the Appellate Division order should be reversed, with costs, defendants' motion for summary judgment granted, and the complaint dismissed.

Chief Judge Wachtler and Judges Simons, Alexander, Titone, Hancock, Jr., and Bellacosa concur.

Order reversed, etc. ***165**

New York Official Reports

33 N.Y.3d 353, 128 N.E.3d 128, 104 N.Y.S.3d 1, 2019 N.Y. Slip Op. 03526

****1** 159 MP Corp. et al., Appellants,
v
Redbridge Bedford, LLC, Respondent.

Court of Appeals of New York
26
Argued March 20, 2019
Decided May 7, 2019

CITE TITLE AS: 159 MP Corp. v Redbridge Bedford, LLC

SUMMARY

Appeal, by permission of the Appellate Division of the Supreme Court in the Second Judicial Department, from an order of that Court, entered January 31, 2018. The Appellate Division affirmed an order of the Supreme Court, Kings County (David I. Schmidt, J.; op 2015 NY Slip Op 32817[U] [2015]), which had (1) denied plaintiffs' motion for a *Yellowstone* injunction; (2) granted defendant's cross motion for summary judgment dismissing the complaint; and (3) dismissed the action. The following question was certified by the Appellate Division: "Was the opinion and order of this Court dated January 31, 2018, properly made?"

159 MP Corp. v Redbridge Bedford, LLC, 160 AD3d 176, affirmed.

HEADNOTES

Landlord and Tenant
Lease

Waiver in Commercial Lease of Right to Commence Declaratory Judgment Action

([1]) The waiver clause in the parties' leases whereby plaintiff commercial tenants unambiguously agreed to waive the right to commence a declaratory judgment action as to the terms of their leases was not void as against public policy and was enforceable. The declaratory judgment waiver was clear and unambiguous, was adopted by sophisticated parties negotiating at arm's length, and did not violate the type of public policy interest that would outweigh the strong public policy in favor of freedom of contract. There is nothing in contemporary statutory, constitutional, or decisional law indicating that the interest in access to declaratory judgment actions, or more generally, to a full suite of litigation options without limitation, is so weighty and fundamental that it cannot be waived by sophisticated, counseled parties in a commercial lease. While access to declaratory relief benefits the parties as well as society in quieting disputes, a declaratory judgment is merely one form of relief available to litigants in enforcing a contract. Critically, the waiver clause at issue here did not preclude access to the courts but left available other judicial avenues through which plaintiffs might adjudicate their rights under the leases. Moreover, arbitration clauses, which are routinely enforced, provide no access to court for initial litigation of the merits and limited judicial review and are more restrictive than the declaratory judgment waiver here, which permitted judicial resolution of the parties' dispute in a RPAPL article 7 proceeding with full appellate review.

Landlord and Tenant
Yellowstone Injunction

Waiver in Commercial Lease of Right to Commence Declaratory Judgment Action

([2]) Plaintiff commercial tenants' waiver of the right to commence a declaratory judgment action as to the terms of their leases was not rendered ***354** unenforceable because it resulted in an inability to obtain *Yellowstone* relief (*First Natl. Stores v Yellowstone Shopping Ctr.*, 21 NY2d 630 [1968]). *Yellowstone* relief is not an end in itself but merely a means of maintaining the status quo by tolling a contractual cure period during a pending action, permitting a tenant who loses on the merits of the lease dispute to cure the defect and retain the tenancy. A *Yellowstone* injunction is not essential to protect property rights in a commercial tenancy which are governed by the terms of the lease negotiated by the parties. Plaintiffs' inability to obtain *Yellowstone* relief did not prevent them from raising defenses in summary proceedings if commenced and thus vindicating their rights under the leases if defendant owner's allegations of default were baseless. If plaintiffs

believed defendant was not performing its respective obligations under the leases, they could bring an action in Supreme Court for breach of contract and request specific performance. While *Yellowstone* injunctions are useful procedural tools for tenants seeking to litigate notices of default, there is no strong societal interest in the ability of commercial entities to seek such a remedy that would justify voiding an unambiguous declaratory judgment waiver negotiated at arm's length, merely because that incidentally precluded access to *Yellowstone* relief.

RESEARCH REFERENCES

Am Jur 2d Estoppel and Waiver §§ 186, 196; Am Jur 2d Landlord and Tenant §§ 18, 38, 39.

Dolan, Rasch's New York Landlord and Tenant including Summary Proceedings (5th ed) § 6:13.

NY Jur 2d Estoppel, Ratification, and Waiver §§ 80, 84; NY Jur 2d Landlord and Tenant §§ 58, 67.

ANNOTATION REFERENCE

See ALR Index under Declaratory Judgments; Estoppel and Waiver; Landlord and Tenant.

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Query: lease /s waive /s declaratory /2 judgment

POINTS OF COUNSEL

A. Joshua Ehrlich, Albany, and *Wenig Saltiel LLP*, Brooklyn (*Meryl L. Wenig* and *Jason M. Fink* of counsel), for appellants.
I. The Supreme Court, Appellate Division, erred by upholding that portion of the lease provision at issue which violates public policy by prohibiting declaratory relief. (*Metropolitan Transp. Auth. v Bruken Realty Corp.*, 67 NY2d 156; *John J. Kassner & Co. v City of New York*, 46 NY2d 544; *Mount Vernon Trust Co. v Bergoff*, 272 NY 192; *Hanover Ins. Co. v D & W* ***355** *Cent. Sta. Alarm Co.*, 164 AD2d 112; *Matter of Leifer v Gross*, 140 AD3d 959; *Hammelburger v Foursome Inn Corp.*, 76 AD2d 646; *Salomon Bros. v West Va. State Bd. of Invs.*, 152 Misc 2d 289, 168 AD2d 384; *Craig v Commissioners of Sinking Fund of City of N.Y.*, 208 App Div 412; *Kalman v Shubert*, 270 NY 375.) II. The Supreme Court, Appellate Division, erred by upholding that portion of the lease provision that prohibits declaratory relief based in part on the availability of judicial review regarding whether the alleged breaches of the leases even exist because the same lease provision explicitly prevents such judicial review and penalizes plaintiffs-appellants for seeking such review. (*Yonkers Contr. Co. v Port Auth. Trans-Hudson Corp.*, 87 NY2d 927; *Westinghouse Elec. Corp. v New York City Tr. Auth.*, 82 NY2d 47; *Kane v Walsh*, 295 NY 198; *Yuppie Puppy Pet Prods., Inc. v Street Smart Realty, LLC*, 77 AD3d 197; *Marbury v Madison*, 5 US 137; *Matter of A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1; *Liang v Wei Ji*, 155 AD3d 1018; *Dimery v Ulster Sav. Bank*, 82 AD3d 1034.) III. The Supreme Court, Appellate Division, erred by upholding that portion of the lease provision at issue which prohibits declaratory relief as it encourages the defendant-respondent to act in bad faith regarding its performance under the leases, in violation of public policy. (*Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62.)
Lupkin PLLC, New York City (*Jonathan D. Lupkin* and *Isabel D. Knott* of counsel), for respondent.
I. There is no public policy against waiving the right to a *Yellowstone* injunction. (*First Natl. Stores v Yellowstone Shopping Ctr.*, 21 NY2d 630; *Steele v Drummond*, 275 US 199; *People v Hawkins*, 157 NY 1; *Victory Taxi Garage, Inc. v Butaro*, 16 Misc 3d 875; *Post v 120 E. End Ave. Corp.*, 62 NY2d 19; *Baltimore & Ohio Southwestern R. Co. v Voigt*, 176 US 498; *Miller v Continental Ins. Co.*, 40 NY2d 675; *New England Mut. Life Ins. Co. v Caruso*, 73 NY2d 74; *Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62; *George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211.) II. By agreeing not to bring an action for declaratory judgment, appellants did not deprive themselves of meaningful judicial review. (*Salomon Bros. v West Va. State Bd. of Invs.*, 152 Misc 2d 289; *Craig v Commissioners of the Sinking Fund of the City of N.Y.*, 208 App Div 412; *Kalman v Shubert*, 270 NY 375; *Kalisch-Jarcho, Inc. v City of New York*, 72 NY2d 727; *European Am. Bank v Mr. Wemmick, Ltd.*, 160 AD2d 905; *Matter of A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1; *Liang v Wei Ji*, 155 AD3d 1018; *Dimery v Ulster Sav. Bank*, 82 AD3d 1034; ***356** *Westinghouse Elec. Corp. v New York City Tr. Auth.*, 82 NY2d 47.) III. Respondent's alleged "bad faith" is neither demonstrated nor relevant. (*Bingham v New York City Tr. Auth.*, 99 NY2d 355; *Telaro v Telaro*, 25 NY2d 433.)

OPINION OF THE COURT

Chief Judge DiFiore.

In New York, agreements negotiated at arm's length by

sophisticated, counseled parties are generally enforced according to their plain language pursuant to our strong public policy favoring freedom of contract. In this case, commercial tenants who unambiguously agreed to waive the right to commence a declaratory judgment action as to the terms of their leases ask us to invalidate that waiver on the rationale that the waiver is void as against public policy. We agree with the courts below that, under the circumstances of this case, the waiver clause is enforceable, requiring dismissal of the complaint.

Plaintiffs 159 MP Corp. and 240 Bedford Ave Realty Holding Corp. executed two commercial leases with the predecessor-in-interest of defendant Redbridge Bedford LLC, the current owner of the subject building. Together, the 20-year leases permit plaintiffs to occupy 13,000 square feet of property in Brooklyn to operate a Foodtown supermarket. Rents started at $341,628 per year and were to increase over the lifetime of the leases to $564,659.02, which included a 10-year option at escalating rents. While the lengthy and detailed leases contained a standard form, its terms were not accepted as boilerplate but rather contained numerous handwritten additions and deletions, initialed ****2** by the parties. Of particular relevance to this dispute, each lease also incorporated a 36-paragraph rider, which was also replete with handwritten additions and deletions. Paragraph 67 (H) of the rider provides:

> "*Tenant waives its right to bring a declaratory judgment action with respect to any provision of this Lease or with respect to any notice sent pursuant to the provisions of this Lease* . . . [I]t is the intention of the parties hereto that their disputes be adjudicated via summary proceedings" (emphasis added).

In March 2014, defendant sent notices to plaintiffs alleging various defaults and stating that plaintiffs had 15 days to cure the violations in order to avoid termination of the leases. Before the cure period expired, plaintiffs commenced this action by way of order to show cause in Supreme Court seeking, as relevant***357** here, a declaratory judgment that they were not in default. Plaintiffs also sought a *Yellowstone* injunction in order to prevent the owner from terminating the leases or commencing summary proceedings during the pendency of the declaratory judgment action. Defendant answered and cross-moved for summary judgment dismissing the complaint, arguing that the action and, thus, the request for *Yellowstone* relief were barred by the waiver clause in the leases.[1] In response, plaintiffs asserted, among other things,[2] that if interpreted in the manner urged by the owner, the waiver clause was unenforceable and that the waiver was premised on mutual mistake concerning the scope of summary proceedings.

Supreme Court denied plaintiffs' motion for a *Yellowstone* injunction, granted defendant's cross motion for summary judgment, and dismissed the action in its entirety. The court began by observing that, "[a]bsent some violation of law or transgression of a strong public policy, the parties to a contract are basically free to make whatever agreement they wish, no matter how unwise it may appear to a third-party" (*159 MP Corp. v Redbridge Bedford LLC*, 2015 NY Slip Op 32817[U], *6 [Sup Ct, Kings County 2015], citing *Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 67-68 [1978]). Relying on the plain language of the contract, the court concluded plaintiffs clearly waived the right to bring a declaratory judgment action and, in enforcing the provision, referenced the fact that the waiver did not

> "prevent either side from performing the agreement or from recovering damages as a result of a breach or the parties' tortious conduct . . . [and did not] deny plaintiffs all legal redress in this instance [because i]f plaintiffs dispute that they are in breach of the leases, they may raise any defenses they may have in any . . . summary proceeding brought by defendant in Civil Court to evict them" ***358** (*159 MP Corp.*, 2015 NY Slip Op 32817[U], *7 [citations omitted]).

The court also rejected plaintiffs' mutual mistake argument, noting that plaintiffs had neither alleged fraud nor claimed they had been unable to review the leases with counsel (*id.*).

The Appellate Division, with one Justice dissenting, affirmed, determining that the declaratory judgment waiver was enforceable and barred plaintiffs' claim (*159 MP Corp. v Redbridge Bedford, LLC*, 160 AD3d 176 [2d Dept 2018]). The Court commented, in light of the strong public policy favoring freedom of contract, that parties may waive a wide range of rights, observing that the parties here are "sophisticated entities that negotiated at arm's length" and entered contracts that defined their obligations "with great apparent care and specificity" (*id.* at 187, 189). Like ****3** Supreme Court, the Appellate Division emphasized that the waiver clause did not leave plaintiffs without other available legal remedies, noting that plaintiffs retained the right to receive notices under the leases (and thus cure defaults), to seek damages for breach of contract and tort, and to defend themselves in summary proceedings (*id.* at 191). Moreover, the Appellate Division observed that plaintiffs will remain in possession of the property unless summary proceedings are commenced and, if vindicated in a summary proceeding, would remain indefinitely until expiration of the leases (*id.* at 191-192). In contrast, if found to have been in default, plaintiffs would properly be evicted under the terms of the leases (*id.* at 192).

One Justice dissented, concluding that the waiver clause is void as against public policy and, thus, unenforceable (160 AD3d at 194 [Connolly, J., dissenting]). The dissent reasoned that declaratory relief serves the important societal function of providing certainty in contractual relationships and that the tenant's ability to litigate in summary proceedings commenced by the owner was not a sufficient substitute for the ability to commence a declaratory judgment action (*id.* at 203-206). The Appellate Division granted plaintiffs leave to appeal to this Court, certifying the question whether its order was properly made, and we now affirm.

We begin with the "familiar and eminently sensible proposition of law . . . that, when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms" (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004] [citation omitted]).***359** As we noted in *Vermont Teddy Bear*, a seminal case involving a commercial lease, this rule has "special import in the context of real property transactions, where commercial certainty is a paramount concern, and where . . . the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length" (*id.* [internal quotation marks and citation omitted]). The lease provision at the center of this dispute could not be clearer. In it, plaintiffs "waive[d] [the] right to bring a declaratory judgment action with respect to any provision of this Lease or with respect to any notice sent pursuant to the provisions of this Lease." Applying our well-settled contract interpretation principles, this unambiguous waiver clause reflects the parties' intent that plaintiffs be precluded from commencing precisely the type of suit they initiated here and, as such, this action was foreclosed by the plain language of the leases. Plaintiffs nonetheless ask us to relieve them of the consequences of their bargain, contending that the waiver clause violates a public policy strong enough to warrant a departure from the bedrock principle of freedom of contract. We reject that argument.

Freedom of contract is a "deeply rooted" public policy of this state (*New England Mut. Life Ins. Co. v Caruso*, 73 NY2d 74, 81 [1989]) and a right of constitutional dimension (US Const, art I, § 10 [1]). In keeping with New York's status as the preeminent commercial center in the United States, if not the world, our courts have long deemed the enforcement of commercial contracts according to the terms adopted by the parties to be a pillar of the common law. Thus, "[f]reedom of contract prevails in an arm's length transaction between sophisticated parties . . . , and in the absence of countervailing public policy concerns there is no reason to relieve them of the consequences of their bargain" (*Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 695 [1995]).[3] We have cautioned that, when a court invalidates a contractual provision, one party is deprived of the benefit of the bargain (*see id.*; *Rowe*, 46 NY2d at 67). By disfavoring judicial upending of the balance ***360** struck at the conclusion of the parties' ****4** negotiations, our public policy in favor of freedom of contract both promotes certainty and predictability and respects the autonomy of commercial parties in ordering their own business arrangements.

Of course, the public policy favoring freedom of contract does not mandate that the language of an agreement be enforced in all circumstances. Contractual provisions entered unknowingly or under duress or coercion may not be enforced (*see Matter of Abramovich v Board of Educ. of Cent. School Dist. No. 1 of Towns of Brookhaven & Smithtown*, 46 NY2d 450, 455 [1979]; *see also Austin Instrument v Loral Corp.*, 29 NY2d 124, 130 [1971]). The doctrine of unconscionability also protects against "unjust enforcement of onerous contractual terms which one party is able to impose [upon] the other because of a significant disparity in bargaining power" (*Rowe*, 46 NY2d at 68). Plaintiffs raised none of these defenses.

([1]) Here, plaintiffs assert that the declaratory judgment waiver is unenforceable because it is void as against public policy. Thus, plaintiffs' challenge is not predicated on the circumstances surrounding the making of this particular agreement, such as allegations of unequal bargaining power, coercive tactics or lack of counsel—claims pertinent to other well-established contract defenses. Rather, plaintiffs' contention is that the right to bring a declaratory judgment action is so central and critical to the public policy of this state that it cannot be waived by even the most well-counseled, knowledgeable or sophisticated commercial tenant. We are unpersuaded.

We have deemed a contractual provision to be unenforceable where the public policy in favor of freedom of contract is overridden by another weighty and countervailing public policy (*Oppenheimer & Co.*, 86 NY2d at 695).[4] But, because freedom of contract is itself a strong public policy interest in New York, we may void an agreement only after "balancing" the public interests favoring invalidation of a term chosen by the parties against those served by enforcement of the clause and concluding that the interests favoring invalidation are stronger (*see* ***361** *New England Mut. Life Ins. Co.*, 73 NY2d at 81). Although we possess the power to set aside agreements on this basis, our "usual and most important function" is to enforce contracts rather than invalidate them "on the pretext of public policy," unless they "clearly

. . . contravene public right or the public welfare" (*Miller v Continental Ins. Co.*, 40 NY2d 675, 679 [1976], quoting *Baltimore & Ohio Southwestern R. Co. v Voigt*, 176 US 498, 505 [1900]).

The fact that a contract term may be contrary to a policy reflected in the Constitution, a statute or a judicial decision does not render it unenforceable; "that a public interest is present does not erect an inviolable shield to waiver" (*Matter of American Broadcasting Cos. v Roberts*, 61 NY2d 244, 249 [1984]). Indeed, we regularly uphold agreements waiving statutory or constitutional rights, indicating that we look for more than the impingement of a benefit provided by law before deeming a voluntary agreement void as against public policy (*see e.g. id.* [upholding waiver of Labor Law protections that serve the societal interest of preventing worker exhaustion]; *Abramovich*, 46 NY2d 450 [upholding waiver by tenured teacher of the protections in Education Law § 3020-a]; *Antinore v State of New York*, 40 NY2d 921 [1976] [upholding waiver of due process protections afforded by disciplinary hearings under Civil Service Law §§ 75 and 76]). Many rights implicate societal interests and, yet, they have been determined to be waivable.

Only a limited group of public policy interests has been identified as sufficiently fundamental to outweigh the public policy favoring freedom of contract. In some circumstances, the legislature has identified the benefits or obligations recognized in constitutional, statutory or decisional law that are so weighty and critical to the public interest that they are nonwaivable. For example, General Obligations Law § 5-321 states that agreements exempting a lessor for liability resulting from its own negligence are "void as against public policy" (*see Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 418 [2006]). Likewise, Rent Stabilization Code (9 NYCRR) § 2520.13 states that "[a]n ****5** agreement by the tenant to waive the benefit of any provision of the [Rent Stabilization Law] or this Code is void" (*see Thornton v Baron*, 5 NY3d 175, 179 [2005]). The legislature has similarly deemed unenforceable agreements to extend the statute of limitations before accrual of a claim by express statutory proscription in General Obligations Law § 17-103 ("[a] promise to . . . extend . . . the statute of limitation" has no effect***362** except where made after accrual of a claim) (*see John J. Kassner & Co. v City of New York*, 46 NY2d 544, 552 [1979]). There are other examples (*see e.g. West-Fair Elec. Contrs. v Aetna Cas. & Sur. Co.*, 87 NY2d 148, 156 [1995] [applying Lien Law § 34 classifying waivers of the right to file or enforce certain liens "void as against public policy and wholly unenforceable"]; *Symphony Space v Pergola Props.*, 88 NY2d 466, 476 [1996] [applying New York's rule against perpetuities statute EPTL 9-1.1 (b), stating that "(n)o estate in property shall be valid unless it must vest, if at all, not later than twenty-one years after one or more lives in being at the creation of the estate and any period of gestation involved"]). Where the legislature has not expressly precluded waiver of a right or obligation, we have deemed that to be a significant factor militating against invalidation of a contract term on public policy grounds (*see e.g. Ballentine v Koch*, 89 NY2d 51, 59 [1996] [there is no "general prohibition preventing the creation of benefits for retired public employees that exist separately from the applicable pension or retirement system"]; *Abramovich*, 46 NY2d at 455 ["the statute contains no express provision preventing a teacher from waiving its benefits"]; *Matter of Feinerman v Board of Coop. Educ. Servs. of Nassau County*, 48 NY2d 491, 498 [1979] [the relevant statute "does not contain a provision which prevents a prospective teacher from knowingly and voluntarily waiving the three-year probationary period embodied therein"]; *see generally Slayko v Security Mut. Ins. Co.*, 98 NY2d 289, 295 [2002]).

We have also classified as void agreements that involve illegal activity.[5] We refused to permit a lender that charged usurious interest from recovering principal (*see Szerdahelyi v Harris*, 67 NY2d 42 [1986]) and refused to permit a lawyer not licensed in New York from collecting fees for work performed here (*see Spivak v Sachs*, 16 NY2d 163 [1965]). Similarly, in *Mount Vernon Trust Co. v Bergoff* (272 NY 192 [1936]), we invalidated an agreement on the public policy rationale that it was essentially fraudulent as to society. Addressing an agreement***363** that a note made to a bank would be unenforceable against its maker, we explained that such "[a] fictitious note delivered to a bank, intended to become part of its apparent assets . . . is in itself a continuing falsehood calculated to deceive the public" and undermines the stability of banks, which is a matter of public concern reflected in the regulatory oversight systems for banking (*id.* at 196). No interest of this magnitude is implicated in this case.

Here, the declaratory judgment waiver is clear and unambiguous, was adopted by sophisticated parties negotiating at arm's length, and does not violate the type of public policy interest that would outweigh the strong public policy in favor of freedom of contract. Although plaintiffs argue otherwise, there is simply nothing in our contemporary statutory, constitutional, or decisional law indicating that the interest in access to declaratory judgment actions or, more generally, to a full suite of litigation options without limitation, is so weighty and fundamental that it cannot be waived by sophisticated, counseled parties in a commercial lease. CPLR 3001 enables Supreme Court to grant declaratory judgments in

the context of justiciable controversies but in no way indicates that sophisticated parties may not voluntarily waive the right to seek such relief. A declaratory judgment is a useful tool for providing clarity as to parties' obligations and may, in some circumstances, enable parties to perform under a contract they might otherwise have breached. Access to declaratory relief benefits the parties as well as society in quieting disputes. However, a declaratory judgment is merely one form of relief available to litigants in enforcing a contract. In codifying the right to seek declaratory relief, the legislature neither expressly nor impliedly made access to such a claim nonwaivable with respect to any party, much less sophisticated commercial tenants.****6**

Our case law discussing declaratory relief explains its benefits in stabilizing uncertainty in contractual relations but likewise expresses no concrete public policy so weighty that it would justify broadly restricting commercial entities from freely waiving in negotiations the ability to seek such relief (*see e.g. James v Alderton Dock Yards*, 256 NY 298, 305 [1931]). To the contrary, this Court already held in *Kalisch-Jarcho, Inc. v City of New York* that a party can relinquish its right to commence a declaratory judgment action in favor of an alternative dispute resolution method (72 NY2d 727 [1988]). There, the ***364** Court held that a declaratory judgment action filed by a construction contractor was barred by a contract provision requiring the contractor to use an administrative procedure to resolve mid-project disputes, postponing claims for additional compensation until project completion (*id*.). The Court reached this conclusion despite recognizing the benefits of declaratory relief in "settling justiciable disputes as to contract rights and obligations" (*id.* at 731).

The availability of declaratory relief may indirectly encourage parties to freely contract at the outset, knowing that they can later obtain judicial clarification of their obligations at the moment a justiciable controversy arises. However, a party who has chosen freely to waive the right to seek such relief could not have relied on any such expectation; that party may compensate for the waiver by demanding greater clarity in the construction of other contract terms so that the parties' respective rights and obligations are fully understood before they sign the agreement. Regardless, a party may agree to such a waiver during contract negotiations to obtain a valuable benefit, such as a rent concession or the inclusion of a cure period following a notice of default. Such considerations are for the parties to weigh in crafting a commercial agreement that meets their unique needs.

Critically, the waiver clause at issue here does not preclude access to the courts but leaves available other judicial avenues through which plaintiffs may adjudicate their rights under the leases. The waiver permits plaintiffs to raise defenses to allegations of default in summary proceedings in Civil Court, under Real Property Actions and Proceedings Law article 7, and specifically states that "it is the intention of the parties . . . that their disputes be adjudicated via summary proceedings." As this Court has observed, RPAPL article 7 "represents the Legislature's attempt to balance the rights of landlords and tenants to provide for expeditious and fair procedures for the determination of disputes involving the possession of real property" (*Matter of Mennella v Lopez-Torres*, 91 NY2d 474, 478 [1998] [citation omitted]). Thus, the leases reflect the parties' general intent to resolve their disputes in proceedings carefully designed for that purpose. Moreover, the waiver does not impair plaintiffs' ability to seek damages on breach of contract or tort theories.

Indeed, despite the waiver clause, the judicial review available to plaintiffs is more generous than that available to parties***365** whose contracts contain arbitration clauses—yet we routinely enforce arbitration clauses (*see e.g. Matter of Nationwide Gen. Ins. Co. v Investors Ins. Co. of Am.*, 37 NY2d 91, 95 [1975]). Such clauses preclude plenary litigation of disputes in court; when an award is made, typically the sole avenue for judicial review is a summary proceeding under CPLR article 75. Courts may set aside an arbitration award only if "it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power" and may not "interpret the substantive conditions of the contract or . . . determine the merits of the dispute . . . even where the apparent, or even the plain, meaning of the words of the contract [was] disregarded" by the arbitrator (*Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 79, 82-83 [2003] [internal quotation marks and citations omitted]). An arbitration clause—providing no access to court for initial litigation of the merits and limited judicial review—is more restrictive than the declaratory judgment waiver here, which permits judicial resolution of the parties' dispute in an RPAPL article 7 proceeding with full appellate review.

Although they significantly limit access to court, arbitration clauses provide "an effective and expeditious means of resolving disputes between willing parties desirous of avoiding the expense and delay frequently attendant to the judicial process" (*Maross Constr. v Central N.Y. Regional Transp. Auth.*, 66 NY2d 341, 345 [1985] [citations omitted]). "It has long been the policy of the law to interfere as little as possible with the freedom of consenting parties to achieve that objective" (*Matter of*

Siegel [Lewis], 40 NY2d 687, 689 [1976]). That policy applies with equal force here where the parties selected a summary proceeding as the primary vehicle for resolution of their disputes. That we permit parties to waive the right to substantive review of their disputes in court by entering arbitration arrangements supports the conclusion we reach here: that there is no overriding public policy preventing sophisticated entities from waiving the right to commence a declaratory judgment action, which presents merely one tool for litigating a dispute.****7**

([2]) Nor was this declaratory judgment waiver rendered unenforceable because, under the circumstances presented here, it resulted in an inability to obtain *Yellowstone* relief. We have described the *Yellowstone* injunction as a "creative remedy" crafted by the lower courts to extend the notice and cure ***366** period for commercial tenants faced with lease termination (*Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.*, 93 NY2d 508, 514 [1999]). In the wake of *First Natl. Stores v Yellowstone Shopping Ctr.* (21 NY2d 630 [1968]), tenants challenging notices of default in declaratory judgment actions "developed the practice of obtaining a stay of the cure period before it expired to preserve the lease until the merits of the dispute could be settled in court," and courts have "accepted far less than the normal showing required" for injunctive relief under CPLR article 63 (*Post v 120 E. End Ave. Corp.*, 62 NY2d 19, 25 [1984]). Requests for a *Yellowstone* injunction are necessarily made in Supreme Court rather than Civil Court, which lacks authority to issue injunctive relief and, as such, may not be obtained in a summary proceeding under RPAPL article 7. *Yellowstone* relief is not an end in itself but merely a means of maintaining the status quo by tolling a contractual cure period during a pending action, permitting a tenant who loses on the merits of the lease dispute to cure the defect and retain the tenancy. Here, because plaintiffs' declaratory judgment action was barred by the lease waiver, there was no pending action in which to adjudicate the parties' rights and to support interim relief in the form of a *Yellowstone* injunction. Indeed, the request was rendered academic by the dismissal of the complaint.

Plaintiffs' inability in this case to obtain *Yellowstone* relief does not prevent them from raising defenses in summary proceedings if commenced and thus vindicating their rights under the leases if the owner's allegations of default are baseless. It is undisputed that the owner cannot evict plaintiffs without commencing a summary proceeding and establishing that plaintiffs materially breached the leases. Absent such a proceeding, plaintiffs remain in possession of the premises and their rights under the leases are undisturbed. If plaintiffs' defenses fail on the merits—if plaintiffs in fact breached the leases—then their interest in the tenancy would properly be extinguished under the plain language of the leases. Furthermore, if plaintiffs believe that the owner is not performing its respective obligations under the leases, they can bring an action in Supreme Court for breach of contract and request specific performance. Thus, a *Yellowstone* injunction is not essential to protect property rights in a commercial tenancy which, of course, are governed by the terms of the lease negotiated by the parties. As this Court has recognized, *Yellowstone* ***367** injunctions are useful procedural tools for tenants seeking to litigate notices of default (*see Graubard*, 93 NY2d at 514). But there is no strong societal interest in the ability of commercial entities to seek such a remedy that would justify voiding an unambiguous declaratory judgment waiver negotiated at arm's length, merely because this incidentally precluded access to *Yellowstone* relief.

Nothing in our statutory or decisional law suggests otherwise. The legislature has made certain rights nonwaivable in the context of landlord-tenant law (*see e.g.* General Obligations Law § 5-321 [right to seek damages for injury caused by landlord's negligence]; Real Property Law § 235-b [right to habitability]; Real Property Law § 236 [right of a deceased tenant's estate to assign the lease when reasonable]) but has not precluded a commercial tenant's waiver of interim *Yellowstone* relief. Notably, the legislature has recognized the utility of *Yellowstone*-type relief for some residential tenants. RPAPL 753 (4) (L 1982, ch 870) provides New York City residential tenants with a nonwaivable 10-day post-adjudication cure period at the conclusion of a summary proceeding and thus offers a losing tenant relief comparable to that obtained with a *Yellowstone* injunction in Supreme Court (i.e., the ability to cure a violation after a judicial determination that the tenant breached the lease) (*Post*, 62 NY2d at 26). The decision to provide this benefit only to a class of residential tenants indicates that the legislature did not view this type of relief as fundamental for commercial tenants, believing that their rights were adequately protected under existing law, which included the availability of *Yellowstone* relief for parties who timely sought such an injunction. As remains true, at that time there was no appellate precedent suggesting that the right of commercial tenants to seek such relief could not be waived by the inclusion of unambiguous language to that effect in a negotiated lease. The legislature was obviously aware of our strong public policy favoring freedom of contract, which is why it included the narrowly-crafted benefit among a group of rights expressly declared to be nonwaivable (RPAPL 753 [5]). Yet, the legislature did nothing to alter the status quo for commercial tenants. Thus, notwithstanding plaintiffs' inability to obtain a *Yellowstone* injunction, we are unpersuaded that the voluntary declaratory judgment waiver by this sophisticated commercial tenant is void as

against public policy.

The right to commence a declaratory judgment action, although a useful litigation tool, does not reflect such a fundamental***368** public policy interest that it may not be waived by counseled, commercial entities in exchange for other benefits or concessions. Entities like those party to this appeal are well-situated to manage their affairs during ****8** negotiations, and to conclude otherwise would patronize sophisticated parties and destabilize their contractual relationships—contrary to New York's strong public policy in favor of freedom of contract. Because the declaratory judgment waiver is enforceable, the action was properly dismissed.

Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question not answered as unnecessary.

Wilson, J. (dissenting). "In New York, agreements negotiated at arm's length by sophisticated, counseled parties are generally enforced according to their plain language pursuant to our strong public policy favoring freedom of contract" (majority op at 356). Just so, but why? The majority's thesis is our State's commitment to freedom of contract is so powerful that it cannot be overcome by competing public policies unless, for example, the legislature has criminalized the object of the contract (majority op at 362) or has expressly stated a prohibition on waiver by statute (*id.* at 361). That thesis has little to do with this case. The public policy at play here, which requires us to disallow contractual provisions depriving a party of the ability to seek a declaratory judgment, is the freedom of contract itself. A contractual provision that forecloses a party from timely knowing its contractual obligations—instead forcing parties to gamble on the contract's meaning—undermines the contract and with it, society's benefit from the freedom of contract.

In any event, freedom of contract is not a limitless right. It should not be elevated above every other protection the law affords to litigants. The majority's decision today will result in the elimination of the "*Yellowstone* injunction," a common-law precedent that has existed in New York for more than half a century. That injunction allows commercial tenants to determine their responsibilities under the terms of their lease agreements without risking eviction. The *Yellowstone* injunction expresses a public policy of this State and is grounded in the legislature's century-old determination that New York's public policy broadly favors the availability of declaratory relief in preference to more protracted, costly and antagonistic litigation.

***369** After this decision, commercial building owners and landlords will undoubtedly include a waiver of declaratory and *Yellowstone* relief in their leases as a matter of course. Those clauses will enable them to terminate the leases based on a tenant's technical or dubious violation whenever rent values in the neighborhood have increased sufficiently to entice landlords to shirk their contractual obligations. The majority insists that its decision represents the application of the well-settled public policy supporting freedom of contract. That notion of the unlimited primacy of contract rights is based on a jurisprudence discredited since the Great Depression. The majority's decision will alter the landscape of landlord-tenant law, and of neighborhoods, throughout the state for decades to come, absent legislative action.

I.

What does "freedom of contract" mean, and why do we care about it? I can enter into an agreement with anyone about anything—I am "free" to contract in that sense, even if the agreement is not legally enforceable. You and I can agree to have dinner next Thursday, and we can both think of it as to our advantage, but if one of us cancels, society has no interest in treating that agreement as enforceable, letting you sue me for damages, or compelling us to sup. We make some agreements legally enforceable because of the societal benefit from doing so, not because of the benefit to the contracting parties per se. Of course, the parties who strike a legally enforceable bargain believe the ****9** bargain will benefit each of them individually, and it most often will, but that is also true of agreements that are not legally enforceable.

Another vantage point from which to understand that freedom of contract is not an individual right, but rather is grounded in the benefit to society at large, is the concept of efficient breach. Damages for breach of contract are not punitive; they are calculated to make the nonbreaching party whole (*see e.g. Freund v Washington Sq. Press*, 34 NY2d 379 [1974]). If the breaching party can put its goods or services to a (societally) higher use than what the contract requires even after fully compensating the nonbreaching party, that is a socially beneficial result: the nonbreaching party receives the full value of its bargain, the breaching party earns more, and society benefits in the process because the property is put to a higher use. That the

breaching party also receives a benefit is not the purpose of ***370** the efficient breach—it is the engine that drives the party to breach so that the resources can be put to their best use.

So "freedom of contract" cannot properly be understood as an individual right of the contracting parties. "Commerce and manufactures can seldom flourish long in any state . . . in which the faith of contracts is not supported by law." (Adam Smith, Wealth of Nations 910 [1976].) The free-market system is driven by the principle that contracting parties will reach agreements that maximize social welfare (output, thought of as price, quantity and quality) by maximizing their individual interests through bargaining in a market in which multiple buyers and sellers exist and transaction costs are as low as possible. The freedom of contract is of fundamental importance in society because it creates legally enforceable rights, on which the contracting parties can act now based on assurances about the future: contracts are a way that economic actors can obtain some measure of security about an otherwise uncertain future. "[T]he major importance of legal contract is to provide a frame-work for well-nigh every type of group organization and for well-nigh every type of passing or permanent relation between individuals and groups." (Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 Yale LJ 704, 736-737 [1931].)

Freedom of contract is based on the understanding that "stability and predictability in contractual affairs is a highly desirable jurisprudential value" (*Sabetay v Sterling Drug*, 69 NY2d 329, 336 [1987]). "The traditional concerns of contract law, and warranty law in particular, are the protection of the parties' freedom of contract and *the fulfillment of reasonable economic expectations*" (*Bellevue S. Assoc. v HRH Constr. Corp.*, 78 NY2d 282, 304 [1991] [emphasis added]). "It is clear that public policy and the interests of society favor the utmost freedom of contract" (*Diamond Match Co. v Roeber*, 106 NY 473, 482 [1887]). "[A] party may waive a rule of law or a statute, or even a constitutional provision enacted for his benefit or protection, where it is exclusively a matter of private right, and no considerations of public policy or morals are involved, and having once done so he cannot subsequently invoke its protection" (*Sentenis v Ladew*, 140 NY 463, 466 [1893]). However, "waiver is not permitted where a question of jurisdiction or fundamental rights is involved and public injury would result" (*People ex rel. Battista v Christian*, 249 NY 314, 318 [1928]).

***371** Whether the State chooses to enforce certain types of agreements turns on whether enforcement would generally advance society's interests. Our rules about contract formalities, parol evidence, consideration, detrimental reliance, fraud, duress, illegality and so on are ways to cabin enforceability to the types of contracts from which society will ordinarily benefit. For example, since 1677, common-law jurisdictions like New York have had some version of the statute of frauds, requiring that certain kinds of contract be in writing so that highly consequential matters (marriage, long-term contracts, etc.) must be in writing to be enforced (*see* General Obligations Law § 5-701). Similarly, the parol evidence rule serves to clarify obligations by limiting the scope of a contractual dispute to its writing.

II.

Declaratory judgments constitute another vital strand in this cord. Because the future is hard to predict, because even the best efforts at precision in language may wind up imprecise, because contracting parties sometimes deliberately avoid negotiating a contentious issue in the expectation that it will never transpire during the life of the contract, and because motivations change, courts since time immemorial have been asked to interpret agreements. Declaratory judgment actions allow contracting parties to know their rights and obligations under a contract prior to breach (*New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 530 [1977] ["when a party contemplates taking certain action a genuine dispute may arise before any breach or violation has occurred and before there is any need or right to resort to coercive measures. In such a case all that may be required to insure compliance with the law is for the courts to declare the rights and obligations of the parties so that they may act accordingly. That is the theory ****10** of the declaratory judgment action authorized by CPLR 3001"]; *see also* Rep of NY St Bar Assn Comm on Law Reform, Proceedings of 44th Ann Meeting at 193-196 [1921] ["congratulat(ing) the People of New York upon the adoption of this enlightened policy" that "enables parties to entertain an honest difference of opinion as to their rights, particularly under written instruments . . . without becoming enemies and undergoing a long expense"]). That knowledge removes a material uncertainty (*James v Alderton Dock Yards*, 256 NY 298, 305 [1931] ["The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain***372** or disputed jural relation either as to present or prospective obligations"]). Uncertainty is itself a form of transaction cost that society has a clear interest in minimizing. As but one example, a party's ability to determine that breach would be efficient

depends on its knowledge as to the interpretation of the contract.[1] "[C]ontract remedies should . . . give the party to a contract an incentive to fulfill [its] promise unless the result would be an inefficient use of resources" (Richard A. Posner, Economic Analysis of the Law 56 [1972]).

Although superficially a private matter between contracting parties, the availability of declaratory judgments has far-reaching societal impacts. Parties may enter into contracts that seem quite clear, only to later find the terms are ambiguous (*see e.g.* the famous "Peerless" case, *Raffles v Wichelhaus* [(1864) 159 Eng Rep 375, 2 Hurl & Colt 906]). Because ambiguity often strikes, society has a powerful interest in adopting procedures that permit a timely and conclusive determination that preserves the object of the parties' bargain. We have previously extolled the virtues of stability and certainty, particularly with respect to real estate (*see Matter of Estate of Thomson v Wade*, 69 NY2d 570, 574 [1987]). Here, the majority has conflated the object of the bargain (the lease of space to a grocery store) with a procedural provision (the prohibition of a declaratory judgment action). The object of the contract—the lease of space—provides the societal value. The provision barring the tenant from seeking a declaratory judgment impedes that very value, by forcing a party (in this case, the tenant) either to refuse to replace the ventilation system and risk eviction if a court later determines that the tenant was responsible, or to replace the ventilation system (if within the tenant's wherewithal) and later institute an action of some sort to recover the costs of doing so if a court later determines that the landlord was responsible. Because the legal liability remains in limbo when the tenant must make that choice, the tenant's ability to consider an efficient breach (e.g., moving to a different***373** space would be less expensive than paying for a compliant ventilation system, with which the landlord would be happy because it could rent the space to others at a higher price) is eliminated, and society's benefit is lost in the balance. Yes, both the use of the space and the declaratory judgment bar appear in the contract, but society's benefit derives from the former, and is defeated by the latter. The availability of declaratory judgments enhances the stability of contracts, allows deviations from the status quo to be done on an informed basis, and allows the efficiency gains of the freedom of contract to be spread throughout the economic system—the fundamental purpose of "freedom of contract."

A waiver of the right to declaratory judgment, by contrast, creates instability by undermining the purposes and benefits of the freedom of contract, and the enforcement of such a waiver violates that very public policy. The ability to obtain declaratory relief is a part of our State's public policy because it is an essential part of the policy of freedom of contract. We should no more allow contracting parties—however sophisticated—to strike declaratory judgments than we would allow them to strike the parol evidence rule or the statute of limitations. The majority's fundamental mistake comes from treating "freedom of contract" as if it were an individual right, when its raison d'être is the economic advancement of society.****11**

That mistake is the same conceptual mistake made during the *Lochner* era, in which the United States Supreme Court aggrandized freedom of contract as if it were solely a personal right, rather than an important ingredient to the formation and advancement of society as a whole (*Lochner v New York*, 198 US 45 [1905]). There, the Supreme Court invalidated a law enacted by the New York Legislature to prevent the overwork of bakers. Here, the majority upholds a contractual provision that prevents the tenant (and notably, the tenant alone) from seeking a judicial declaration of the rights and obligation of the parties to a lease agreement. Today's decision, like *Lochner*, rests on "juristic thought of an individualist conception of justice, which exaggerates the importance of property and of contract . . . [and] exaggerates private right at the expense of public right" (Roscoe Pound, *Liberty of Contract*, 18 Yale LJ 454, 457 [1909]).

III.

When contractual obligations are unclear and disputed, a declaratory judgment affords the parties a conclusive determination,***374** without the attachment of any damages or injunction. The availability of a pre-breach (or pre-enforcement) interpretation of disputed rights and obligations is incorporated by, but long predates, the common law.[2] In the Roman law of procedure, as in our own, actions at law resulted in an executory judgment, called a *condemnatio*, which decreed that something must be done, including that damages might have to be paid (*see* Edwin M. Borchard, *The Declaratory Judgment—A Needed Procedural Reform*, 28 Yale LJ 1, 10 [1918]). Often, a preliminary procedure would be sought, known as *prae-judicium*, where parties merely asked for questions of law or fact to be determined, resulting in statements of law known as *pronuntiatio* (*id.* at 11). Those preliminary proceedings proved so advantageous they eventually developed into independent actions, without any *condemnatio* ever sought (*id.*).

The declaratory judgment continued to develop in Italy

through the Middle Ages, including the creation of negative declaratory actions, or actions to declare that another does not have a claim against the plaintiff (*id*. at 13). Upon the "reception" of Roman law into central Europe in 1495, both forms of declaratory judgment would have been known (*id*. at 12). The declaratory judgment of the Middle Ages first made its way into common-law countries through Scotland, with cases of "declarator" occurring as far back as the 1500s (*id.* at 21). England would adopt a form of the declaratory judgment in 1852, with a version much like what we know today adopted in 1883 (*id.* at 25).

That history is not some far-flung obscurity. Professor Borchard's 1918 article was the first written in the United States about declaratory judgments; three years later, the New York State Bar Association extolled the virtues of declaratory judgments, and referenced that history and Professor Borchard's work (Rep of NY St Bar Assn Comm on Law Reform, Proceedings of 44th Ann Meeting at 194-196 [1921]). The next year, 1922, when the New York Legislature first enacted the Civil Practice Act, a portion of that act authorized declaratory judgments (*see generally* Louis S. Posner, *Declaratory Judgments in New York*, 1 St. John's L Rev [No. 2, art 2] 129 [1927]). Shortly after, the federal government and numerous other ***375** states legislatively created the right to seek declaratory judgments. Unlike the several states that modeled their legislation on the Commission on Uniform State Legislation's Uniform Declaratory Judgment Statute, New York's declaratory judgment statute afforded the courts broad leeway in issuing declarations, "based on the theory that the courts should be given as broad powers as possible so that their discretion under the statute be unfettered and that they should accordingly be free to work out their own rules as contingencies may arise" (*id*. at 130). New York's adoption of the declaratory judgment was so swift that there is no formal legislative history. In its absence, the history of the federal counterpart, passed shortly afterwards, is instructive. Both the Senate and House Reports note that England had a declaratory judgment act in 1852 and that Scotland's had existed for nearly 400 years (S Rep 1005, 73rd Cong, 2d Sess at 4 [1934]; H Rep 1264, 73rd Cong, 2d Sess at 1 [1934]). Both cite Professor Borchard and the history his work chronicled (*id*.). The reports recount a rapid and substantial movement: between 1919 and the U.S. Senate's report on the Declaratory Judgment Act, 34 states and territories had passed their own declaratory judgment laws (S Rep 1005, 73rd Cong, 2d Sess at 4). The Senate Report ****12** notes that our Chief Judge Benjamin Cardozo was one of the principal advocates supporting the federal act (*see id.* at 1-2).

We know that the common law allowed suits that were de facto declaratory judgments long before this wave of declaratory judgment acts swelled. Suits to quiet title, declare marital status, declare the validity of a trust, or to declare the legitimacy of children are all declaratory judgments of one kind or another. Proponents of expanding declaratory judgments understood this (*see id.* at 4). When viewed in history properly, Civil Practice Act § 473, now embodied in CPLR 3001, is not the start of declaratory judgments in this state, but is rather an expansion and legislative endorsement of a right with a deep legal history.

IV.

The majority offers several arguments about why, "under the circumstances of this case" (majority op at 356), we should enforce the parties' agreement barring the courts from making a declaration of their rights and obligations: (A) barring declaratory relief does not bar all resort to the courts; (B) agree ***376** ments to arbitrate are enforceable, and those are a greater bar to the courts than the elimination of declaratory judgments; (C) many constitutional and statutory rights are waivable, so the right to a declaratory judgment must also be waivable; and (D) "[o]nly a limited group of public policy interests has been identified as sufficiently fundamental to outweigh the public policy favoring freedom of contract" (majority op at 361). I address each in turn.

A.

By observing that "[c]ritically, the waiver clause at issue here does not preclude access to the courts but leaves available other judicial avenues" (majority op at 364), the majority concedes that public policy would void a contractual provision that barred the contracting parties from all forms of judicial or quasi-judicial (arbitral) resolution. That concession makes sense, it comports with our cases voiding arbitration agreements as inimical to the common law (discussed below), and it reaffirms the central failure of the majority's thesis: freedom of contract is not merely an individual right (were it so, we would allow contract disputes to be determined by any means to which the parties agreed, including no means at all). Instead, the agreements society will enforce as binding are those of a type that generally improve output for society, because

freedom of contract is rooted in its benefit to society. Although the clause in question does not absolutely bar judicial review, it obstructs it in clear contravention of public policy and the common law.

From the time the legislature enacted the declaratory judgment act through its present incarnation as CPLR 3001, the statute has always granted parties the right to seek a declaratory judgment "whether or not further relief is or could be claimed." Thus, when the majority relies on the availability of other avenues of redress as the reason to enforce a clause barring declaratory judgments, it contravenes the legislature's express command: declaratory actions are available regardless of the availability of other avenues for judicial review. Again, because society has an interest in the determination of the parties' contractual obligations, and because that interest is the basis for devoting society's resources to the enforcement of contracts in the first place, public policy demands that such ***377** clauses are unenforceable.[3] The public interest in declaratory relief is patent in cases like this, involving a commercial lease. ****13** Certainty and stability in the contractual affairs of a neighborhood grocery has consequences for local residents and employees, not merely for the grocer. The majority allows parties to contract away those societal benefits, which we would never allow for a statute of limitations or the parol evidence rule, even though the societal benefits of the latter are more abstract and attenuated.

B.

The common-law entitlement to judicial determination of contractual disputes is quite powerful, to be overcome by legislative action (narrowly construed) or a judicial modification of the common law based on some more important public policy. In that regard, the majority's framework is backwards, assuming instead that parties are free to avoid judicial (and, with arbitration now firmly established by statute, quasi-judicial) resolution of disputes if they so desire.

One would not understand, from the majority's opinion, that New York common law condemned arbitration clauses as contrary to public policy, and thus unenforceable, because arbitration agreements purported to bar parties from the courts (*Meacham v Jamestown, Franklin & Clearfield R.R. Co.*, 211 NY 346, 354 [1914, Cardozo, J., concurring] ["If jurisdiction is to be ousted by contract, we must submit to the failure of justice that may result from these and like causes. It is true that some judges have expressed the belief that parties ought to be free to contract about such matters as they please. In this state ***378** the law has long been settled to the contrary"]). Ousting jurisdiction by contract is precisely what the majority seeks to legitimate by theorizing that a party might obtain "a valuable benefit, such as a rent concession" in exchange for waiving the right to a declaratory judgment (majority op at 364). So too might a party obtain that same benefit by waiving all judicial and arbitral resolution of contract disputes, or by waiving the statute of limitations or the rules of evidence. Thus, neither the benefit to a party nor the expectation of the parties determines whether our public policy is violated.

New York's policy was in line with other common-law courts, which had been deeply suspicious of arbitration for centuries, dating back to England (*see* Angelina M. Petti, Note, *Judicial Enforcement of Arbitration Agreements: The Stay-Dismissal Dichotomy of FAA Section 3*, 34 Hofstra L Rev 565, 570-571 [2005]). New York was at the forefront of the nationwide shift in attitude toward arbitration clauses, with the Arbitration Act, passed in 1920, serving as a template for the federal act passed five years later. The Court of Appeals accepted that legislative derogation of the common law, albeit with a strong caveat: "The new policy does not mean that there is to be an inquisition rather than a trial, and that evidence unknown to the parties and gathered without notice may be made the basis of the judgment" (*Berizzi Co. v Krausz*, 239 NY 315, 319 [1925, Cardozo, J., writing for the Court]).

Given the above, addressing the majority's argument about arbitration agreements is short work. The legislature modified the common law in 1920 to make arbitration agreements enforceable, against a common law that voided them as contrary to public policy. Having expressly provided that declaratory relief is available "whether or not further relief is or could be claimed," the legislature never provided that private parties could contract otherwise. Ironically, the majority now justifies the contractual elimination of the legislature's grant by relying on the "availab[ility of] other judicial avenues" (majority op at 364).

The majority's claims about arbitration ignore the above history and, thus, erroneously invert the presumption against the derogation of the common law (*Fitzgerald v Quann*, 109 NY 441, 445 [1888] ["the rule to be well established and almost universally acted on, that statutes changing the common law must be strictly construed, and that the common law must be held no further abrogated than the clear import of the language ***379** used in the statutes absolutely requires"]; *Morris v Snappy Car Rental*,

84 NY2d 21, 28 [1994] ["It is axiomatic concerning legislative enactments in derogation of common law . . . that they are deemed to abrogate the common law only to the extent required by the clear import of the statutory language"]; *Artibee v Home Place Corp.*, 28 NY3d 739, 748 [2017] ["Because CPLR 1601 is a statute in derogation of the common law, it must be strictly construed"]). The common ****14** law has always been suspicious of clauses seeking to limit access to the courts. The history of arbitration clauses demonstrates precisely the opposite of what the majority has concluded.

C.

That certain rights afforded to individuals are waivable is true but uninteresting and irrelevant here.[4] Television workers may alter their statutory meal breaks through collective bargaining (*Matter of American Broadcasting Cos. v Roberts*, 61 NY2d 244 [1984]), and teachers may waive the Education ***380** Law's tenure protections (*Matter of Abramovich v Board of Educ. of Cent. School Dist. No. 1 of Towns of Brookhaven & Smithtown*, 46 NY2d 450 [1979]). Those rights are personal, and we leave it up to each individual to determine whether that individual would be personally advantaged by asserting or relinquishing those rights in a particular situation. As explained above, the freedom to contract is not a purely individual right; it is a societal engine for growth and stability.

A criminal defendant may prefer to testify than to remain silent; another may make the opposite choice. Society is indifferent to the choice made, so long as it is knowing and voluntary. Society, however, is not indifferent to whether contracting parties can obtain a quick determination of their rights and obligations before they must or may take actions that would be better informed (and often different) with a declaration in hand. We, as a society, are not benefitted or burdened by the defendant's choice; we are burdened when a contracting party's choice is made based on guesswork as to contractual rights, and benefitted when contracting parties make decisions informed by knowledge of their rights and obligations. Indeed, the majority's tacit admission that parties cannot contractually waive *all* judicial and quasi-judicial review, like our common-law decisions voiding arbitration clauses before the legislature stepped in, demonstrates the fundamental difference between the waivable rights to which the majority points and the clause barring declaratory relief at issue here.

D.

The proposition that only a "limited group of public policy interests" is sufficiently strong to overcome freedom of contract is both wrong and irrelevant here. It is wrong for the following reason: most law-abiding people do not enter into agreements that are against public policy. Countless parties enter into agreements to violate criminal and civil laws; those laws embody thousands of public policies, but those parties do not come to court to seek enforcement of agreements to traffic drugs or people or to recover damages from an illicit stock tip gone bad. Instead of the majority's sweeping claim, a more accurate statement would be that there are a modest number of cases in which the courts have voided an agreement as against public policy, because that circumstance arises only when the alleged violation of public policy is a close call.

The majority's proposition is also irrelevant here: it describes when a public policy *other than* the freedom to contract is sufficient***381** to outweigh the freedom to contract. Here, the issue is whether the public policy underlying the freedom to contract *itself* voids the purported declaratory judgment bar, not whether some distinct public policy voids it. As discussed previously, freedom of contract is vital because of the benefits that flow to society—not because of any individual right to have the government enforce agreements between parties. As the legislature recognized when it provided for a declaration of rights regardless of the existence of other remedies, society is benefitted when disputes between contracting parties can be resolved by a declaration of rights, and injured when parties must guess and act at their peril.

V.

This case offers a concrete illustration of why the public policy underlying freedom of contract requires voiding contractual provisions barring declaratory judgments. In 2010, 159 MP Corp. and 240 Bedford Ave Realty Holding Corp. (herein, collectively MP) entered into 20-year leases for retail and storage space in which to operate a Foodtown grocery store in the Williamsburg section of Brooklyn. Two years later, the lessor, BFN, sold the building to Redbridge Bedford, LLC. In 2014, Redbridge Bedford sent

MP a "Ten (10) Day Notice to Cure Violations." The notice alleged that the site had had work done without proper approvals from city agencies, that the store configuration violated lease terms, that city agencies had improperly been denied access to the premises to inspect the sprinkler system, and that the ventilation system violated the lease and had to be removed. MP disputes all the violations, asserting they either depend on misreadings of the lease or on factual inaccuracies.

MP filed a verified complaint asserting four causes of action: (1) a request for a declaration that the lease was in effect and no violations had occurred; (2) a request to enjoin Redbridge Bedford from taking any steps to terminate the lease; (3) a claim to estop Redbridge Bedford from asserting violations, if any, to which it and BFN had consented; and (4) a claim for damages. To preserve the status quo, MP also sought a *Yellowstone* injunction, which would toll the cure period during the pendency of the action.

Redbridge Bedford moved for summary judgment on the ground "that the mere commencement of the declaratory judgment action constituted contractual grounds for terminating ***382** the tenancies" (*159 MP Corp. v Redbridge Bedford, LLC*, 160 AD3d 176, 181 [2d Dept 2018]). The contractual provision on which Redbridge Bedford relied states that MP:****15**

> "waives its right to bring a declaratory judgment action with respect to any provision of this Lease or with respect to any notice sent pursuant to the provisions of this Lease. Any breach of this paragraph shall constitute a breach of substantial obligations of the tenancy, and shall be grounds for the immediate termination of this Lease. It is further agreed that in the event injunctive relief is sought by Tenant and such relief shall be denied, the Owner shall be entitled to recover the costs of opposing such an application, or action, including its attorney's fees actually incurred, it is the intention of the parties hereto that their disputes be adjudicated via summary proceedings."

Both Supreme Court and the Appellate Division denied MP's request for a *Yellowstone* injunction on the basis of the above contractual provision.

The *Yellowstone* injunction derives from *First Natl. Stores v Yellowstone Shopping Ctr.* (21 NY2d 630 [1968]). In that case, we held that a tenant's failure to obtain a temporary restraining order prior to the expiration of the 10-day cure period in the lease deprived the court of the power to extend the cure period (*id.* at 637-638). In so doing, we implicitly endorsed what would come to be known as the *Yellowstone* injunction, which allows the court to stay the running of a cure period so that tenants may obtain a declaration as to the existence of an alleged lease default and retain the ability to cure such default once their obligations have been determined. The *Yellowstone* injunction is an important adjunct to one type of declaratory judgment action, in which a tenant threatened with eviction based on debatable claims of breach may obtain a judicial resolution of the debate before deciding whether to cure, to remain with no need to cure, or to accept the eviction. Although CPLR 3001 (and its predecessor) does not mention the prospect of judicial extension of a contractual cure period, we explained that " 'declaratory relief is *sui generis* and is as much legal as equitable' . . . Thus, in a proper case, a court has the fullest liberty in molding its decree to the necessities of the occasion" (21 NY2d at 637, quoting Edwin M. Borchard, Declaratory Judgments 239 [2d ed 1941]).

***383** MP has been operating a grocery store in a neighborhood that has undergone, and continues to undergo, rapid gentrification, rendering the real estate substantially more valuable. Its lease is for 20 years, with a further 10-year renewal option. It would like to keep operating the grocery store under the lease terms. Redbridge Bedford would, undoubtedly, like to terminate the lease and make a greater profit from it. Let us assume that there is a legitimate dispute about whether the violations identified by Redbridge Bedford are MP's obligation to cure. The declaration sought by MP, coupled with the *Yellowstone* injunction, would allow MP to learn which, if any, of the claimed violations it is obligated to cure, and could then decide whether to cure any for which it is responsible or agree to termination of the lease. Enforcement of the waiver provision eliminates that possibility, requiring MP to take one of the following courses without the benefit of knowing its contractual liability: (1) cure all the alleged defects, even though it might be responsible for none of them; (2) cure none or some of the alleged defects, guessing which, if any, it may be held responsible for, and defend an eviction proceeding hoping that it has guessed correctly; or (3) accept termination of the lease because the eviction proceeding's result is too uncertain, and attempt to move its business elsewhere or shut it down.

The majority protests that MP and all other commercial tenants who waive declaratory and *Yellowstone* relief in their leases are left with "other judicial avenues through which [they] may adjudicate their rights under the leases" (majority op at 364). The only available legal avenue left to MP, however, as the majority acknowledges, is to wait for Redbridge Bedford to commence summary eviction proceedings in Civil Court and then raise any defenses it

may have against the allegations of default in that summary proceeding (*see* majority op at 364).

Notably, the waiver provision at issue here prevents *only the tenant* from commencing a declaratory judgment action to clarify its rights and responsibilities. The leases permit Redbridge Bedford to commence a declaratory judgment action at will. As the dissenting Justice of the Appellate Division noted, MP is completely at the mercy of Redbridge Bedford to commence such summary eviction proceedings before it may raise any defenses it has to the allegations of default (*see* 160 AD3d at 206-207 [Connolly, J., dissenting]). "In other words, the plaintiffs, having been boxed into a corner, would be entirely dependent on the defendant commencing a summary proceeding***384** in order to bring the issue of the validity of a notice to cure before a court" (*id*.). Such a tenant "would be ****16** faced with great uncertainties with respect to any decision-making related to improving the property, accepting deliveries of new stock or merchandise, or the negotiation of any type of long-term agreement with customers or suppliers" (*id*. at 207).

Furthermore, as the majority acknowledges (majority op at 365-367), the waiver provision at issue here prevents MP from obtaining a *Yellowstone* injunction, even though it did not mention *Yellowstone* itself, because the tenants were limited to defending themselves in summary eviction proceedings commenced by Redbridge Bedford in Civil Court, and Civil Court lacks plenary authority to grant injunctive relief (*see* NY City Civ Ct Act § 209 [b]). If Civil Court therefore determines during the summary eviction proceeding that MP is responsible for some or all of the alleged defaults, even if MP has all along been willing and able to cure those defaults, it will be too late: the leases will have terminated. That "all or nothing result" (*Post v 120 E. End Ave. Corp.*, 62 NY2d 19, 25 [1984]) destabilizes contract relationships and neighborhoods, and effectively allows landlords who own buildings in gentrifying areas to terminate commercial leases at any time based on technical or minor violations. In other words, if a waiver of declaratory and *Yellowstone* relief is enforceable, it will be used by landlords as a mechanism to vitiate a lawful contract. That does not preserve the parties' benefit of their bargain, it destroys it.

"The public policy behind Yellowstone relief is not difficult to envision: commercial enterprises leasing business locations have a vested interest in remaining at the locations known to their customers, their premises are often fitted with industry-specific fixtures, and commercial evictions disrupt employments and potential business profitability" (Hon. Mark C. Dillon, *The Extent to Which "Yellowstone Injunctions" Apply in Favor of Residential Tenants: Who Will See Red, Who Can Earn Green, and Who May Feel Blue?*, 9 Cardozo Pub L Pol'y & Ethics J 287, 315-316 [2011]). The majority's elimination of the clearly best option—knowing one's rights before determining whether and what action to take—strikes at the very core of declaratory judgments. One of the very first decisions under the then-new declaratory judgment act closely parallels the present case:

> ***385** "Plaintiff urges that this construction imposes upon the lessee the risk of forfeiture if he subleased and points out the practical difficulty of finding a sublessee under such circumstances. *Young v. Ashley Gardens Properties, Ltd.*, L. R. (1903) 2 Ch. Div. 112, shows the remedy. There plaintiff sought a declaratory judgment that defendant had no right to withhold consent. Cozens-Hardy, L. J., writes: 'I cannot imagine a more judicious or beneficial exercise of the jurisdiction to make a declaratory order than that which has been adopted . . . in this case.' Under Section 473 of the Civil Practice Act, plaintiff may, if the facts warrant, secure a similar declaration in the instant case" (*Sarner v Kantor*, 123 Misc 469, 470 [1924]).

The majority allows a lease provision to undo the legislature's creation of declaratory judgments, the common law's rejection of contractual provisions purporting to remove judicial interpretation of contracts, and the long-standing efforts of our Court and the lower courts thereafter in fashioning the *Yellowstone* injunction, which, after 50 years of unquestioned existence, itself is engrained in the common law.

The majority's newfound dismissiveness towards *Yellowstone* cannot be justified by its observation that the legislature has granted a 10-day post-adjudication cure period for New York City residential tenants and made that cure period unwaivable (*see* RPAPL 753 [4], [5]). The majority reasons that the legislature's decision to provide that benefit "only to a class of residential tenants indicates that the legislature did not view this type of relief as fundamental for commercial tenants" (majority op at 367). To the contrary, the legislature did not enact this particular protection for residential tenants in New York City until 1982 (*see* L 1982, ch 870; *see Post*, 62 NY2d at 22-24). By that time, *Yellowstone* injunctions had been a long-established method for commercial tenants to preserve their right to cure if they were alleged to be in default of their lease agreements. It is entirely likely, then, that the legislature extended this protection to certain residential tenants in 1982 but did not extend it to commercial tenants because the legislature believed that *Yellowstone* itself already adequately protected the rights of commercial tenants. Indeed, a one-size-fits-all 10-day post-adjudication cure period might be appropriate for

residential tenants, whereas commercial tenants, whose uses are more specialized and varied, would best be left to the ***386** court's discretion to determine the length and nature of any post-adjudication cure period. The majority's reasoning is backwards, drawing a negative inference about our jurisprudence from the legislature's provision of a fixed post-adjudication ****17** cure period to residential tenants. At most, this would qualify as long-standing legislative inaction in the face of well-established common law, which we typically construe as approval (*see People v Defore*, 242 NY 13, 23 [1926, Cardozo, J.] ["If we had misread the statute or misconceived the public policy, a few words of amendment would have quickly set us right. The process of amendment is prompt and simple. It is without the delays or obstructions that clog the change of constitutions. In such circumstances silence itself is the declaration of a policy"]). By holding today that commercial tenants may waive declaratory and *Yellowstone* relief, the majority is effectively unwinding 50 years of common-law precedent based in part on erroneous assumptions about the legislature's intent.

The majority appears to assume that commercial tenants have a relatively higher level of sophistication and bargaining power than residential tenants, and therefore commercial tenants should be allowed to waive the availability of *Yellowstone* relief even though some residential tenants cannot (*see* RPAPL 743 [4], [5]). Indeed, the majority states several times that "sophisticated" commercial tenants should be allowed to waive their right to declaratory relief. A contract provision that violates public policy, however, cannot be enforceable regardless of the level of the sophistication of the parties (*see* 160 AD3d at 207 [Connolly, J., dissenting]; *see e.g. Riverside Syndicate, Inc. v Munroe*, 10 NY3d 18 [2008] [wherein a sophisticated tenant bargained away the rent limits of the Rent Stabilization Code as part of an eviction settlement that allowed his tenancy to continue despite being a non-primary residence]; *see also Bissell v Michigan S. & N. Ind. R.R. Cos.*, 22 NY 258, 285 [1860] ["That contracts which do in reality contravene any principle of public policy are illegal and void, is not and cannot be denied. The doctrine is universal. There is no exception"]). Furthermore, there is no evidence on this record demonstrating the sophistication of these particular tenants.[5] The majority assumes that because they were commercial tenants, they were sophisticated. The level of ***387** sophistication of commercial tenants, and their relative bargaining power, may fall anywhere between Walmart and *Cheers*' Sam Malone. It is not true that all commercial tenants will understand the meaning of a waiver of declaratory relief, or will have the bargaining power to negotiate for removal of such a waiver if they understand it, and we should not assume otherwise.

VI.

The majority has now undone the faithful work of the courts over the past 50 years in creating the *Yellowstone* injunction, based on the uniform understanding of the Appellate Division Departments that the declaratory judgment act, when applied in the context of commercial leases, requires a specialized form of augmenting injunction (*see Another Slice, Inc. v 3620 Broadway Invs. LLC*, 90 AD3d 559 [1st Dept 2011]; *Caldwell v American Package Co., Inc.*, 57 AD3d 15, 18 [2d Dept 2008]; *Kem Cleaners v Shaker Pine*, 217 AD2d 787 [3d Dept 1995]; *Fay's Inc. v Park Centre Dev.*, 226 AD2d 1067 [4th Dept 1996]). That undoing calls for a simple enough legislative fix. The far more troubling aspect of the majority's decision is that it, perhaps unwittingly, heads us down the road of the roundly discredited *Lochner*-era jurisprudence, in which "freedom of contract" was misunderstood as an individual right instead of as a doctrine by which society decides to enforce only those types of agreements that tend to enhance social welfare. "[F]reedom of contract is a qualified, and not an absolute, right. There is no absolute freedom to do as one wills or to contract as one chooses" (*West Coast Hotel Co. v Parrish*, 300 US 379, 392 [1937], quoting *Chicago, B. & Q. R. Co. v McGuire*, 219 US 549, 567 [1911], and overruling *Adkins v Children's Hospital of D. C.*, 261 US 525 [1923] and *Lochner*).****18**

It is easy to see why freedom of contract is enhanced when the parties, arriving at a dispute about what a contract requires, can have that dispute resolved and then act accordingly. That best preserves the substance of their bargain and provides assurance to future negotiating parties that our law will not require a Hobson's choice of them. Conversely, what reason is there to allow parties to agree to bar declaratory judgments, other than "the-parties-agreed-to-it-so-it-must-be-***388** their-right"? As Charles Evans Hughes commented in support of New York's Declaratory Judgment Act, "[w]hatever may be said as to the propriety of desirability of such a change in practice, the point that any body will be injured in that way cannot be regarded as well taken" (Rep of NY St Bar Assn Comm on Law Reform, Proceedings of 44th Ann Meeting at 196). We deserve better than the majority's resuscitation of the long-discredited "assumption that economic liberty is the holy of holies in a just constitutional system" (Robert Green McCloskey, American Conservatism in the Age of Enterprise 83 [1951]). "I regret sincerely that I am unable to agree with the judgment in this case, and that I think it

my duty to express my dissent" (*Lochner*, 198 US at 74-75 [Holmes, J., dissenting]).

Judges Stein, Garcia and Feinman concur; Judge Wilson dissents in an opinion in which Judges Rivera and Fahey concur.

Order affirmed, with costs, and certified question not answered as unnecessary.

Footnotes

1 Although defendant cited a portion of paragraph 67 (H) stating that commencement of a declaratory judgment action provided a separate basis for termination of the leases, it did not counterclaim seeking either a declaration that the leases terminated or eviction based on purported breach of this provision. Because that provision was not enforced in this case, we have no occasion to further address it.

2 Plaintiffs also argued that the complaint pleaded a cognizable breach of contract claim that was not barred by the waiver clause. However, that argument is not presented in this Court.

3 *See also Bluebird Partners v First Fid. Bank*, 94 NY2d 726, 739 (2000) (declining to enforce the contract on champerty grounds may "engender uncertainties in the free market system in connection with untold numbers of sophisticated business transactions—a not insignificant potentiality in the State that harbors the financial capital of the world"); *J. Zeevi & Sons v Grindlays Bank (Uganda)*, 37 NY2d 220, 227 (1975) ("In order to maintain [New York's] pre-eminent financial position, it is important that the justified expectations of the parties to the contract be protected").

4 When we refer to public policy in this context, we mean "the law of the State, whether found in the Constitution, statutes or decisions of the courts" (*New England Mut. Life Ins. Co.*, 73 NY2d at 81). It is not enough that the agreement appears unwise to outsiders (*see Rowe*, 46 NY2d at 68), or violates "personal notions of fairness" (*Welsbach Elec. Corp. v MasTec N. Am., Inc.*, 7 NY3d 624, 629 [2006]) or "[courts'] subjective view of what is sound policy" (*Matter of Walker*, 64 NY2d 354, 359 [1985]).

5 "Decisions like these are not based on a search for the equitable outcome of a particular case, or on a calculation of which result will most contribute, in an immediate and practical way, to the enforcement of a particular statute or public policy" (*Balbuena v IDR Realty LLC*, 6 NY3d 338, 364-365 [2006]). "Rather, they are based on the sound premise that courts show insufficient respect for themselves and for the law when they help a party to benefit from illegal activity" (*id.* at 365).

1 Here, for instance, the landlord and tenant each claim that the other is responsible to resolve several lease violations, including the current configuration of a ventilation system. If the tenant knows it is liable, it might decide to terminate the lease; the landlord apparently has better offers for the space, so that the tenant could walk away without liability and the landlord could rent the space to a higher-paying tenant. If the landlord knows it is liable, it may then determine whether it is more profitable to buy out the tenant and lease the space to a higher-paying tenant or to continue under the existing lease terms.

2 Even before Roman times, King Solomon issued a declaratory judgment, determining the rights of the parties without requiring either putative mother to abscond with the infant (1 *Kings* 3:16-28).

3 The majority's reliance on *James v Alderton Dock Yards* and *Kalisch-Jarcho, Inc. v City of New York* (majority op at 363) is misplaced. In *James*, we upheld the denial of declaratory relief as an appropriate exercise of the trial court's discretion: "The use of a declaratory judgment, while discretionary with the court, is nevertheless dependent upon facts and circumstances rendering it useful and necessary" (*James v Alderton Dock Yards*, 256 NY 298, 305 [1931]). Likewise, in *Kalisch-Jarcho, Inc. v City of New York* (72 NY2d 727 [1988]), the contract between the City and the contractor required the contractor to continue with work even if the obligation to do the work was contested, subject to payment for the additional work at the contract's end. The denial again was for discretionary reasons. Neither case upholds the validity of a provision purporting to extinguish the right to seek a declaration, because the contracts in those cases had no such provision. Even were we to strike as void against public policy the provision at issue here, nothing would prevent Supreme Court from denying declaratory relief or the *Yellowstone* injunction in a proper exercise of its discretion.

[4] The majority's observation that the legislature has specified that several types of agreements are void as against public policy (majority op at 361) is true but irrelevant. No one disputes the legislature's ability to do so (query, then, whether the purported force of the freedom of contract is so great as the majority claims), but the legislature's ability to declare contractual terms void as against public policy does not disable the common law from doing so as well. The cases the majority cites for the proposition that the legislature's failure to preclude a waiver is "a significant factor militating against invalidation of a contract term on public policy grounds" (*id.* at 362) do not support that proposition at all. *Ballentine v Koch* (89 NY2d 51 [1996]) contains no such statement; it rejected the plaintiffs' claim because "they attack as unenforceable an aspect of the legislation that was necessary to the creation of the rights they seek to enforce" (*id.* at 59), and rejected their Contract Clause argument to boot. *Matter of Abramovich v Board of Educ. of Cent. School Dist. No. 1 of Towns of Brookhaven & Smithtown* (46 NY2d 450 [1979]) is not a case in which the legislature was silent; instead, we concluded the waiver there was not against public policy because the statue affirmatively "authorized waiver by simple neglect" and the "waiver serves as the quid pro quo for countervailing benefits" (*id.* at 455). *Matter of Feinerman v Board of Coop. Educ. Servs. of Nassau County* (48 NY2d 491 [1979]) says nothing about legislative inaction, but instead is merely a follow-on to *Abramovich* concluding that nontenured faculty have, a fortiori, less of a property interest than tenured faculty, and therefore also can waive the rights determined waivable in *Abramovich*. Only *Slayko v Security Mut. Ins. Co.* mentions legislative inaction, but expressly conditions it on the rejection of the plaintiff's attempt to analogize the highly regulated field of automobile insurance to homeowner's insurance: "Cases involving auto insurance coverage—an area in which the contractual relationship and many of its terms are prescribed by law—provide a weak basis for generalization about the constraints public policy places upon other insurance contracts" (98 NY2d 289, 295 [2002]).

[5] The majority not only asserts that plaintiffs were "sophisticated" but also that they were "counseled" (majority op at 363, 368). There is no evidence in the record before us that plaintiffs reviewed the lease terms with counsel. Supreme Court concluded that plaintiffs had the "opportunity" to review the leases with the assistance and guidance of counsel, not that such assistance and guidance actually occurred.

New York Official Reports

2 Tiffany 115, 29 N.Y. 115, 1864 WL 4076 (N.Y.), 86 Am.Dec. 292

EDWARD MERRITT
v.
JUSTUS E. EARLE.

Court of Appeals of New York.
March, 1864.

CITE TITLE AS: Merritt v Earle

***115** The law adjudges a common carrier responsible for the loss of the goods irrespective of any question of negligence or fault on his part, if the loss does not occur by the act of God or the public enemies. With these exceptions, the carrier is an insurer against all losses.

By the 'act of God' is meant something which operates without any aid or interference from man. When the loss is occasioned, or is the result in any degree of human aid or interference, the case does not fall within the exceptions of the carrier's liability.

In an action against the owner of a steamboat, to recover the value of a span of horses which were lost while being transported from Albany to New York by the sinking of the vessel in the Hudson river, it appeared that the immediate cause of the accident and loss was the contact of the steamboat with the mast of a sloop which had been sunk, in a squall, two days before, which mast was out of water fifteen or sixteen feet at low water, and was visible the day before and the same day of the accident. *Held*, that the loss was not caused by an inevitable accident, or act of God, within the meaning of the terms as used in the law, but might have been avoided.

That the squall which sunk the sloop was but the remote or secondary cause of the accident, and afforded no shield to the carrier.

Held, also, that the fact that the contract for the transportation of the horses was made, and the property delivered on board the carrier's vessel, on *Sunday*, did not exempt the carrier from liability for the loss.

The liability of a common carrier does not rest on his contract, but is a liability imposed by law. It exists, independent of the contract, having its foundation in the policy of the law; and it is upon this legal obligation that he is charged as carrier for the loss of the property entrusted to him

THIS action was against the defendant as the owner of the steamboat Knickerbocker, to recover the value of a span of horses belonging to the plaintiff, which were lost while being transported from Albany to New York, by the sinking of the vessel in the Hudson river.

It was admitted by the defendant in his answer, that on or about the 1st of September 1856, he was the owner of the steamboat Knickerbocker, and that he used the same for the transportation of freight and of passengers for hire, as a public employment and as a common carrier between the ***116** cities of Albany and New York, on the waters of the Hudson river. On the trial before Mr. Justice EMOTT, at the Westchester Circuit, in September 1858, it appeared that the plaintiff had purchased a pair of horses at Syracuse, and reached Albany with them by railroad on Sunday, the 31st of August 1856, and on the afternoon of that day they were received on board the steamboat for transportation to New York. The plaintiff paid the freight of the horses to New York, and also took passage himself. The boat left Albany for New York on Sunday evening, and about two or three o'clock on the following morning, she ran upon the mast of a sunken vessel near Buttermilk Falls and sunk, and the plaintiff's horses were drowned. They were of the value of $450.

The defence was that the horses were lost by inevitable accident, and that the contract for transportation having been made on Sunday, was void, and the plaintiff could not recover.

The defendant gave evidence tending to show that the officer in charge of the boat did not know or discover that there was any obstruction in the river. It appeared, however, that the sloop sunk in a squall on the preceding Friday, owing to the neglect of the crew to lower its sails in season, and her mast was, at low water, fifteen or sixteen feet out of water. It was also visible on Saturday and Sunday.

At the close of the evidence the counsel for the defendant requested the judge to instruct the jury that the plaintiff was not entitled to recover, for the reason that the loss was occasioned by an inevitable accident, against which the defendant could not have guarded by the exercise of due diligence and precaution; and because the contract was void under the statute relating to the observance of Sunday. The judge refused so to decide, but directed a verdict in favor of the plaintiff, and the defendant excepted.

Judgment being entered, the defendant appealed to the ***117** supreme court, where the same was affirmed. He now appeals to this court.

J. H. Reynolds, for respondent.

WRIGHT, J.

There was no controversy as to the nature of the accident, or how it occurred, which caused the loss of the plaintiff's horses. On the Friday preceding the downward trip of the defendant's steamer a sloop had been sunk, in a squall of wind, near Buttermilk Falls, and about in the usual route on the downward passage of steamboats navigating the river. The defendant's steamer ran upon the mast of this sunken vessel, which stove in her bottom, and she was cast away, and sunk in the water to her promenade deck in consequence. The defendant assumed this to be an inevitable accident, against which he could not have guarded by the exercise of due diligence and precaution; and, as matter of law, that it excused him from liability as a carrier. This presents one of the two questions raised by the exceptions in the case.

The law adjudges the carrier responsible, irrespective of any question of negligence or fault on his part, if the loss does not occur by the act of God or the public enemies. With these exceptions, the carrier is an insurer against all losses. The expressions 'act of God' and 'inevitable accident' have sometimes been used in a similar sense, and as equivalent terms. But there is a distinction. That may be an 'inevitable accident' which no foresight or precaution of the carrier could prevent; but the phrase 'act of God' denotes natural accidents that could not happen by the intervention of man--as storms, lightning, and tempest. The expression excludes all human agency. In the case of the *Trent Proprietors v. Wood* (4 Douglass, 287), Lord Mansfield said: 'The general principle is clear. The act of God is natural necessity--as winds and storms--which arise from natural causes, and is distinct from inevitable ***118** accident.' The same judge, in *Forward v. Pittard* (1 Term Rep. 27), defined the 'act of God' to be something in opposition to the act of man-- adding 'that the law presumes against the carrier, unless he shows it was done by such an act as could not happen by the intervention of man--as storms, lightning, and tempest.'

Another principle running through the case is, that to excuse the carrier the act of God must be the sole and immediate cause of the loss. That it is the remote cause is not enough. This is illustrated in the case of *Smith v. Shepherd* reported in Abbot on Shipping (part 3, ch. 4, § 1); and *McArthur v. Sears* (21 Wend. 190). In neither of the cases was the loss occasioned directly by natural violence, although a sudden and extraordinary flood in the one case, and a light on board a steamer which had grounded in a previous gale of wind in the other, were the remote causes.

In *Smith v. Shepherd,* the vessel was lost by striking a floating mast attached to a vessel which had been sunk by getting on a bank that had suddenly and unexpectedly been made dangerous by an extraordinary flood. Coming in contact with the mast attached to the sunken ship, the defendant's vessel was forced by it upon the bank, altered suddenly by the flood, and was wrecked. The flood which changed the bank was the ultimate occasion of the misfortune; but it was held to be too remote. The vessel had not been forced on the bank by winds or other extraordinary violence of nature, or without human interference. The immediate cause of the loss was the coming in collision with a floating mast which some person had attached to the sunken vessel. In *McArthur v. Sears,* the vessel was lost in attempting to enter port by mistaking a light on board of a steamer which had grounded in a previous gale of wind for one of two beacon lights of the port. One of the beacon lights, through some neglect, was not burning, and the light on board of the wrecked steamer was easily mistaken for it. It was a dark night, the snow was falling, ***119** and there was a considerable wind. The mistake occasioned the loss of the vessel without any fault of her master or crew, yet it was held that the carrier was not excused.

In the present case the sinking of the defendant's vessel was not directly caused by the act of God. The immediate cause was her running upon the mast of a sloop that had been sunk in a squall of wind a day or two previously. She was not forced upon the mast which stove in her bottom by the wind or current, and although the sloop may have been sunk by the violence of the wind, yet that was but the remote cause of the loss of the defendant's steamer. The case of *Smith v. Shepherd,* in its circumstances, closely resembles the present one. In that case the defendant's vessel ran against a floating mast attached to a vessel which had been sunk by getting on a bank suddenly changed and made dangerous by a flood, and was forced by the mast upon the changed bank and wrecked, In this case the defendant's vessel ran against the mast of a sloop that had been sunk in a sudden and violent squall of wind. In the former case, the changing of the bank was the 'act of God,' as spoken of in the law of carriers. So in this case the sinking of the sloop was occasioned by what may be properly called the 'act of God.' But neither the changing of the bank by the flood, nor the sinking of the sloop by the sudden and violent squall, was alone the cause of the loss of the defendant's vessel. Human agency intervened in the one case, by attaching to the sunken vessel the floating mast with which the lost vessel came in contact; and in this other, by placing the sloop in the position in which she was overtaken by the wind. All the cases agree that by the expression 'act of God,' is meant something which operates without any aid or interference from man; and when the loss is occasioned, or is the result in any degree of

human aid or interference, the case does not fall within the exception to the carrier's liability. I am of the opinion, therefore, that had the defendant shown that the plaintiff's loss was occasioned***120** by an accident, against which he could not have guarded by the exercise of due diligence and precaution, it would not have absolved him from his responsibility as a carrier.

The horses were put on board the defendant's steamer for transportation, on Sunday, the freight paid and a receipt taken. The defendant's second point was that he was discharged from liability on the ground that the contract to carry the horses was in violation of the statute respecting the observance of Sunday. (1 R. S. 575, 676.) There is no force in the suggestion. Even if the contract were for the performance of servile labor, there was nothing in it which required the defendant to transport or commence the transportation on Sunday; and notwithstanding, the horses were taken on board on Sunday, he was at liberty to detain the vessel at her dock until Monday morning. A contract made on Sunday is not void, and to invalidate a transaction under the statute, the contract must necessarily require the act to be performed on Sunday. (*Boynton v. Page*, 13 Wend. 425; *Watts v. Van Ness*, 1 Hill, 76.) However, if it was expected that the transaction was to begin on Sunday, it was not to be completed until Monday. But it is not material whether the contract made was good or bad: it was enough to entitle the plaintiff to recover, that the defendant being a common carrier, had in his custody for transportation the plaintiff's property, and by his negligence or in violation of duty, it was lost. This gave the plaintiff a right of action, wholly disconnected from the statute relating to the observance of Sunday. (*Allen v. Sewall*, 2 Wend. 338.) The judgment of the supreme court should be *affirmed*.

JOHNSON, J.

There is nothing in the facts of this case which could excuse the defendant from liability for the loss as a common carrier. The immediate cause of the accident and loss was the contact of the defendant's vessel with the ***121** obstruction in the river. This obstruction was the mast of a sloop which had sunk in a squall two days previous. It was out of water fifteen or sixteen feet at low water, and was visible the preceding Saturday and Sunday. This was not an inevitable accident within the meaning of the term, as used in law. It might have been avoided. The squall which sunk the sloop was not the immediate proximate cause of this accident, though it may have been that of sinking the sloop. It was but the remote or secondary cause of the accident in question, and affords no shield to the defendant. (Edwards on Bailm. 455, 456; Story on Bailm., § 517; *McArthur v. Sears*, 21 Wend. 190.)

The fact that the contract was made and the property delivered on board the vessel on Sunday does not exempt the defendant from liability for the loss of the property. The loss did not happen on Sunday, and it was not within the contemplation of the parties when making the contract, that it would or could be wholly performed on that day. As a contract, I do not think it comes within the purview of the statute. It was not strictly a contract for servile labor, although labor of that kind would necessarily be employed, to some extent, in its performance by the defendant. But even if it was, the contract was only to be entered upon on that day, and completed the next day in the usual course of the business of the defendant's vessel. The statute only prohibits servile working and laboring on that day, and can be construed to avoid such contracts only as are for work or labor of that description to be wholly performed on that day. Hence it has been held that a contract made on Sunday to work for a year was good, and not within the statute; (*The King v. The Inhabitants of Whitnash*, 7 B. & C. 596); and in *Sandiman v. Breach* (7 Id. 100), it was held that the statute did not include the driver and owner of a stage-coach, and that the plaintiff might recover damages of the owner of the coach for not transporting him on Sunday in pursuance of a contract to be ***122** executed on that day; inasmuch as the statute did not make it illegal for stage-coaches to travel on that day. The statute does not prohibit the transportation of property on the Sabbath, either by land or by water, and therefore a contract made for the transportation of property on that day would not come within the prohibition. At common law the observance of the Sabbath was a duty of imperfect obligation. (*Rex v. Brotherton*, 2 Str. 702.) Any private business may be lawfully done which the statute does not prohibit, and all contracts relating thereto are valid. (*Boynton v. Paige*, 13 Wend. 425.) It was held in *Harrison v. Marshall* (4 E. D. Smith, 271), that in an action for an injury to a thing hired, it was no defence that it was hired on Sunday. In Massachusetts it has been held that a promissory note made on Sunday is good (*Geer v. Putnam*, 10 Mass. 311.)

But even if the contract was so far void that it could not be enforced as an executory contract, it would constitute no defence to this action. The liability of a common carrier does not rest in his contract, but is a liability imposed by law. It exists, independently of the contract, having its foundation in the policy of the law, and it is upon this legal obligation that he is charged as carrier for the loss of property entrusted to him. (Edwards on Bailm. 466; *Hollister v. Nowlen*, 19 Wend. 239; *Ansell v. Waterhouse*, 1 Chitty R. 1.)

It is clear, in any view of the case, that the defendant became, and was, the common carrier of this property, and of course all the duties and liabilities pertaining to that

character attached to him in reference to such property. He is therefore liable for the loss, even if the contract in other respects could not be enforced by reason of the day on which it was made, which I do not think is the case. It would scarcely do to hold a common carrier exempt from the ordinary liability, because it was understood between the parties at the time of the undertaking that ***123** the property for some portion of the time and distance was to be transported on the Sabbath. That would be extending the statute for the observance of Sunday far beyond its object and intention. I am of the opinion, therefore, that the judgment was right, and should be affirmed.

All the judges concurring, judgment affirmed.

70 N.Y.2d 900, 519 N.E.2d 295, 524 N.Y.S.2d 384

Kel Kim Corporation et al., Appellants,
v.
Central Markets, Inc., et al., Respondents.

Court of Appeals of New York
344
Argued November 18, 1987;
decided December 21, 1987

CITE TITLE AS: Kel Kim Corp. v Central Mkts.

SUMMARY

Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered June 23, 1987, which, with two Justices dissenting, affirmed an order of the Supreme Court (Robert Doran, J.), entered in Saratoga County, *inter alia*, granting defendants' motion for summary judgment, declaring that a lease between the parties was nullified, and directing plaintiff to vacate the leased premises.

Kel Kim Corp. v Central Mkts., 131 AD2d 947, affirmed.

HEADNOTES

Landlord and Tenant
Lease

Impossibility of Performance--Force Majeure Clause

(1) In an action to declare the rights of the parties with respect to a lease of real property, specifically a provision requiring the lessee to obtain liability insurance in a certain amount, an order of the Appellate Division, which affirmed an order granting summary judgment to defendant lessor and declaring the lease nullified, should be affirmed. Impossibility excuses a party's performance only when the destruction of the subject matter of the contract makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract. Applying these principles to plaintiff's inability to obtain the required amount of liability insurance due to a liability insurance crisis and consequent refusal of insurers to offer policies, it is concluded that plaintiff's predicament is not within the embrace of the doctrine of impossibility, since plaintiff's inability to procure and maintain coverage could have been foreseen and guarded against when it specifically undertook that obligation in the lease. Similarly, performance is not excused under the *force majeure* provision of the policy since that provision did not specifically include the inability to procure or maintain insurance, nor does this inability fall within the catchall "or other similar causes beyond the control of such party". ***901**

APPEARANCES OF COUNSEL

Paul Pelagalli and *Richard C. Miller, Jr.*, for appellants.
John P. Miller for respondents.

OPINION OF THE COURT

The order of the Appellate Division should be affirmed, with costs.

In early 1980, plaintiff Kel Kim Corporation leased a vacant supermarket in Clifton Park, New York, from defendants. The lease was for an initial term of 10 years with two 5-year renewal options. The understanding of both parties was that plaintiff would use the property as a roller skating rink open to the general public, although the lease did not limit use of the premises to a roller rink.

The lease required Kel Kim to "procure and maintain in full force and effect a public liability insurance policy or policies in a solvent and responsible company or companies * * * of not less than Five Hundred Thousand Dollars * * * to any single person and in the aggregate of not less than One Million Dollars * * * on account of any single accident". Kel Kim obtained the required insurance coverage and for six years operated the facility without incident. In November 1985 its insurance carrier gave notice that the policy would expire on January 6, 1986 and would not be renewed due to uncertainty about the financial condition of the reinsurer, which was then under the management of a court-appointed administrator. Kel Kim transmitted this information to defendants and, it

asserts, thereafter made every effort to procure the requisite insurance elsewhere but was unable to do so on account of the liability insurance crisis. Plaintiff ultimately succeeded in obtaining a policy in the aggregate amount of $500,000 effective March 1, 1986 and contends that no insurer would write a policy in excess of that amount on any roller skating rink. As of August 1987, plaintiff procured the requisite coverage.

On January 7, 1986, when plaintiff's initial policy expired and it remained uninsured, defendants sent a notice of default, directing that it cure within 30 days or vacate the premises. Kel Kim and the individual guarantors of the lease then began this declaratory judgment action, urging that they should be excused from compliance with the insurance provision either because performance was impossible or because the inability to procure insurance was within the lease's *force* ***902** *majeure* clause.[*] Special Term granted defendants' motion for summary judgment, nullified the lease, and directed Kel Kim to vacate the premises. A divided Appellate Division affirmed.

Generally, once a party to a contract has made a promise, that party must perform or respond in damages for its failure, even when unforeseen circumstances make performance burdensome; until the late nineteenth century even impossibility of performance ordinarily did not provide a defense (Calamari and Perillo, Contracts § 13-1, at 477 [2d ed 1977]). While such defenses have been recognized in the common law, they have been applied narrowly, due in part to judicial recognition that the purpose of contract law is to allocate the risks that might affect performance and that performance should be excused only in extreme circumstances *(see,* Wallach, *The Excuse Defense in the Law of Contracts: Judicial Frustration of the U.C.C. Attempt to Liberalize the Law of Commercial Impracticability*, 55 Notre Dame Law 203, 207 [1979]). Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract *(see, 407 E. 61st Garage v Savoy Fifth Ave. Corp.,* 23 NY2d 275; *Ogdensburg Urban Renewal Agency v Moroney*, 42 AD2d 639).

Applying these principles, we conclude that plaintiff's predicament is not within the embrace of the doctrine of impossibility. Kel Kim's inability to procure and maintain requisite coverage could have been foreseen and guarded against when it specifically undertook that obligation in the lease, and therefore the obligation cannot be excused on this basis.

For much the same underlying reason, contractual *force majeure* clauses--or clauses excusing nonperformance due to circumstances beyond the control of the parties--under the common law provide a similarly narrow defense. Ordinarily, only if the *force majeure* clause specifically includes the event that actually prevents a party's performance will that party ***903** be excused. *(See, e.g., United Equities Co. v First Natl. City Bank,* 41 NY2d 1032; Squillante & Congalton, *Force Majeure*, 80 Com LJ 4 [1975].) Here, of course, the contractual provision does not specifically include plaintiff's inability to procure and maintain insurance. Nor does this inability fall within the catchall "or other similar causes beyond the control of such party." The principle of interpretation applicable to such clauses is that the general words are not to be given expansive meaning; they are confined to things of the same kind or nature as the particular matters mentioned *(see,* 18 Williston, Contracts § 1968, at 209 [3d ed 1978]).

We agree with the conclusion reached by the majority below that the events listed in the *force majeure* clause here are different in kind and nature from Kel Kim's inability to procure and maintain public liability insurance. The recited events pertain to a party's ability to conduct day-to-day commercial operations on the premises. While Kel Kim urges that the same may be said of a failure to procure and maintain insurance, such an event is materially different. The requirement that specified amounts of public liability insurance at all times be maintained goes not to frustrated expectations in day-to-day commercial operations on the premises--such as interruptions in the availability of labor, materials and utility services--but to the bargained-for protection of the landlord's unrelated economic interests where the tenant chooses to continue operating a public roller skating rink on the premises.

Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Titone, Hancock, Jr., and Bellacosa concur.

Order affirmed, with costs, in a memorandum.

Footnotes

* The clause reads: "If either party to this Lease shall be delayed or prevented from the performance of any obligation through no fault of their own by reason of labor disputes, inability to procure materials, failure of utility service, restrictive governmental laws or regulations, riots, insurrection, war, adverse weather, Acts of God, or other similar causes beyond the control of such party, the performance of such obligation shall be excused for the period of the delay."

New York Official Reports

302 A.D.2d 1, 751 N.Y.S.2d 4, 2002 N.Y. Slip Op. 08839

Roundabout Theatre Company, Inc., et al., Respondents,
v.
Continental Casualty Company, Appellant, et al., Defendant.

Supreme Court, Appellate Division, First Department, New York
1830
November 26, 2002

CITE TITLE AS: Roundabout Theatre Co. v Continental Cas. Co.

SUMMARY

Appeal from an order of the Supreme Court (Helen Freedman, J.), entered January 16, 2002 in New York County, which (1) denied defendant's motion for summary judgment seeking dismissal of the complaint and a declaration that it is not required to insure plaintiff Roundabout Theatre Company for its business interruption losses, and (2) granted plaintiffs' cross motion for summary judgment on the issue of coverage only.

HEADNOTE

Insurance
Exclusions

Business Interruption--Losses Resulting from Off-Site Property Damage Not Covered

The business interruption clause of an insurance policy issued to plaintiff theatre company does not cover losses occasioned by an order of the City of New York closing the street and denying access to the insured's theatre due to a construction accident in the area in the absence of any physical damage to the theatre premises. Plaintiff was forced to cancel 35 performances of a musical production, resulting in substantial monetary losses in the form of ticket and production-related sales, as well as additional expenses incurred in reopening the production. However, the language of the business interruption clause in the policy clearly and unambiguously provides coverage only where there is direct physical loss or damage to the insured's property. ***2** Losses resulting from off-site property damage restricting access to the insured premises do not constitute covered perils under the policy. The IAS court erred in determining that, since the policy was an "all-risk" policy, the loss was presumptively covered, and that the burden of proof therefore shifted to defendant insurer to demonstrate that a policy exclusion was applicable. Labeling the policy as "all-risk" does not relieve the insured of its initial burden of demonstrating a covered loss under the terms of the policy. Furthermore, plaintiff's settlement of a negligence claim against its former insurance broker for failing to obtain coverage for business interruption loss resulting from off-site property damage further supports the grant of summary judgment to defendant.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Insurance §§ 513, 1562.

NY Jur 2d, Insurance §§ 539, 1589, 1989.

ANNOTATION REFERENCES

Business interruption insurance. 37 ALR5th 41.

APPEARANCES OF COUNSEL

Robert M. Sullivan and *William M. Fennell* of counsel, New York City *(Nicoletti, Hornig, Campise & Sweeney*, attorneys), for respondents.
Eric A. Portuguese of counsel, New York City (*John Sandercock* on the brief; *Lester Schwab Katz & Dwyer, LLP*, attorneys), for appellant.

OPINION OF THE COURT

Gonzalez, J.

This appeal requires us to determine whether the business interruption clause of an insurance policy issued to plaintiff theatre company covers losses occasioned by an order of the City of New York closing the street and

denying access to the insured's theatre due to a construction accident in the area, notwithstanding the absence of any physical damage to the theatre premises. Because the language of the business interruption clause in the policy clearly and unambiguously provides coverage only where there is direct physical loss or damage to the insured's property, we reverse the IAS court's determination and grant summary judgment to defendant insurer declaring that plaintiffs' losses are not covered by the subject policy.

In February 1998, plaintiff Roundabout, a nonprofit theatre company, began staging a production of the musical Cabaret at the Kit Kat Klub (the theatre), located at 124 West 43rd Street. ***3** On the morning of July 21, 1998, a portion of a 48-story exterior elevator being used in the construction of the Conde Nast building, located 65 feet west on the south side of West 43rd Street, collapsed into the street and adjacent buildings. As the Conde Nast building and the theatre were separated by one building, the theatre sustained only minor damage to its roof and air conditioning system, which was repaired within one day. However, because of the substantial damage to the area and the danger from the partially collapsed scaffold, the City's Office of Emergency Management closed West 43rd Street between Broadway and 6th Avenue until August 18, 1998. As a result, the theatre became inaccessible to the public and Roundabout was forced to cancel 35 performances of Cabaret. Roundabout sustained substantial monetary losses in the form of ticket and production-related sales as well as additional expenses incurred in reopening the production.

At the time of the accident, defendant Continental insured Roundabout under a "Theatrical Package Policy," which included, inter alia, business interruption coverage. The "Insuring Agreement" provided:

"The Company agrees to pay to the Insured such loss ... as the Insured shall necessarily incur in the event of interruption, postponement or cancellation of an Insured Production *as a direct and sole result of loss of, damage to, or destruction of property or facilities (including the theatre building occupied ... by the Insured, and [certain equipment])*, contracted by the Insured for use in connection with such Production, *caused by the perils insured against*, and occurring during the term of coverage ..." (emphasis added).

The "Perils Insured" clause of the policy provided: "This coverage insures against "*all risks of direct physical loss or damage to the property described in Paragraph I* [i.e., the theatre building or facilities] ..., *except as hereinafter excluded*" (emphasis added).

The policy further included a "War Risk and Governmental Authority and Civil Commotion Exclusion" which provided: "The Company shall not be liable for any loss caused directly or indirectly by ... Civil Commotion assuming the proportions of or amounting to a popular rising, riot, martial law of [*sic*] the act of any lawfully constituted authority."***4**

On August 20, 1998, Roundabout, through its insurance broker J&H Marsh & McLennan (J&H Marsh),[1] provided notice of its loss to Continental. On August 31, 1998, Continental disclaimed coverage on the ground that the policy provided coverage only where there had been "physical damage to the property or facilities contracted by the Insured," and because the loss was not covered due to the civil commotion exclusion.

On March 4, 1999, Roundabout commenced an action against its former insurance broker DeWitt, alleging that DeWitt was negligent in failing to obtain coverage for business interruption loss resulting from off-site property damage. In its complaint, Roundabout alleged that although DeWitt had obtained from Chubb Group the necessary coverage for losses due to off-site property damage with respect to a different property, DeWitt had failed to follow its instructions to obtain the same coverage for the Kit Kat Klub location.[2] Roundabout and DeWitt reached a settlement in this action whereby DeWitt agreed to pay Roundabout $990,063 in exchange for an assignment to DeWitt of Roundabout's rights and causes of action against Continental.

In February 2000, Roundabout and DeWitt, as assignee of the rights of Roundabout, commenced the instant action against Continental for breach of the insurance contract, and against J&H Marsh for breach of contract and negligence in failing to properly determine Roundabout's insurance needs.[3] In its answer, Continental's second and fourth affirmative defenses asserted, consistent with its disclaimer, that the policy did not provide coverage for business interruption loss resulting from off-site property damage or from the act of any lawfully constituted authority.

In June 2001, Continental moved for summary judgment and a for a declaration that the loss arising out of the collapse of the elevator at the Conde Nast building was not covered under the Continental policy. It argued there was no coverage because there was no direct, physical loss to Roundabout's facilities ***5** and because the loss was excluded under the policy's civil commotion exclusion. Plaintiffs cross-moved for summary judgment on the issue of coverage, arguing that coverage existed because this

was an "all risk" policy, the loss at issue was "fortuitous," and because the policy's reference to "loss of, damage to, or destruction of property or facilities" should be read to include "loss of use" of the premises. Plaintiffs also contended that the civil commotion exclusion applies only to actions by government "in violent, war-like circumstances," which are not present here.

In its order entered January 16, 2002, the IAS court denied Continental's motion and granted summary judgment to Roundabout on the issue of coverage only. It found that because the Continental policy was an "all risk" policy, the loss was presumptively covered and the burden shifted to the insurer to demonstrate that the loss was expressly excluded by the terms of the policy. The court rejected Continental's argument that the policy required physical damage to the insured's property, finding that the language "loss of, damage to, or destruction of [the insured's] property or facilities" encompasses a " loss of use" of the property. Otherwise, the court concluded, the phrase "loss of" would be redundant to "destruction of" the property. The court also ruled that the civil commotion exclusion did not apply since it was intended to cover occurrences arising from "war, civil insurrection or actions by government in violent, war-like circumstances." This appeal followed.

Continental makes two arguments in support of reversal. First, it argues that the IAS court misconstrued the unambiguous policy language requiring physical damage to the insured's property for covered losses and erroneously placed the burden on the insurer to demonstrate the applicability of a policy exclusion. Second, it contends that the civil commotion exclusion is applicable to the circumstances of this case and excludes coverage. We find sufficient merit in Continental's first argument to reverse the order on appeal, and, given this result, we do not reach the second argument.

At the outset, Continental argues that the IAS court erroneously held that the burden of proof lay with Continental to demonstrate that a policy exclusion was applicable. We agree. This aspect of the court's holding was premised on its characterization of the policy as an "all risk" policy, which, the court stated, allows recovery "for all losses not resulting from misconduct or fraud unless there is a specific policy provision excluding coverage of the loss in express terms," citing ***6** *M.H. Lipiner & Son, Inc. v Hanover Ins. Co.* (869 F2d 685 [2d Cir 1989]).

Overlooked by the IAS court, however, is the well-established principle that a policyholder bears the initial burden of showing that the insurance contract covers the loss (*see Morgan Stanley Group Inc. v New England Ins. Co.*, 225 F3d 270, 276 [2d Cir 2000]; *Chase Manhattan Bank v Travelers Group*, 269 AD2d 107, 108; *Simplexdiam, Inc. v Brockbank*, 283 AD2d 34, 37). Continental argued before the IAS court that the loss at issue was not covered under the terms of the "Perils Insured" and "Insuring Agreement" provisions of the insurance contract. Since, as discussed below, these provisions do not provide coverage for off-site property damage, the court erred in finding that the burden of proof had shifted to Continental to prove that the loss was excluded. Labeling the policy as "all risk" does not relieve the insured of its initial burden of demonstrating a covered loss under the terms of the policy (*see Whitaker v Nationwide Mut. Fire Ins. Co.*, 115 F Supp 2d 612, 617 [ED Va 1999] [the fact that a loss was fortuitous under an "all risk" policy does not automatically imply that such defects were covered by the policy; the "direct physical loss" language in the policy provides a further limitation on the types of fortuitous loss covered]).

Turning to the issue of whether Roundabout met its burden of showing a covered loss, we are guided by the well-established rules governing the interpretation of insurance contracts. "Where the provisions of [a] policy 'are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement'" (*United States Fid. & Guar. Co. v Annunziata*, 67 NY2d 229, 232 [citations omitted]). "Courts 'may not make or vary the contract of insurance to accomplish [their] notions of abstract justice or moral obligation'" (*Teichman v Community Hosp.*, 87 NY2d 514, 520, quoting *Breed v Insurance Co.*, 46 NY2d 351, 355). Nevertheless, "[t]he policy must ... be construed in favor of the insured, and ambiguities, if any, are to be resolved in the insured's favor and against the insurer" (*United States Fid. & Guar. Co. v Annunziata*, 67 NY2d 229, 232 [citations omitted]).

Contrary to the ruling of the IAS court, the language in the instant policy clearly and unambiguously provides coverage only where the insured's property suffers direct physical damage. The Insuring Agreement provides coverage for " loss of, damage to, or destruction of property or facilities ... contracted by the Insured for use in connection with such Production,caused***7** by the perils insured against." The Perils Insured clause covers "all risks of direct physical loss or damage to the [insured's] property," not otherwise excluded. Reading these provisions together, the only conclusion that can be drawn is that the business interruption coverage is limited to losses involving physical damage to the insured's property (*see Howard Stores Corp. v Foremost Ins. Co.*, 82 AD2d 398, 401, *affd for reasons stated* 56 NY2d 991 [no coverage under terms of policy for business interruption

loss at two stores where no physical damage occurred]; *Harry's Cadillac-Pontiac-GMC Truck Co., Inc. v Motors Ins. Corp.*, 126 NC App 698, 486 SE2d 249 [NC Ct App 1997] [no business interruption coverage where no "direct physical loss" to premises under terms of policy; loss occurred due to inaccessibility of plaintiff's dealership due to snowstorm]; *see also* 11 Couch on Insurance 3d § 167:15, at 167-20--167-21 [business interruption policies "generally require[ ] some physical damage to the insured business in order to permit recovery"]).

The IAS court's interpretation that the phrase "loss of" must include "loss of use of," because otherwise "loss of" would be redundant to "destruction of," is flawed. Initially, as Continental points out, "loss of" could refer to the theft or misplacement of theatre property that is neither damaged nor destroyed, yet still requires the cancellation of performances.

More importantly, the court's interpretation completely ignores the fact that the above-quoted Insuring Agreement is limited by the phrase "caused by the perils insured against," which, as noted, requires "direct physical loss or damage to the [insured's] property." The plain meaning of the words "direct " and "physical" narrows the scope of coverage and mandates the conclusion that losses resulting from off-site property damage do not constitute covered perils under the policy (*see Whitaker v Nationwide Mut. Fire Ins. Co.*, 115 F Supp 2d at 616 [coverage for "direct physical loss" did not include defective workmanship during construction of premises]; *Great N. Ins. Co. v Benjamin Franklin Fed. Sav. & Loan Assn.*, 793 F Supp 259 [D Or 1990], *affd* 953 F2d 1387 [9th Cir 1992] [cost of asbestos removal was not "direct physical loss " under policy where building undamaged and loss only economic]).

Other provisions in the policy support the conclusion that coverage is limited to instances where the insured's property suffered direct physical damage. In the "Definition of Loss" section of the policy, the measure of recovery is limited to "such length of time as would be required with the exercise of due ***8** diligence and dispatch to *rebuild, repair, or replace such part of the property herein described as has been lost, damaged or destroyed*" (emphasis added). If, as Roundabout argues, the policy covers losses resulting from off-site property damage, this provision would be meaningless since the insured obviously has no duty to repair a third party's property.

Similarly, the "Substitute Theatre" provision of the policy requires the insured to "exercise due diligence and dispatch to occupy a substitute theatre ... following *loss of, damage to or destruction of the theatre,*" and that the new theatre must be reasonably comparable in size and quality *"as the theatre which has been damaged or destroyed*" (emphasis added). This provision would also make little sense were there no requirement of physical damage to the insured's premises. An insurance policy should not be read so that some provisions are rendered meaningless (*see County of Columbia v Continental Ins. Co.*, 83 NY2d 618, 628), and such would be the result if Roundabout's position were upheld here.

The cases relied upon by Roundabout are inapposite as they involved policies which offered more expansive coverage than the policy in this case. For instance, in *Sloan v Phoenix of Hartford Ins. Co.* (46 Mich App 46, 207 NW2d 434 [1973]), the plaintiffs-insureds suffered business losses when the Governor of Michigan imposed a curfew during the 1967 riots. None of the theatres suffered any property damage. The business interruption provision of the subject policy included a "civil authorities extension" which stated "[t]his policy is extended to include the actual loss ... not exceeding 2 consecutive weeks, when ... access to the premises described is prohibited by order of civil authority." (46 Mich App at 49, 207 NW2d at 435-436.) Since other provisions of the policy required "damage to or destruction of real or personal property" (*id.*), but the civil authorities extension did not, the court ruled that the business interruption losses were covered under the policy. Here, of course, the policy did not contain a civil authorities extension--in fact it included a governmental authority exclusion.

Similarly, in *Fountain Powerboat Indus., Inc. v Reliance Ins. Co.* (119 F Supp 2d 552, 556 [ED NC 2000]), the policy contained both a civil authorities extension and an "ingress/egress clause" providing coverage for "loss[es] sustained during the period of time when ... ingress to or egress from real and personal property ... is thereby prevented." The District Court held that because neither provision incorporated a physical loss requirement, losses sustained due to lack of access to ***9** the property were covered under the policy. In contrast, the Perils Insured provision of the instant policy provides exactly such a limitation.

Datatab, Inc. v St. Paul Fire & Mar. Ins. Co. (347 F Supp 36 [SD NY 1972]), cited by Roundabout and relied upon by the IAS court, is also distinguishable. In *Datatab*, the insured leased the fifth and sixth floors of a building where a water main break damaged the building's water pumps. While there was no physical damage or restricted access to the leased floors, the incident rendered Datatab's air conditioning and computer systems inoperable. The policy extended business interruption coverage to losses "when as a direct result of a peril insured against[,] the premises in

which the property is located is so damaged as to prevent access to such property." (*Id.* at 37.) The District Court found that the policy terms "premises" and "access" were ambiguous, and ruled that the policy could reasonably be construed to cover losses arising from damage to portions of the building other than the leased floors, and which impeded the actual use of, not merely physical access to, covered property.

In this case, there is no similar ambiguity in the coverage provisions. There is no dispute that the premises covered in this policy is the Kit Kat Klub. Nor is there any provision in the policy extending coverage where access to the property is denied. Accordingly, Roundabout's reliance on *Datatab* is entirely misplaced.

Lastly, the position taken by Roundabout in its prior lawsuit against DeWitt cannot be ignored. As noted, Roundabout initially sued DeWitt arguing that it was negligent in failing to obtain from Continental business interruption coverage for the Kit Kat Klub covering off-site property damage, as it had obtained from Chubb Group for a different location. Now, Roundabout makes exactly the opposite argument--that the Continental policy covers off-site property damage. Since the express provisions of the policy support Roundabout's initial position in the *DeWitt* lawsuit, Continental is entitled to a declaration that the loss is not covered by its policy.

In light of the foregoing, it is unnecessary for us to rule on the applicability of the governmental authority exclusion.

Accordingly, the order of the Supreme Court, New York County (Helen Freedman, J.), entered January 16, 2002, which denied defendant-appellant Continental Casualty Company's motion for summary judgment seeking dismissal of the complaint and a declaration that Continental is not required to ***10** insure plaintiff-respondent Roundabout Theatre Company for its business interruption losses, and granted plaintiffs-respondents' cross motion for summary judgment on the issue of coverage only, should be reversed, on the law, with costs, defendant-appellant's motion for summary judgment dismissing the complaint and for a declaration that Roundabout's loss is not covered by the Continental policy granted. The Clerk is directed to enter judgment accordingly.

Williams, P.J., Nardelli, Mazzarelli and Marlow, JJ., concur.

Order, Supreme Court, New York County, entered January 16, 2002, reversed, on the law, with costs, defendant-appellant's motion for summary judgment dismissing the complaint and for a declaration that plaintiff Roundabout's loss is not covered by the defendant Continental's policy granted.***11**

Footnotes

1 The subject policy was initially procured for Roundabout by the DeWitt Stern Group (DeWitt), Roundabout's former broker. Roundabout dropped DeWitt and switched to J&H Marsh in April 1998, three months before the collapse at the Conde Nast building.

2 The Chubb policy covered business interruption losses "which you incur due to the actual interruption of your operations ... when a civil authority prohibits access to your covered property because of direct physical loss or damage caused by a covered cause of loss *to property not otherwise excluded in the vicinity of your covered property*" (emphasis added).

3 The causes of action against J&H Marsh are not at issue on this appeal.

Exhibit 11

STATE OF NEW YORK

10226--A

IN ASSEMBLY

March 27, 2020

Introduced by M. of A. CARROLL, FAHY, GRIFFIN, SIMOTAS, EPSTEIN, LENTOL, M. G. MILLER, PHEFFER AMATO, WRIGHT, DINOWITZ, ORTIZ, THIELE, CUSICK, BARRETT, COLTON, MALLIOTAKIS, MAGNARELLI, FALL -- Multi-Sponsored by -- M. of A. ENGLEBRIGHT -- read once and referred to the Committee on Insurance -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT in relation to requiring certain perils be covered under business interruption insurance during the coronavirus disease 2019 (COVID-19) pandemic

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. (a) Notwithstanding any provisions of law, rule or regulation to the contrary, every policy of insurance insuring against loss or damage to property, which includes, but is not limited to, the loss of use and occupancy and business interruption, shall be construed to include among the covered perils under that policy, coverage for business interruption during a period of a declared state emergency due to the coronavirus disease 2019 (COVID-19) pandemic.

(b) Every policy of insurance insuring against loss or damage to property, which includes, but is not limited to, the loss of use and occupancy and business interruption, whose policy expires during a period of a declared state emergency due to the coronavirus disease 2019 (COVID-19) pandemic, shall be subject to an automatic renewal of the policy at the current rate of charge.

(c) Any clause or provision of a policy of insurance insuring against loss or damage to property, which includes, but is not limited to, the loss of use and occupancy and business interruption, which allows the insurer to deny coverage based on a virus, bacterium, or other microorganism that causes disease, illness, or physical distress or that is capable of causing disease illness, or physical distress shall be null and void; provided, however, the remaining clauses and provisions of the contract shall remain in effect for the duration of the contract term.

(d) The coverage required by this section shall indemnify the insured, subject to the limits under the policy, for any loss of business or

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD16053-03-0

business interruption for the duration of a period of a declared state emergency due to the coronavirus disease 2019 (COVID-19) pandemic.

(e) This section shall apply to policies issued to insureds with less than 250 eligible employees in force on the effective date of this act. "Eligible employee" means a full-time employee who works a normal work week of 25 or more hours.

§ 2. (a) An insurer which indemnifies an insured who has filed a claim pursuant to section one of this act may apply to the superintendent of financial services for relief and reimbursement by the department from funds collected and made available for this purpose as provided in section three of this act.

(b) The superintendent of financial services shall establish procedures for the submission and qualification of claims by insurers which are eligible for reimbursement pursuant to this act. The superintendent of financial services shall incorporate in these procedures such standards as are necessary to protect against the submission of fraudulent claims by insureds, and appropriate safeguards for insurers to employ in the review and payment of such claims.

§ 3. (a) The superintendent of financial services is authorized to impose upon, distribute among, and collect from the companies engaged in business pursuant to the insurance law, such additional amounts as may be necessary to recover the amounts paid to insurers pursuant to section two of this act.

(b) The additional special purpose apportionment authorized pursuant to subdivision (a) of this section shall be distributed in the proportion that the net written premiums received by each company subject to the apportionment authorized by this section for insurance written or renewed on risks in this state during the calendar year immediately preceding, bears to the sum total of all such net written premiums received by all companies writing that insurance or coverage within the state during that calendar year, as reported.

(c) For the purposes of this section, "net written premiums received" means gross direct premiums written, less return premiums thereon and dividends credited or paid to policyholders, as reported on the company's annual financial statement.

§ 4. This act shall take effect immediately, and shall be deemed to have been in full force and effect on and after March 7, 2020 and shall apply to insurance policies in force on that date.

NEW YORK – EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA ADVISORY NOTICE TO POLICYHOLDERS

This Notice does not form a part of your insurance contract. No coverage is provided by this Notice, nor can it be construed to replace any provisions of your policy (including its endorsements). If there is any conflict between this Notice and the policy (including its endorsements), the provisions of the policy (including its endorsements) shall prevail.

Carefully read your policy, including the endorsements attached to your policy.

This Notice provides information concerning the following new endorsement, which applies to your new or renewal policy being issued by us:

New York – Exclusion Of Loss Due To Virus Or Bacteria Endorsement BP 06 04 01 07

This endorsement makes an explicit statement regarding a risk that is not covered under Section **I** – Property of your Businessowners Insurance Policy. It points out that there is no coverage under such insurance for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease. The exclusion in this endorsement applies to all coverages provided under Section **I** – Property of your Businessowners Coverage Form, including property damage and business income coverages.