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Landlord Permitted to Draw Down on Letter of Credit Caterer Posted as Security Despite COVID-19 Defense

A Recent Trial-Court Level Decision from Manhattan Gives Landlords a Victory in Disputes with Commercial Tenants Suffering COVID-19 Losses.

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A recent trial-court level decision from Manhattan gives landlords a victory in disputes with commercial tenants suffering COVID-19 losses. In *Backal Hospitality Group LLC v 627 West 42nd Retail LLC*, Justice Kathryn Freed denied a caterer and event space tenant's motion for a preliminary injunction seeking to require its Landlord to refund a letter of credit that the tenant had posted as security or, alternatively, post a bond in the letter of credit amount.

The tenant contended that Governor Cuomo's executive orders prohibited large gatherings, which were the type of events the tenant catered and were held in the event space. When the tenant did not pay its rent, the Landlord presented a site draft and drew down on the letter of credit that the tenant posted as security.

In denying the tenant's motion, Justice Freed reviewed the lease and concluded the tenant was not likely to succeed on the merits. Justice Freed noted that the tenant had not demonstrated that the landlord had accepted the tenant's purported surrender of possession of the premises. Justice Freed also relied upon a clause in the lease that provided that if rent became uncollectible due to any law or government order the parties would enter an agreement or take other action so that Landlord

could collect the maximum legal rent up to the rent reserved under the lease. The clause upon which Justice Freed relied appears to be designed to address potential future commercial rent regulation and Justice Freed noted that neither party had cited it to her. Nevertheless, Justice Freed concluded that the clause prevented tenant from arguing the lease had terminated.

Although noting that it was unnecessary to her decision, Justice Freed also found that the tenant had not established it would suffer irreparable harm without the injunction. The tenant had alleged that without access to the funds represented by the letter of credit it would not be able to refund deposits to clients that had booked events that had to be cancelled under Governor Cuomo's COVID-19 Orders (How the tenant would be able to access funds earmarked as held in its bank as a deposit for a letter of credit is not explained in the opinion.)

Thus, while the *Backal Hospitality Group* decision turns on specific unique facts, it is an early indication that tenants may not be able to rely on COVID-19 alone as a defense against landlords seeking to recover against the tenant's security.

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