

New Jersey – Force Majeure Law

Under New Jersey law, a force majeure clause “must be construed, like any other contractual provision, in light of ‘the contractual terms, the surrounding circumstances, and the purpose of the contract.’” *Facto v. Pantagis*, 390 N.J. Super. 227, 232, 915 A.2d 59, 62 (App. Div. 2007) (quoting *Marchak v. Claridge Commons, Inc.*, 134 N.J. 275, 282, 633 A.2d 531 (1993)). “When an unforeseen event affecting performance of a contract occurs, such a clause will be given a reasonable construction in light of the circumstances.” *Id.* Subject to the specific language of the clause, force majeure clauses are generally construed to apply to events beyond a party’s control and serious enough to interfere materially with performance. *Id.*

Though the interfering event must be unforeseen, that requirement is not applied strictly to the point of absurdity. For example, in *Facto v. Pantagis* the court held the possibility of a power outage at a banquet hall “was not absolutely unforeseeable during the hot summer months,” but that did not preclude relief from the operator of the banquet hall’s obligation to provide a wedding reception at the hall. 390 N.J. Super. at 233.

New Jersey precedent establishes that “[e]ven if a contract does not expressly provide that a party will be relieved of the duty to perform if an unforeseen condition arises that makes performance impracticable, ‘a court may relieve him of that duty if performance has unexpectedly become impracticable as a result of a supervening event.’” *Facto*, 390 N.J. Super. at 232, 915 A.2d at 62 (quoting *Restatement (Second) of Contracts* § 261 cmt. a (1981)). “In deciding whether a party should be relieved of the duty to perform a contract, a court must determine whether the existence of a specific thing is necessary for the performance of a duty and its destruction, or deterioration makes performance impracticable.” *Id.* (citation omitted). “If the contract contains no words of express condition to either party’s duty of performance, the court may have to fill the gap and determine whether the continued availability of certain means of performance should be deemed a constructive or implied condition.” *Id.* (quoting *14 Corbin on Contracts* § 75.7 (Perillo rev. 2001)); see also *JB Pool Mgmt., LLC v. Four Seasons at Smithville Homeowners Ass’n, Inc.*, 431 N.J. Super. 233, 246, 67 A.3d 702, 709 (App. Div. 2013) (“A successful defense of impossibility (or impracticability) of performance excuses a party from having to perform its contract obligations, where performance has become literally impossible, or at least inordinately more difficult, because of the occurrence of a

supervening event that was not within the original contemplation of the contracting parties.”).

“Specifically when dealing with a subsequent government act, “if the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made.” *Petrozzi v. City of Ocean City*, 433 N.J. Super. 290, 303, 78 A.3d 998, 1005 (App. Div. 2013) (quoting *Restatement (Second) of Contracts* § 264 (1981)).

New Jersey law also allows for excuse of performance under the doctrine of frustration of purpose. The doctrine differs from impossibility or impracticability, in that “the obligor’s performance can still be carried out, but the supervening event fundamentally has changed the nature of the parties’ overall bargain.” *JB Pool Mgmt., LLC*, 431 N.J. Super. at 246, 67 A.3d at 709. The principle applies where, after the contract is made, “a party’s principal purpose is *substantially frustrated without his fault* by the occurrence of an event the non-occurrence of which was *a basic assumption* on which the contract was made, his remaining duties to render performance are discharged, *unless the language or the circumstances indicate the contrary*. *Id.* (quoting *Restatement (Second) of Contracts* § 265 (1981) (emphasis in original). “Frustration of purpose deals with the problem that arises when a change in circumstances makes one party’s performance worthless to the other, frustrating his purpose in making the contract.” 431 N.J. Super. at 246-47, 67 A.3d at 709-10 (citation omitted). “The frustration must be so severe that it is not fairly to be regarded as the risks that the party invoking the doctrine assumed under the contract.” *Id.* (citation omitted).