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World War 2-era case cited in frustration of purpose doctrine

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Parties that want to back out of commercial property contracts due to government shutdowns can do so, a Los Angeles County judge ruled, citing the frustration of purpose doctrine.

Superior Court Judge Gregory Alarcon in his Nov. 5 ruling sided with property buyers whose dream of building a gym was dashed by the governor's indoor retail restrictions. Plaintiff BV Glendora LLC bought property from defendants Palo and Crystal Plesnik in November 2019 in the hope of building and opening a gym in the city of Glendora. BV Glendora LLC made a down payment of $1 million and financed the remainder of the $5.25 million purchase price with a loan from the defendants secured by a deed of trust. The property could not be used for any purpose other than a gym, both parties agreed. *BV Glendora LLC v. Palo Plesnik,* 20STCV30885 (L.A. Super. Ct., filed Aug. 13, 2020).

The first payment on the loan was due in April, before BV Glendora could start construction, and three weeks after Gov. Gavin Newsom's mandates prohibited most retailers, including gyms, from operating. The plaintiffs could not use the property as intended, and defaulted on the loan. The Plesniks moved to foreclose, which BV Glendora tried to stop, arguing that it was temporarily excused from performing under the loan agreements due to the frustration of purpose, impossibility, impracticability and force majeure.

Alarcon wrote in his order, "The balance of harm tips in plaintiffs' favor." Both the plaintiff and defendants cited cases from the World War II era that discussed equitable doctrines and contracts affected by government orders during the 1940s. Two primary cases, from both the plaintiff and defense, were the focal points of Alarcon's decision. The judge ultimately agreed with BV Glendora and decided its interpretation of *20th Century Lites LLC v. Goodman* 149 2d (1944) was most closely applicable to the COVID-19 situation affecting contracts. 20th Century stopped making payments for neon signs it leased from a company after a government order banning all outdoor neon lights from dusk until dawn due to the war.

"The defense of frustration or purpose applies when performance on a contract may not be impossible but the value of performance at least one of the parties and basic reason for contract, recognized as such by both parties, for entering into contract, has been destroyed by a supervening and unforeseen event," Alarcon wrote, referencing one case raised by the defendants, *Dorn v. Goetz,* (1948) 85 Cal. App. 2d 407, 410. The Dorn court found the frustration doctrine didn't excuse performance of a buyer who wanted to build a new home and contracted to sell the old property when the Veterans' Emergency Housing Act of 1946 passed. The act set aside building materials only for the intended purpose of housing veterans returning from the war. Both plaintiffs and defendants in Dorn recognized the contract's purpose was about the sale of the home, not construction.

The Dorn court ruled the plaintiffs did not show they were harmed by the delay nor could give reasons why it could not fulfill the contract for the sale of the house or that it would be affected by the federal law, Alarcon noted.

Unlike Dorn, BV Glendora showed that the public health orders disallowed operation of the indoor gym facility. The case boiled down to a mutual understanding of the parties that the purpose of their agreement was to provide a loan for the plaintiff to build a gym on the property, Alarcon wrote.

"As such, plaintiff is not presently able to use the property for the approved purpose of allowing gym facilities on the premises; and plaintiff has adequately argued that the continued provision of the premises to the plaintiff is presently without value," Alarcon ruled.

Steven Morris, a partner at Turner Friedman Morris and Cohan LLP, who represents the Plesniks, could not be reached for comment.

Miller Barondess partner Amnon Z. Siegel, who secured the injunction on behalf of BV Glendora LLC, said he hopes the judge's order will provide guidance in showing that there is ongoing viability for cases that are decades old but still have equitable doctrines that continue to apply during government-mandated shutdowns. Alarcon's findings at this stage in the litigation is also helpful, Siegel said, there is no current governmental order in Los Angeles County prohibiting nonjudicial foreclosures during the pandemic.

While there have been some disputes arising from residential foreclosures for pandemic-related loss of income where mortgage owners are prohibited from foreclosing, the gym operator is in an entirely different situation, Siegel said. In the early days of the shutdown, there were discussions about equitable doctrines including impracticability and force majeure, "but unfortunately, there isn't a whole lot of case law out there that squarely addresses those doctrines during a pandemic," he said.

"The COVID-19 pandemic and associated government restrictions were not foreseeable to the parties in 2019 before this virus even existed," Siegel explained. "These doctrines are alive and well, and can apply to COVID-related restrictions all over the country and can apply to more than these types of lease contracts."

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