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Coronavirus and tenancy law

A new decision by a Zurich court “partially” admits a restaurant owner’s claim for a reduction of the rent due to the covid situation and the ordered closures of public establishments.

One year ago, the undersigned presented a decision of 23 April 2021, also by a Zurich court, in proceedings for the release of the objection to the landlord’s claim against the tenant for the unpaid rent. The Zurich court did not therefore act as a judge of the merits of the case in matters of tenancy law but only as a judge of the release of the objection.

The tenant in question, who was a restaurant owner, had withheld part of the rent, considering it unjustified to have to pay the entire rent following the ordered closures. In other words, he had not paid the full rent. The landlord had sent a summon to pay the unpaid rent. The tenant objected to the summon to pay and the landlord had requested that the objection be lifted.

In this decision of 23 April 2021, the judges considered that the restaurant owner had valid objections and also considered that “the rental contract […] concluded between the parties does not constitute a title of discharge” for the landlord’s claim.

They had therefore refused to lift the opposition to the summon to pay but nothing more.

In other words, the principle of a rent reduction due to the Covid situation and the ordered closures of public facilities was not accepted.

On 28 January 2022, a new decision was rendered by the Zurich authorities, this time by a judge of the court of first instance in matters of tenancy (MG.2021.20 of 28 January 2022, decision published and commented in Newsletter May 2022 Bail.ch, https://bail.ch/bail/page/newsletter/2148).

In this case, the tenant was the operator of a fast-food restaurant in which “food and drinks are served both for consumption on the premises and for take-away” (free translation of the decision).

The restaurant owner requested a 100% rent reduction for the periods from 16 March 2020 to 31 March 2020 and from 1 May 2020 to 10 May 2020.

The Zurich court partially agreed.

In its decision, the court recalled the principles regarding defects in the rented property. In particular, it recalls that “*defects over which the landlord has no influence or which result from the environment or the behaviour of third parties may also constitute a defect in the rented property and lead to a reduction in the rent*” (free translation of the decision). It also points out that *‘if the rented premises cannot be used due to a public law prescription against the landlord, there is a defect (ZK-Higi/Bühlmann, Art. 256 CO, N 40). There is*

no defect within the meaning of Art. 259d OR if this public law prescription concerns the tenant (e.g. restaurant licence to operate a restaurant) (Sarah Brutschin, Xavier Rubli, Pierre Stastny, legal opinion on behalf of the Swiss Tenants' Association, Payment of rent for commercial premises during the Covid-19 epidemic)" (free translation of the decision).

As a reminder, according to Article 259d of the Swiss Code of Obligations, "*if the defect hinders or restricts the use for which the property was rented, the tenant may demand from the lessor a proportional reduction of the rent from the moment the lessor became aware of the defect until the defect is remedied*".

In its decision, the Zurich court explains that some Swiss authors consider that article 259d CO "*does not apply after the Confederation has ordered the provisional closure of certain establishments because the closure of the businesses ordered by the authorities is not due to the rented premises and its condition, but to the commercial activity carried out by the tenant, which is currently not permitted (Peter Higi, Gutachtenliche Stellungnahme zur Frage der Her-absetzung des Mietzinses wegen Mängel des Geschäftsraumes im Zusammenhang mit der 'Corona-Pandemie', Zurich, 26 March 2020)*

The lessor cannot be bound by warranties that relate to matters outside his sphere of influence. The lessor cannot therefore be expected to guarantee that the official opening hours of the shops will never be changed or that the public authorities will never order the closure of the shops" (free translation of the decision).

For another part of the Swiss authors – and the Zurich court agrees with them in its decision – Article 259d applies because "*Ordinance 2 of COVID-19 is addressed to both landlords and tenants and has a connection to the rented object, since it specifically orders its temporary closure (Sarah Brutschin/Xavier Rubli/Pierre Stastny, Avis de droit, Paiement des loyers des locaux commerciaux pendant l'épidémie de Covid-19, Genève, Lausanne, Bâle, 23 mars 2020, p. 3; David Lachat/Sarah Brutschin, Les loyers en période de coronavirus, mp 2020, p. 111). […] the provisions of the ordinance COVID-19 2 must be complied with not only by the tenant, but also by the landlord if he himself owns a business or wishes to rent a vacant property during the period of application of the ordinance (David Lachat/Sarah Brutschin, Die Mieten in Zeiten des Coronavirus, mp 2020, p. 110 f.)*' (free translation of the decision).

In the case decided by the Zurich court, the court found that "***the use of the rented property was expressly agreed as a fast-food restaurant […]. As a result of the closure of restaurants by the Federal Council, the plaintiff was able to continue to operate the premises as a take-away […]. However, the area normally available for consumption could not be used. A catering establishment with consumption on the premises was not possible. The actual condition therefore differed from the contractually agreed condition for the duration of the closure ordered by the authorities***" (free translation of the decision).

For the Zurich court, ***'the COVID-19 2 regulation is not addressed exclusively to tenants or landlords, but to the community, and can therefore in principle concern tenants as well as landlords'*** (free translation of the decision). The Zurich court also stated that the tenant is affected by the Covid Ordinance because he can no longer operate his restaurant and the landlord is affected because he can no longer fulfil his obligation to provide a rental property in accordance with the agreement reached.

For the Zurich court, this is therefore a defect in the leased object in the same way as, for example, *'immissions which originate outside the lessor's sphere of influence and which are not necessarily related to the object'* (free translation of the decision).

However, the Zurich court partially accepted the restaurant owner's claim, considering that he had been able to continue to operate his establishment as a "*simple takeaway*". The Zurich Court therefore refused the 100% reduction requested by the restaurant owner and held that "*in the event of a temporary closure of the consumption area for approximately two months in the spring, assuming that the restaurant business is decisively compensated by the take-away business, a 30% reduction in rent in accordance with Art. 259d CO seems appropriate*" (free translation of the decision).

In conclusion, the Zurich court thus agrees with a number of Swiss authors who consider that the ordered closure of public facilities is a defect within the meaning of Article 259d of the Swiss Code of Obligations and may give rise to a reduction in rent, the amount of which must be determined on a case-by-case basis, even if the 'defect' originates outside the lessor's sphere of influence and is not necessarily related to the object itself.

However, it should be kept in mind that the Zurich decision is only a first instance decision. It is likely that it will be appealed to the cantonal court of the canton of Zurich and then perhaps to the Federal Court.

More on this in the next episode or in a future article by the undersigned …

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