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Decaffeinated: *Simon Property Group L.P. v. Starbucks Corporation* Is Not a Fix for the Retail Apocalypse

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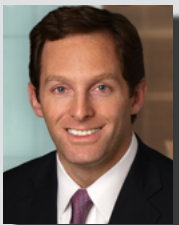
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The shopping center world is abuzz with the recent decision in the *Simon Property Group L.P. v. Starbucks Corporation* decision, which prevented Starbucks from shuttering 77 of its Teavana stores in Simon-owned or managed properties. **While this decision is without doubt a tremendous victory for Simon, it is not a guarantee that other shopping centers owners or managers can prevent other retailers from closing their stores prematurely.**

The *Simon Property* decision turned heavily on four facts specific to the dispute between Simon and Starbucks, which are not often present in retail closings.

1. The continuous operations provisions in nearly all the Teavana Leases identified specific performance as a remedy for breach of that particular provision.

Continuous operation provisions are common in shopping center leases. Indeed, it is no exaggeration to suggest that a shopping center cannot survive without such provisions because continuous operation provisions protect the very co-tenancy that creates a vibrant and successful center. Each of the leases (the “Teavana Leases”) at issue in *Simon Property* contained a continuous operations provision requiring Starbucks’ Teavana stores to remain open and to operate continuously during the term of the leases. These provisions also required Starbucks to pay Simon a specified amount of additional rent in the event Starbucks ceased operating these stores. The *Simon Property* court provides a detailed and thorough discussion about the importance of co-tenancy.

Typically, when a tenant closes prematurely and thereby breaches a continuous operations provision, a landlord looks to the general remedies provision of the lease for its remedies. However, in *Simon Property*, most of the Teavana Leases differ from many shopping center leases because the continuous operations provisions contained additional critical language

regarding Simon's remedy: 72 of the continuous-operations provisions expressly state that Simon "shall have the right to specific performance by [Starbucks] upon [Starbucks's] failure to comply with the provisions of this Section" In addition, the general remedies provision in all of the Teavana Leases, including the five that did not identify specific performance as a remedy for breach of the continuous operations provision, authorized Simon to obtain injunctive relief for any breach "or threatened breach by Tenant of the terms and provisions of this Lease" The *Simon Property* court noted that courts typically enforce a party's negotiated remedy of specific performance. Starbucks did not – and presumably could not – deny the existence of these clearly defined remedies or that closing its Teavana stores would violate these continuous operations provisions.

While we will never know if Simon would have enjoyed the same success against Starbucks if specific performance had not been clearly identified as a remedy for breach of the continuous operations provisions, the court found it significant that the continuous operations provisions in 72 of the 77 leases expressly gave Simon the right to specific performance as a remedy. There could be no mistake in these 72 leases: the parties clearly intended that Simon could compel Starbucks to keep its Teavana stores open and operating. Shopping center owners can learn from the *Simon Property* decision to include specific remedies for specific types of breaches, an additional protection beyond the general remedies available. If a shopping center owner needs a specific tenant to remain open and operating, the lease should clearly state this necessity and provide shopping center owner with the requisite remedy.

2. Unlike the majority of retailers shuttering stores in a strategic effort to survive, Starbucks is financially sound, which minimized the hardship of the court's order requiring it to continue to operate.

The *Simon Property* court was also swayed by Starbucks' balance sheet. The court was clear to highlight that although Starbucks would lose about \$15 million if it was forced to keep its Teavana stores open, Starbucks had \$4 billion of

revenue in 2017 and more than \$2.7 billion of cash and cash equivalents on hand, up from \$2.1 billion the year before.

The court also recognized that Starbucks' hardships were self-imposed. Starbucks voluntarily acquired these Teavana stores and assumed these 77 leases knowing that they contained continuous operation provisions, and then Starbucks unilaterally made the decision to announce the closure of these stores. Moreover, the court noted that Starbucks was seeking to close these 77 Teavana stores "simply as a cost cutting measure where the existence of the company was not at issue." "[C]losure of an underperforming store where the company as a whole was viable could present a scenario where a mall owner would suffer irreparable harm due to the consequences of the closure." Relieving a party of its obligation – in this case opening and continuing to operate – simply because it is unprofitable or burdensome runs afoul of the public policy that encourages parties to act as promised. In contrast, many of the store closings that make headlines occur because the business has failed, and the retailer has filed for bankruptcy or shuttered stores in a desperate attempt to avoid that fate.

3. The number of Teavana stores that Starbucks sought to close weighed in favor of Simon's request for specific performance.

The *Simon Property* court also suggested that closing one Teavana store in one Simon mall might not have been enough. Stores like Teavana are not anchor tenants, generally do not drive foot traffic, and probably do not trigger violations of co-tenancy provisions that could have a domino effect. When these Teavana stores and the number of shopping centers affected were taken in aggregate, however, the magnitude was much greater. Shopping center owners and managers should not lend too much weight to the *Simon Property* decision unless a vibrant retailer is looking to close a large number of stores in violation of continuous to operations provisions.



4. The Teavana stores had not actually closed yet, making Simon's request to maintain the status quo.

Lastly, each of these Teavana stores was open and operating at the time of the injunction, and none of these stores had been problem tenants in the past. While courts are generally reluctant to impose "mandatory" injunctions, which compel a party to act in a certain manner, the injunction in the *Simon Property* case was actually a "prohibitory" injunction, meaning that it preserved the *status quo*. Simon was not seeking to compel Starbucks to re-open any of its Teavana stores; none of them had closed yet. Moreover, the court discarded any suggestion that monitoring Starbucks' operation of these 77 stores would be problematic or burdensome for the court because none of these stores had been a problem tenant for Simon in the past. It begs the question of whether Starbucks would have been better off simply closing these 77 stores without warning.

Conclusion

After watching many retail chains fail during the so-called retail apocalypse, the *Simon Property* decision is sure to embolden some shopping center owners and managers to push back against closures in the future. The court's decision provides a detailed analysis of continuous operations provisions and co-tenancy issues and provides guidance for both shopping centers and retailers alike. **It may not, however, give shopping center owners a surefire way to prevent retailers from closing stores prematurely, just as it should give warning to retailers looking to close selected underperforming stores.**

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