

CAUSE NO. 2017-24217

BARON REAL PROPERTY HOLDINGS LLC and TSQUARE APTS LLC	§	IN THE DISTRICT COURT
Plaintiffs,	§	
	§	
	§	
v.	§	
	§	OF HARRIS COUNTY, TEXAS
AML/ BPMT TOWNE SQUARE PARTNERSHIP, AMLI RESIDENTIAL PROPERTIES, L.P., AMLI RESIDENTIAL PARTNERS LLC, and AML MANAGEMENT COMPANY	§	
Defendants.	§	295TH JUDICIAL DISTRICT

PLAINTIFFS' EMERGENCY MOTION FOR CONTINUANCE

TO THE HONORABLE JUDGE ROTH:

There is no reason anyone should get sick—or die—to resolve this long-running business dispute that, while important, matters only to the parties. Because of the continuing health and safety threat posed by the COVID-19 pandemic (and in light of the late disclosure of AMLI Management Company’s CEO Greg Mutz as a fact witness), Plaintiffs Baron Real Property Holdings LLC and TSquare Apts LLC respectfully ask that the Court grant this first request for a continuance until the Texas Supreme Court lifts the general prohibition against jury trials. At that time, the Court can reevaluate whether and when a jury trial in this case can be conducted in a manner that ensures both a fair trial and the health and safety of participants.

The core reason for a continuance is the COVID-19 pandemic. Baron joined the Court in the hope that a September 2020 setting would be safe. However, after hearing the proposed safety plan and in the course of preparing for trial, it has become clear to Baron that it is simply not possible to conduct a safe or fair trial in this case at this time. This is a complex case involving

tens of millions of dollars and requiring witnesses from across the country. And the trial will last more than two weeks, and possibly up to four, and will involve numerous participants, including court staff, litigants, witnesses, and jurors and prospective jurors. It is, in other words, exactly the type of case that should not go forward amid the COVID-19 pandemic—while some have concluded that “small socially distanced trials might work,” not even the most optimistic think “complex or extended cases” should be tried.¹ That should be especially so in Harris County, where the infection rate for COVID-19 exceeds 85 percent of all other Texas counties combined.²

In addition to COVID-related health and safety concerns, Baron also seeks a continuance based on the late disclosure of AMLI Management Company’s CEO Greg Mutz as a fact witness. Until just last week, AMLI had told the Court and Baron that Mutz would “be the corporate representative for all the defendants at trial.” But no longer: AMLI has now disclosed that Mr. Mutz a person with relevant facts under Rule 194.2(e). His deposition has not been taken and is scheduled for September 2, 2020. A continuance is appropriate to permit Baron the opportunity to follow up on Mr. Mutz’s testimony and prepare for trial. Baron will be severely prejudiced absent that opportunity.

The circumstances surrounding this motion are extraordinary and unprecedented. There is good cause to continue the trial setting. The Court should grant a continuance.

I. This complex commercial case should not be one of the “limited” cases tried while the COVID-19 pandemic rages in Harris County.

The current trial setting in this complex commercial case cannot be squared with the Texas Supreme Court’s directives regarding the protection of health and safety of trial participants. And

¹ Daniel Siegal, *Don’t Expect Pandemic Trials to Scale Up, Fla. Judge Says*, LAW360.COM (Aug. 20, 2020), <https://www.law360.com/articles/1303112> (last visited Aug. 21, 2020) (Exhibit C-1); *see also* Decl. of Catherine Troisi, Ph.D (Exhibit A); Jeff Tillotson Aug. 20, 2020 Letter to the Court (Exhibit B).

² Worldometer: Coronavirus, <https://www.worldometers.info/coronavirus/usa/texas/> (last visited Aug. 24, 2020) (Exhibit C-2).

it makes little sense to risk the health and safety of court staff, jurors, parties, and attorneys just so two businesses can resolve a purely private, non-time-sensitive dispute affecting no one else. The risks of trial *far* outweigh the need for speedy resolution.

The Texas Supreme Court has mandated that, “[s]ubject only to constitutional limitations, all courts in Texas . . . must[,] to avoid the risk to court staff, parties, attorneys, jurors, and the public[,] . . . take . . . reasonable action to avoid exposing court proceedings to the threat of COVID-19.”³ For that reason, generally, “[a] court must not hold a jury proceeding, including jury selection or a jury trial, prior to October 1.”⁴ While the Supreme Court has authorized “a limited number of jury proceedings” to occur before October 1, it has mandated that any such cases may proceed only if, among other things, “restrictions and precautions are taken to ensure the health and safety of court staff, parties, attorneys, jurors, and the public.”⁵

Baron appreciates the precautions this Court has in place to protect those involved in any proceedings to take place. But the nature and scope of this case preclude it from proceeding to trial in a manner that complies with the Supreme Court’s mandate.

For starters, COVID-19 continues to ravage the Houston area. Harris County has adopted a system to inform residents about the current threat from COVID-19 and about actions that County officials “strongly urge residents to take to stay healthy, save lives, and ensure our local economy recovers in a way that is sustainable over the long term.”⁶ Currently, though there has been mild improvement in case counts and other indicia of pandemic containment over the past

³ Misc. No. 20-9095, *22nd Emergency Order Regarding the COVID-19 State of Disaster* (Tex. Aug. 6, 2020), at ¶3.

⁴ *Id.* ¶1.

⁵ *Id.* ¶¶7, 8.b.

⁶ “Stay Safe,” Ready Harris, <https://www.readyharris.org/stay-safe> (last visited Aug. 24, 2020) (Exhibit C-3).

weeks, the threat level is the highest it can be: “Level 1: Severe-Stay Home.”⁷ That means, according to the County, that the threat posed by COVID-19 transmission is “severe and uncontrolled,” and residents are recommended to “take action to minimize contacts with others wherever possible and avoid leaving home except for the most essential needs like going to the grocery store for food and medicine.”⁸

For these reasons, Chief Judge Lee H. Rosenthal of the U.S. District Court for the Southern District of Texas has issued an order continuing *all trials* (even criminal ones) in the Houston and Galveston divisions of that court currently set on or before October 1, 2020. These continuances are necessary, she concluded, “[d]ue to the court’s reduced ability to obtain an adequate spectrum of jurors and due to the reduced availability of attorneys and court staff to be present in courtrooms because of the public-health risk.”⁹ Chief Judge Rosenthal’s order reflects that jurors and other trial participants should be permitted to do what government officials tell them they need to do to stay safe: stay home and avoid large groups. They cannot follow this guidance if they are forced to participate in a jury trial during this uncontrolled phase of the pandemic.

But even if *some* jury trials can or should take place, a jury trial *in this case*—which will last for weeks, require travel by witnesses and representatives from other states, and necessitate a large venire of potential jurors—can and should not. The following reasons make that clear:

1. *The nature of the dispute.* This commercial real-estate dispute is likely one of the most complex matters on this Court’s docket, with an amount in controversy exceeding \$30 million.

⁷ *Id.*

⁸ *Id.*; see also Texas DPHS, Minimum Recommended Health Protocols, All Individuals, available at <https://dshs.texas.gov/coronavirus/opentexas.aspx#protocols> (last visited Aug. 24, 2020) (Exhibit C-4).

⁹ Special Order H-2020-22, U.S. District Court for the Southern District of Texas – Houston and Galveston Divisions, *Sixth Supplemental Order* (Aug. 10, 2020), available at <https://www.txs.uscourts.gov/sites/txs/files/Special%20Order%20H-2020-22%20Sixth%20Supplemental%20Court%20Operations%20in%20Houston%20and%20Galveston%20During%20COVID-19.pdf> (last visited Aug. 24, 2020) (Exhibit C-5).

2. *The length of the trial.* Before the pandemic, the parties estimated that trial would last two weeks. Now, in light of the challenges expected to arise throughout the proceeding, the trial will almost surely last three weeks and may extend into a fourth week. This, of course, increases the risk to participants. As the CDC guidelines recognize, “the longer [the] interaction lasts, the higher the potential risk of becoming infected with COVID-19 and COVID-19 spreading.”¹⁰

3. *The number and location of witnesses.* The parties have identified more than 40 witnesses they plan to call at trial, including some potential witnesses who will be required to travel from outside the region and state:

- Greg Mutz (AMLII’s CEO) – Chicago (which will require witnesses to quarantine for 14 days upon returning from Houston)¹¹
- Char Sparrow, Julie Martens, and Kisha Donahue (AMLII employees) – Chicago
- Traci Hall (AMLII employee) – Dallas
- Tony Childress (AMLII’s engineering expert) – Dallas
- Scott Fisher and Jeff Riggs (Baron principals) – Denver
- Greg Hector (Lighthouse Consulting) – Denver
- Sharon Kraft (due diligence) – Colorado
- Richard Klenke (Blackstone) – Lewisville, Texas

¹⁰ Exhibit A ¶33.

¹¹ No. 2020-10, *Quarantine Restrictions on Persons Entering Chicago from High Incidence States*, Order of the Commissioner of Health of the City of Chicago, available at <https://www.chicago.gov/city/en/sites/covid-19/home/emergency-travel-order.html> (last visited Aug. 24, 2020) (Exhibit C-6).

The CDC cautions that “travel increases your chances of getting infected and spreading COVID-19.”¹² Airports, airplanes, and hotels pose a heightened risk to travelers, who in turn pose a heightened risk to other participants at trial.

4. *The number of participants.* Baron is represented by five lawyers; AMLI is represented by six. Paralegals, IT specialists, and other support staff will assist. Although not all of these personnel will be inside the courtroom at any given time, they will be interacting with each other throughout the trial. They will also be coming in and out of the courtroom daily, increasing the potential number of interactions with other trial participants as well as the risk of infection through “aerosolized” droplets.¹³

5. *Risks associated with prohibiting face masks.* The CDC “does not recommend use of face shields for normal everyday activities or as a substitute for cloth face coverings.”¹⁴ While prohibiting face masks over a one-day trial might be an acceptable trade-off to permit participants to see expressions, read lips, etc., the risk is too great over 15 or 20 days.

6. *Mistrial caused by juror attrition.* As the Court has noted, during a lengthy trial it is all but certain that some number of jurors will experience mild symptoms, such as coughs or slight fevers. These types of symptoms, which would normally be inconsequential, will likely require dismissal of affected jurors under current safety protocols. Moreover, the number of alternative jurors is limited by the courtroom’s current total occupancy limit of 25 persons. As a result, there is significant doubt that at least ten jurors will remain by the end of a three-to-four-week trial to render a verdict.

¹² Exhibit A ¶32.

¹³ *Id.* ¶22.

¹⁴ *Id.* ¶41.

7. A skewed jury pool. The Court has further observed that many or most potential jurors are unwilling or unable to participate in any trial at this time, in part because so many Harris County residents are caring for children, the elderly, and the sick. For a lengthy trial like this one, the number of jurors willing and able to serve will be few and far between, leading to a jury pool that is significantly skewed. Moreover, jury research reveals that jurors who do participate in a lengthy trial tend to resent and distrust witnesses who appear remotely.

8. A non-diverse jury pool. The disproportionate impact of the pandemic on diverse communities will likely affect the diversity of the jury pool. It has been shown that members of communities of color are more likely to be caring for children and sick family members and rightfully may have heightened concerns about additional public contact. Survey data also shows that “minority respondents expressed higher concerns over their health and safety, a greater fear of possible COVID-19 exposure, and far greater economic hardship in serving on a jury.”¹⁵ There is thus a “strong likelihood that, if summoned for a trial during August or September 2020, venire panels in Harris [County] will be far, far less diverse than [its] demographics and past attendance rates would suggest.”¹⁶ The disparate impact on minority service is even more pronounced in cases lasting longer than a few days, like this one.¹⁷

9. No urgency. In many cases, justice delayed is justice denied. But not here. Baron’s concern is that the trial be as fair as possible, not that it begin as soon as possible. Limited judicial resources should be allocated to simpler cases in which the parties desire and agree to have their claims resolved expeditiously in a modified, experimental form of jury trial.

¹⁵ Exhibit B at 4.

¹⁶ *Id.* at 8-9.

¹⁷ *Id.* at 9.

10. Mistrial caused by COVID-19 diagnosis or exposure. Over the course of several weeks, there is a significant possibility that one or more individuals involved in the trial will report a positive COVID-19 test result or a known exposure to someone outside the courtroom who is infected with COVID-19. Indeed, according to the “COVID-19 Event Risk Assessment Planning Tool” published by researchers at Georgia Tech University, there is an *76 percent chance* that, in a gathering in Harris County of fifty people, at least one participant will have COVID-19.¹⁸ For an event with 100 people—a more likely approximation of the total number of participants in jury selection—there is a *94 percent chance* that at least one participant will have COVID-19.¹⁹ The risk is even more heightened here (although 94% is high) because the trial is scheduled to begin after Labor Day weekend, when widespread social activities are expected to take place, which could lead to an increase in cases just as there was after Memorial Day and Fourth of July.²⁰ Should this occur, every person involved in the trial will presumably be directed to quarantine while awaiting test results, causing a mistrial.

11. Health and safety of trial participants. Finally, more is at risk than a mistrial. As the Court well knows, “COVID-19 is very contagious.”²¹ A major reason is that people can spread the virus before they start to show symptoms or even when they show no symptoms at all.²² Such asymptomatic individuals may be the most dangerous for a large event like a trial, as “[i]t is difficult to identify asymptomatic carriers because they can pass temperature screens and other

¹⁸ Georgia Tech University, COVID-19 Event Risk Assessment Planning Tool, <https://covid19risk.biosci.gatech.edu> (last visited Aug. 24, 2020).

¹⁹ *Id.*

²⁰ Exhibit A ¶¶14, 30

²¹ Exhibit A ¶21.

²² *Id.*; see also Jordan Gruskay, MD et al., *Universal Testing for COVID-19 in Essential Orthopaedic Surgery Reveals a High Percentage of Asymptomatic Infections*, J. BONE JOINT SURG. AM. Vol. 102-A, No. 16 (2020) (Exhibit C-7).

tests designed to identify people expressing symptoms of a COVID-19 infection.”²³ The potential for the spread of COVID-19 at trial is, in turn, a major risk because “COVID-19 is potentially fatal.”²⁴ The risk is not limited to older people or those with underlying conditions; “COVID-19 can be fatal to healthy individuals from just about all age groups. In other words, anyone can be infected with COVID-19 and suffer serious and potential fatal outcomes.”²⁵ The near certainty that at least one participant in this trial will have COVID-19 or contract it during trial therefore poses a substantial risk to everyone else involved. That participant will be in a confined courtroom with dozens of other people for hours at a time over the course of multiple weeks. The risk is substantial that the virus will spread to other participants, as well as their families and communities, no matter the precautions taken.²⁶ Trying this case sooner rather than later is simply not worth risking the health (and potentially the lives) of those involved in this case, as well as their families and communities.

II. In addition, and in any event, the trial setting should be continued in light of AMLI’s untimely designation of Mr. Mutz as a fact witness.

Another reason counsels in favor of a continuance: it appears AMLI intends to have Mr. Mutz testify as a fact witness, despite untimely disclosing Mr. Mutz and subsequently informing the Court that Mr. Mutz would only testify in his capacity as corporate representative. Absent additional time to follow up on Mr. Mutz’s fact testimony through discovery, AMLI’s untimely designation of Mr. Mutz as a fact witness will severely prejudice Baron.²⁷

²³ *Id.*

²⁴ *Id.* ¶18.

²⁵ *Id.* ¶20.

²⁶ *Id.* ¶¶21-24.

²⁷ See *Standard Sav. Ass’n v. Cromwell*, 714 S.W.2d 49, 51 (Tex. App.—Houston [14th Dist.] 1986, no writ) (prejudice appropriate consideration when deciding motion for continuance).

AMLI did not disclose Mr. Mutz as a potential witness until 18 months after discovery closed. Baron moved to strike this untimely disclosure. In response to Baron’s motion to strike the untimely disclosure, and in clear recognition that Mr. Mutz would not be able to testify as a potential fact witness due to AMLI’s untimely disclosure, AMLI came up with the only solution it could to potentially allow Mr. Mutz to testify at trial: “Mr. Mutz will serve as the corporate representative for one or more of the AMLI defendants at trial, and *he is entitled to testify in that capacity whether or not AMLI disclosed him.*” To be sure, Defendants cited *only* to cases that a trial court may not exclude the testimony of a corporate representative at trial.

Indeed, at the March 18, 2020 hearing on Baron’s motion to strike, AMLI’s counsel reiterated this argument:

19	But at this point, our intention at this
20	point is to have Mr. Mutz be the corporate
21	representative for all the defendants at trial.
22	THE COURT: So that would be the AMLI Towne
23	Square, the AMLI Residential Property, AMLI Residential
24	Partners, and AMLI Management Company; is that correct?
25	MR. FIELDING: That's correct, Your Honor.

Only on August 18, 2020, when Baron’s counsel asked AMLI’s counsel to confirm that Mr. Mutz would only be testifying as the corporate representative, AMLI’s counsel responded that Mr. Mutz will be testifying as a fact witness.

If Mr. Mutz testifies as a fact witness at trial, Baron will need more time to depose Mr. Mutz and, as Baron’s counsel mentioned at the parties’ March 18, 2020 hearing, will likely need additional discovery based on Mr. Mutz’s testimony. If Baron is forced to go to trial without this

and Mr. Mutz is permitted to testify as a fact witness, Plaintiffs will be severely prejudiced. A continuance is warranted for this additional reason.

CONCLUSION AND PRAYER

The risks of holding trial in this case at the height of the COVID-19 pandemic outweigh the marginal benefits of resolving this dispute now, rather than in a few months. And a continuance is all the more appropriate given AMLI's late designation of Mr. Mutz as a fact witness. Accordingly, Baron respectfully requests that the Court grant this motion for continuance. Baron also requests all other relief to which it may be entitled.

Respectfully submitted,

/s/ Lynne Liberato

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on all counsel of record pursuant to the Texas Rules of Civil Procedure via e-service on August 24, 2020:

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IN THE DISTRICT COURT

HARRIS COUNTY, TEXAS

295th JUDICIAL DISTRICT

VERIFICATION

STATE OF TEXAS

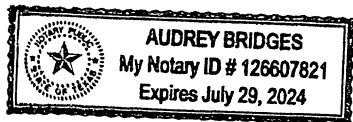
COUNTY OF HARRIS

Before me, the undersigned notary, on this day personally appeared William S. Helfand, who being by me duly sworn on his oath, deposed and said that he has read the above and foregoing Motion and every statement contained therein is within his personal knowledge and is true and correct.



William S. Helfand

SUBSCRIBED AND SWORN TO BEFORE ME on this 24th day of August, 2020 to certify which witness my hand and seal of office.





NOTARY PUBLIC

My Commission Expires: July 29, 2024