

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FIRST DEPARTMENT

558 Seventh Ave. Corp. v. Times Sq. Photo Inc.

2021 N.Y. Slip Op. 03244 (App. Div. 2021) · No. Appeal No. 13889; Case No. 2021-00177; Index No. 653090/20 · Decided May 20, 2021

SUMMARY

The Appellate Division, First Department, reversed an order that denied the plaintiffs' motion for summary judgment on liability and sua sponte dismissed the complaint in a commercial landlord-tenant dispute. The court held that the tenant's defenses of frustration of purpose and impossibility did not excuse its obligation to pay rent during the COVID-19 pandemic, and granted summary judgment on the first cause of action for unpaid rent. The court reinstated the complaint, permitted security-deposit arguments to be addressed at trial on damages, and allowed factual showings regarding the guarantor's liability for periods outside the statutory restriction on commercial lease guaranties.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, First Department
WRITING FOR THE COURT	Renwick, J.P.; Manzanet-Daniels, J.; Mazzarelli, J.; Mendez, J.
JURISDICTION	New York
DECIDED	May 20, 2021
DOCKET	Appeal No. 13889; Case No. 2021-00177; Index No. 653090/20
DISPOSITION	reversed
PROCEDURAL POSTURE	Plaintiffs appealed from an order of Supreme Court, New York County, that denied their motion for summary judgment on liability against Times Square Photo Inc. and sua sponte dismissed the complaint.
STANDARD OF REVIEW	Review of the order was on the law; the court addressed entitlement to summary judgment as to liability.
PRECEDENTIAL VALUE	Published New York Appellate Division opinion
PARTIES	558 Seventh Ave. Corp., et al. v. Times Square Photo Inc., et al.

TOPICS

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QUESTIONS PRESENTED

1. Whether the Appellate Division could review the sua sponte dismissal of the complaint when dismissal was not appealable as of right.
2. Whether Supreme Court was a proper forum for the action based on its general jurisdiction and the amount of plaintiffs' monetary claims.
3. Whether defendants' nonpayment of rent during the COVID-19 pandemic was excused by frustration of purpose, impossibility, or the lease's force majeure clause.
4. Whether plaintiffs were entitled to summary judgment as to liability on the first cause of action for unpaid rent.
5. Whether disputes concerning the security deposit and the guarantor's liability required resolution at trial rather than dismissal of the complaint.

HOLDINGS

1. Although the sua sponte dismissal was not appealable as of right, the Appellate Division treated the notice of appeal from that portion of the order as a motion for leave to appeal and granted leave.
2. Supreme Court was a proper forum because it has general jurisdiction and plaintiffs' monetary claims exceeded Civil Court's \$25,000 jurisdictional threshold.
3. The COVID-19-related reduction in defendants' revenues and temporary shuttering of the business did not establish frustration of purpose or impossibility of performance sufficient to excuse the obligation to pay rent.
4. The lease's force majeure clause did not excuse the tenant's obligation to pay rent or additional rent because the clause expressly excluded that obligation.
5. Plaintiffs were entitled to summary judgment as to liability on the first cause of action for unpaid rent.
6. Defendants could present their arguments concerning the security deposit at trial on damages, and the parties should be permitted to make factual showings concerning the guarantor's liability for periods outside the statutory restriction on commercial lease guaranties.

KEY QUOTATIONS

*“Thus, although the pandemic has been disruptive for many businesses, the purpose of the lease in this case was not frustrated, and defendants' performance was not rendered impossible, by its reduced revenues.” (at *1)*

“Although the force majeure clause in the lease would excuse the parties from their obligations under the lease for the duration of certain circumstances beyond their control, the clause expressly excepts the tenant's

*obligation to pay rent and additional rent.” (at *1)*

FACTUAL BACKGROUND

Times Square Photo Inc. failed to pay rent for certain periods during the COVID-19 pandemic. Its electronic sales and repair business was shuttered for a period by pandemic-related executive orders, but the business later reopened for curbside service and defendants were able to access the leased premises during the nonpayment period. The parties disputed plaintiffs' treatment of the security deposit in calculating damages, and the guarantor's liability potentially extended to periods outside the statutory restrictions on enforcement of commercial lease guaranties.

PROCEDURAL HISTORY

Supreme Court denied plaintiffs' motion for summary judgment as to liability and sua sponte dismissed the complaint. The Appellate Division deemed the notice of appeal from the nonappealable dismissal to be a motion for leave to appeal, granted leave, reinstated the complaint, and granted plaintiffs summary judgment as to liability on the first cause of action for unpaid rent.

DISPOSITION

reversed

REMAND INSTRUCTIONS

The complaint was reinstated. Plaintiffs were granted summary judgment as to liability on the first cause of action, while security-deposit arguments and factual issues concerning the guarantor's liability were left for trial.

CASES CITED

- Ray v. Chen, 148 A.D.3d 568 (1st Dep't 2017)
- Center for Specialty Care, Inc. v. CSC Acquisition I, LLC, 185 A.D.3d 34, 42-43 (1st Dep't 2020)
- Latipac Corp. v. BMH Realty LLC, 93 A.D.3d 115, 123 n.4 (1st Dep't 2012), leave dismissed, 19 N.Y.3d 1099 (2012)

OPINION

PER CURIAM.

558 Seventh Ave. Corp. v Times Sq. Photo Inc. (2021 NY Slip Op 03244) 558 Seventh Ave. Corp. v Times Sq. Photo Inc. 2021 NY Slip Op 03244 Decided on May 20, 2021 Appellate Division, First Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided and Entered: May 20, 2021 Before: Renwick, J.P., Manzanet-Daniels, Mazzarelli, Mendez, JJ. Index No. 653090/20 Appeal No. 13889 Case No. 2021-00177 [*1]558 Seventh Ave.

Corp., et al., Plaintiffs-Appellants, vTimes Square Photo Inc. et al., Defendants-Respondents. Borah Goldstein Altschuler Nahins & Goidel PC, New York (Paul N. Gruber of counsel), for appellants.

Law Office of Gary S. Fish, New York (Gary S. Fish of counsel), for respondents. Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered on or about January 11, 2021, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion for summary judgment as to liability against defendant Times Square Photo Inc. and sua sponte dismissed the complaint, unanimously reversed, on the law, without costs, the complaint reinstated and plaintiffs' motion granted as to the first cause of action.

Although the sua sponte dismissal of the action is not appealable as of right (CPLR 5701[a][2]), we deem the notice of appeal from that portion of the order to be a motion for leave to appeal, and grant such leave (see *Ray v Chen*, 148 AD3d 568 [1st Dept 2017]).

As Supreme Court has general jurisdiction and plaintiff's monetary claims exceed Civil Court's \$25,000 jurisdictional threshold (NY Const, art VI, §§ 7; 15[b]), Supreme Court is a proper forum, and we reinstate the complaint. Plaintiff's motion for summary judgment as to liability on the first cause of action for unpaid rent is granted.

The parties do not dispute that tenant defendant Times Square Photo failed to pay rent for certain periods during the COVID-19 pandemic; they appear to dispute plaintiffs' treatment of the security deposit in calculating their damages.

We reject defendants' affirmative defenses of frustration of purpose and impossibility (see *Center for Specialty Care, Inc. v CSC Acquisition I, LLC*, 185 AD3d 34, 42-43 [1st Dept 2020]; *Latipac Corp. v BMH Realty LLC*, 93 AD3d 115, 123 n 4 [1st Dept 2012], lv dismissed 19 NY3d 1099 [2012]). Plaintiffs do not dispute that the tenant's business, an electronic sales and repair store, was shuttered for a period as a result of pandemic-related executive orders.

However, defendants acknowledge that they eventually reopened for curbside service and that they were able to gain access to the premises during the period of nonpayment. Thus, although the pandemic has been disruptive for many businesses, the purpose of the lease in this case was not frustrated, and defendants' performance was not rendered impossible, by its reduced revenues.

Although the force majeure clause in the lease would excuse the parties from their obligations under the lease for the duration of certain circumstances beyond their control, the clause expressly excepts the tenant's obligation to pay rent and additional rent. Similarly, defendants raise the defense of unclean hands with respect to plaintiffs' treatment of the security deposit but do not explain how their challenge to the requirement to replenish the security deposit in these circumstances would warrant dismissal of the action.

However, defendants may raise their arguments about the security deposit at the trial on damages. Plaintiffs acknowledged the applicability of Administrative Code of City of NY § 22—1005, which prohibits the enforcement of commercial lease guaranties against natural persons in certain circumstances.

However, because the third cause of action [*2]alleges that guarantor defendant Saka is liable under the guaranty for periods outside the statute, the parties should be permitted to make their respective factual showings at the trial. THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT. ENTERED: May 20, 2021