

APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT

Mona and Jack's Clothing, Inc. v. Ola, Inc.

133 A.D.3d 642 (N.Y. App. Div. 2d Dep't 2015) · No. 2014-02551 · Decided November 12, 2015

SUMMARY

The Appellate Division, Second Department reversed an order denying defendants’ motion in an action involving alleged moisture, mold, and mildew damage to clothing stored in leased premises. The court held that the plaintiff’s failure to comply with a conditional order of preclusion made the order absolute and that the plaintiff failed to show a reasonable excuse or a potentially meritorious cause of action. The court also held that defendants established entitlement to summary judgment and remitted the matter for a hearing on contractual costs and reasonable attorneys’ fees.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, Second Judicial Department
WRITING FOR THE COURT	L. Priscilla Hall, J.P.; Leonard B. Austin, J.; Sandra L. Sgroi, J.; Sylvia O. Hinds-Radix, J.
JURISDICTION	New York
DECIDED	November 12, 2015
DOCKET	2014-02551
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Defendants appealed from an order denying their motion to dismiss for failure to comply with a conditional order of preclusion, or alternatively for summary judgment, and denying their request for costs and reasonable attorneys' fees.
STANDARD OF REVIEW	The Appellate Division reviewed the order on the law and in the exercise of discretion. Summary judgment was reviewed under the standard requiring the movant to establish entitlement to judgment as a matter of law and the opposing party to raise a triable issue of fact.
PRECEDENTIAL VALUE	published

PARTIES

Ola, Inc., doing business as Ridgewood Automotive Center, et al. v.
Mona and Jack's Clothing, Inc., doing business as Cheap Jack's
Clothing

TOPICS

motions to dismiss

summary judgment

sanctions

attorney fees

civil procedure

PRACTICE AREAS

civil procedure

contracts

torts

commercial litigation

appellate procedure

QUESTIONS PRESENTED

1. Whether the plaintiff's failure to comply with the conditional order of preclusion caused the order to become absolute and warranted dismissal of the complaint.
2. Whether the plaintiff demonstrated a reasonable excuse for noncompliance and a potentially meritorious cause of action sufficient to obtain relief from the preclusion order.
3. Whether defendants were entitled to summary judgment because they established entitlement to judgment as a matter of law and plaintiff failed to raise a triable issue of fact.
4. Whether defendants were entitled under the lease to recover costs, including reasonable attorneys' fees.

HOLDINGS

1. A conditional order of preclusion becomes absolute when the party subject to it fails to comply timely with its directives.
2. A party seeking relief from a conditional preclusion order must demonstrate both a reasonable excuse for the failure to comply and the existence of a potentially meritorious cause of action.
3. Defendants were entitled to summary judgment because they established their entitlement to judgment as a matter of law and the plaintiff failed to raise a triable issue of fact.
4. Under the parties' lease, which bound the plaintiff as a holdover tenant, the prevailing party in an action arising from the plaintiff's possession of the premises was entitled to costs incurred in the action, including reasonable attorneys' fees.

KEY QUOTATIONS

*“As a result of the plaintiff's failure to timely comply with the conditional order of preclusion, that conditional order became absolute” (*2)*

*“To be relieved of the adverse impact of the conditional order, the plaintiff was required to demonstrate a reasonable excuse for its failure to comply with the order and the existence of a potentially meritorious cause of action” (*2)*

FACTUAL BACKGROUND

In 2005, the plaintiff leased premises from the defendants to store vintage clothing. In 2010, the plaintiff discovered that the clothing had been damaged by moisture, mold, and mildew and sued for breach of contract and negligence. The plaintiff failed to comply with a conditional preclusion order requiring production of damages documentation and an expert report, and also failed to retain new counsel after its attorney was relieved. Defendants submitted expert evidence attributing the damage to the plaintiff's defective storage methods rather than defective premises conditions.

PROCEDURAL HISTORY

The plaintiff commenced an action alleging breach of contract and negligence after clothing stored on leased premises was damaged by moisture, mold, and mildew. The Supreme Court issued a conditional order of preclusion requiring the plaintiff to provide damages documentation and an expert damages report, but the plaintiff failed to comply. The Supreme Court denied defendants' subsequent motion to dismiss or for summary judgment and directed the parties to complete discovery. The Appellate Division reversed, granted defendants' motion, and remitted for a hearing on costs and attorneys' fees.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Remit the matter to the Supreme Court, Queens County, for a hearing and determination of defendants' request for costs, including reasonable attorneys' fees.

CASES CITED

- Wilson v. Galcia Contr. & Restoration Corp., 10 N.Y.3d 827, 830
- SRN Realty, LLC v. Scarano Architect, PLLC, 116 A.D.3d 693
- Gibbs v. St. Barnabas Hosp., 16 N.Y.3d 74, 80
- Hughes v. Brooklyn Skating, LLC, 120 A.D.3d 758
- Alvarez v. Prospect Hosp., 68 N.Y.2d 320
- City of New York v. Pennsylvania R.R. Co., 37 N.Y.2d 298, 300
- Visken v. Oriole Realty Corp., 305 A.D.2d 493, 494
- Lynch v. Savarese, 217 A.D.2d 648, 649

OPINION

PER CURIAM.

Mona & Jack's Clothing, Inc. v Ola, Inc. (2015 NY Slip Op 08151) Mona & Jack's Clothing, Inc. v Ola, Inc. 2015 NY Slip Op 08151 Decided on November 12, 2015 Appellate Division, Second 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 on November 12, 2015 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Second Judicial Department L. PRISCILLA HALL, J.P. LEONARD B. AUSTIN SANDRA L. SGROI SYLVIA O. HINDS-RADIX, JJ. 2014-02551 (Index No. 10722/11) [*1]Mona and Jack's Clothing, Inc., doing business as "Cheap Jack's Clothing," respondent, vOla, Inc., doing business as "Ridgewood Automotive Center," et al., appellants.

Gallo, Vitucci & Klar, LLC, New York, N.Y. (Stephen A. Hoffman of counsel), for appellants. DECISION & ORDER In an action to recover damages for negligence and breach of contract, the defendants appeal from an order of the Supreme Court, Queens County (Kitzes, J.), entered January 16, 2014, which denied their motion to dismiss the complaint based on the plaintiff's failure to comply with a conditional order of preclusion or for summary judgment dismissing the complaint, and for an award of costs, including reasonable attorneys' fees.

ORDERED that the order is reversed, on the law and in the exercise of discretion, with costs, the defendants' motion is granted, and the matter is remitted to the Supreme Court, Queens County, for a hearing and determination with respect to that branch of the defendants' motion which was for an award of costs, including reasonable attorneys' fees.

In 2005, the plaintiff leased the subject premises from the defendants to store vintage clothing. Sometime in 2010, the plaintiff discovered that the items stored were damaged by moisture, mold, and mildew, and commenced the instant action alleging causes of action sounding in breach of contract and negligence.

On October 15, 2012, the Supreme Court issued a conditional order of preclusion directing the plaintiff, within 60 days of the order, to provide the defendants with "a response to their demand for documentation regarding its damages claims" and "its expert report on damages," or be "precluded from offering such at trial or in any motion."

The plaintiff failed to comply with those directives. In an order dated May 15, 2013, the plaintiff's counsel's motion to be relieved as counsel was granted, and the action was stayed for 60 days following filing of the proof of service of the order to permit the plaintiff to retain new counsel.

The plaintiff failed to retain new counsel. By notice of motion dated August 7, 2013, the defendants moved to dismiss the complaint based upon the plaintiff's failure to comply with the preclusion order, asserting that they were entitled to such relief because the plaintiff was precluded from offering any evidence as to damages.

In opposition, the plaintiff submitted the affidavit of one of its officers, in which he asserted that former counsel "egregiously mis-handled discovery." In the alternative, the defendants moved for summary judgment dismissing the complaint, relying on the affidavit of an expert, who opined that the damage to the plaintiff's property was caused by the plaintiff's defective methods of storage, and not defective conditions on the premises.

The defendants also sought an award of costs, including reasonable attorneys' fees. In the order appealed from, the Supreme Court denied the defendants' motion, upon determining that dismissal for failure to comply with the preclusion order [*2] was not warranted and, in effect, that an award of summary judgment would be premature.

The court directed the parties to complete discovery within 60 days. We reverse. As a result of the plaintiff's failure to timely comply with the conditional order of preclusion, that conditional order became absolute (see *Wilson v Galcia Contr. & Restoration Corp.*, 10 NY3d 827, 830; *SRN Realty, LLC v Scarano Architect, PLLC*, 116 AD3d 693).

To be relieved of the adverse impact of the conditional order, the plaintiff was required to demonstrate a reasonable excuse for its failure to comply with the order and the existence of a potentially meritorious cause of action (see *Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 80).

The plaintiff failed to demonstrate either (see *Hughes v Brooklyn Skating, LLC*, 120 AD3d 758). Further, the defendants established their entitlement to judgment as a matter of law, and the plaintiff, in opposition thereto, failed to raise a triable issue of fact (see generally *Alvarez v Prospect Hosp.*, 68 NY2d 320). Pursuant to the terms of the parties' lease, which was binding upon the plaintiff as a holdover tenant (see *City of New York v Pennsylvania R.R.*

Co., 37 NY2d 298, 300; *Visken v Oriole Realty Corp.*, 305 AD2d 493, 494; *Lynch v Savarese*, 217 AD2d 648, 649), the prevailing party in an action arising out of the plaintiff's possession of the premises is entitled to costs incurred in the action, including reasonable attorneys' fees.

Accordingly, we remit the matter to the Supreme Court, Queens County, for a hearing and determination with respect to that branch of the defendants' motion which was for an award of costs, including reasonable attorneys' fees.

The defendants' remaining contentions need not be addressed in light of our determination. HALL, J.P., AUSTIN, SGROI and HINDS-RADIX, JJ., concur. ENTER: Aprilanne Agostino Clerk of the Court