

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

Yi Jing Tan v. Liang

2018 NY Slip Op 02497 (App. Div. 2018) · No. 2016-01508 · Decided April 11, 2018

SUMMARY

The Appellate Division, Second Department, reversed a sua sponte dismissal of the plaintiffs' complaint under 22 NYCRR 202.27. The court held that dismissal was an improvident exercise of discretion because the Supreme Court had adjourned the inquest to a date when plaintiffs' counsel was unavailable, and remitted the matter for an inquest.

CASE DETAILS

|                       |                                                                                                                                                                                                                                                                                          |
|-----------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of the State of New York, Appellate Division, Second Judicial Department                                                                                                                                                                                                   |
| WRITING FOR THE COURT | Reinaldo E. Rivera, J.P.; Jeffrey A. Cohen, J.; Joseph J. Maltese, J.; Angela G. Iannacci, J.                                                                                                                                                                                            |
| JURISDICTION          | New York                                                                                                                                                                                                                                                                                 |
| DECIDED               | April 11, 2018                                                                                                                                                                                                                                                                           |
| DOCKET                | 2016-01508                                                                                                                                                                                                                                                                               |
| DISPOSITION           | reversed_and_remanded                                                                                                                                                                                                                                                                    |
| PROCEDURAL POSTURE    | Plaintiffs appealed from an order that sua sponte directed dismissal of their complaint under 22 NYCRR 202.27 after the plaintiffs were not ready to proceed with a damages inquest. The Appellate Division deemed the appeal a motion for leave to appeal, granted leave, and reversed. |
| STANDARD OF REVIEW    | Abuse of discretion; the court reviewed whether the Supreme Court improvidently exercised its discretion in dismissing the complaint for lack of readiness under 22 NYCRR 202.27(b).                                                                                                     |
| PRECEDENTIAL VALUE    | Published New York Appellate Division opinion                                                                                                                                                                                                                                            |
| PARTIES               | Yi Jing Tan, et al. v. Gary Liang, et al.                                                                                                                                                                                                                                                |

TOPICS

- appellate procedure
- default
- civil procedure
- standard of review
- remedies

## PRACTICE AREAS

civil procedure

appellate procedure

remedies

## QUESTIONS PRESENTED

1. Whether the plaintiffs' notice of appeal from a sua sponte dismissal order could be treated as an application for leave to appeal.
2. Whether the plaintiffs could obtain appellate review of their lack of readiness to proceed and whether that lack of readiness was excusable despite the order having been entered upon their purported default.
3. Whether the Supreme Court improvidently exercised its discretion by dismissing the complaint under 22 NYCRR 202.27(b) after adjourning the inquest to a date when plaintiffs' counsel was unavailable.

## HOLDINGS

1. A sua sponte order is appealable when leave to appeal is granted; the court therefore deemed the notice of appeal an application for leave and granted leave.
2. Issues concerning the plaintiffs' lack of readiness to proceed and whether that lack of readiness was excusable were reviewable on appeal because those issues were the subject of contest below.
3. Although 22 NYCRR 202.27(b) gives a court discretion to dismiss a complaint when a plaintiff fails to appear or is not ready to proceed, the Supreme Court improvidently exercised that discretion by dismissing this complaint under the circumstances.

## FACTUAL BACKGROUND

The plaintiffs obtained a default judgment in an action involving alleged breach of fiduciary duty and unjust enrichment, with an inquest on damages directed. The inquest was scheduled for November 18, 2015, but the Supreme Court adjourned it to November 19 over the plaintiffs' objection, despite knowing that plaintiffs' counsel was unavailable on the adjourned date. A per diem attorney appeared for the plaintiffs on November 19 but was unprepared to proceed, and the court dismissed the complaint sua sponte.

## PROCEDURAL HISTORY

The plaintiffs commenced an action alleging breach of fiduciary duty and unjust enrichment and seeking to void certain stock and real estate transfers. After the plaintiffs obtained a default judgment, the Supreme Court directed an inquest on damages. The court adjourned the inquest to a date when plaintiffs' counsel was unavailable, and, when a per diem attorney appeared unprepared, the court sua sponte dismissed the complaint. The Appellate Division reversed and remitted for an inquest.

## DISPOSITION

reversed\_and\_remanded

## REMAND INSTRUCTIONS

Remanded to the Supreme Court, Queens County, for an inquest on damages.

#### CASES CITED

- Matter of Andrew J.U.M. [Jelaine E.M.], 154 AD3d 758, 759
- James v Powell, 19 NY2d 249, 256 n 3
- Bank of N.Y. v Castillo, 120 AD3d 598, 599

#### INSTRUCTIONS FOR AN AI ASSISTANT

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