

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

Clendeninn v. Young

2026 NY Slip Op 03421 · No. 2024-06481 · Decided June 3, 2026

SUMMARY

The Appellate Division, Second Department reversed a \$32,000 judgment entered in favor of the tenant against the landlord-related defendants. The court held that the plaintiff failed to establish prima facie that the COVID-19 pandemic and related executive orders made performance of the lease impossible or frustrated its purpose, and also failed to establish that certain defendants were proper parties. The court therefore denied the plaintiff's summary judgment motion and reinstated the challenged defenses and counterclaim.

OPINION

PER CURIAM.

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This decision is uncorrected and subject to revision before publication in the Official Reports. Neil Clendeninn, respondent, v Dawn H. Young, as administrator of the estate of Steven W. Young, et al., appellants, et al., defendant. Supreme Court of the State of New York, Appellate Division, Second Judicial Department Decided on June 3, 2026 2024-06481, (Index No. 609056/21) Betsy Barros, J.P.

Barry E. Warhit Carl J. Landicino Laurence L. Love, JJ. Patricia Byrne Blair, Blue Point, NY, for appellants. Ronald D. Weiss, P.C., Melville, NY, for respondent. [*1] DECISION & ORDER In an action, inter alia, to recover damages for unjust enrichment, the defendants Dawn H. Young, as administrator of the estate of Steven W. Young, S.W. Young Property Management, and S.W.

Young Contracting appeal from a judgment of the Supreme Court, Suffolk County (Linda Kevins, J.), entered March 19, 2024. The judgment, upon an order of the same court dated June 23, 2023, inter alia, granting those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against those defendants and dismissing their fourth and fifth

affirmative defenses and counterclaim, is in favor of the plaintiff and against those defendants in the principal sum of \$32,000.

ORDERED that the judgment is reversed, on the law, with costs, those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendants Dawn H. Young, as administrator of the estate of Steven W. Young, S.W. Young Property Management, and S.W. Young Contracting and dismissing their fourth and fifth affirmative defenses and counterclaim are denied, and the order dated June 23, 2023, is modified accordingly.

In December 2019, the plaintiff, as tenant, entered into a lease agreement with the defendant S.W. Young Property Management (hereinafter the landlord), as landlord, for the rental of premises located on Fire Island.

The lease, which was signed by Steven W. Young (hereinafter the decedent) on behalf of the landlord, was for a term beginning on April 15, 2020, and ending on October 31, 2020. In May 2021, the plaintiff commenced this action against the decedent, the landlord, the defendant S.W. Young Contracting (hereinafter SWYC, and collectively with the decedent and the landlord, the SW defendants), and another defendant, inter alia, to recover damages for unjust enrichment, "frustration of purpose," and "impossibility of performance."

The plaintiff alleged, among other things, that he had been unable to take possession of the property as anticipated by the lease agreement due to governmental restrictions in place during the COVID-19 pandemic. The plaintiff sought to recover advance payments he had made pursuant to the lease agreement.

The SW defendants interposed an answer to the complaint in which, inter alia, they asserted their fourth and fifth affirmative defenses alleging, respectively, that SWYC and the decedent were not proper parties to this action, and a counterclaim alleging breach of the lease agreement.

The plaintiff subsequently moved, among other things, for summary judgment on the complaint insofar as asserted against the SW defendants and dismissing their fourth and fifth affirmative defenses and counterclaim. In an order dated June 23, 2023, the Supreme Court, inter alia, granted those branches of the plaintiff's motion. Thereafter, a judgment was entered, upon the order, in favor of the plaintiff and against the SW defendants in the principal sum of \$32,000.

The SW defendants appealed. During the pendency of the appeal, the decedent died, and the defendant Dawn H. Young, as the administrator of the decedent's estate, was substituted for the decedent. As an initial matter, although the SW defendants failed to submit a paragraph-by-paragraph response to the plaintiff's statement of material facts, under the circumstances presented, the Supreme Court improvidently exercised its discretion in deeming the assertions therein admitted. "[B]ind adherence to the procedure set forth in 22 NYCRR 202.8-g [wa]s not

required,' even though the rule—which has since been amended—included 'mandatory language' at the time the court determined [the plaintiff's] motion" (*Argueta v Hall & Wright, LLC*, 230 AD3d 1200, 1201, quoting *Leberman v Instantwhip Foods, Inc.*, 207 AD3d 850, 851; see *On the Water Prods., LLC v Glynos*, 211 AD3d 1480, 1481).

Further, the Supreme Court erred in granting those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the SW defendants and dismissing their fourth and fifth affirmative defenses and counterclaim. "In order to invoke the doctrine of a frustration of purpose, 'the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense'" (*Kay v Heavenly Events & Catering Corp.*, 241 AD3d 1305, 1308, quoting *Gulf LNG Energy, LLC v Eni S.p.A.*, 232 AD3d 183, 192; see *Restatement [Second] of Contracts* § 265). "'[T]he law of impossibility provides that performance of a contract will be excused if such performance is rendered impossible by intervening governmental activities, but only if those activities are unforeseeable'" (*Pleasant Hill Developers, Inc. v Foxwood Enters., LLC*, 65 AD3d 1203, 1206, quoting *Matter of A & S Transp.*

Co. v County of Nassau, 154 AD2d 456, 459; see *Kay v Heavenly Events & Catering Corp.*, 241 AD3d at 1308). "'Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible '" (*Berman v TRG Waterfront Lender, LLC*, 181 AD3d 783, 786, quoting *Kel Kim Corp. v Central Mkts.*, 70 NY2d 900, 902 [emphasis added]).

Here, in support of his motion, the plaintiff failed to establish, *prima facie*, that the COVID-19 pandemic and subsequent executive orders issued by former Governor Andrew Cuomo (see Executive Order [A. Cuomo] Nos. 202, 202.8 [9 NYCRR § 8.202]), made performance of the lease agreement impossible, or frustrated the purpose of the lease agreement (see *Gap, Inc. v 44-45 Broadway Leasing Co. LLC*, 206 AD3d 503, 504; *Fives 160th, LLC v Qing Zhao*, 204 AD3d 439, 440; cf. *Kay v Heavenly Events & Catering Corp.*, 241 AD3d 1305).

In addition, the plaintiff failed to demonstrate, *prima facie*, that SWYC and the decedent were proper parties to this action (cf. *Popal v DiLorenzo*, 231 AD3d 1067, 1069; *McCarthy v Young*, 57 AD3d 955, 955). Accordingly, since the plaintiff failed to satisfy his *prima facie* burden, the Supreme Court should have denied those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the SW defendants and dismissing their fourth and fifth affirmative defenses and counterclaim, regardless of the sufficiency of the opposition papers (see *Winegrad v New York Univ.*

Med. Ctr., 64 NY2d 851, 853). BARROS, J.P., WARHIT, LANDICINO and LOVE, JJ., concur.
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