

To Our Clients and Friends

Memorandum

July 6, 2021

New York State Commercial Lease Decision Overturned on Appeal

In the first New York State appellate court ruling of its kind, the Appellate Division, First Department, issued an important decision clarifying the right of tenants to claim a rent abatement due to the COVID-19 pandemic. In an earlier alert, we summarized the New York State Supreme Court preliminary ruling in the matter of *The Gap, Inc., v. 170 Broadway Retail Owner, LLC*, 2020 WL 6435136 (N.Y. Sup. Ct., Oct. 30, 2020) (“*The Gap*”).¹ In that preliminary ruling, the Supreme Court denied the landlord’s motion to dismiss on the basis that the tenant had stated a viable claim that the New York executive shutdown orders triggered the lease’s casualty provision, and that the lease should be rescinded. This ruling was recently overturned in a unanimous decision on appeal in the Appellate Division, giving much-needed guidance to landlords and tenants on how New York’s executive shutdown orders will affect a tenant’s obligations under its lease.

The Gap was an action brought by a retail store operator who claimed that it was entitled to a rent abatement starting in March 2020 on account of the executive shutdown orders in New York State, as well as rescission of its lease. The tenant sought a declaration that it was entitled to a refund of rent paid to the landlord—from the time that the executive shutdown orders took effect—based on the lease’s casualty provision, as well as rescission of the lease. The landlord brought a motion to dismiss these claims, and the Supreme Court denied the landlord’s motion in part because the tenant had stated viable claims to relief based on the casualty clause, impossibility of performance, and for rescission of the lease.

The landlord appealed the Supreme Court’s decision, and in a recent ruling the Appellate Division overturned the Supreme Court’s ruling in a unanimous decision.² With respect to the tenant’s casualty claim, the Appellate Division held that the pandemic did not trigger the casualty provision in the lease because that provision “refers to singular incidents causing physical damage to the premises and does not contemplate loss of use due to a pandemic or resulting government lockdown.” App. Div. at *3. Similarly, the Appellate Division held that the tenant had failed to state a claim for rescission of the lease based on the theories of frustration of purpose and impossibility. The Appellate Division held that the

¹ See our earlier client alert titled [New York State Courts Provide Preliminary Rulings on Commercial Lease Performance During COVID-19 Pandemic](#) (Nov. 10, 2020).

² See *The Gap, Inc. v. 170 Broadway Retail Owner, LLC*, 2021 N.Y. App. Div. LEXIS 4207 (June 29, 2021) (“App. Div.”)

defense of frustration does not apply where the tenant was “not completely deprived of the benefit of its bargain,” and that the impossibility defense likewise did not apply because by the time the tenant had filed its complaint in July 2020, it was permitted to conduct its retail store operations at the premises. *Id.*

In light of several conflicting rulings from the New York Supreme Court earlier on these issues, the decision from the Appellate Division gives much needed guidance to landlords and tenants alike as to how various claims and defenses for non-payment of rent in light of the COVID-19 pandemic will be addressed by the courts. We will continue to monitor developments in the case law as they unfold.

* * *

Authors:

Janice Mac Avoy

Meyer Last

Jennifer Yashar

Emilie B. Cooper

Ben Paull

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its contents. If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or an attorney listed below:

Contacts and COVID-19 Co-Head:

Janice Mac Avoy	+1.212.859.8182	janice.macavoy@friedfrank.com
Meyer Last	+1.212.859.8151	meyer.last@friedfrank.com
Jennifer A. Yashar (Co-Head)	+1.212.859.8410	jennifer.yashar@friedfrank.com
Emilie B. Cooper	+1.212.859.8311	emilie.cooper@friedfrank.com