



There Was No 'Gap' in the Lease Language: COVID Is Not a Casualty



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On June 29, 2021, in *The Gap, Inc. v. 170 Broadway Retail Owner, LLC*, the New York Appellate Division, First Department, overturned an earlier decision by the New York Supreme Court and issued a decisive victory to commercial landlords whose tenants have claimed that the COVID pandemic should be treated as a casualty under the terms of its commercial lease or that the COVID pandemic has frustrated the purpose of its commercial lease.

In the underlying complaint, The Gap alleged that the governmental shutdown of non-essential businesses was a casualty and, as a result, it was entitled to a rent abatement due to the loss of the use of all or a portion of its premises as a result of such casualty. The Gap further alleged that the landlord's failure to permit a rent abatement as a result of such casualty was a breach of the underlying commercial lease.

The New York Appellate Division disagreed with these assertions and held that the casualty provisions of the lease "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." Based on this definition, a pandemic and the resulting government lockdown is not a casualty, and, therefore, the New York Appellate Division dismissed the tenant's breach of contract claim because the "[u]nderlying complaint fails to identify a single lease provision defendant allegedly breached, which is fatal to this claim."

In another cause of action, The Gap alleged that it was excused from paying the rent due under the lease as a result of its inability to use the premises as a retail store due to an unanticipated event that could not have been foreseen or guarded against in the lease. The New York Appellate Division rejected this claim because the tenant was not *completely* deprived of the benefit of its bargain. In rendering this decision, the New York Appellate Division cited a case finding that the performance of a lease was not rendered impossible by reduced revenues. The

court further dismissed this cause of action by finding that the brief closure required in the spring of 2020 was not a factor by the time The Gap filed its complaint and, as a result, determined that the tenant could not rely on the government-required closure to support its claims that it was impossible to perform under its lease.

In conclusion, the decision by the New York Appellate Division in *The Gap, Inc. v. 170 Broadway Retail Owner, LLC* strengthened New York law in protecting a commercial landlord from claims by a tenant that the COVID pandemic was a casualty under its lease or otherwise frustrated the purpose of the lease.