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Court Requires The Gap to Pay 90% of Rent During COVID-19 Case

A Manhattan Judge has ruled that The GAP and its affiliate Old Navy must pay 90% of their rent while it litigates its COVID-19 defenses to its rent obligations.

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The Gap and Old Navy are tenants at the Bow Tie Building in Times Square. Each has a lease requiring base rent payments of approximately \$1.5 million per month. In May 2020, both The Gap and Old Navy stopped paying rent. The landlord declared both tenants in default and served Notices to Cure. The tenants filed an action and sought to enjoin the landlord from terminating their leases as well as other relief.

Justice Debra James of the New York County Supreme Court enjoined the landlord from terminating the leases, but required, as a condition of the injunction, that the tenants continue to pay rent at an amount equal to “about ten percent” less than specified in the lease. The court also required the tenants post a bond of nearly \$6 million representing nearly two months of arrears. Justice James specified that the “extraordinary circumstances” arising from COVID-19’s “devastating impact on the retail industry” accounted for the Court’s ten percent reduction in the rental amount required to be paid as a condition of the injunction, which the Court noted was an “exercise of its discretion.”

The decision is an early indication that commercial tenants looking for judicially ordered relief from rental obligations because of COVID-19 will likely be

disappointed. The decision is also a cautionary tale about the wisdom of seeking injunctive relief after being served with a notice to cure that threatens a lease termination. A tenant may stall the lease termination, but it is likely to get a court order requiring the payment of a substantial portion of its rent as a condition of the injunction, a pyrrhic victory at best.

The decision also provides landlords with leverage in negotiations with tenants seeking forbearance or rent forgiveness because of COVID-19. Landlords now have a credible basis to claim that if a deal cannot be worked out, a court will compel the payment of rent. This puts tenants, seeking to remain in possession in a more challenging bargaining position.

Justice James’s decision was made in the context of a request for preliminary injunctive relief. Thus, Justice James could alter the decision after a trial or summary judgment motion based upon a full record. Nevertheless, the decision provides early guidance on how courts might approach COVID-19 landlord tenant related issues.

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