

273 A.D.2d 331, 709 N.Y.S.2d 596, 2000 N.Y. Slip Op. 06176
(Cite as: 273 A.D.2d 331, 709 N.Y.S.2d 596)

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Supreme Court, Appellate Division, Second Department, New York.

BARBARA ANNE, INC., d/b/a Brunchies, respondent,

v.

SMITHHAVEN CENTER ASSOCIATES, LLC, et al., appellants.

June 19, 2000.

Commercial tenant brought action against landlords to recover damages for breach of contract, alleging that landlords unreasonably refused to consent to a site location for the tenant's kiosk. The Supreme Court, Suffolk County, Henry, J., granted the tenant's motion for partial summary judgment on the issue of liability to the limited extent of directing a hearing. Landlords appealed. The Supreme Court, Appellate Division, held that tenant's failure to obtain building permit excused landlords' performance under lease.

Reversed.

West Headnotes

Landlord and Tenant 233 48(.5)

233 Landlord and Tenant

233II Leases and Agreements in General

233II(B) Construction and Operation

233k48 Liability of Lessor for Breach of Contract

233k48(.5) k. In General. Most Cited

Cases

Commercial tenant's failure to obtain a building permit for a particular location within a mall excused the landlords' performance under a lease, thus defeating the tenant's claim for breach of contract, alleging that landlords unreasonably refused to consent to a site location for the tenant's kiosk; terms of the lease and the circumstances surrounding its signing established that the parties intended a specific location inside the mall.

****596 Simmons, Jannace & Stagg, LLP**, East Meadow, N.Y. (Kristen E. Zerrenner and [Thomas E. Stagg](#) of counsel), for appellants.

Greshin Ziegler & Pruzansky, Smithtown, N.Y. ([Joel J. Ziegler](#) of counsel), for respondent.

CORNELIUS J. O'BRIEN, J.P., DANIEL W. JOY, DANIEL F. LUCIANO and ROBERT W. SCHMIDT, JJ.

MEMORANDUM BY THE COURT.

331** In an action, *inter alia*, to recover damages for breach of contract, the defendants appeal (1) from an order of the Supreme Court, Suffolk County (Henry, J.), entered May 17, 1999, which granted the plaintiff's motion for partial summary judgment on the issue of liability on the first cause of action and denied their cross motion for summary judgment dismissing the complaint, and (2), as limited by their brief, from so much of an order of the same court, entered November 1, 1999, as, upon renewal, granted the plaintiff's motion for partial summary judgment on the issue of liability on the first cause of action to the *597** limited extent of directing a hearing on the issue of whether the defendants unreasonably refused to consent to the site location for the plaintiff's kiosk.

ORDERED that the appeal from the order entered May 17, 1999, is dismissed, as that order was superseded by the order entered November 1, 1999; and it is further,

ORDERED that on the court's own motion, the defendants' notice of appeal from the order entered November 1, 1999, is treated as an application for leave to appeal, and leave to appeal is granted (*see*, [CPLR 5701\[c\]](#)); and it is further,

***332** ORDERED that the order entered November 1, 1999, is reversed insofar as appealed from, on

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the law, the order entered May 17, 1999, is vacated, the motion is denied, the cross motion is granted, and the complaint is dismissed; and it is further,

ORDERED that the defendants are awarded one bill of costs.

The terms of the lease and the circumstances surrounding its signing establish that the parties intended a specific location inside the Smith Haven Mall. The plaintiff's failure to obtain a building permit for that particular location excused the defendants' performance under the lease (*see, 67 Wall St. Co. v. Franklin Nat. Bank, 37 N.Y.2d 245, 371 N.Y.S.2d 915, 333 N.E.2d 184*).

N.Y.A.D. 2 Dept.,2000.

Barbara Anne, Inc. v. Smithhaven Center Associates, LLC

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