



Caution

As of: Dec 05, 2012

**Anthony Sapp et al., Appellants, v. The Propeller Company LLC et al., Respondents.  
(And a Third-Party Action.)**

**3084**

**SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST  
DEPARTMENT**

*5 A.D.3d 181; 772 N.Y.S.2d 515; 2004 N.Y. App. Div. LEXIS 2323*

**March 9, 2004, Decided**

**March 9, 2004, Entered**

**SUBSEQUENT HISTORY:** [\*\*\*1]

Reargument denied by *Sapp v. Propeller Co. LLC, 2004 N.Y. App. Div. LEXIS 6808 (N.Y. App. Div. 1st Dep't, May 11, 2004)*

Stay granted by *Sapp v. Propeller Co., LLC, 2004 N.Y. App. Div. LEXIS 6807 (N.Y. App. Div. 1st Dep't, May 11, 2004)*

**PRIOR HISTORY:** *Sapp v. Propeller Co., LLC, 2004 N.Y. App. Div. LEXIS 1003 (N.Y. App. Div. 1st Dep't, Jan. 29, 2004)*

**CORE TERMS:** tenant, landlord, leased premises, usable, locked, lawful, physical possession, period following, issues of fact, collateral estoppel, reasonable basis, immediately following, unrestricted, unspecified, padlocked, eviction, holdover, demolish, triable, rebuild, summary judgment

**HEADNOTES**

Landlord and Tenant--Wrongful Eviction.--Plaintiffs were not entitled to summary judgment on cause of

action for wrongful ouster of tenant from physical possession of leased premises since, although they demonstrated that, for some unspecified period following fire, defendant landlords padlocked building, there were triable issues of fact as to whether premises were usable at time plaintiffs were locked out.

Judgments--Collateral Estoppel.--Question of whether premises were usable at time plaintiffs were locked out was not resolved by prior finding in holdover proceeding against another tenant of same building, that fire damage was insufficient to provide reasonable basis for decision to demolish or rebuild building since there was no identity of issue; unlike issue in prior proceeding, question before motion court was whether, in weeks immediately following fire, defendants had lawful basis for denying plaintiffs unrestricted entry into building.

**COUNSEL:** For Plaintiffs-Appellants: Thomas C. Lambert.

For Defendants-Respondents: Bruce H. Wiener, Nat J. Azznara.

**JUDGES:** Concur--Andrias, J.P., Saxe, Sullivan and Gonzalez, JJ.

### OPINION

[\*182] [\*\*515] Order, Supreme Court, New York County (Edward Lehner, J.), entered August 27, 2003, which, to the extent appealed from as limited by the brief, denied plaintiffs' motion for summary judgment, unanimously affirmed, without costs.

An actual eviction occurs when a landlord wrongfully ousts a tenant from physical possession of the leased premises (*Barash v Pennsylvania Term. Real Estate Corp.*, 26 N.Y.2d 77, 82-83, 256 N.E.2d 707, 308 N.Y.S.2d 649 [1970]). Although plaintiff tenants demonstrated that, for some unspecified period following a fire, defendant [\*\*516] landlords padlocked the building in which plaintiffs had leased premises, there are triable issues of fact as to whether the premises in question were usable at the time plaintiffs were locked out and whether defendants' action had a lawful basis.

This question is not resolved by the prior finding of the Civil Court in a holdover proceeding brought by defendant Propeller against another tenant [\*\*\*2] of the same building, that the fire damage was insufficient to provide a reasonable basis for Propeller's decision to demolish or rebuild the building. Invocation of the doctrine of collateral estoppel is inappropriate because there was no identity of issue (*see Schwartz v Public Adm'r of County of Bronx*, 24 N.Y.2d 65, 71, 246 N.E.2d 725, 298 N.Y.S.2d 955 [1969]). Unlike the issue before the Civil Court, the question before the motion court was whether, in the weeks immediately following the fire, defendants had a lawful basis for denying plaintiffs unrestricted entry into the building.

We have considered plaintiffs' remaining contentions and find them unavailing.

Concur--Andrias, J.P., Saxe, Sullivan and Gonzalez, JJ.