SCAW

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

TRIAL/IAS PART 5

SIB REALTY CO., LLC,

INDEX NO. 14786/10

Plaintiff(s),

- against -

AUTO BARN OF BETHPAGE, INC.,

Defendant(s).

DECISION AFTER TRIAL

By petition dated February 4, 2010, the petitioner SIB Realty Co., LLC as landlord, instituted a summary proceeding in Nassau County District Court to recover possession of premises and a money judgment for arrears in rent from the respondent Auto Barn of Bethpage, Inc., 4025-4045 Hempstead Turnpike, Store 1, Bethpage, NY 11741. The respondent Auto Barn of Bethpage, 4025-4045 Hempstead Turnpike, Store 1, Bethpage, NY 11741, by written verified answer dated March 11, 2010, interposed a denial of the allegations in the petition, and an affirmative defense of a wrongful eviction, a second affirmative defense of failure of a condition precedent and a third affirmative defense of failure of due, adequate and proper notice (*see Court Exhibit #1).* On April 21, 2010 the parties, by written stipulation, agreed to return possession of the premises to the petitioner SIB Realty Co., LLC, by entry of a judgment of possession and a warrant of eviction therefore, without stay. All other issues and defenses, other than possession, were deemed severed to be tried as directed by the Court subject to pending applications in Supreme Court, Nassau County, by tenant.

In the New York State Supreme Court, 100 Supreme Court Drive, Mineola, NY, a separate action denominated as Auto Barn of Bethpage, Inc. against SIB Realty Co., LLC Index #7456/10 was pending wherein Auto Barn of Bethpage, Inc., as plaintiff, sought money damages for wrongful eviction by SIB Realty Co, LLC, a defendant. Plaintiff Auto Barn of Bethpage, Inc. moved within the action to consolidate it with the pending summary proceeding in Nassau County District Court. The defendant SIB Realty Co., LLC cross moved to dismiss the plaintiff's complaint. BY decision and order dated July 8, 2010, Supreme Court granted the plaintiff Auto Barn of Bethpage, Inc's motion to consolidate the action for wrongful eviction with the petitioner SIB Realty Co., LLC's summary proceeding and denied the cross motion to dismiss Auto Barn of Bethpage, Inc's complaint.

By written stipulation dated May 17, 2011, the parties agreed to discontinue the action for wrongful eviction by Auto Barn of Bethpage, Inc. against SIB Realty Co., LLC and to withdraw the affirmative

defense of wrongful eviction alleged by Auto Barn of Bethpage, Inc. in the remaining summary proceeding. Any application to the Court for attorneys' fees could, by the same stipulation, indicate costs incurred in defense of the discontinued action for wrongful eviction by SIB Realty Co., LLC.

Accordingly, the action for trial presented to this Court was the petitioner SIB Realty Co., LLC's claim for unpaid rend for the balance of the lease. In opposition thereto was the denial of the allegations and the remaining affirmative defenses of failure of a condition precedent and failure of due, adequate, and proper notice. On January 19, 2012, the parties appeared before the New York State Supreme Court, Part 5, 100 Supreme Court Drive, Mineola, NY to undertake a trial before the Court on these remaining issues. Menoranda and affirmations were submitted to the Court, on issues of law and attorneys' fees claimed by petitioner's attorney in accordance with the terms of the lease, no later than March 2, 2012. After trial, the Court now makes the following finds of fact and conclusions of law.

Petitioner's sole witness was Mr. Charles Hirsch, a member of SIB Realty Co., LLC, hereinafter "SIB". He testified that "SIB" had acquired the property leased to the respondent Auto Barn of Bethpage, Inc., hereinafter "Auto Barn", in 2004, as part of a shopping center containing retail shops and a movie theater, later replaced by a medical office building. The respondent "Auto Barn" occupied 8000 feet of retail space and 2800 feet of warehouse space to conduct its' business of selling retail automobile parts. The respondent's tenancy was secured by a written lease with the petitioner "SIB's" predecessor in title, Binker Goes Shopping, LLC. Mr. Herbert Blumberg executed the lease for "Auto Barn" (*see Plaintiff's #1 in Evidence)*

The terms of the lease provided for a ten year term commencing January 1, 1999 and terminating on December 31,2009. Rent was to be calculated by a monthly base rent combined with an assessment for common area and maintenance charges, herein after as "CAM", late fees, if any and taxes. Monthly base rent was agreed by the parties to be $8,978.63 with monthly "cam" charges set at $1,661.01. The property is managed by Millbrook Properties, Ltd. with whom the witness holds the position of president. Millbrook Properties Ltd collects the rent from the respondent "Auto Barn" for the subject premises.

The witness further testified that "Auto Barn" fell into arrears in rental payments in October 2009 in the amount of $2,694.13, reflecting a partial payment of monthly rent of $8,978.63, a late charge of $448.93 and $.55 arrears in payment of CAM charges. In November 2009, this sum grew to $164,939.71, reflecting monthly rent of $8,978.63, $3,142.51 in past due rent and late charges, $33,449.22 in real estate taxed, $2,060.36 in CAM charges, $39,045.42 in school taxes and a one-time assessment for maintenance costs of $78,263.61. By the end of December 2009, the total sum in arrears had grown to $165,406.03, reflecting an arrears in monthly rent for December 2009, past due rend and a monthly late charge of $3,591.44, past due real estate taxes of $33,449.22, unpaid CAM charges of $2,077.71, unpaid school taxes of $39,045.42, and the past due maintenance assessment of $78,263.61. Additionally, the term of the lease expired on December 31, 2009.

Mr. Hirsch stated that the defendant "Auto Barn" remained in possession of the premises after the expiration of the lease term and exercised an option to renew the lease for a term of five years. This was done by a letter forwarded to Mr. Hirsch on December of 2009 signed by Mr. Herbert Blumberg, CEO of "Auto Barn" (*see plaintiff's #3 in Evidence).* This letter followed a number of meetings between Mr. Hirsch and Mr. Blumberg where attempts were made to reach an agreement on market value of the space, of which "Auto Barn" would pay 80% as monthly rent. Under the terms of the same provision in the lease, in the event of an impasse between the parties as to market value, both the plaintiff and the defendant could select an arbitrator who, in turn, would select a third arbitrator to determine market value

(see Plaintiff's #1, Rider to Lease, paragraph 41(f) in Evidence). Neither the plaintiff, nor the defendant ever selected an arbitrator for this purpose.

On January 1, 2010, the defendant was still in possession of the subject premises and remained in possession until March, 2010. No rental payments were made by the defendant for January, February or March of 2010. The defendant afforded the plaintiff no notice of its intent to vacate the premises before March 1, 2010. According to the witness rental arrears due from the defendant had grown to $198,736.26 as of March 31, 2010.

During March 2010, the plaintiff discovered that the defendant's store was largely empty. Finding the front door open and no one inside, the witness changed the locks and showed the premises to a prospective tenant. The defendant re-entered only for the purpose of removing some personal items. In the beginning of April, 2010, the plaintiff received notice that the premises were now vacant. The witness further explained how tax assessment were reconciled with rent payments after tax statements were received. No other rents were collected by the plaintiff for these premises after April 1, 2010 other than $18,000.00 received from rent from an interim tenant who operated a Halloween store at the premises.

Following Mr. Hirsch's testimony, plaintiff's counsel read from the transcript of an examination before trial of Mr. Herman Blumberg, President of the defendant Autobarn and thereafter rested.

At the close of the plaintiff's case, the defendant moved to dismiss the plaintiff's case on the grounds that the plaintiff SIB had failed to prove at trial that the lease with the defendant originally made with Binker Goes Shopping, LLC, had been validly assigned to the plaintiff, affording the plaintiff standing to institute and prosecute the instant action for breach of contract. The defendant also moved to dismiss on the grounds plaintiff failed to present a prima facie case. Plaintiff opposed the motion. The Court reserved decision.

The defense elected to present a case. It's sole witness was Herbert Blumberg, President and shareholder of the defendant Autobarn. He indicated that he signed the lease for the premises originally with Binker Goes Shopping, LLC. He believes he vacated the premises in February, 2010. He confirmed that several discussions were had with the plaintiff before the expiration of lease's term about extending the lease, but no agreement was reached on the amount of the rent for the lease extension, and no selection of arbitrators to determine the rental value was ever undertaken by the plaintiff.

Thereafter, the defense rested its case. The plaintiff did not offer a rebuttal case. The defendant Autobarn renewed its motion to dismiss upon the ground that the plaintiff lacked the capacity to prosecute the instant action. The plaintiff opposed the motion. The Court reserved decision on the motion and asked for the submission of post-trial memoranda from counsel. Plaintiff's submission of memorandum and an affirmation of legal services submitted in support of an application for legal fees due plaintiff under the terms of the lease was made on March 2, 2010.

After trial, the Court now denies all motions to dismiss made by the defendant for failure by the plaintiff to present a prima facie case. In examining the history of the instant case, the Court observes that the defendant "Autobarn" paid rent to the plaintiff for a significant period of time before defaulting in its obligation to pay rent under the lease. Moreover, the defendant surrendered possession of the subject premises to the plaintiff by its' stipulation of April 21, 2010 in Nassau County District Court. The defendant should not be permitted in the Court's view to adopt the inconsistent positions of both paying

rent and surrendering possession of the premises to the plaintiff while, at the same time, challenging the plaintiff's standing to prosecute the instant action for breach of contract under the lease. The defendant's remaining contentions are similarly without merit.

In examining the terms of the lease, the Court notes that the right of the defendant-tenant to exercise the option to extend the lease appears in paragraph 41(f) of the rider to the lease which provides:

> (f) Provided that Tenant is not in default hereunder, Tenant shall have the option to extend the Term of this lease for two additional five year periods under the following conditions:
>
> (I) Tenant must deliver a notice to landlord exercising the option to extend on or before the first day of the one hundred eighth (108th) month from the commencement date for the first five (5) years extension of the Term and if the first option is exercised by Tenant then on or before the first day of the one hundred sixth eighth (168th) month from the Commencement Date for the second five (5) year extension of the Term.
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> (ii) The Base Rent for the first five year extension shall equal eighty (80%) percent of market value.
>
> (iii) The Base Rent for the second five year extension shall equal eighty (80%) percent of market value.
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> (iv) In the event of a dispute between the parties as to market value, Landlord and Tenant shall each choose an arbitrator and the two arbitrators chosen shall select a third arbitrator. The determination of the three arbitrators shall be binding as to the determination of market value. Any arbitrators that are selected are to be qualified as experts in determining the market value for rents of retail properties that are comparable to the premises. *(Emphasis supplied)*

Plaintiff contends that the defendant exercised its option to extend the lease by it's December 2009 letter from Mr. Blumberg to Mr. Hirsch *(see Plaintiff's #3 in Evidence)*, and seeks the sum of $643,193.74 as damages for the breach of the lease. The defendant contends, and it is undisputed, that no arbitrator panel was ever selected to determine the market value of the rent, nor were an agreement reached between the parties as to the amount of the rent.

Plaintiff alleges and the Court now finds that the defendant was in rental arrears in the amount of $165,406.03 as of December 31, 2009. While the payment of rent is not ordinarily a condition precedent to the renewal of a lease because of the independence of its' covenant, it may, expressly be made so by the parties. And where it is so expressly provided, strict performance by the tenant of the condition precedent is required before the renewal may be effectuated. (see, **J.N.A. Realty Corp v Cross Bay Chelsea, Inc**, 42 NY2d 392, 397 NYS2d 958 (1977). In the instant case, the right of the defendant tenant to extend the lease was expressly conditioned upon the defendant-tenant not being in default of the terms of the lease at the time of the renewal. *(see, Plaintiff's #1 in Evidence, Rider To Lease, paragraph 41, supra)*. No evidence was adduced at trial that the parties, either expressly or

impliedly waived non-payment of the rent in their negotiations regarding a possible extension. An extensive review of the protracted provisions of this lease for commercial property similarly fails to reveal to the Court any intent by the parties to omit non-payment of rent as a default under the terms of the lease. Accordingly, the Court finds that in December, 2009, the defendant-tenant, by the terms of the lease, lacked the capacity to seek the first five year renewal provided in paragraph 41 by reason of its' default in the payment of rent for the months of October, November and December of 2009 and the letter forwarded by the defendant to the plaintiff seeking to extend the lease is rendered a nullity (*see, Plaintiff's #3 supra).*

Where a tenant fails to perform a condition precedent to a renewal and the non-performance is not waived, the tenant, by continuing a possession after the expiration of the term, becomes a holdover. The measure of damages for wrongfully holding over is the reasonable value of the premises for the period possession is withheld which is the value of use and occupation (see, **Ocumpaugh v Engel**, 121 AD 9, 105 NYS 510 (4th Dept. 1907); **Earl v Nalley**, 273 AD 451, 78 NYS2d 92, (3rd Dept. 1948). In the instant case, the Court finds that the defendant tenant remained in possession of the premises until April, 2010 when it afforded written notice to the plaintiff of its intention to vacate.

Accordingly, the Court awards to the plaintiff the sum of $165,406.03 for arrears in rent for the period ending December 31, 2009, and $31,768.86 reflecting prior monthly base rent and additional rent, as a measure of reasonable use and occupation, for the months of January, February and March 2010, for a total sum of $197,174.89.

Paragraph 19 of the lease renders the defendant Autobarn liable for an award of reasonable attorney's fees for the prosecution of the instant action and the summary proceeding which preceded it. Counsel had stipulated at trial to make post-trial submissions to the Court for a determination of this issue. The Court has received an application for attorney's fees from plaintiff's counsel, Robert G. Steinberg, Esq., an affirmation in partial opposition from defense counsel, Lee J. Monschein, Esq., and a reply by letter to Mr. Monschein's affirmation from Mr. Steinberg dated March 2, 2012 accompanied by a copy of Mr. Steinberg's retainer agreement with the plaintiff.

After careful consideration of the submissions to the Court, the Court awards to the plaintiff the sum of $21,624.81 as reasonable attorney's fees.

This constitutes the decision and Order of the Court. Let judgment enter accordingly.

DATED: 5/3/2012

Ray S. Mellon
J.S.C.

ENTERED

MAY 08 2012

NASSAU COUNTY
COUNTY CLERK'S OFFICE