

KENNETH H. LOBELL

*

NO. 2018-CA-0600

VERSUS

*

COURT OF APPEAL

CINDY ANN ROSENBERG

*

FOURTH CIRCUIT

DENN, ET AL

*

STATE OF LOUISIANA

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2008-03338, DIVISION "C"
Honorable Sidney H. Cates, Judge

Judge Daniel L. Dysart

(Court composed of Judge Daniel L. Dysart, Judge Joy Cossich Lobrano, Judge Dale N. Atkins)

LOBRANO, J., DISSENTS

Roderick R. Alvendia
ALVENDIA KELLY & DEMAREST, L.L.C.
909 Poydras Street, Suite 1625
New Orleans, LA 70112

Matthew L. Pepper
LAW FIRM OF WONDERLY & PEPPER
25211 Grogans Mill Road, Suite 450
The Woodlands, TX 77380
COUNSEL FOR PLAINTIFFS/APPELLEES

Harry Rosenberg
PHELPS DUNBAR, L.L.P.
365 Canal Street, Suite 2000
New Orleans, LA 70130-6534

Brian D. Katz
Herbert A. Cade
HERMAN HERMAN & KATZ, L.L.C.
820 O'Keefe Avenue
New Orleans, LA 70113
COUNSEL FOR DEFENDANTS/APPELLANTS/PLAINTIFFS IN
RECONVENTION

AFFIRMED

DECEMBER 19, 2018

Defendants-appellants, Cindy Rosenberg Denn, Craig Rosenberg, Ricky Rosenberg, Harry Rosenberg, Lenore Rosenberg Bramblett, Ann Rosenberg Silberman, Carla Rosenberg Waggoner, Paige Rosenberg Hirschkop, Rosalie Rosenberg Samuelson, and Larry Rosenberg, and 2025 Canal Street, L.L.C.¹ (hereafter, collectively, the “Rosenbergs”), appeal a March 23, 2018 judgment which denied several of the Rosenbergs’ post-trial motions. A full recitation of the pertinent facts and procedural history related to this litigation, arising out of a lease of property located at 2025 Canal Street, New Orleans, Louisiana, is set forth in the companion case of *Kenneth H. Lobell, et al. v. Cindy Ann Rosenberg, et al.*,” 2018-CA-0559 (La. App. 4 Cir. --/--/----), also handed down this date.²

In the companion case, this Court found that an August 22, 2013 judgment was final in its entirety and found no error in the trial court’s denial of Lobell’s motion to amend the judgment. The August 22, 2013 judgment found that the

¹ The Rosenbergs transferred their collective interest in the property to 2025 Canal St., L.L.C. on May 30, 3008. *Lobell v. Rosenberg*, 10-0983, p. 7 (La. App. 4 Cir. 4/6/11), 62 So.3d 823, 827 (“*Lobell I*”).

² In the companion case, plaintiffs-appellees, Kenneth H. Lobell and K.H.L. Canal, L.L.C. (hereafter, collectively, “Lobell”), appealed the same judgment.

lease at issue was terminated as of April 30, 2013, and awarded, *inter alia*, past-due rent and ad valorem property taxes through that date.³

This appeal concerns the Rosenbergs' Motion to Assess Payment of Post-Trial Unpaid Rent, Unpaid Taxes, Unpaid Insurance and Interest Thereon (hereafter referred to as the "Motion"). In the Motion, the Rosenbergs sought a judgment awarding them rent, ad valorem taxes, insurance premiums, and judicial interest for the period between April 30, 2013 (the date on which the trial court found that the lease terminated) and June 7, 2016 (the date on which the trial court's August 22, 2013 judgment became final in its entirety based on the Louisiana Supreme Court's denial of Lobell's application for a writ of certiorari).⁴

In their Motion, the Rosenbergs argued that, because Lobell suspensively appealed the August 22, 2013 judgment, the lease was effectively suspended until the judgment become final on June 7, 2016. During this time, Lobell paid no rent and the Rosenbergs were required to pay the property taxes and insurance on the property, sums the Rosenbergs claim Lobell owes them.

A hearing on the Motion was held and by judgment dated March 23, 2018, the trial court denied the Motion in its entirety.⁵ The Rosenbergs timely appealed that judgment.

³ It is unclear from the trial court's judgment and Reasons for Judgment how the court determined that the lease terminated on April 30, 2013. However, this Court noted that, in his initial appeal, Lobell only challenged the award for restoration and, in a later appeal, the Court rejected the argument that the lease terminated in 2008, as Lobell contended. See *Lobell v. Rosenberg*, 14-0060, pp. 6-7 (La. App. 4 Cir. 1/27/16), 184 So.3d 850, 854, *writ denied*, 16-0669 (La. 5/27/16), 192 So.3d 744. The Court found that "[t]he trial judge ... rejected this assertion," this Court "explicitly affirmed his ruling on this point" and that, because "Mr. Lobell failed to seek review of this ruling with the Supreme Court . . . this aspect of the trial judge's ruling is final." *Id.* Thus, the Court "refuse[d] to reopen the matter." *Id.* In the companion case, this issue was raised again and this Court refused to reconsider this issue, reiterating the finality of the judgment and that issue in particular.

⁴ See *Lobell v. Rosenberg*, 16-0669 (La. 5/27/16), 192 So.3d 744; La. C.C.P. art. 2166 E.

⁵ The Motion was originally denied by a judgment dated September 6, 2016 for which an appeal was taken. However, this Court found that the judgment was not final. *Lobell v. Rosenberg*, 17-

DISCUSSION

The issue presented in this case is a novel one, and while the Rosenbergs list seven assignments of error, they all turn on a singular issue – whether, despite the judicial termination of a lease, a lessor is entitled to continued rent payments and to enforce other provisions of a lease when a suspensive appeal is taken of a judgment pertaining to the lease. The Rosenbergs cite no case law answering that specific question in the affirmative, but rather cite general jurisprudence regarding the enforcement of contracts and the effect of suspensive appeals. The gist of the Rosenberg’s argument is that, because of the suspensive nature of the appeal, the August 22, 2013 judgment was suspended until June 7, 2016, the effect of which was to maintain Lobell’s possession of the property to their exclusion. Accordingly, the Rosenbergs argue, the lease’s requirement that Lobell pay property taxes and insurance on the property remained in effect during the pendency of the appeal process through the finality of the judgment.⁶ We disagree.

We recognize that a suspensive appeal is “one that suspends the effect or the execution of the judgment pending the appeal.” *Davenport v. City of Alexandria*, 15-0454, p. 2 (La. 6/30/15), 168 So.3d 377, 378, citing La. C.C.P. art. 2123.

However, equally well-settled are the following principles:

Generally, when a lessee defaults on a lease agreement, the lessor has two options available: he may sue to cancel the lease and to recover accrued rentals due, or he may sue to enforce the lease and to recover both accrued rentals and future accelerated rentals (if the lease contains an acceleration clause). These remedies are mutually exclusive. *Riccobono v. Kearney*, 164 La. 947,

0111 (La. App. 4 Cir. 10/4/17), 228 So.3d 1241. The trial court’s March 23, 2018 judgment is designated as final.

⁶ “The lease documents . . . required Mr. Lobell to pay stipulated rent; pay all ad valorem taxes on the property; [and] maintain insurance coverage.” *Lobell v. Rosenberg*, 15-0247 (La. 10/14/15), 186 So.3d 83, 85.

114 So. 846 (1927); Comment, *The Louisiana Law of Lease*, 39 Tul.L.Rev. 798, 860 (1965); V. Palmer, *Leases, The Law in Louisiana* § 5-19 (1982). If the lessor elects to cancel the lease, the lease is terminated and the lessor is entitled to return into possession, *but he forfeits the right to all future rentals*. On the other hand, if the lessor elects to enforce the lease, he may obtain a money judgment against the lessee based on the terms of the lease agreement, but the lease remains in effect and the lessee retains the right of occupancy for the remainder of the term of the lease.

Richard v. Broussard, 495 So.2d 1291, 1293 (La. 1986)(emphasis added). See also *1001 Harimaw Court E., L.L.C. v. Blo, Inc.*, 10-860, p. 4 (La. App. 5 Cir. 5/24/11), 66 So.3d 1131, 1133 (“[i]f the lessor elects to cancel the lease, the lease is terminated and the lessor is entitled to return into possession, but he forfeits the right to all future rentals.”); *Southpark Cmty. Hosp., LLC v. Southpark Acquisition Co., LLC*, 13-59, p. 15 (La. App. 3 Cir. 10/30/13), 126 So.3d 805, 815; *Kushi Healthcare, L.L.C. v. St. James Behavioral Health Hosp., Inc.*, 15-0007, p. 8 (La. App. 1 Cir. 6/5/15), 174 So.3d 1192, 1997.

The Rosenbergs point to the various provisions of the lease which require Lobell to pay rent, real estate taxes and insurance through the expiration of the lease on May 31, 2017. There is no question that the lease includes these provisions; however, the lease also contains provisions that, in the event that the lessee fails to comply with the terms of the lease, including the payment of rent, taxes or insurance, the lessor may “declare this lease terminated.” The lease provided another option, which the Rosenbergs chose not to enforce; namely, “to declare the rent for the whole unexpired term due and exigible.” It cannot seriously be argued that even after the lessor cancels a lease, lessee must continue to pay rent, taxes and insurance thereafter. See *Richard*, 495 So.2d at 1293; *1001 Harimaw Court*, 10-860, p. 4, 66 So.3d at 1133.

The Rosenbergs further rely heavily on the case of *American Branch Bldg. Corp. v. Bozeman*, 543 So.2d 1114, 1115 (La. App. 1 Cir. 1989) in support of their position. In *Am. Branch*, at issue was the validity of a sublease. The trial court ordered the lessor to execute the sublease, and the lessor took a suspensive appeal of that judgment. During the pendency of the appeal (the appellate court affirmed the judgment and the Supreme Court denied a writ application), the sublease expired. Under the terms of the sublease, the sub-lessee was required to provide written notice to the lessor no less than 90 days before the lease expired of his intent to renew the sublease. The lessor then filed suit for a determination that the lease had terminated, and the sub-lessee reconvened for a determination of the validity of the lease.

The Court noted that “LSA-C.C.P. art. 2123 provides that a suspensive appeal suspends *the effects of a judgment*; however, the law does not permit either or both parties to cure defects in their performance during the suspensive appeal period after the suspensive appeal is finally decided.” *Id.*, 543 So.2d at 1117 (emphasis supplied). It then noted that “[t]he purpose of a suspensive appeal is to defer the effects of a judgment that could possibly be overturned until it is determined that the judgment will be upheld. It does not make all affirmative acts required of an appealing party relate back to the date of the appeal.” *Id.* It then held that “[t]he existence of a suspensive appeal did not eliminate the requirement that [the sub-lessee] protect his rights by taking the necessary affirmative action required by contract to continue the validity of the sublease,” noting that “nothing prevented [him] from increasing the monthly rentals he was paying during the pendency of the appeal, which he was required to do under the express contractual provisions.” *Id.*

We do not find that *American Branch*, a First Circuit decision having no binding precedence on this Court,⁷ dictates that, pending the suspensive appeal of a judgment terminating a lease, all obligations under the lease continue to be enforceable. To the contrary, we note our well-settled jurisprudence that appeals are favored.⁸ If the Rosenbergs' position was accepted, and a lessee was held to be bound by all obligations of a lease during the suspensive appeal process, the result would have a chilling effect on the right to a suspensive appeal. We find such a result would be untenable.

Thus, under the peculiar circumstances of this case, we find that Lobell does not owe the Rosenbergs rent payments, insurance premium payments or tax payments for the period of time after the lease was terminated and the August 22, 2013 judgment became final. We therefore affirm the trial court's ruling denying the Motion.

We note, too, that, in May 2008, the Rosenbergs initiated eviction proceedings against Lobell. *Lobell v. Rosenberg*, 14-0060, p. 9 (La. App. 4 Cir. 1/7/15), 158 So.3d 874, 881, *writ granted*, 15-0247 (La. 5/1/15), 169 So.3d 366, *rev'd*, 15-0247 (La. 10/14/15), 186 So.3d 83. As this Court noted, though, there is no evidence that the Rosenbergs pursued that eviction proceeding. *Id.*, p. 9 n.8, 158 So.3d at 881. Had the Rosenbergs continued with their eviction proceeding,

⁷ See *Ernest N. Morial New Orleans Exhibition Hall Auth. v. New Limits New Limits, LLC*, 16-0706, p. 7 (La. App. 4 Cir. 4/5/17), 215 So.3d 974, 978, quoting *Bridges v. Production Operators, Inc.*, 07-0648, p. 7 (La. App. 4 Cir. 12/12/07), 974 So.2d 54, 59 (“[u]nder the ‘law of the circuit’ rule, we are not bound by the decisions made by other circuits; it is persuasive authority only.”). See also *Doerr v. Mobil Oil Corp.*, 00-0947 (La. 12/19/00), 774 So.2d 119, 128, *opinion corrected on reh'g*, 00-0947 (La. 3/16/01), 782 So.2d 573 (“[u]nder the civilian tradition, while a single decision is not binding on our courts, when a series of decisions form a ‘constant stream of uniform and homogenous rulings having the same reasoning,’ *jurisprudence constante* applies and operates with ‘considerable persuasive authority.’” (internal citations omitted)).

⁸ See, e.g., *Fraternal Order of Police v. City of New Orleans*, 02-1801, p. 2 (La. 11/8/02), 831 So.2d 897, 899 (“[i]t is well settled that appeals are favored in the law.”).

perhaps the various delays in this matter could have been avoided and the Rosenbergs may have regained possession of the property at an earlier time.

CONCLUSION

For the reasons set forth herein, we affirm the trial court's judgment denying the Rosenbergs' Motion to Assess Payment of Post-Trial Unpaid Rent, Unpaid Taxes, Unpaid Insurance and Interest Thereon.

AFFIRMED