First Resort, LLC v Demetriades

2007 NY Slip Op 34368(U)

July 3, 2007

Supreme Court, Suffolk County

Docket Number: 0029114/2005

Judge: Gary J. Weber

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INDEX No. 05-29114

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

P R E S E N T:

Hon. Gary J. Weber MOTION DATE **DECISION AFTER**
Acting Justice of the Supreme Court Motion Seq. # **NON-JURY TRIAL**

FIRST RESORT, LLC,

Plaintiff(s)

-against-

ALEX DEMETRIADES,

Defendant(s)

TWOMEY, LATHAM, SHEA, KELLEY
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This is an action brought by First Resort, LLC (hereinafter "First Resort") against the Defendant Alex Demetriades (hereinafter Demetriades) seeking the following relief:

1. A declaration that plaintiff's lease was renewed for two additional years pursuant to [Lease] Rider paragraph 29;

2. Declaring that defendant's Notice of Intention to Terminate the Lease is void and that Plaintiff is not in default under the lease.

Demetriades, for his part, has denied the substantive allegations of First Resort and raised certain affirmative defenses and asserted, as well, various counterclaims:

1. That Plaintiff tortiously interfered with a contract of sale of the subject real property in question to Mackenzie Realty, L.L.C., which the defendant had secured.

2. That the Plaintiff owes the Defendant for use and occupancy of the subject real property and for unpaid real estate taxes in "at least the sum of $36,574.64".

3. That the Plaintiff owes the Defendant, pursuant to the subject lease, an unspecified sum in attorney's fees for defending this action as well as for disbursements.

4. That the Plaintiff owes the Defendant a sum of money for the loss of certain furniture which was consigned by Defendant to Plaintiff for sale.

Both sides have included the usual prayer for "such other and further relief as to the court may seem just and proper".

The case was tried before the Court without jury on April 29, April 30 and May 1, 2008.

Background

First Resort and Demetriades entered into a lease for the commercial premises known as 640 County Road 39, Southampton, New York on April 15, 2004 (Plaintiff's Exhibit 1).

The lease contains, in pertinent part, the following provisions:

Printed Form Portion - Main Body

NINETEENTH. The Landlord has made no representations or promises in respect to said building or to the demised premises except those contained herein, and those, if any, contained in some written communication to the Tenant, signed by the Landlord. This instrument may not be changed, modified, discharged or terminated orally.

TWENTIETH. If the Tenant shall at any time be in default hereunder, and if the Landlord shall institute an action or summary proceeding against the Tenant based upon such default, then the Tenant will reimburse the Landlord for the expense of attorneys' fees and disbursements thereby incurred by the Landlord, so far as the same are reasonable in amount. Also, so long as the Tenant shall be a tenant hereunder the amount of such expenses shall be deemed to be "additional rent" hereunder and shall be due from the Tenant to the Landlord on the first day of the month following the incurring of such respective expenses.

Rider - Typed Portion

"R29. LIMITED OPTION TO EXTEND TERM OF LEASE.

A. During the first nine (9) months of the term of this Lease only, Tenant shall have the limited option to renew the term of the lease for a single two year (2) year period beyond the initial term. Upon Tenant's failure to give written notice to Landlord of its commitment to exercise such limited option to extend on or before December 31, 2004, said limited option to renew shall be canceled. It is expressly understood and agreed that Tenant shall be able to exercise said option to renew only provided that: 1) this Lease shall not be have been previously terminated, 2) no Tenant default shall have occurred on either the date Tenant gives Landlord written notice to renewal or April 14, 2005, and 3) Tenant shall be in actual occupancy of the Demised Premises.

B. If such limited option to extend is exercised, the following base rent shall be due and payable for the extension period:

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R30. LIMITED NON-ASSIGNABLE OPTION TO PURCHASE.

A. Tenant shall have the limited non-assignable option to purchase the building and property which the demised premises are a part, in 'as is' condition, for the purchase price of 1.75 Million Dollars ($1,750,000.00) in the event that, pursuant to the terms of this Article R30, Tenant shall deliver written notice of Tenant's election to purchase to Landlord's attorney, together with a contract deposit in the amount of $175,000.00, and four purchaser-executed copies of the contract of sale annexed hereto as Exhibit 'A'.

B. 1. It is expressly understood and agreed that Tenant shall be able to exercise said option to purchase only provided that: 1) this Lease shall not be have been previously terminated and/or expired, ii) no Tenant default shall have occurred on either the date Tenant delivers to Landlord purchaser-executed contracts of sale together with a contract deposit

or on the date of Closing, and iii) Tenant shall be in actual occupancy of the Demised Premises.

2. It is further expressly understood and agreed that in the event that Tenant exercises said option to purchase, Tenant's obligations under this Lease shall continue in full force and effect until the date of Closing, including without limitation, Tenant's obligations to pay any and all applicable taxes and operating expenses related to the demised premises to the date of Closing and to pay to Landlord a monthly 'use and occupancy' fee in an amount equal to the then applicable base rent.

C 1. In the event Tenant shall not deliver written notice of its election to purchase, together with a contract deposit in the amount of $175,000.00, and four purchaser-executed copies of the contract of sale annexed hereto as Exhibit 'A', on or before April 14, 2005 and Tenant shall also have failed to exercise its limited option to renew this Lease pursuant to Article R29 hereof, the non-assignable option to purchase hereunder shall be deemed null and void.

2. In the event that Tenant shall have properly exercised its limited option to renew this Lease pursuant to Article R29 hereof, but fail to deliver written notice of its election to purchase, together with a contract deposit in the amount of $175,000.00, and four purchaser-executed copies of the contract of sale annexed hereto as Exhibit 'A', on or before April 14, 2007, the non-assignable option to purchase hereunder shall be deemed null and void.

D 1. At Closing, Landlord shall credit Tenant towards the purchase price in an amount equal to Fifty Percent (50%) of all base rent paid to Landlord in the first year of this Lease. However, it is expressly understood and agreed that Tenant will not be entitled to no greater credit than $45,000.00 in the event that such Closing is held on or after April 14, 2005.

The principals of First Resort are Ms. Victoria Collett (hereinafter "Collett") and James Nicolino (hereinafter Nicolino).

The instant litigation centers around First Resort's claim that, despite First Resort's admitted failure to strictly comply with the renewal option portion of the lease, that the lease was renewed by operation of law, thus giving life to the purchase option portion of the lease which, under the circumstances of this case at least, would otherwise die along with the lease at its conclusion.

The Facts

Each side called its principals to the stand but Collett and Demetriades were the main witnesses. The Court finds the testimony of each of them to have been credible in all material respects.

There is no significant difference between the sides as to the facts in this matter.

Collett admits to having executed the lease while represented by counsel. She also testified that in October of 2004 and twice in November of 2004 she sent letters to Demetriades concerning a reduction in the level of post-summer rent and asking for a reduction in rent (see Plaintiff's Exhibits 5 & 6). She received no reply to these letters.

However, on December 19, 2004, Demetriades showed up unannounced at the premises and both Collett and Demetriades concur that Demetriades agreed to accept $5,000.00 in rent for the winter months of December 2005, and January, February

and March of 2005 instead of the amount called for in the lease ($7,500.00). The unpaid rent was to be made up in the summer months which, by implication at least, signified that the lease would be renewed. Without a renewal the lease would expire on April 15, 2005, before the summer months could even begin.

Ms. Collett testified that Demetriades was so happy with the appearance of the premises, which are operated as an antique or furniture store by First Resort, that he kissed her on both cheeks as a celebration, Collett thought, of the fact that she, and First Resort, would be staying.

On April 8, 2005 Collett and Nicolino sent a letter to Demetriades which stated in relevant part:

April 8, 2005

Alex Demetriades,

Enclosed please find the rent check in the amount of $10,000. This confirms our renewal of the lease and it is considered in full force and effect. Currently, we are in the process of lining up the financing for the building. We do realize that no rent money will be applied toward the agreed on purchase price.

Respectfully,

Victoria Collett James Nicolino

Defendants Exhibit 10.

On April 9, 2005 Collett and Nicolino sent Demetriades another letter which said, in pertinent part:

April 9, 2005

Alex Demetriades,

This letter is to confirm that the original lease dated 4/15/04 has been extended pursuant to all terms and conditions as stated in the above.

As per our conversation with you in the store on or about 12/19/04, it was agreed that we would pay a reduced winter (November through March 2005) rental rate of $5,000/monthly with the stipulation that when our lease term renewed on April 15, 2005 we would make up the difference and begin paying $10,000/monthly at start of new term as per contract. This rent check was mailed to you on April 8, 2005. . . . .

Victoria Collett James Nicolino

(Defendant's Exhibit ll)

The check contained in the letter of April 8, 2005 as well as similar checks in the sum of $10,000.00 each dated May 9, 2005 and June 16, 2005 were all deposited on July 11, 2005 in Demetriades' account and were endorsed "Deposited under protest. Use and Occupancy only. No lease renewal, Partial Payment".

Another check in the amount of $10,000.00 dated July 16, 2005 was deposited without comment, as were 14 other checks in various amounts for rent after July 15, 2005 up to and including May 15, 2007. (See Defendant's Exhibit 14 in evidence).

On April 12, 2007 Christopher Kelley, Esq., an attorney in the firm presently representing First Resort sent a letter containing the signed contracts and a check for $175,000.00 to Demetrios G. Melis, Esq. who was then representing Demetriades, stating that First Resort was exercising the option to purchase contained in the lease as above mentioned and described at paragraph R30 of the original lease. (Plaintiff's Exhibit #21).

By letter dated April 17, 2007, Demetrious G. Melis, Esq., on behalf of his then client, Demetriades, rejected the tender made by First Resort (Plaintiff's Exhibit 22 in Evidence).

The contract of sale attached to the lease, which had apparently been executed by First Resort contains the following language.

"§ 16.02

A. It is expressly understood and agreed that Tenant shall be able to exercise said option to purchase only provided that: 1) said Lease shall not be have been previously terminated and/or expired, 2) no Tenant default shall have occurred on either the date Tenant delivers to landlord purchaser-executed contracts of sale together with a contract deposit or on the date of Closing, and 3) Tenant shall be in actual occupancy of the Premises.

B It is further expressly understood and agreed that in the event that Tenant exercises said option to purchase, Tenant's obligations under said Lease shall continue in full force and effect until the date of Closing, including without limitation, Tenant's obligations to pay any and all applicable taxes and operating expenses related to the demised premises to the date of Closing and to pay to Landlord a monthly "use and occupancy" fee in an amount equal to"

Analysis of Plaintiffs Claims
and Causes of Action

In *J.N.A. Realty Corp. v. Cross Bay Chelsea Inc.*, (42 N.Y.2nd 392, 397 N.Y.S.2d 958 1977), the Court of Appeals held that

"[W]hen a tenant in possession under an existing lease has neglected to exercise an option to renew, he might suffer a forfeiture if he has made valuable improvements on the property. This of course generally distinguishes the lease option, to renew or purchase, from the stock option or the option to buy goods. This is a distinction which some of the older cases failed to recognize (see, e.g. *Fidelity & Columbia Trust Co. v. Levin, supra; Doepfner v Bower, supra; cf. People's Bank of City of N.Y. v. Mitchell, supra).* More recently it has been noted that "although the tenant has no legal interest in the renewal period until the required notice is given, yet an equitable interest is recognized and protected against forfeiture in some cases where the tenant has in good faith made improvements of a substantial character, intending to renew the lease, if the landlord is not harmed by the delay in the giving of the notice and the lessee would sustain substantial loss in case the lease were not renewed" (2 Pomeroy, Equity Jusisprudence [5th ed], § 453b, p 296).

The leading case on this point is *Fountain Co. V. Stein* (97 Conn 619; 27 ALR 976) and the rule has been accepted by noted commentators (see, e.g., 1 Corbin, op. Cit., § 35, p 146; 1 Williston, Contracts [3d ed], § 76, p 249, n 4; 2 Pomeroy, op. cit. § 453b, p 296). It has also been accepted and applied by this court. In *Jones v. Gianferante (*305 NY 135, 138), citing the *Fountain* case we held that the tenant was entitled to "the benefit of the rule or practice in equity which relieves against such forfeitures of valuable lease terms when default I notice has not prejudiced the landlord, and has resulted from an honest mistake, or similar excusable fault." The rule was extended in *Sy Jack Realty Co. v. Pergament Syosset Corp.* NY2d 449, 453, *supra* to preserve the tenant's interest in a "long-

standing location for a retail business" because this is "an important part of the good will of that enterprise, [and thus] the tenant stands to lose a substantial and valuable asset"."

Here, the proof is that First Resort, the Tenant, did make substantial investments in the property (see Plaintiff's Exhibit D, as an example), so much so that the Landlord, Demetriades, expressed his appreciation for the work that the Tenant had done by kissing Collett on both cheeks and proceeding to thereafter accept and cash First Resort's checks.

In any event, the delay in the giving of the written notice of renewal of the lease by First Resort was minimal - a period of four months, and clearly inadvertent. Collett and Nicolino, while generally good intentioned, were naive in believing that they could so easily deal with what has unnecessarily become a complicated legal situation, without the aid of competent counsel, which is exactly what they were unsuccessfully attempting to do between the time that they signed the original lease and the time that they retained their present counsel. Such a mistake does not mean that Collett and Nicolino should necessarily lose everything that they have put into this project as a penalty for not sending a written notice in proper form at the exact moment called for in the lease, even as Demetriades was proceeding, albeit somewhat grudgingly, to collect rent checks meant to cover the extended term of the lease.

Demetriades admitted from the witness stand that he expected to make up for reduced rent which he had agreed to in the winter months by getting more rent in the summer. There could be no other way for him to logically expect to achieve that unless the lease were extended. Moreover, Demetriades opined from the witness stand to the effect that the only hardship he would suffer in the event that the lease, and, hence, the option to purchase were to be extended, would be that he would not be able to sell the property for more money than called for in his agreements with First Resort. Of course, one of the reasons that First Resort was willing to pay the substantial agreed rent in the first place was to prevent Demetriades from doing exactly this, thus selling the place out from under them.

On the other hand, Plaintiff's position that First Resort need not pay rent for the period after which the option hereunder was purportedly exercised and/or that the proper amount of rent for the reasonable use and occupancy of the premises is not capable of being fixed on this record, is without merit.

Plaintiff cites *Barbarita v.Shilling* 489 N.Y.S.2d 86 App. Div. 2nd Dept. 1985) in support of the proposition that a contract vendee in possession, need not pay rent.

However that case specifically holds that:

"Although the two relationships are not mutually exclusive, the general rule is that execution of a contract of sale between landlord and tenant serves to merge the landlord-tenant relationship into the vendor-vendee relationship and thus effectively terminates the former, unless the parties clearly intend the contrary result (*compare* Bullock v. Cutting, *155 App.Div. 825, 140 N.Y.S. 686, with* Bostwick v. Frankfield, *74 N.Y. 207* and Sid Farber Hempstead Corp V. Buckley, *supra).*

An intention to deviate from the general rule and to avoid a merger may be directly expressed in the agreement or may be inferred from a medley of factors such as the terms of the agreement, the circumstances of its making, and the subsequent behavior of the parties (*see generally,* Rae v. Courtney, *250 N.Y. 271, 165 N.E. 289;* 2 Rasch, New York Landlord and Tenant [2d ed.]; § 690)."

Here, there is a clause, paragraph 16.02 supra, in the option contract of sale specifically requiring that Plaintiff continue to pay rent during the pendency of the closing of title.

Moreover, it is axiomatic that "he who seeks equity must do equity". First Resort, evidently, has been and continues to be in possession of the premises, doing business there from the inception of the lease to the present day.

As a general principal, the seller must have either his rent or the ability to collect interest on purchase money.

As to the amount, the Court finds that the reasonable rent is the base rent payable as of the last month of the lease, as if it had been formally extended and, as to any previous period covered by the original lease as yet unpaid, if any, the amount called for in the lease, together with such other adjustments, such as payment of real property taxes, as were called for in the lease and or contract of sale arising out of the option.

Analysis of Defendants Counterclaims
And Causes of Action

Defendants cause of action by way of a counterclaim seeking damages for the alleged tortious interference by the Plaintiff in a prospective sale by the defendants to MacKenzie Realty L.L.C. is dismissed as unproven. In any event, there was no showing that it was the plaintiff who caused the sale to fail to materialize and it does not appear that there were any damages.

Defendants counterclaim for damages for goods left on consignment with Plaintiff to sell is without merit.

Defendant failed to pick up the goods after receiving much communication from Plaintiff concerning his need to pick up these unsold items. This culminated in a letter dated October 20, 2005 (Plaintiff's Exhibit 30) which specifically warned Demetriades that the furniture would be given to charity, if not picked up. The testimony is to the effect that this is exactly what occurred. In light of all of this, it is hard to see how Demetriades has anybody or anything to blame for the loss of the remaining portion of his used furniture consignment except his own obdurate refusal to pick it up.

In any event, no adequate proof was ever adduced as to the value of this missing property - if, under all the circumstances, this lost furniture had any significant value at all.

Decision

Plaintiff owes defendant a balance of $6,574.64 because this amount was deducted from the total rent due of $10,000.00 from the rent check dated 12-15-05, so that tenant could install a new heating system. This was not permitted pursuant to either the terms of the lease or as a general principal of law.

Plaintiff, First Resort, is directed to pay the Defendant, Demetriades all sums of money outstanding as rent or other adjustments, pursuant to the original lease, including the sum of $6,574.64, as previously described, as well as rent at the rate of $10,300.00 per month together with such other adjustments as are called for in the original lease and or the option contract. This is mostly occasioned by the legal action made necessary by the conduct of both parties resulting in a delay of both payment of rent and closing of title.

Demetriades shall either cash or return such checks from First Resort as he now holds. Any sum he receives from cashing the checks shall operate as a credit for the account of First Resort.

If Plaintiff, First Resort, shall pay the sums above described to Defendant Demetriades within 30 days of the entry of the order to be signed herein, then the lease option contract herein shall be of full force and effect and the parties shall close title in accordance with its terms, as may be adjusted by the conditions of this decision and the order to follow, as well as those made necessary by the passage of time.

In the event that Plaintiff, First Resort, shall not pay the sums aforementioned to Defendant, Demetriades, within 30 days of the service upon its attorney or the opposing attorney of the order to be entered herein, then the lease option contract shall be of no further force and effect and the Defendant, Demetriades shall be free to pursue his remedies by way of summary proceedings or otherwise.

In the event that the parties cannot, within 5 days of the service upon them of the order to be entered herein, agree upon the amount of the sums presently due Demetriades pursuant to this decision, prior to closing of title, Karl E. Bonheim, Esq. of 431 Griffing Avenue, Riverhead, New York is conditionally appointed as a Referee to hear, determine and report to the Court the sums due pursuant to this decision and order. His fees shall be $300.00 an hour, and split by the parties.

No attorney's fees are awarded either side as it cannot be said that either side was a prevailing party. In any event, there was no adequate proof as to the value of attorney's fees provided either side. Moreover, the lease provision at paragraph 20 which calls for payment of Landlord's attorney's fees by Tenant refers to a summary proceeding. This action is one instituted by the Tenant to enforce Tenant's rights under the lease. (See *Board of Managers of Dickerson Pond Condominium I v. Jagwani, 276 A.D. 2d 517, 713 N.Y.S.2d 761 (2nd Dept. 2000).*

Defendant shall take nothing as to his counterclaims for tortious interference with contract and the alleged loss of his consignment furniture.

As neither party can be said to have prevailed, no costs or disbursements are awarded to either party.

All other applications or prayers for relief that are inconsistent with this decision are in all respects denied and no other relief is granted to either side except as is herein specified.

The Court, on its own motion, has conformed the pleadings to the proof.

Submit order on notice.

Dated: July 3, 2007

Gary J. Weber, Acting J.S.C.

Non-Final Disposition
Scan