136 Ninth Ave. Corp. v Dog Run, LLC
2013 NY Slip Op 32677(U)
October 11, 2013
Sup Ct, New York County
Docket Number: 104454/11
Judge: Nancy M. Bannon
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SCANNED ON 10/28/2013
[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY – PART 42
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136 NINTH AVENUE CORP.,

Plaintiff,

DECISION AFTER TRIAL
Index No.: 104454/11

-against-

THE DOG RUN, LLC and
MARY P. CONNELLY,

Defendants.

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NANCY M. BANNON, J.

In this action seeking to recover damages for an alleged breach of a lease, the plaintiff, 136 Ninth Avenue Corp., the owner of a building at that address, claims in its first cause of action that the defendants, The Dog Run, LLC, a tenant at the premises, and its principal, Mary P. Connelly, owe $17,614.68 in unpaid rent, including $8,266.18 per month for December of 2007 and January of 2008, as well as $541.18 per month in rent shortfalls for January and February of 2006. In its third cause of action, the plaintiff alleges that it is owed $ 21,831.59 in unpaid water bills. The remainder of the plaintiff's claims have been withdrawn.

The defendants' position is that they owe rent only for December of 2007, have paid their rent shortfall and do not owe any money for water charges. The defendants counterclaim for the return of their security deposit, reimbursement for expenses incurred in repairing the premises and payment for services rendered by Connelly at the premises on the plaintiff's behalf. At trial, each party testified and introduced documentary evidence, and the defendants called an employee of the New York City Department of Environmental Protection (DEP).

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FINDINGS OF FACT

In 2003, the Dog Run, a hydrotherapy spa for dogs, signed a commercial lease for space on the ground floor and in the basement at 136 Ninth Avenue. Defendant Mary P. Connelly, the owner of the Dog Run, who had an apartment on the second floor of the building, personally guaranteed the lease on December 31, 2003. The lease term was from January of 2004 through December 2005 and had an option for 2006. Upon signing the lease, the Dog Run gave a security deposit of $14,440, or two months' rent.

Paragraph 4 of the lease provides in part that the "owner shall maintain and repair the public portions of the building, both interior and exterior" and that the tenant "shall, throughout the term of the lease, take good care of the demised premises and fixtures and appurtenances therein and the sidewalks adjacent thereto, at its sole cost and expense, make all nonstructural repairs thereto and when needed to preserve them in good working order and condition...damage from the elements, fire or other casualty excepted." That provision further provides that the tenant "shall not be entitled to any set off or reduction of rent by reason of any failure of owner to comply with the covenants of this or any other article of this lease." Finally, paragraph 4 also provides that if the owner fails to comply with any lease provision, the tenant's sole remedy would be an action for breach of contract.

Paragraph 27 of the lease requires any notices by the defendants to the plaintiff to be sent certified or registered mail. Paragraph 28 of the lease required the defendants to pay for "water consumed" and paragraph 44(a) of the rider required the Dog Run to "arrange and pay for" its water/sewer bills.

During the tenancy of the Dog Run, Joseph Talkiewicz was the manager/superintendent

of 136 Ninth Avenue, which consisted of the commercial space occupied by the defendants and five residential units. His duties included collecting rent, making repairs, exterminating, and addressing plumbing and heating issues. He also worked full-time for the Port Authority. John Murtagh, Talkiewicz's father in law, was the sole shareholder of 136 Ninth Avenue Corp.

When its lease expired, the Dog Run stayed at the premises and continued to pay rent. In January of 2006, the rent increased from $7,725 to $8,266.18 per month but, in January and February of that year, it paid only $7,725, for a total shortfall of $1,082.36. Talkiewicz admitted that, in April of 2006, the Dog Run paid the plaintiff $1,082.36 to correct this shortfall but also stated that the Dog Run still owed a $1,082.36 shortfall for the months of March and April of 2006. The Dog Run paid rent of $8,266 for each month of 2007, except December. The Dog Run did not pay any rent in December of 2007 or January of 2008.

In late 2007, Talkiewicz told Connelly that he was raising the Dog Run's rent from $8,266.18 to $11,000 per month. In early December of 2007, Connelly told Talkiewicz that the defendants would be leaving by the end of the year. Sometime prior to Christmas of 2007, the Dog Run put a sign in its window stating that it would be closing on December 24.

On January 3, 2008, Talkiewicz received a fax from the defendants advising that they were vacating the premises. The defendants left the keys in the mailbox and he obtained them on January 4. The Dog Run's security deposit, which Talkiewicz admitted was placed in the building's operating account and not in a separate account, was not returned to the defendants after they vacated the premises.

The Dog Run had a heated pool, a dog wash area, and washing machine. During the Dog Run's tenancy, there were two accounts used by the DEP to bill for water consumed in the

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building. One had an account number starting with "8000" and was for the commercial space. The other account began with "3000" and was for the residential portion of the building. In June of 2006, the DEP discovered that the 3000 meter for the residential portion of the premises was also billing the commercial space and it credited the plaintiff for double billing the commercial space. From June of 2006 through 2010, the plaintiff received no water bill for the commercial space and only the 3000 account was billed. From 2004-2007, the plaintiff did not send the Dog Run a bill for water charges. Talkiewicz did not inform the defendants that they owed money for water because he did not know they were in arrears.

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In support of the defendants' counterclaims, Connelly testified that she had to spend her own money on repairs to the building. Upon moving into the space in 2004, walls and tiles on the ground floor needed to be replaced due to mold in the 100 year-old building. In April of 2006, Connelly paid McKenna Renovations, LLC $7,500 to re-tile a wall due to a recurring mold problem on the north side of the building. In August of 2006, Connelly paid McKenna $3,000 to perform additional repairs to that area. In 2006, Connelly, McKenna, and Talkiewicz met at the premises. She told Talkiewicz that north side of wall was causing leaks and he said if that were true he would pay for it to be repaired. Talkiewicz had the facade of the north side of the building and the roof over apartment 3A repaired in 2007 at a cost of $45,000. He neither reimbursed Connelly for paying McKenna nor promised to do so.

Throughout her tenancy, Connelly performed services at the building including maintenance, cleaning the hallways, and attending meetings with exterminators. Talkiewicz asked her to clean the hallways because he was usually not at the building and tenants complained that the hallways were dirty. Connelly estimated that she spent approximately 7

hours per month servicing the building during the 4 years that the Dog Run was at the premises, a total of 336 hours, and she estimated that she was entitled to payment of $45 per hour for her services "based on an assessment of property management responsibilities." She did not ask for compensation for her services at any time prior this action and she agreed that Talkiewicz never agreed to pay her for these services.

Andrew Rettig, a litigation attorney for the DEP, appeared at trial pursuant to subpoena and stated that, in 2006, the DEP discovered that, although there were two separate water meters for the building, the "3000" account was being billed for the entire building and the "8000" account was being billed for the commercial space, so there was double billing for the commercial space. The plaintiff's account was then credited. Its balance of $12,303.87 was canceled and it was also credited $4,536.27. Thus, approximately $17,600 of water which passed through the meter for the 8000 account was billed or paid through the 3000 account.

The court credits Rettig's testimony regarding the water/sewer charges. His review of the bills on the 8000 account from May of 2005 until March of 2006 reflected that they totaled $17,576.64. The DEP thereafter stopped billing on the 8000 account and only one meter recorded water usage for the whole building until 2010. The court discredits Connelly's testimony to the extent that she denies her responsibility to pay the water bills, insofar as the bills sent by the DEP on the 8000 account in 2005 and 2006 were addressed to both the Dog Run and Talkiewicz.

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CONCLUSIONS OF LAW

Outstanding Rent

The plaintiff claims that the defendants owe rent in the amount of $8,266.18 per month for December, 2007 and January, 2008. Although the defendants concede that they owe the December, 2007 rent, they deny that they owe the January, 2008 rent because they provided sufficient notice that they would be vacating the premises. However, since the Dog Run admits in its pre-trial memorandum that it was a month-to-month tenant, it was obligated to give the plaintiff at least thirty days' notice that it was vacating. See RPL § 232-a; Fajardo v Eisner, 11 Misc 3d 139(A) (App Term 2d Dept 2006). Although Connelly told the plaintiff in late November of 2007 that the Dog Run would be vacating the premises, she did not say that the defendants would leave by a specific date and no written notice was provided to the plaintiff until it received a fax from Connelly on January 3, 2008. Neither the sign in the window of the Dog Run, indicating that the business would be closing on December 24, 2007, nor the fax was sufficient to notify the plaintiff that the defendants would be leaving. This is because Paragraph 27 of the lease required such notice to be by certified or registered mail. Thus, the plaintiff has established by a preponderance of the evidence that the defendants are liable for outstanding rent for both December 2007 and January 2008, in the total amount of $16,532.36.

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Talkiewicz admitted that the defendants paid the plaintiff the rent shortfall owed for the months of January and February of 2006, in the amount of $541.18 per month, for a total of $1,082.36. The court does not credit Talkiewicz's testimony that the defendants owe an additional shortfall of $1,082.36 for the months of March and April of 2006. This claim was not made prior to trial and no documentary evidence established that this amount was owed.

Water/Sewer Charges

Rettig's testimony regarding the outstanding water/sewer charges and the DEP records admitted into evidence establish by a preponderance of the evidence that the plaintiff is entitled to recover $17,576.64 from the defendants for water charges billed from May, 2005 until March, 2006. The plaintiff conceded in its motion to amend the complaint that its claim for any charges prior to April 14, 2005 are barred by the Statute of Limitations since this action was commenced on April 13, 2011. Further, Rettig admitted that no bills were sent on the 8000 account from March of 2006 until 2010, by which time the defendants left the premises.

Attorneys' Fees

The plaintiff alleged in its complaint that it is entitled to reimbursement of attorneys' fees it incurred in this matter and that evidence of such fees would be introduced at trial. However, no such fees can be awarded since no proof to support the claim was introduced at trial. See generally Rose v Rose, 47 AD3d 790 (2d Dept 2008).

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Counterclaims

The Dog Run's first counterclaim is that it is owed $10,500 for repairs it made to the building due to the plaintiff's failure to properly maintain the premises. This counterclaim, which sounds in breach of contract, is expressly authorized by paragraph 4 of the lease, which provides that the defendants' sole remedy against the plaintiff for any damages arising from the agreement was an action for breach of contract.

Here, paragraph 4 of the lease obligated the owner to maintain and repair the interior and exterior public portions of the building. While the lease also requires the tenant to "take good care of the demised premises...at its sole cost and expense' and to "make all nonstructural repairs thereto and when needed to preserve them in good working order and condition", the lease expressly excludes from the tenant's obligation "damage from the elements, fire or other casualty excepted."

Since paragraph 4 obligated the plaintiff to pay for nonstructural repairs caused by the elements, the plaintiff must reimburse the defendant $10,500 for the repairs the plaintiff needed to make due to leaks in the building. Connelly advised Talkiewicz that the repairs were needed due to leaks in the building from rain penetrating the exterior, and Talkiewicz admitted at trial that the building leaked. As here, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." Greenfield v Philles Records, Inc., 98 NY2d 562, 569 (2002); see MHR Capital Partners LP v Presstek, Inc., 12 NY3d 640 (2009); Ashwood Capital, Inc. v OTG Management, Inc., 99 AD3d 1 (1st Dept. 2012); 150 Broadway N.Y. Associates, LP v Bodner, 14 AD3d 1, 6 (1st Dept. 2004). "

As a second counterclaim, the defendants assert that they are entitled to the return of their security deposit of $14,400. General Obligations Law § 7-103(1) states that:

> [w]henever money shall be deposited or advanced on a contract or license agreement for the use or rental of real property as security for the performance of the contract or agreement when due, such money, with interest accruing thereon, if any, until repaid or so applied, shall continue to be the money of the person making such deposit or advance and shall be held in trust by the person with whom such deposit or advance shall be made and shall not be mingled with the personal monies or become an asset of the person receiving the same.

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Here, Talkiewicz admitted that the Dog Run's security deposit was commingled with the plaintiff's operating account. Since the plaintiff violated GOL 7-103, the Dog Run has an "immediate right" to recover its security deposit. See Tappan Golf Driving Range, Inc. v Tappan Property, Inc., 68 AD3d 440 (1st Dept 2009) *quoting* LeRoy v Sayers , 217 AD2d 63 (1st Dept 1995).

As a third counterclaim, Connelly asserts that she is entitled to compensation of $15,000 on a theory of *quantum meruit* for performing cleaning and other services at the building. To establish this claim, Connelly needed to establish that she assisted the plaintiff by performing her services in good faith, that her services were accepted by the plaintiff, that she had an expectation of payment for her services, and that the value of her services was reasonable. See Balestriere PLLC v BanxCorp, 96 AD3d 497 (1st Dept 2012); Graubard Miller v Nadler, 60 AD3d 499 (1st Dept. 2009). Connelly admitted at trial that Talkiewicz did not agree to pay her for her services and gave no other reason why she expected to be paid. See Autorama Collision, Inc. v City of New York, 247 AD2d 313 (1st Dept 1998). Further, she failed to establish that the value of her services was reasonable. See Ludemann Electric, Inc., v Dickran, 74 AD3d 1155 (2d Dept 2010). Despite her testimony that she should be paid $45 per hour for her services "based on an assessment of property management responsibilities," she did not do so much as to elaborate on the source or reliability of this information. Therefore, she cannot recover on this counterclaim.

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CONCLUSION

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Upon the above findings of fact and conclusions of law, the plaintiff is entitled to recover $16,532.36 in unpaid rent for the months of December, 2007 and January, 2008. Additionally,

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the plaintiff is entitled to recover $17,576.64 in water charges incurred by The Dog Run from May, 2005 until March of 2006. The defendants are entitled to$10,500.00 as reimbursement for repairs made toe the premises plus $14,400.00, representing their security deposit. These awards result in a net monetary award to the plaintiff of $9,209.00.

Accordingly, it is:

ORDERED that the plaintiff is awarded $16,532.36, plus interest from January 1, 2008 on its first cause of action; and it is further,

ORDERED that the plaintiff is awarded $17,576.64, plus interest from March 1, 2006 on its third cause of action; and it is further,

ORDERED that the defendants are awarded $10,500.00, plus interest from August 1, 2006 on their first counterclaim; and it is further,

ORDERED that the defendants are awarded $14,400.00, plus interest from January, 2008, on their second counterclaim; and it is further,

ORDERED that to the extent not expressly provided herein, any further request for relief is denied, and it is further,

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

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Dated: October 11, 2013

NANCY M. BANNON, J.C.C.