

<b>Tower Cleaners, Inc. v Parker Fairway Cleaners, Inc.</b>
2013 NY Slip Op 32693(U)
October 23, 2013
Sup Ct, New York County
Docket Number: 650183/12
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. ANIL C. SINGH
SUPREME COURT JUSTICE

PRESENT:

PART 67

Justice
Index Number : 650183/2012
TOWER CLEANERS, INC.
vs
PARKER FAIRWAY CLEANERS, INC.
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum opinion.

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 10/23/13

HON. ANIL C. SINGH, J.S.C.
SUPREME COURT JUSTICE

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 61

-----X

TOWER CLEANERS, INC., and  
HASIK CHOI,  
Plaintiffs,

DECISION AND  
ORDER

-against-

Index No.  
650183/12

PARKER FAIRWAY CLEANERS, INC., and  
JOHN PARKER,  
Defendants.

-----X

HON. ANIL C. SINGH, J.:

Plaintiffs move for summary judgment on the amended complaint pursuant to CPLR 3212, seeking a judgment declaring that plaintiffs have the right to occupy the retail premises for a term ending August 31, 2021, as the tenant under a valid lease agreement. Defendants oppose the motion.

Plaintiff Hasik Choi, as the tenant, entered into a written commercial lease agreement with defendant Parker Fairway Cleaners, Inc. (“Parker”), as the landlord, for premises located at 235 East 40<sup>th</sup> Street in Manhattan. The lease, which is for a term of ten years, was created when Choi purchased the existing dry cleaning business at the premises from co-defendant John Parker, who also owns the premises as landlord.

In addition to the lease, Choi entered into an agreement of sale with defendants dated August 22, 2011, to purchase the dry cleaning business from Parker for the sum

of \$130,000. At closing, Choi paid \$105,000 in cash and signed a promissory note for the sum of \$25,000. The note stated that the entire amount of \$25,000 "shall be due and payable by January 22, 2012" (Motion, exhibit E). Additionally, the note provided:

If the Maker fails to make payment within thirty (30) days from the date any payment is due, the Maker shall be in default of this Note.

(Id.).

Paragraph 3 of the lease agreement stated in part as follows:

The Tenant shall, without any previous demand therefor, pay to the Landlord, or its agent, the said rent at the times and in the manner above provided. In the event of the non-payment of said rent, or any instalment thereof [sic.], at the times and in the manner above provided, and if the same shall remain in default for ten days after becoming due, or if the Tenant shall be dispossessed for non-payment of rent, or if the leased premises shall be deserted or vacated, the Landlord or its agents shall have the right to and may enter the said premises as the agent for the Tenant, either by force or otherwise, without being liable for any prosecution or damages therefor, and may relet the premises as the agent of the Tenant, and receive the rent therefor, upon such terms as shall be satisfactory to the Landlord, and all rights of the Tenant to repossess the premises under this lease shall be forfeited.

(Motion, exhibit D, para. 3).

Paragraph 49(A) of the lease provided:

All payments other than Fixed Annual Rent to be made by Tenant pursuant to this Lease shall be deemed additional rent and, in the event of any non-payment thereof, Landlord shall have all of the rights and remedies provided for herein or by law for nonpayment of rent.

(Motion, exhibit D, para. 49(A)).

Paragraph 70 of the lease agreement stated as follows:

Tenant's default on the Note in the amount of \$25,000 to Landlord shall constitute material default under the Lease Agreement and Landlord reserves the right to terminate the Lease Agreement without notice.

(Motion, exhibit D, para. 70).

Plaintiffs commenced the instant action by filing a summons and complaint on January 20, 2012, alleging causes of action for breach of contract, fraudulent inducement and rescission of contract. The complaint alleged that the defendants had "defrauded" plaintiffs by misrepresenting the true financial condition of the dry cleaning business at the time of sale.

Subsequently, based on his belief that he had been defrauded by Parker, Choi did not pay the \$25,000 note when it became due on January 22, 2012.

On January 25, 2012, defendants' attorney issued a "Default Notice" stating in part, "Pursuant to the terms of the Note, the payment of \$25,000 was due by January 22, 2012. You are in default. If you want to avoid legal action, you must pay \$25,250.00, which includes my legal fees for today, by January 27, 2012" (Motion, exhibit F).

On January 31, 2012, defendants' attorney issued a "Lease Termination Notice" purporting to terminate the lease based on the failure to make the payment due pursuant to the promissory note (Motion, exhibit G).

On February 3, 2012, defendants' attorney issued a "Notice to Cure," which

stated in part, “You have 10 days to cure default” (Motion, exhibit H).

On February 21, 2012, defendants commenced a summary nonpayment proceeding in the Civil Court, seeking a judgment of possession and damages in the amount of \$25,000, plus late charges and interest from January 22, 2012.

The Civil Court awarded damages in favor of Parker in the amount of \$25,000. Choi fully satisfied and paid the judgment. It is undisputed that no warrant of eviction was ever issued.

Plaintiff filed an amended complaint in the instant matter on January 16, 2013, abandoning the original causes of action. The complaint, as amended, seeks a declaratory judgment that the lease remains in effect. Defendants contend that the written lease has been terminated and that plaintiffs occupy the premises as a month-to-month tenant.

#### Discussion

The key fact in the instant matter is that the landlord did not commence a holdover proceeding against the tenant in the Civil Court matter. Rather, it brought a nonpayment proceeding. A holdover proceeding has completely different consequences than a nonpayment proceeding.

The Civil Court accurately summarized the different consequences in Frost Equities Co., LLC v. New York Brasserie Ltd., 5 Misc.3d 1004(A) [Civ. Ct., N.Y. Cty., 2004]). There, the Court wrote:

Petitioner's choice to pursue a nonpayment proceeding under RPAPL 711(2) is in fact the very antithesis of declaring respondent's default and terminating the lease. The nonpayment proceeding necessarily is premised on respondent being a tenant that has failed to pay rent under an unexpired rental agreement.

\* \* \*

Were petitioner declaring a lease default and terminating the rental agreement, petitioner would not allege a lease in effect and would be relegated to a holdover proceeding, where respondent would be holding possession of the previously rented premises over and beyond the lease's expiration, under RPAPL 711(1). The holdover proceeding presupposes a terminated rental agreement, while the nonpayment proceeding presupposes a rental agreement that remains in effect.

Thus, in this nonpayment proceeding, respondent has the all important right to honor the lease and pay any judgment for rent, to avert a warrant of eviction and keep the rental agreement in effect. Had petitioner commenced a holdover proceeding, the court could not afford respondent any time after the five day notice period to cure the nonpayment of rent, and neither respondent nor the court could reaffirm or revive the terminated lease and tenancy.

(Id.) (internal citations omitted).

Relying on Frost Equities, the Appellate Term in Shahid v. Carillo, 18 Misc.3d 136(A) [App. Term, 2<sup>nd</sup> & 11<sup>th</sup> Jud. Dists., 2008], held that since a nonpayment proceeding must be predicated on an existing unexpired agreement to pay rent, the final judgment entered in a nonpayment proceeding conclusively established that the tenancy continued to exist or was reinstated after the service of the notice of termination and vitiated such notice.

Similarly, here the defendants purported to terminate the lease for failure to


make payment. Thereafter, the landlord issued a notice to cure. Rather than commencing a summary holdover proceeding predicated upon termination of the lease, the landlord brought a nonpayment proceeding seeking rent. The Civil Court found in favor of landlord, and the tenant cured by paying the \$25,000 prior to the issuance of a warrant and reinstated the tenancy. Accordingly, the lease clearly remains in effect.

Accordingly, it is

ORDERED that the motion of plaintiff for summary judgment is granted; and it is further

ADJUDGED and DECLARED that the lease remains in full force and effect until the end of the ten-year term on August 31, 2021.

Date: 10/23/13  
New York, New York

  
\_\_\_\_\_  
Anil C. Singh  
**HON. ANIL C. SINGH**  
**SUPREME COURT JUSTICE**