SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Arthur F. Engoron Justice PART 37

Index Number : 600811/2009
KANTOR, AMY
vs.
75 WORTH STREET, LLC
SEQUENCE NUMBER : 011
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE 4/9/13
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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 5/2/13

HON. ARTHUR F. ENGORON, J.S.C.

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 37

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AMY KANTOR d/b/a WORTH STREET VETERINARY HOSPITAL [etc.],

Index Number: 600811/09

Plaintiff,

Decision and Order

- against -

Motion Sequence 011

75 WORTH STREET, LLC and JODI RICHARD,

Defendants.

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Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers were used on this motion by plaintiff to reargue certain aspects of this Court's February 21, 2013 Decision and Order deciding Motion 006:

	Papers Numbered:
Moving Papers	1
Opposition Papers	2
Reply Papers	3

Upon the foregoing papers, the instant motion is granted, and upon reargument the court modifies the February 21, 2013 Decision and Order only as follows:

(1) The clerk is hereby directed to vacate that portion of the judgment in favor of defendants that awarded defendants $500,000, plus interest from December 18, 2008, on their counterclaim for breach of a promise to repay a construction loan; and

(2) Defendants may obtain a retrial of said counterclaim (by jury, if requested), to be presided over by this Court (pursuant to clerk's office directive), by contacting plaintiff's counsel and the Court (646-386-3181) to determine a schedule acceptable to all concerned.

In all other respects the Court adheres to its original determination.

Background

As readers of this Decision and Order are probably aware, after a trial of several days in or about May of 2012, a jury (1) awarded plaintiff $225,127.22 in breach of contract damages for an alleged failure to guarantee or collateralize a loan; and (2) dismissed defendants' counterclaim for plaintiff's alleged breach of a construction loan agreement. Theretofore, this Court apparently (neither side has attached a full transcript, or even the relevant pages) had awarded defendants a judgment of $40,000 on their counterclaim for rent and $23,802.88 on their counterclaim for additional rent. By Motion Sequence 006 defendants moved to set aside the jury verdict in plaintiff's favor and for a directed verdict in defendants' favor on their

counterclaim for breach of the construction loan agreement. In a Decision and Order of February 21, 2013, this Court found that defendants were entitled to judgment notwithstanding the verdict and directed the clerk to enter judgment dismissing all of plaintiff's claims and in favor of defendant for the aforesaid $40,000 in rent (plus interest); for the aforesaid $23,802.88 for "additional rent" (plus interest); for the $500,000 in construction costs (plus interest); plus attorney's fees (in an amount to be determined at inquest). Plaintiff now moves to reargue that Decision and Order only to the extent that it awarded defendants the $500,000 for the construction loan and $23,802.88 for "additional rent."

Construction Loan

The construction loan counterclaim is best seen in a metaphorical context: defendants' counterclaim was the "tail," and plaintiff's breach of contract claim was the "dog." Most of the trial and its attendant arguments focused on plaintiff's breach of contract claim (despite the fact that the amount at issue therein was arguably less than the amount at issue in the counterclaim). Accordingly, this Court's discussion of the construction loan counterclaim occupies less than half a page (at 15) of the 17-page February 21, 2013 Decision and Order. Similarly, the first eight of the ten questions on the verdict sheet address plaintiff's claims. Question 9 asked whether "plaintiff's obligation to reimburse defendants for construction costs [was] conditioned upon plaintiff's receiving an SBA-guaranteed or other loan." Five of the six jurors (sufficient for a verdict, of course) answered "yes." The verdict sheet directed the jurors to "report [their] verdict" at that point. Notwithstanding this directive, the jurors proceeded to Question 10, which asked, "What amount of damages, if any, are defendants entitled to as a result of plaintiff's breach of the agreement in Question 9?" The same five jurors answered, "$0." Post-verdict, defendants moved for a directed verdict on this counterclaim.

In the February 21, 2013 Decision and Order, this Court wrote as follows:

> Kantor argues (Mot. 6, Opp. Memo, at 4) that Richard was not damaged by her construction loan to Kantor because the total Richard spent on construction was $1 million, and she values the space at that amount. However, that fails to take into account the cost of the unimproved real estate itself, which apparently was upwards of $6 million, as TD Bank had a mortgage of $5.9 million dollars on the property, and possibly as high as $15 million (as per the UWB loan documents). As noted, Kantor acknowledged responsibility for paying $500,000 back to Richard:
>
> > I have never seen the 500k as anything you've given me. As I understood it, it's a loan, with interest. * * * It was something I always appreciated, and my sole intention is to be able to pay you back within the first years of the [veterinary] practice, as we've discussed.
>
> Mot. [Seq. 006], Moving Exh. B, Trial Exh. 48.

In support of the request to reargue the $500,000 award, just as in her opposition to defendants' motion for a directed verdict, plaintiff essentially argues that the jury could reasonably have

concluded that Richard was not damaged by the $500,000 loan. The heart of the argument is, still, that Richard testified that after the $500,000 loan, some or all of which Richard apparently paid directly to the subject contractor(s), and after spending $500,000 to upgrade her own space, the combined space was worth $1,000,000.

Upon reargument, this Court believes that it misapprehended the facts, evidence, and/or law on this issue. This Court is confident that it correctly directed a verdict on Question Nine; there was no evidence that Richard's loan to Kantor was conditional; and plaintiff is not rearguing this issue (although she is appealing it). However, this Court now believes, for several reasons, that it erred in directing a $500,000 verdict in defendants' favor on this counterclaim. First, Richard's own testimony did not necessarily support a $500,000 verdict; rather, the actual damages were probably somewhere between $0 (the jury award) and $500,000 (the judge award). Second, plaintiff's e-mail, although it promises to repay $500,000, assumes that she will have opened and been operating her veterinary practice for "years.". Had she received her loan and done so, she would have been the beneficiary of the construction. But because she did not, and because defendants' rented the space to a successor, and a veterinarian at that, defendants' almost certainly received some benefit from the construction for which they paid. Indeed, in an e-mail of February 15, 2009, Richard told Kantor, "I very well might have another vet[erinarian] take over the space, so the [benefit of the] construction loan will go to them." Obviously, if the benefit of the construction goes to the new tenant, defendants can reflect that in the rent. Third, the jury concluded, albeit in response to a question they were not supposed to reach, that defendants' damages were $0. From the current perspective, this Court cannot tell for certain whether they thought the $500,000 defendants' expended benefitted them in that amount (therefore, no damages), or whether their answer to Question Ten was simply a follow-up, and dictated by, their answer to Question Nine, concluding that plaintiff was not obligated to reimburse defendants because she never received the loan for which she applied.

This Court still believes that there was no evidence that the loan was conditional. However, as a matter of common sense and common experience, a landlord that improves property in a general way can expect more rental income; and even a landlord that improves property to a specific tenant's particular specifications will likely be able to recoup some amount, if not the full amount, from a successor tenant (even one engaged in the same business).

Thus, the directed verdict for $500,000 cannot stand; however, defendant may proceed to a new trial on this counterclaim (assuming this particular issue, or the entire litigation, cannot be settled).

Additional Rent

The subject lease provided for, as is typical in such situations, payments for "additional rent" for such items as property taxes and elevator maintenance fees. These fees accrued, and defendants billed plaintiff for them in the particular amount of $23,802.88. When plaintiff sued, defendants' counterclaimed for this "additional rent." At trial, defendants introduced a bill for this amount and plaintiff did not refute it in any way. Accordingly, this Court (apparently, see above) granted defendants a directed verdict in this amount. In the February 21, 2013 Decision and Order, this Court affirmed that ruling, and directed the clerk to enter judgment in that amount as follows:

"for $23,802.88 for additional rent (a claim that Kantor failed to refute), plus interest on that amount also from December 15, 2008 [the approximate midpoint of the lease]."

Plaintiff's argument against this award is simple: defendants never made out a prima facie case for such an award. Defendants counter-argument is almost as simple: they did; plaintiff never contested the amount; and plaintiff has failed to submit the transcript pages that might shed light on the matter. What it all boils down to, counsels' arguments suggest, is whether a letter setting forth the "additional rent" charges was admitted into evidence.

First, in their opposition papers, defendants submit an undated letter from them to plaintiff seeking additional rent of $23,802.88. This letter apparently was not even marked for identification. Next, attached to an April 15, 2013 cover letter to the Court, defendants submit a different letter from them to plaintiff, also seeking $23,802.88 in "additional rent." This has a stamp marking it as Exhibit S, but e-mail correspondence from plaintiff, also dated April 15, 2013, seems to indicate that it was never introduced into evidence. Finally, attached to an April 17, 2013 cover letter to the Court, defendants submit a letter from them to plaintiff, also seeking said amount in "additional rent," and setting forth, with some specificity, the items and amounts therefor (10% of "condo fees," 8% of property taxes, 25% of the elevator maintenance fees; and various late fees). This letter appears to have been admitted into evidence as Defendants' Exhibit EE and seems to settle the matter, for the three reasons argued by defendants (*supra*).

Overview

Although it is vacating the $500,000 judgment it awarded defendants on their construction loan counterclaim and directing a retrial thereof, this Court remains as adamant as ever that defendants were entitled as a matter of law to a judgment, notwithstanding the jury verdict, dismissing plaintiff's claims. However, the Court will let its February 21, 2013 Decision and Order speak for itself on that matter.

Conclusion

Thus the instant motion to reargue is granted, and upon reargument the court modifies the February 21, 2013 Decision and Order only as follows:

(1) The clerk is hereby directed to vacate that portion of the judgment in favor of defendants that awarded defendants $500,000, plus interest from December 18, 2008, on their counterclaim for breach of a promise to repay a construction loan; and

(2) Defendants may obtain a retrial of said counterclaim (by jury, if requested), to be presided over by this Court (pursuant to clerk's office directive), by contacting plaintiff's counsel and the Court (646-386-3181) to determine a schedule acceptable to all concerned.

In all other respects the Court adheres to its original determination.

Dated: May 2, 2013

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Arthur F. Engoron, J.S.C.