Landucci v De La Rosa
2017 NY Slip Op 30449(U)
March 9, 2017
Civil Court of the City of New York, Bronx County
Docket Number: 901546/2016
Judge: Sabrina B. Kraus
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: PART 52
_____________________________________X
ROBERT LANDUCCI,

Petitioner

-against-

DECISION & ORDER
Index No.: 901546/2016

HON. SABRINA B. KRAUS

ANGELA DE LA ROSA
6699 BROADWAY CORP
6691-99 Broadway
Bronx, NY 10471

Respondent
_____________________________________X

BACKGROUND

This summary nonpayment proceeding was commenced by **ROBERT LANDUCCI** (Petitioner) against **ANGELA DE LA ROSA** (Respondent) and **6699 BROADWAY CORP** seeking to recover possession of the store/restaurant located at 6691-99 Broadway, Bronx, NY 10471 (Subject Premises) based on the allegation that Respondents had failed to pay rent due for the Subject Premises.

PROCEDURAL HISTORY

Petitioner issued a five day rent demand dated October 1, 2015 [1], seeking $11, 600.00 in arrears rent for September and October 2016. The petition is dated October 11, 2016.

[1]The date on the demand appears to be a typographical error and presumably should read 2016, but this was not addressed at trial by either party.

Respondent appeared by counsel on October 21, 2016, and filed an answer asserting improper service, improper demand, bad faith, and additional claims. Respondent also filed counterclaims asserting fraudulent inducement, breach of contract, and breach of good fath. The proceeding was initially returnable October 27, 2016, and was adjourned pursuant to a stipulation to December 7, 2016, for trial. On December 7, 2016, the proceeding was adjourned to January 4, 2017. On January 4, 2017, the trial commenced and concluded, and the proceeding was adjourned to February 16, 2017 for the submission of post trial memoranda. The proceeding and submission of post trial memos were further adjourned at the parties' request to February 27, 2017, when the matter was marked submitted and the court reserved decision.

FINDINGS OF FACT

Petitioner asserts it is is the owner of the premises known as 6693-6699 Broadway, Bronx, New York, pursuant to a deed dated June, 20, 1962 (Ex 1). The deed was admitted into evidence without objection, and conveyed the premises subject to a life estate for Elisa Landucci, whom the deed states is Petitioner's mother. No evidence was offered at trial as to whether Elisa Landucci is deceased. The date the notary listed for Elisa Landucci's signature is March 28, 1972, nearly a decade after the date listed on the top of the deed. The deed does not appear to be recorded. The block and lot listed on the deed are Block 3423P, Lot 1542. The Subject Premises is Block 5888, Lot 1542 (*see eg* Ex J-2). Due to the above irregularities, which were not addressed by Petitioner at trial, the court does not consider the deed submitted to be competent evidence.

There is a written lease governing the landlord tenant relationship (Ex 3). It is difficult to make out the date of the lease, which appears to have been changed. The lease appears to be

dated July 2016. Petitioner is the lessor on the lease, and the tenant on the lease is listed as 6697 Broadway Corp.. The lease states that the Subject Premises are 6697 Broadway, and that the Subject Premises was to be used as a Restaurant Bar and Lounge. There are a total of four pages for the lease, the first two pages are a preprinted form and the last two pages are riders.

Each of the four pages is signed at the bottom by Petitioner, Respondent and a witness. Respondent signed over a line that states tenant. The signatures do not indicate whether she is signing in her individual capacity or as an officer of the corporation. At the top of the third page, the rider states tenant is 5219 Bway & Delic Corp, which again would appear to be a typographical error as said entity is not referenced anywhere else in the document or in this proceeding. The final page and second rider states the tenant is "Angela De la Rosa" at the top.

Petitioner testified that Respondent was the tenant under the lease.

At trial the court found the lease to be somewhat ambiguous as to whether the Corporation , Respondent or both were the tenants. The court asked the parties to address this in their post trial memoranda. Neither party did specifically address it in their memos, but both memos refer to the corporation and Respondent interchangeably as respondents, and neither make any distinction between the interest of the Corporation and Respondent in the Subject Premises. As such, the court finds that it is conceded by the parties that both Respondent and the Corporation were intended to be and are tenants under the lease.

Paragraph 9 of the lease is titled "Condition of Leased Premises: Maintenance and Repair" and provides:

> The Tenant acknowledges that the Leased Premises are in good order and repair. The Tenant agrees to take good care of and maintain the Leased Premises in good condition throughout the term of the Lease.

The Tenant, at his expense, shall make all necessary repairs and replacements to the Leased Premises, including the repair and replacement of pipes, electrical wiring, heating and plumbing systems, fixtures and all other systems and appliances and their appurtenances. The quality and class of all repairs and replacements shall be equal to or greater than the original worth. If Tenant defaults in making such repairs or replacements, Landlord may make them for Tenant's account, and such expense will be considered additional rent.

Paragraph 10 of the Lease is titled "Compliance with Laws and Regulations" and provides:

Tenant, at its expense, shall promptly comply with all federal, state and municipal laws orders, and regulations, and with all lawful directives of public officers, which impose any duty upon it or Landlord with respect to the Leased Premises: The Tenant at its expense, shall obtain all required license or permits for the conduct of its business within the terms of this lease, or for the making of repairs, alterations, improvements or additions. Landlord, when necessary, will join with the Tenant in applying for all such permits or licenses.

Paragraph 24 of the rider repeats that tenant is responsible for all repairs and maintenance.

Paragraph 30 of the rider provides that tenant has inspected the Subject Premises and takes the premises in as is condition.

Both Petitioner and Respondent testified at trial. They both agree that the lease was signed and three months security was given in connection with the execution of the lease. They both agree Respondent never made any additional payments. Respondents surrendered possession along with the keys, on the record, at the conclusion of the trial.

Petitioner's testimony

The following is a summary of Petitioner's testimony.

Petitioner testified there was approximately $40,000 due under the lease as of the date of the trial, based on Respondent's failure to pay rent for August 2016 through January 2017. No rent demand was made for August 2016 rent, nor was same sought in the petition There was no motion by Petitioner to amend the petition to seek any month beyond October 2016, or to amend

any other aspect of the petition, therefore the court may not consider any request for arrears beyond September and October 2016, as sought in the petition [*NYCHA v Sinclair* 21 Misc3d 133(A)].

The Subject Premises was rented as a restaurant four months prior to the time Respondents' took occupancy, and a few years earlier had been rented for the same purpose. Petitioner acknowledged belatedly receiving notice of the violations and stated that when he found out about the violations he immediately addressed them. Petitioner entered into an agreement with the city to pay $753.37 per quarter towards outstanding fines for violations.

Respondent damaged the Subject Premises by hiring workers who "sheared" the front of the building, took down the awning, and made holes in the walls. Respondent removed the fireproof steel from the kitchen as well as a steel ceiling. Respondent removed the sprinkler system, and portions of a DJ booth. Respondent removed the bar and the plumbing under the bar. Respondent committed extensive damage to the electrical system. Respondent removed the fans on the main floor, and certain walls. The only work the parties had discussed Respondent doing was painting, which was done in some portions of the Subject Premises.

Respondent failed to obtain permission from Petitioner for the work done and did not appear to have any permits for said work.

Petitioner rented the Subject Premises to Respondent in "as is" condition, and advised her that she would need to do work to the Subject Premises. At the time Respondent rented the Subject Premises there was no electrical service , but Respondent subsequently had electrical service provided. Respondent advised Petitioner that Con Edison would not install gas at the Subject Premises. There was no gas service when the Subject Premises was rented to Respondents and Respondents attempted to have it installed but were unable to do so.

Respondent was aware at the time she rented the Subject Premises that there was no electricity. She had Petitioner had to use flashlights to view the Subject Premises prior to the execution of the lease.

On cross-examination, Petitioner was unable to provide any specific testimony about the outstanding violations of record. Petitioner never discussed the violations with Respondent, but Respondent asked Petitioner to pay for a plumber to the necessary work to have gas installed and Petitioner agreed to do it.

Petitioner acknowledged receipt of a letter (Ex K) dated September 29, 2016 from Respondents' counsel. Petitioner stated he found the letter shocking and full of misstatements. The letter was a demand to Petitioner to rescind the lease, return the security and pay Respondent damages for the amount invested in alterations to the Subject Premises.

Petitioner testified that at some point prior to the trial he passed by the Subject Premises, saw that the lock Respondent had placed was unlocked, called the police, and placed a new lock on the Subject Premises to secure the Subject Premises.

Testimony of Angela De la Rosa

The following is a summary of the testimony of Miss De la Rosa.

Respondent was familiar with the Subject Premises prior to renting it because she drove by daily for over approximately one and a half years. Respondent noted that during this period the Subject Premises was always closed and locked. Respondent saw a sign that the Subject premises was for rent and she called Petitioner to inquire about renting. Petitioner and Respondent met.

Respondent is the owner of another restaurant located at 4139 Broadway. Respondent has owned the restaurant at that location for 17 years.

Petitioner told Respondent that the prior use for the Subject Premises had been for a bar, and Respondent was aware prior to renting the space that there was no kitchen. Petitioner told Respondent he would purchase a stove for her to use. Petitioner and Respondent met on three occasions to discuss the lease prior to signing the lease.

Petitioner told Respondent that there was a severe leak in the roof, and that water was penetrating the interior walls, but that Petitioner would have the roof repaired. Respondent acknowledged that she was aware there were no utilities in service at the time she leased the Subject Premises including gas and electricity and that it would be her responsibility to arrange for installation of same.

Respondent was told by Con Edison that it would take three weeks for them to come to the Subject Premises for the installation of electricity as it was not an emergency situation. Con Edison also stated Respondent would need a licensed plumber before gas service could be installed because the Subject Premises had been closed for a year. Respondent acknowledged that she was represented by counsel for the purpose of the negotiation and execution of the lease. Respondent testified that she spent $35,000.00 in improvements in the Subject Premises.

Documentary Evidence

The last page of the rider to the lease provides that no rent is due through August 31, 2016 and that on September 1, 2016, $5800 per month would be due for the first year. It is undisputed that Respondent did not pay the $11,600.00 sued for representing rent for $5800 per month for September and October 2016.

Respondents asserts she is not liable for the rent under the lease, because after she took possession, she discovered there were many outstanding violations at the Subject Premises and allege they could not install gas service in the Subject Premises until the violations were cleared.

Respondents submitted certified copies of violations issued by ECB between 2003 and 2012 (Exs A-I). This included:

A violation issued on February 17, 2012[2] for failure to maintain the building in a code compliant manner, noting defective and rotted wooden floor joist, and a load bearing masonry wall removed at the cellar (Ex A); and

A second violation issued the same day for work with out a permit (Ex B); and

Violation issued January 25, 2004 (Ex C) and March 30, 2003 (Ex D) for operation of a place of assembly without a permit ; and

Violations issued March 20, 2004 (Ex D) and February 2, 2008 (Ex F) for failure to have approved Public Assembly Plans available for inspection; and

Violations for place of Assembly Plans not conforming to approved construction documents issued on January 22, 2010 (Ex G), September 16, 2011 (Ex H -I).

All of the above violations were listed as open, no compliance recorded as of September 28, 2016, and that $41,700 remained outstanding as unpaid fines due to said violations (Ex J-1).

Petitioner entered into evidence a certified copy of the certificate of occupancy (Ex 2) for the Subject Premises, with an issuance date of May 24, 1991, which shows that the Subject Premises may be used as a restaurant "with restriction on entertainment." Petitioner also submitted a Place of Assembly Certificate of Operation issued by the New York City Department of Buildings on May 7, 2013 and valid for a period of one year from said date (Ex 7).

Respondent's post-trial memorandum focuses primarily on her argument that the counterclaim asserted for fraudulent inducement should be deemed a counterclaim for recision, that the court should grant recision, and that the court improperly limited Respondents' evidence on damages suffered by Respondents on these counterclaims.

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[2] The document admitted into evidence provides that the violation was issued 2/17/04 and that a hearing date was set for 4/6/12, however the issuance date appears to be a typographical error , as in Ex J-1, the same violation is listed as having been issued February 17, 2012.

[* 9]

DISCUSSION

Petitioner failed to establish a prima facie case, or even make allegations setting forth a cause of action as to 6699 Broadway Corporation

It is not clear that 6699 Broadway Corp., is a respondent in this proceeding. Though the corporation is listed in the caption of the petition and notice of petition, there are no allegations regarding the corporation in the body of the petition. Though the corporation is listed in the affidavit of service for the petition, there was only one joint mailing done to both Respondents as indicated by the certified mailing receipt annexed to the notice of petition. No service of any rent demand on the corporation is alleged in the pleadings, nor was any proof offered as to same at trial.

The lack of a rent demand and improper service is raised in the answer, and given the facial defects in the affidavits of service filed as to the Corporation, is sufficient to put the issue before the court. Based on the forgoing, the petition is dismissed as to 6699 Broadway Corp..

This court lacks jurisdiction over Respondents' Request for recision

NY Const Art VI, §15(b) provides that Civil Court shall "... exercise such equity jurisdiction as may be provided by law."

§ 208 of the New York City Civil Court Act provides that the court has jurisdiction over " ..any counterclaim the subject matter of which would be within the jurisdiction of the court if sued upon separately [NYCCCA § 208(a)]" or of any counterclaim for ".. the recision or reformation of the transaction upon which plaintiff's cause of action is founded, if the amount in controversy on such counterclaim does not exceed $25,000 [NYCCCA § 208(c)(1)]."

§ 213 of the New York City Civil Court Act provides that "(t)he court shall have jurisdiction of actions for recision or reformation of a transaction if the amount in controversy does not exceed $25,000."[3]

In determining the amount in controversy the court must look to the economic impact of recision of the contract, rather than the amount of Petitioner's claim [*Practice Commentaries*, David D. Siegel; *Apollon Waterproofing & Restoration Corp*. 172 Misc.2d 888; *Smith v Monarch Life Insurance* 66 AD2d 482, 484 (*amount due under contract including future amounts due should be used to compute amount in controversy*).

While Respondent did not specifically plead a counterclaim for recision nor specifically request recision in their answer Respondent argues that the counterclaim for fraudulent inducement should be deemed a counterclaim for recision and there is some support for this.

However, the amount due under the contract is well over $25,000, as it provides for a monthly rent of $5800 per month for the first year with increases in subsequent years. The court further notes that Respondents' claim is based on the fact that at the time the lease was entered there were violations of record that had to be cleared before Con Edison could install gas service for the Subject Premises. The only evidence that Con Edison would not install gas service because of the outstanding violations was the hearsay testimony of Respondent. No witness was called from Con Edison in this regard.

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[3] Though not raised by Respondent, RPAPL 743 provides that the answer vin a summary proceeding may "... contain any legal or equitable defense or counterclaim" and would seem to allow for broader based equity jurisdiction in summary proceedings, then provided for in the NYCCA. However, where there is a conflict between the provisions of the NYCCCA and RPAPL, the provisions of the NYCCCA, which are intended specifically for proceedings in New York City Civil Court, as opposed to statewide provisions of the RPAPL, prevail [*Washington v. Palanzo*, 192 Misc.2d 577 (App.Term, 2nd Dept., 2002); 3 Rasch, New York Landlord and Tenant, Summary Proceedings, § 1339 (2d ed, 1971); *319 West 48th Street Realty Corp. v. Slenis*, 117 Misc.2d 259, 260–61].

Respondent does not appear to have much of a case for fraudulent inducement. It is undisputed that Respondent knew that the Subject Premises had been closed for at least a year and half before she rented the space, that at the time of the rental there was no electricity or gas service in the Subject Premises and that there was no usable kitchen in the Subject Premises.

The lease puts all of the onus on getting the premises ready to operate as a restaurant on Respondent. Respondent is an experienced restauranteur who was represented by counsel.

Where, as here, the violations were a matter of public record readily ascertainable by basic due diligence an arms length commercial transaction will not be set aside (*Gelta, LLC v 133 Second Avenue LLC* 2013 NY Slip Op 31264 *citing UST Private Equity Invs. Fund v Salomon Smith Barney* 288 AD2d 87; *Fariello v Checkmate Holdings LLC* 82 AD3d 437; *Urstadt Biddle Props. Inc. v Excelsior Realty Corp.* 65 AD3d 1135).

Based on the foregoing, Respondents' first and third counterclaims which seek recision are dismissed, as they are beyond the jurisdiction of this court.

Similarly Respondent's second counterclaim asserts breach of contract based on representations made in paragraphs 9 and 10 of the lease. As discussed above, Paragraph 10 of the lease contains no representations by Petitioner, only obligations on the part of Respondent. While paragraph 9 of the lease states that the tenant acknowledges that the Leased Premises are in good repair, it is superceded by paragraph 30 of the rider which provides that Tenant had inspected the Subject Premises and was taking possession in "as is" condition. Pursuant to paragraph 27 of the rider the provisions of the rider prevail to the extent there is a conflict.

Based on the foregoing Respondent's second counterclaim for breach of contract is dismissed. Respondent failed to establish an entitlement to relief on any of the remaining defenses pled.

As possession was surrendered at the conclusion of the trial, the only remaining relief before the court is Petitioner's request for a money judgment for September and October rent. Petitioner is awarded a money judgment for same in the amount of $$11,600 as against Angela De La Rosa.

This constitutes the decision and order of this court.

Dated: March 9, 2017
Bronx, NY

____
Hon. Sabrina B. Kraus
JCC

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