

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IAS PART 22

Justice

68-49 WOODHAVEN BOULEVARD HOLDING
CORP.,

Plaintiff,

-against-

EXXON MOBIL CORPORATION, f/n/a MOBIL
OIL CORPORATION,

Defendant.

EXXON MOBIL OIL CORPORATION,
Third-Party Plaintiff,

-against-

AC WOODHAVEN INC., A.C. WOODHAVEN
REALTY CORP. and ADELMO CIOFFI,

Third-Party Defendants.

Index No. 1353/05

Motion

Date November 13, 2007

Motion

Cal. No. 5

Motion

Sequence No. S005

SUA SPONTE ORDER

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NUMBERED**

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The court, sua sponte, recalls its order/decision dated February 22, 2008, and hereby renders the following in its place:

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

This is a motion by defendant ExxonMobil Oil Corporation (hereinafter “ExxonMobil”) for an Order pursuant to CPLR 4404 (a), setting aside a jury verdict rendered on July 31, 2007 in favor of plaintiff 68-49 Woodhaven Boulevard Holding Corp. (hereinafter “WBHC”), and

directing a new trial, upon the ground, *inter alia*, that the jury verdict is not supported by sufficient evidence, and is contrary to the weight of the evidence. Defendant's motion is granted only to the extent, and for the reasons set forth hereinafter.

I. PROCEDURAL HISTORY

Plaintiff commenced this action on January 19, 2005 seeking to recover money damages. The complaint alleges, *inter alia*, that ExxonMobil is a holdover tenant who failed to pay rent, and who breached terms of a lease agreement (hereinafter "Lehrman Lease"). This court presided over a jury trial on this case that was conducted from July 16, 2007 through July 30, 2007. On July 31, 2007, the jury rendered a verdict in favor of plaintiff and against defendant ExxonMobil finding, *inter alia*,

1. that ExxonMobil was a holdover tenant of Lehrman Realty and that holdover tenancy, and all rights under the Lehrman Lease, were transferred to plaintiff when plaintiff purchased the premises,
2. that ExxonMobil currently is, and has been, a holdover tenant of the plaintiff and that pursuant to the terms of the Lehrman Lease, ExxonMobil breached a provision of the lease and was obligated to pay plaintiff rent for the premises from January 3, 2001 through the present in the amount of \$792,000.00,
3. that pursuant to the terms of the Lehrman Lease, ExxonMobil breached a provision of the lease and was obligated to pay \$915,302.05 to plaintiff for the cost of rebuilding a building that was demolished,
4. that pursuant to the terms of the Lehrman Lease, ExxonMobil breached a provision of the lease and was obligated to pay \$37,000 to plaintiff for the cost of repaving the premises,
5. that pursuant to the terms of the Lehrman Lease, ExxonMobil breached a provision of the lease and was responsible for the payment of property taxes on the premises from January 2005 through the present and was obligated to pay \$43,378.57 to plaintiff for reimbursement of property tax that was paid by plaintiff during that period.

By leave of the Court, defendant ExxonMobil was granted an extension to September 27, 2007 to file a post-trial motion pursuant to CPLR 4404(a). That date was extended by several adjournments by stipulations. In the instant motion, defendant ExxonMobil seeks an order pursuant to CPLR 4404(a), setting aside the jury verdict and directing a new trial.

The undisputed facts in this case are as follows:

Third-party defendant Adelmo Cioffi owns plaintiff 68-49 Woodhaven Boulevard Holding Corp. ("WBHC"). Prior to October 31, 2000, Lehrman Realty Company ("Lehrman Realty") owned property known as 68-29 Woodhaven Boulevard, Rego Park, New York (the

“premises”). On July 2, 1990, Lehrman Realty and defendant/third-party plaintiff ExxonMobil Corporation (“ExxonMobil”), the operator of a Mobil gasoline service station, entered into a ten (10) year lease agreement to lease the premises (hereinafter referred to as the “Lehrman Lease”). The lease commenced on November 1, 1990 and expired by its terms on October 31, 2000. ExxonMobil conducted environmental cleanup work at the premises after that date. ExxonMobil, after the expiration of the lease on October 31, 2000, erroneously continued to pay real estate taxes on the premises in the amount of \$70,422.60. On January 8, 2001, Lehrman Realty conveyed title to the premises to plaintiff WBHC. In or about July 2001, at the request of ExxonMobil, WBHC demolished a building on the premises.

II. DISCUSSION

Generally, a trial court should exercise considerable caution in utilizing its discretionary power to set aside a jury verdict and grant a new trial (*see Higbie Constr., Ltd. v IPI Indus.*, 159 AD2d 558, 559 [2d Dept 1990]; *Nicastro v Park*, 113 AD2d 129, 133 [2d Dept 1985]). Defendant seeks to set aside the verdict both, as a matter of law, and as against the weight of the evidence pursuant to CPLR 4404. To set aside a verdict as a matter of law, the trial court must conclude that there is “no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial” (*see Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 499 [1978]). To set aside a verdict as against the weight of the evidence, a court must determine that “the jury could not have reached the verdict on any fair interpretation of the evidence” (*Nicastro v Park*, 113 AD2d 129, 134 [1985] [internal quotation marks omitted]). “In making this determination, the court must proceed with considerable caution, ‘for in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict’” (*McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [1st Dept 2004], quoting *Nicastro v Park*, 113 AD2d 129 at 133).

In determining a CPLR 4404 motion, the trial court must afford the opposing party every inference which may properly be drawn from the facts presented, considering those facts in a light most favorable to the nonmovant (*Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]).

Moreover, a court cannot set aside a jury verdict merely because of disagreement with it, but must cautiously balance the deference due to a jury determination, and its obligation to ensure that a verdict is fair and supported by the evidence (*McDermott v Coffee Beanery, Ltd.*, 9 AD3d at 206). It is for the jury to make credibility determinations and to draw inferences, where facts give rise to conflicting inferences (Siegel, *New York Practice* § 406, at 687 [4th ed.]).

Defendant argues that the verdict should be set aside because, as a matter of law and fact, there is no direct or indirect evidence in the record to support a finding that a holdover tenancy was created between Lehrman Realty and ExxonMobil. Defendant contends that the uncontroverted facts introduced as evidence at the trial support the argument that, as a matter of law and fact, there was no enforceable lease agreement between Lehrman Realty and ExxonMobil after October 31, 2000, and no landlord-tenant relationship between ExxonMobil and Lehrman Realty, or ExxonMobil and plaintiff that would otherwise create a holdover

tenancy. It further argues that the verdict should be set aside because it is inconsistent.

On the other hand, plaintiff relies on several legal theories to support its claims. First, plaintiff argues that after the expiration of the Lehrman Lease on October 31, 2000, a holdover tenancy was created between Lehrman Realty as landlord and defendant ExxonMobil as holdover tenant because ExxonMobil failed to vacate the leased premises and continued wrongfully in possession of the premises, and offered rent that was accepted by plaintiff as landlord (*see* Real Prop Law § 232-c; 1 Rasch NY Landlord & Tenant [4th ed.], 10:1, p. 445). Plaintiff's next legal theory is based on case law which provides that where a tenant holds over without any other or new agreement with his landlord, the law will *imply* a continuance of tenancy on the same terms and subject to the same conditions and covenants as contained in the original written lease, except duration (1 Rasch NY Landlord & Tenant [4th ed.], 10:2, p. 448). Specifically, plaintiff WBHC argues that the evidence shows that ExxonMobil continued wrongfully in possession of the premises, paid rent and additional rent, and thereby, became a holdover tenant, and as defendant ExxonMobil is a holdover tenant, all of the lease provisions of the Lehrman Lease are effective as against ExxonMobil, except the term, which became month-to-month.

The fundamental underpinning of WBHC's entire case rests on one sole issue: whether Lehrman Realty had any rights that were legally enforceable against ExxonMobil that arose out of, and survived the expiration of the Lehrman Lease. This issue is primarily related to issues of law, i.e. contract interpretation and the law of holdover tenancy. In addressing this issue, the Court must first consider the Lehrman Lease and what the parties to this contract contemplated when they entered into the agreement, and then next it must consider the conduct of the parties.

III. LAW OF CONTRACT INTERPRETATION

When a contract is straightforward and unambiguous, its interpretation presents a question of law for the court, to be determined without resort to extrinsic evidence (*West, Weir & Bartel v Mary Carter Paint Co.*, 25 NY2d 535, 540 [1969]). Thus, where the application of a contract provision is disputed, the issue is normally resolved by reference to contract itself (*Slamow v Delcol*, 79 NY2d 1016, 1018 [1992]).

“Courts are obligated to interpret a contract so as to give meaning to all of its terms.” (*Mionis v Bank Julius Baer & Co.*, 301 AD2d 104 [1st Dept 2002] citing *Corhill Corp. v S.D. Plants, Inc.*, 9 NY2d 595, 599 [1961]; *Trump-Equitable Fifth Ave. Co. v H.R.H Constr. Corp.*, 106 AD2d 242, 244, *affd* 66 NY2d 779 [2002]). A cardinal rule of contract construction is that “a court should not ‘adopt an interpretation’ which will operate to leave a “provision of a contract ... without force and effect”. (*Corhill Corp. v S.D. Plants, Inc.*, 9 NY2d 595 [1961] citing *Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42, 46; *Fleischman v Furgueson*, 223 NY 235, 239 [1918]). The reason for such a rule is clear. Since a contract is a voluntary undertaking, it should be interpreted to give effect to the parties' reasonable expectations (*see Sutton v East River Sav. Bank*, 55 NY2d 550, 555[1982]). Here the Lehrman Lease must be interpreted so as to give meaning to all of its terms.

A. THE LEHRMAN LEASE

1. EXISTENCE OF A LEASE AGREEMENT BETWEEN WBHC AS THE LANDLORD AND EXXONMOBIL AS THE HOLDOVER TENANT.

The first question that must be addressed is whether subsequent to October 31, 2000 there existed a lease agreement between Lehrman Realty and ExxonMobil, or between WBHC and ExxonMobil. To answer this question, we must look to the written Lehrman Lease itself and to the conduct of the parties after the expiration of the Lease.

The Lehrman Lease is the only written lease agreement in this case. WBHC concedes, and there is ample unrefuted evidence in the record that shows that it was never a party to this lease. Plaintiff presented no evidence, and failed to controvert ExxonMobil's evidence of the fact that there was never a written lease between WBHC and ExxonMobil. Indeed, WBHC acknowledged and admitted that the written lease between Lehrman Realty and ExxonMobil expired on October 31, 2000 (¶ 8 Plaintiff's Memorandum In Opposition), and that there never was a written lease between WBHC and ExxonMobil.

The original parties to the Lehrman Lease were Lehrman Realty, as landlord, and ExxonMobil, as tenant. It is undisputed that this lease was entered into on July 2, 1990 with a term of ten (10) years, expiring on October 31, 2000. WBHC concedes that at the time that WBHC purchased the subject premises from Lehrman Realty on January 8, 2001, the Lehrman Lease had expired. WBHC argues that a holdover tenancy was created between Lehrman Realty and ExxonMobil subsequent to the expiration date of the lease on October 31, 2000, and WBHC acquired all of Lehrman Realty's interest in the premises including its interest as a landlord of holdover tenant ExxonMobil when Lehrman Realty conveyed title to the premises to WBHC on January 8, 2001.

WBHC submitted into evidence a copy of the deed of conveyance. With this deed, Lehrman Realty transferred to WBHC all its purported interest in the expired Lehrman Lease to WBHC at the time that the subject premises was conveyed (*see Stogop Realty Co., Inc. v Marie Antoinette Hotel Company*, 217 App Div 555 [1st Dept 1926] [holding the conveyance of property with appurtenances conveyed all the interests of the owner then in existence]).

ExxonMobil argues that there existed no lease agreement between Lehrman Realty and ExxonMobil which Lehrman Realty could transfer or convey to WBHC on January 8, 2001, the date Lehrman Realty conveyed title to the premises to WBHC.

2. WBHC'S RIGHTS UNDER THE LEHRMAN LEASE

Here, WBHC argues that upon the sale of the premises to it, Lehrman Realty, Inc., conveyed or otherwise transferred to WBHC all of Lehrman Realty's rights and interest in the Lehrman Lease. Logically, WBHC who has become the transferee to the rights and interests of Lehrman Realty, Inc. can have no greater or lesser rights than WBHC's transferor, Lehrman Realty, Inc. As transferee, the transferee stands in the shoes of the transferor and assumes all the rights, privileges and benefits of the transferor. (*See Arena Const. Co., Inc. v J. Sackaris &*

Sons, Inc., 282 AD2d 489, 489 [2d Dept 2001]). Figureatively, WBHC stepped into the shoes of Lehrman Realty. Therefore, on January 8, 2001 when title to the premises was conveyed to WBHC, the only interest or rights that Lehrman Realty could transfer to WBHC would be the unexpired remainder terms, conditions or covenants of the lease, if any, and any of the promises or obligations, if any, under the lease agreement that survived or continued even though the lease expired. Thus, we must now turn to the Lehrman Lease to construe the agreement to determine what rights or interest, if any, did Lehrman Realty have on January 8, 2001 when Lehrman Realty conveyed the premises to WBHC.

Paragraph 1 of the Lease provides:

This lease shall be in full force and effect from the date hereof, and the term shall continue for a period of ten (10) years to commence as of November 1, 1990 and **to terminate on October 31, 2000.** [Emphasis added].

It is clear by the unambiguous language of the lease, specifically paragraph 1 of the Lease, that the lease terminated on October 31, 2000. Lehrman Realty, Inc. and ExxonMobil entered into an agreement negotiated at arm's length in which the parties unequivocally agreed that the lease agreement would cease on October 31, 2000. The lease expired by its express terms unless there is some other provision in the lease that expressed that the parties clearly intended a contrary result. There was no evidence offered by WBHC to show that the lease was reinstated, renewed, or extended. Therefore after October 31, 2000, there existed no landlord-tenant relationship between the original owner Lehrman Realty, Inc. and ExxonMobil.

WBHC argues that notwithstanding the expiration of the lease on October 31, 2000, the lease was reinstated, restored, or revived as evidenced by the conduct and performance of certain acts by ExxonMobil. Specifically, WBHC elicited evidence from Adelmo Cioffi to show that ExxonMobil engaged in certain conduct after October 31, 2000 that supported the creation of a holdover tenancy. Specifically, ExxonMobil (1) continued to wrongfully occupy and possess the premises; (2) paid real estate taxes; and (3) paid \$44,000.00 rent.

ExxonMobil argues that no holdover tenancy was created and that its conduct after the expiration of the lease was consistent with its rights, duties, and obligations under the lease contract, and not as a holdover tenant.

3. EXXON MOBIL DID NOT CONTINUE IN POSSESSION OR CONTINUE TO OCCUPY THE PREMISES AFTER THE TERMINATION OF THE LEASE ON OCTOBER 31, 2000.

ExxonMobil claims that it did not continue in possession of, or occupy the demised premises after the expiration of the lease, but merely was present to perform environmental clean-up as it was obligated to do under paragraph 32 of the Lease.

Paragraph 32 of the lease provides in pertinent part:

It is understood and agreed by Lessor and Lessee that thirty (30) days prior to the expiration of this lease, the Lessee shall commence test borings and an environmental examination which may include the installation of observation wells. In the event evidence of hydrocarbon contamination to soil or water is noted, or if sub-surface conditions and structure, in the opinion of Lessee, represents an environmental hazard, **Lessee may have access to the leased premises for the purpose of an “environmental clean-up” and shall perform such clean-up** at its own cost and expense after the expiration of the lease. Lessee shall be responsible at its sole cost and expense to take whatever steps are necessary to clean up any contamination found in excess of state, federal or local environmental standards. Lessee shall indemnify and save harmless Lessor from and against any and all liability and damages, including reasonable attorneys’ fees, and from and against any and all suits, claims and demands of every kind and nature, by or on behalf of any persons, firm, association, corporation, arising out of or based upon any environmental accident or occurrence, injury or damage, occurring during the term of this lease, which happens in or about the demised premises, or any consequential damages resulting therefrom including, but not limited to, any matter growing out of testing for or clean up of any environmental hazard, and replace under-ground tanks if necessary.

- (a) It is understood and agreed between Lessor and Lessee that thirty (30) days prior to the expiration of this lease, the Lessee shall at its own cost and expense remove the underground storage tanks and back-fill the vacant area and **repave the premises so that its appearance and quality of pavement is the same or greater than existed at the time of the execution of this lease.** In addition, the Lessee shall commence a site evaluation and on environmental clean-up, if necessary, as hereinabove provided within the thirty (30) day period. In the event that it shall be impossible for the Lessee to comply with the requirements of any federal, state or local government environmental agency or other agency having jurisdiction thereof within the thirty (30) day period, then the Lessor grants the Lessee the right to remain on the premises for the limited purpose of complying with the abovementioned federal, state or local laws. However, **if in the performance of the environmental clean-up the Lessee interferes with the Lessor’s use of the premises,** then and in the event the Lessee agrees **to pay to the Lessor on a**

monthly basis on the first day of each month that the Lessee is in possession for the limited purpose outlined above, a sum equivalent to the use and occupancy of the premises.

- (b) It is understood and agreed between the Lessor and the Lessee that the Lessor has the right to enter the premises upon reasonable notice to the Lessee within ninety (90) days from the expiration of the term of this lease to commence any environmental examination of the premises that the Lessor in its sole discretion deems advisable [sic]. This right granted to the Lessor is not intended to be an obligation on the part of the Lessor but merely an option on its part to exercise at its sole discretion. [Emphasis added].

By the clear and unambiguous terms of the Lehrman Lease, the parties to the lease, Lehrman Realty and ExxonMobil, intended to afford ExxonMobil access to the premises after the expiration date of the lease for the limited purpose of performing environmental clean-up. Although, Paragraph 1 of the lease establishes that the parties intended and contemplated that the lease would expire on a specific date certain, paragraph 32 of the lease shows that the parties also contemplated that ExxonMobil's obligation to perform environmental clean-up might carryover after the expiration date of the lease and that Lehrman Realty agreed to grant ExxonMobil limited access to the premises for the limited purpose of completing the environmental clean-up work that was started but not completed prior to October 31, 2000. The parties contemplated certain acts would be performed by the parties even after the date of the expiration of the lease. The parties had no intention of extending the date of the expiration of the lease even though certain terms and conditions would still be enforceable after that expiration.

ExxonMobil introduced uncontroverted evidence at trial that demonstrated that after October 31, 2000 it did not continue to occupy or possess the premises in the same manner it possessed the premises prior to the expiration of the lease, that it closed down all business operation, and that with authorization of Lehrman Realty, it accessed the premises only to perform environmental clean-up. ExxonMobil's overwhelming and consistent evidence of its conduct after the expiration of the lease on October 31, 2000 was undisputed. Thus, the finding by the jury that ExxonMobil was wrongfully in possession of the premises was against the weight of the evidence. Accordingly, there is no evidence in the trial record to show that ExxonMobil continued to wrongfully occupy or possess the premises after October 31, 2000.

4. EXXONMOBIL'S PAYMENTS OF \$44,000.00 AND REAL ESTATE TAXES DID NOT CONSTITUTE AN OFFER AND PAYMENT OF RENT TO SUPPORT ESTABLISHING A HOLDOVER TENANCY BETWEEN WBHC AND EXXONMOBIL.

In addition, in forming the Lehrman Lease the parties contemplated an amount that

ExxonMobil would pay Lehrman Realty in the event ExxonMobil's environmental clean-up interfered with Lehrman's "use of the premises". Paragraph 32 of the Lease provides that ExxonMobil agreed to pay Lehrman Realty a sum the "equivalent to the use and occupancy of the premises". Although WBHC presented evidence to show that ExxonMobil paid real estate taxes and paid WBHC \$44,000.00, WBHC presented no evidence to controvert ExxonMobil's evidence that the payments were not intended by ExxonMobil to be an offer to WBHC to pay "rent". To the contrary, the uncontroverted evidence showed that ExxonMobil's payment of real estate taxes was inadvertent, and the payment of \$44,000.00 was made consistent with ExxonMobil's obligation under paragraph 32(a) of the original Lehrman Lease for "use and occupancy".

Moreover, paragraph 16(e) of the Lease provides in pertinent part that:

No receipt of monies by Lessor from Lessee after the termination or cancellation hereof in any lawful manner shall reinstate, continue or extend the term hereof, or affect any notice theretofore given to Lessee, or operate as a waiver of the right of Lessor to enforce the payment of fixed or additional rent or other charges then due or thereafter falling due, or operate as a waiver of the right of Lessor to recover possession of the demised premises by proper suit, action, proceedings or remedy;

This provision indicates that the parties contemplated that any rent monies received by Lehrman Realty from ExxonMobil after the expiration of the lease shall not act to "reinstate, continue or extend the terms of the lease". WBHC argues that the entire Lehrman Lease was reinstated, continued or extended when ExxonMobil paid the \$44,000.00 and real estate taxes subsequent to October 31, 2000. However, this argument is belied by the unambiguous terms of the lease which state that such payment could not "reinstate, continue or extend the Lehrman Lease". Indeed, it is clear from the unambiguous language of the lease that the parties agreed and intended that even an action by ExxonMobil such as the unilateral act, intentional or inadvertent, of paying real estate taxes after the expiration of the lease, or the receipt by the landlord Lehrman Realty, of any monies from ExxonMobil after the expiration of the lease, would not operate to "reinstate, continue or extend" the term of the lease beyond October 31, 2000.

Accordingly, there is insufficient evidence in the record to support the jury's verdict that defendant ExxonMobil offered and paid rent to plaintiff WBHC after October 31, 2000 that would support the creation of a holdover tenancy. Furthermore, as the court finds that defendant ExxonMobil did not engage in any act or conduct after October 31, 2000 that would create a holdover tenancy, the law cannot imply a continuance of a tenancy on the same terms and conditions as the original Lehrman Lease.

5. WBHC HAS A RIGHT TO ENFORCE AGAINST EXXONMOBIL TERMS AND PROVISIONS IN THE LEHRMAN LEASE THAT SURVIVED THE EXPIRATION OF THE LEASE.

Notwithstanding the fact the parties intended that the landlord-tenant relationship between Lehrman Realty and ExxonMobil would terminate on October 31, 2000, there were enforceable provisions in the original lease that survived the expiration. In other words, although WBHC had no right of action to enforce a breach of every term and condition in the entire Lehrman Lease, WBHC, as a transferee of the rights of Lehrman Realty, had a right to enforce those terms and conditions in the lease that survived after October 31, 2000. As there is unequivocal and unambiguous language in the lease that the parties intended both that the lease terminate on October 31, 2000 and that certain terms and conditions of the lease survive, the court must construe the lease to give effect to parties' reasonable expectations for all the terms.

However, the claims that arose out of and relate to provisions of the lease that survived the expiration of the lease cannot be the basis for the revival of the entire lease when the express and unambiguous language in the lease shows that the parties intended that the lease was terminated.¹ The jury was charged, and found that ExxonMobil breached its promise under paragraph 32 of the lease, and as a result awarded WBHC damages of \$792,000.00 for use and occupancy for the premises from January 3, 2001 through the present and \$37,000.00 for the cost of repaving the premises. In addition, the jury was charged, and found that ExxonMobil breached its promise under paragraph 13 of the lease, and impliedly found, although not specifically charged, that ExxonMobil breached its promise under paragraph 7 of the lease, and as a result awarded WBHC damages of \$915,303.05 for the cost of rebuilding the building that was demolished.

On a motion to set aside a jury's verdict as against the weight of the evidence, the standard is whether the evidence "so preponderated in favor of the other side that the verdict could not have been reached on any fair interpretation of the evidence." (*Lolik v Big V Supermarkets, Inc.*, 86 NY2d 744, 746 [1995]; *Voiclis v International Association of Machinist and Aerospace Workers*, 239 AD2d 339 [2d Dept 1997]). A verdict would not be against the weight of the evidence "unless it is palpably wrong and there is no fair interpretation of the evidence to support the jury's conclusion." (*Sperduti v Mezger*, 283 AD2d 1018 [4th Dept 2001]).

WBHC's claim for breach of paragraph 32 of the lease was adequately supported by witness testimony and exhibits. ExxonMobil elicited evidence in rebuttal. The jury having considered the evidence of the parties, chose to accept WBHC's view of the evidence. If a verdict for a plaintiff is based on a fair interpretation of the evidence, it should not be set aside as being against the weight of the evidence (*Brosnan v Pratt*, 37 AD3d 388 [2d Dept 2007]). Here, the jury could have reached its verdict upon a fair interpretation of the evidence (*Kennedy v New*

¹Notably, both WBHC and ExxonMobil claim that each have enforceable rights that arise out of paragraph 32 of the original Lehrman Lease that survived the expiration of the lease.

York City Health and Hosp. Corp., 300 AD2d 146 [1st Dept 2002]).

With respect to WBHC's claims for \$43,378.57 for payment of property taxes on the premises in breach of paragraph 3 of the lease agreement and \$915,303.05 for the cost of rebuilding the building that was demolished in breach of paragraphs 7 and 13 of the lease agreement, as a matter of law WBHC has no claims against ExxonMobil since it did not establish that the written lease agreement was in existence at the time of the breach, that WBHC was a party to the lease or had some other right to enforce the lease, and that WBHC breached a term or provision of the lease entitling WBHC to damages. Moreover, WBHC never alleged in its complaint a claim for \$43,378.57 for payment of property taxes. Thus, the findings by the jury that WBHC was entitled to damages of \$43,378.57 for property taxes on the premises and \$915,303.05 for the cost of rebuilding a demolished building were against the weight of the evidence as a matter of law and fact. ²Accordingly, the jury verdict with respect to these claims are vacated, set aside, and dismissed.

IV. CONCLUSION

Thus, as there was no evidence showing (i) that after October 31, 2000 there was either a lease agreement between Lehrman Realty and defendant ExxonMobil, or between plaintiff WBHC and defendant ExxonMobil, (ii) that a holdover tenancy was created between plaintiff WBHC and defendant ExxonMobil, and (iii) that plaintiff WBHC is entitled to damages for \$43,378.57 for breach of paragraph 3 of the lease and \$915,303.05 for breach of paragraphs 7 and 13 of the lease, the Court finds that no jury could have reached the verdict in this case on these claims on any fair interpretation of the evidence. Therefore, the jury verdict was against the weight of the evidence.

Accordingly, defendant ExxonMobil's motion for an Order pursuant to CPLR 4404(a) setting aside the jury verdict rendered on July 31, 2007 in favor of plaintiff WBHC is granted solely to the extent that the verdicts for \$43,378.57 and \$915,303.05 are set aside and vacated. The Clerk is directed to enter judgment dismissing the complaint with respect to these claims. However, to the extent that defendant's motion seeks an Order directing a new trial and setting aside the verdict of the jury awarding damages of \$792,000.00 and \$37,000.000 for breach of paragraph 32 of the lease, the motion is denied as the verdict was not contrary to the weight of the evidence.

²With respect to WBHC's building demolition claim, the Court notes that in or about the time that WBHC demolished the building in July 2001, it was nearly 10 months from the time the Lehrman Lease had expired and nearly 8 months from the time that WBHC took title to the premises. Although WBHC had no claim for breach of contract under the Lehrman Lease, arguably, if ExxonMobil had in fact committed a wrong, WBHC was not without a remedy and had the option to seek to recover damages from ExxonMobil under some other contract or tort cause of action. However, WBHC choose not to pursue this option.

The court has considered the defendant's remaining arguments and finds them to be without merit.

The foregoing constitutes the Decision and Order of this Court.

Dated: February 26, 2008

.....
Howard G. Lane, J.S.C.