

Andejo Corp. v South St. Seaport L.P.

2013 NY Slip Op 32903(U)

November 13, 2013

Supreme Court, New York County

Docket Number: 603707/2004

Judge: Shlomo S. Hagler

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17**

-----X
**ANDEJO CORPORATION d/b/a SEAPORT WATCH
COMPANY, ET AL,**

Index No.: 603707/2004

Plaintiffs,

-against-

DECISION/ORDER

**SOUTH STREET SEAPORT LIMITED PARTNERSHIP
and SEAPORT MARKETPLACE, L.L.C.,**

Defendants.
-----X

HON. SHLOMO S. HAGLER, J.S.C.:

While the genesis of this contentious litigation arose in 2004, it has continued for almost a decade, spawned more than sixty (60) motions, and culminated in a protracted trial spread over several months. The issue of ejection of the last remaining tenant, Fulton Market Retail Fish Inc. d/b/a Simply Seafood ("Simply Seafood" or "Tenant") at Pier 17 of the South Street Seaport ("Seaport") is just one component of this prolonged history.

FINDINGS OF FACT

Parties

Plaintiffs were commercial tenants at the Seaport by virtue of certain written leases. Defendants South Street Seaport Limited Partnership and Seaport Marketplace, L.L.C., ("defendants" or "Landlord") were plaintiffs' landlord pursuant to certain leases and amendments between the City of New York and The South Street Seaport Corporation. (Plaintiffs' Trial Exhibit 210, § 2.1, SP 000685 - SP 000686.)

FILED

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**COUNTY CLERK'S OFFICE
NEW YORK**

Brief Procedural History

Plaintiffs commenced this action against defendants for breach of contract¹ alleging that they suffered lost profits as a result of the landlord's failure to maintain, repair, promote and/or market the Seaport. Defendants denied these allegations and asserted counterclaims against plaintiffs for ejectment, unpaid rent and additional rent, and an award of attorney's fees. Without reciting the entire lengthy history, all of the plaintiffs vacated their commercial spaces except for Simply Seafood. As such, the parties agreed to bifurcate² the trial on defendants' counterclaim for ejectment of Simply Seafood.

Lease Agreement and Amendments

Simply Seafood and defendant South Street Seaport Limited Partnership entered into a Lease Agreement, dated September 17, 1982, to occupy two locations at the Fulton Street Market of the Seaport to be used as retail fish store and clam bar for a term of fifteen (15) years. (Plaintiffs' Trial Exhibit 210.) When the parties started to negotiate relocating Simply Seafood to another location in the same building, they entered into a First Amendment of Lease, dated January 10, 1989, with an extended term of three years, and then entered into a Second Amendment of Lease, dated April 4, 1989. (*Id.*) When Simply Seafood relocated to its current commercial space 3095 containing 550 square feet on the third floor of the new Pier 17 building located at 89 South Street in lower Manhattan ("subject premises"), the parties entered into the Third Amendment to Lease, dated February 23, 1995, for an extended term of fifteen (15) years

1. All other causes of action have been dismissed. (*See, Andejo Corp. v South St. Seaport Ltd. Partnership*, 40 AD3d 407 (1st Dept 2007))

2. This Court concluded plaintiffs' *prima facie* case for breach of contract and started the trial of defendants' other extant counterclaims.

with a Tenant option to renew for an additional ten (10) years (i.e., May 31, 2010 to May 31, 2020). (*Id.*)

Rent and Additional Rent

The current rental and additional rental payment obligations were articulated in the Third Amendment to Lease which incorporated the original Lease Agreement. Simply Seafood was obligated to pay, in part, on or before the tenth (10th) day of each month four basic items: (1) ten percent of gross sales or base rent (*Id. at* § 5, SP 000653); (2) cooking gas (*Id. at* § 13, SP 000655-SP 000656); (3) electricity (*Id. at* §§ 5, 6ii, 12.1, SP 000653-SP 000655); and (4) sales tax (*Id. at* § 6.4, SP 000690). Simply Seafood was required to report its gross sales to the Landlord every month, and maintain the back-up documentation for three years, in order for the Landlord to properly bill the percentage rent payment. (*Id. at* §§ 5.6, 5.7, SP 000688-SP 000689.)

Estimated Charges

The Landlord provided the Tenant with a 2005 statement of monthly estimated charges for payment of utilities. (Plaintiffs' Trial Exhibit 268, SEAP 0067314.) Specifically, the Tenant was obligated to pay monthly \$560 for cooking gas, \$960 for electricity, and \$81.94 for sales tax which totaled \$1,591.94. (*Id.*) These charges were later adjusted based on actual charges.

Cooking Gas

The cooking gas charge was derived from a mathematical equation as specified in § 13 of the Third Amendment to Lease. The Landlord was required to have its "consulting engineer" assign a "gas factor" to the Tenant which (1) measured the "capacity of the gas using equipment

used by Tenant” in the subject premises (“numerator”) in relationship to the (2) “total amount of the capacity of the gas using equipment used by tenants” (“denominator”) and multiplied by the (3) “actual cost to the Landlord of such gas” resulting in the Tenant’s gas charge. In other words, a fraction and product were created as follows:

$$\frac{\text{Tenant's gas factor}}{\text{Total amount of gas factors}} \times \text{Landlord's Actual Gas Cost} = \text{Tenant's Gas Charge}$$

The numerator or the Tenant’s gas factor of 742 was established through a gas survey. (Plaintiffs’ Trial Exhibit 231, SEAP 59227.) In 2005, the denominator or the total amount of gas factors was 14,685 and the Landlord’s actual cooking gas cost was \$192,963.46. (Defendants’ Trial Exhibit LLLLLL, SEAP 0078657.) Based on this formula, the Tenant’s fractional share was 0.050528 after dividing the numerator by the denominator. The Tenant’s fractional share of 0.050528 is then multiplied by the Landlord’s cost of \$192,963.46. After calculating this equation, the Tenant’s 2005 actual cooking gas charges totaled \$9,750.06. Since the Tenant only paid \$6,720.00 for the estimated cooking gas, the Landlord sent the Tenant an invoice for the differential amount of \$3,030.06, which was never paid. (*Id.*, SEAP 0078657.)

Electricity and Sales Tax

As with the cooking gas, the Tenant was billed estimated electricity charges in 2005 which amounted to \$11,400.00. (Defendants’ Trial Exhibit LLLLLL, SEAP 0078651.) However, the Tenant’s actual electricity charges for 2005 totaled \$12,930.46. Therefore, the Tenant was obligated to pay the differential of \$1,530.46 based on the actual metered electricity charges for 2005, which was never paid. (*Id.*, SEAP 0078650.) The Tenant was also obligated to pay an additional \$113.15 for the sales tax. Both the actual electricity charges and the increased sales tax totaled \$1,643.61, which was never paid. (*Id.*)

Amounts Owed on November 23, 2005

While the above calculations take into account the later adjusted billing for the utilities, there was only \$4,093.44 due for utilities and sales tax as of November 23, 2005.³ (Defendants' Trial Exhibit NNNNN, SE-TR 00000306.) In addition, Michael Piazzola credibly testified that \$1,723.92 was outstanding for the Tenant's base rent.⁴ (Trial Transcript 4572:3 to 4574:25.) There was also two months of storage rent at \$79.16 per month for \$158.32 outstanding. (Plaintiffs' Trial Exhibit 268, SEAP 0067318.) Thus, the total amount due and owing by the Tenant to the Landlord as of November 23, 2005 was \$5,975.68.

History of Non-Payment

From the time Simply Seafood moved into the subject premises on Pier 17 in 1995 through 2005, the Tenant had a history of failing to pay its rental and additional rental obligations. (Plaintiffs' Trial Exhibits 211, 215, 219, 220, 221, 224, 225, 226, 227, 242 and 285.) In May 2005, the Landlord served the Tenant with a rent demand due to the Tenant's failure to pay \$36,814.28, which partly originated from charges that were three years old. (Plaintiffs' Trial Exhibit 247.) The majority of the unpaid rent stemmed from the Tenant's dispute concerning cooking gas and electricity charges. When Simply Seafood realized that the Landlord intended to evict it as a result of the above non-payment of rent, it promptly paid the Landlord the entire amount allegedly owed. (Plaintiffs' Trial Exhibit 249.)

3. The accounts receivable statement provides for \$5,925.74 of debits representing various utility charges and credits of \$1,832.30, leaving \$4,093.44 due and owing.

4. There was \$0.02 due for July 2005 base rent, \$962.00 (reported gross sales of \$9,620) for August 2005 base rent and \$761.90 (reported gross sales of \$7,619) for September 2005 base rent. (Plaintiffs' Trial Exhibit 311, SEA-TR 00001756.)

Notice of Termination

Since the default in the payment of rental and additional rental obligations persisted, the Landlord exercised its option under sections 17.1(f) and 17.2(c) of the Lease Agreement by serving the Tenant a Notice of Termination dated November 23, 2005, terminating Simply Seafood's tenancy effective November 29, 2005, as a result of its failure to pay \$5,975.68. Pursuant to § 17.1(f), an "Event of Default" is defined as "[t]he failure by Tenant to pay any Rental or other sum of money within seven (7) days after the same is due hereunder." Upon such an Event of Default, § 17.2(c) permits the Landlord to terminate the Lease and tenancy by providing the Tenant with a notice of termination. By check dated November 28, 2005, Simply Seafood attempted to cure the default by mailing a check to the Landlord's "lock box" which was deposited, but promptly returned to the Tenant. (Plaintiffs' Trial Exhibits 256 and 258.)

Unsupported Payments

In addition to its November 28, 2005 check, the Tenant alleged that on October 31, 2005 and November 10, 2005, it mailed six checks to the Landlord's lock box totaling \$6,040.30, none of which were cashed. (Plaintiffs' Trial Exhibit 255.) Without explanation, the October 31, 2005 checks were specifically designated to pay the October 2005 utility charges, while the later November 10, 2005 checks referenced partial payment for the earlier September 2005 utility charges. Other than a summary of breakdown of the checks, the Tenant neither offered copies of the actual checks nor check stubs. (Plaintiffs' Trial Exhibit 255.) The Landlord persuasively claims that it never received these checks. As such, the Tenant failed to support its allegation of payment with credible evidence that \$6,040.30 was paid prior to the service of the Notice of Termination.

Sufficiency of Notice of Termination

Simply Seafood moved to dismiss the defendants' ejectment counterclaim by challenging the sufficiency of the Notice of Termination. However, on November 28, 2006, the Hon. Marcy Friedman, J.S.C., denied Simply Seafood's motion, holding that the Notice of Termination was sufficient as a predicate for the ejectment counterclaim.

Option to Renew

Notwithstanding the above, by letters dated August 13, 2008, December 16, 2008, and June 23, 2009, Simply Seafood attempted to exercise its option to renew the Lease for an additional ten (10) years. (Plaintiffs' Trial Exhibits 260, 264 and 267.) In response, by letters dated August 26, 2008, January 7, 2009, and July 9, 2009, the Landlord rejected and treated the Tenant's exercise of the option to renew the Lease as a "nullity." (Plaintiffs' Trial Exhibits 261, 265 and 266.)

Use and Occupancy

While there remained a dispute between the parties concerning payment of both basic rental obligations and utility charges, the Landlord moved for an order for payment of use and occupancy during the pendency of the action. By decision and order dated May 5, 2006 (and entered June 28, 2006), Justice Friedman granted the Landlord's motion for an award of use and occupancy against the seventeen (17) tenants including Simply Seafood.⁵ It is undisputed that Simply Seafood's use and occupancy payment only amounted to \$673.14, but did not include payment of the utility charges which was more than \$1,500.00.

5. Justice Friedman's use and occupancy order was affirmed by the Appellate Division. (*See*, 35 AD3d 174 [1st Dept 2006].)

Destruction of Back-Up Documentation

All the tenants, including Simply Seafood, that paid a percentage of gross sales rent to the Landlord were obligated to maintain back-up documentation under their respective leases. However, these tenants admitted that they destroyed “z-tapes” and cash register receipts at various times before and after this action was commenced. Specifically, Simply Seafood admitted at trial that it threw out its “z-tapes” shortly after the commencement of this action in November 2004, and later again right before a deposition on December 1, 2006. As a result, the Landlord moved to dismiss the complaint or to preclude plaintiffs from introducing evidence concerning sales based on the Tenant’s spoliation of evidence. By decision and order dated September 8, 2008, Justice Friedman granted the Landlord’s motion to the extent of precluding plaintiffs from proving sales in an amount greater than that reported in duly filed tax returns and payment of \$5,000 as costs of the motion.

Misreporting of Gross Sales

Simply Seafood’s reporting of gross sales to the Landlord varied widely from that reported to the Internal Revenue Service (“IRS”) in its federal tax returns. (Plaintiffs’ Trial Exhibit 310.) For tax years 2005 and 2006, Simply Seafood admitted that it under-reported gross sales to the Landlord of approximately \$25,000 in each year. (*Id.*) From 2004 through 2007, while the litigation was pending, Simply Seafood intentionally under-reported gross sales of more than \$72,000. (*Id.*)

Dismissal of Holdover Proceeding

After the Tenant's Lease purportedly expired in May 31, 2010, the Landlord commenced a commercial holdover proceeding in Civil Court, New York County under Index No. 69066/10 seeking to evict Simply Seafood based on the expiration of the Lease. In Civil Court, Simply Seafood moved to dismiss the holdover proceeding based on the Landlord's prior assertion of the counterclaim for ejectment in this action. By decision and order dated July 16, 2010, the Hon. Arlene Bluth, J.C.C., granted the Tenant's motion "because the issue [of termination of the tenancy] was already affirmatively put before the Supreme Court by the landlord, and it is still pending before the Supreme Court, the case is not properly here and it is dismissed." (Plaintiffs' Trial Exhibit 437.)

Denial of Summary Judgment

Defendants moved for summary judgment on their counterclaims for ejectment and unpaid rent and additional rent. By decision and order dated November 16, 2011, Justice Friedman denied summary judgment on the ejectment counterclaim against Simply Seafood because there was a triable issue of fact as to whether defendants' "custom and practice in resolving rent delinquencies rose to the level of 'active involvement' necessary to support a finding of intent to modify the lease, and to waive the right to terminate the tenancy based on late payment of rent." However, Justice Friedman granted the Landlord summary judgment against all the tenants, including Simply Seafood, as to liability on the counterclaims for unpaid rent, utilities and services as well as attorney's fees because "no plaintiff claims to have fully paid rents due."

Expiration of Lease

About a year later, the Landlord moved again for an order of ejectment against Simply Seafood premised partly on the unpled counterclaim of expiration of the Lease by its own terms. Although Justice Friedman denied the motion on August 8, 2012, the court permitted the Landlord to seek relief at trial for an ejectment of Simply Seafood based on the ground that the Lease expired on its own terms. Justice Friedman also allowed Simply Seafood to assert its defense at trial that it exercised a lease renewal option, but refused to limit what defaults fall within the scope of the pleadings and proof at trial.

CONCLUSIONS OF LAW

Amendments

At the outset, it is necessary to delineate the scope of the Landlord's ejectment counterclaim and the proof adduced at trial. The answer rests within the strictures of CPLR § 3025, which governs the amendment of pleadings. Subsection (b) deals with amendments by leave of court, and subsection (c) permits amendments to conform to the evidence at trial. With respect to subsection (b), Justice Friedman granted leave to the Landlord to expand or amend its counterclaim for ejectment to include the expiration of Simply Seafood's Lease by its own terms. This ruling was tempered with Simply Seafood's right to assert that it properly exercised its option to renew the Lease.

Subsection (c) invests the trial court with wide discretion to grant amendments to conform to the proof at trial. Such amendments may be freely granted even if the amendment changes the theory of recovery or increases the award of damages in excess of the original *ad damnum* clause except where prejudice is manifested. (*Dittmar Explosives, Inc. v A.E.*

Ottaviano, Inc., 20 NY2d 498 [1967]; *Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18 [1981].) When no prejudice is shown, the amendment may be allowed at any stage of litigation including during or after trial. (*Id.*)

As a result of Justice Friedman's order on August 8, 2012, the Tenant can not show any prejudice due to the Landlord's amendment to conform to the proof at trial. In fact, the Tenant also sought amendment on the very same issue so as to add a declaratory judgment that Simply Seafood properly exercised its renewal option. Moreover, it should come as no surprise to the Tenant that the Landlord was seeking its ejection based on the expiration of the Lease. Furthermore, the Tenant knew, or should have known, that it needed to be in compliance with all the "terms, covenants and conditions" of the Lease to exercise its renewal option. (Plaintiffs' Trial Exhibit 210, §2, SP 000653.) Therefore, it was quite clear that the Landlord would be able to proffer evidence at trial that the Tenant was in default or otherwise did not comply with the above conditions to exercise its renewal option. The scope of the amendment necessarily includes all of the Tenant's monetary defaults under the terms of the Lease.

Law of the Case

Justice Friedman has made many rulings in this action that are "law of the case." The court ruled that: (1) the Notice of Termination was proper and sufficient as a predicate for the ejection counterclaim, (2) the Landlord was permitted to assert a new ground at trial to eject the Tenant based on the expiration of the Lease without the necessity of a new pleading, (3) granted the Landlord summary judgment against all the tenants, including Simply Seafood, on liability on counterclaims for unpaid rent, utilities and services because "no plaintiff claims to have fully paid rents due," and (4) granted the Landlord an award of attorney's fees against all

tenants, including Simply Seafood, as the Landlord was presumably the prevailing party in this action. These rulings can not be revisited, as this Court can not review the order of another judge of co-ordinate jurisdiction in this same action. (*Matter of Cellamare v Lakeman*, 36 AD3d 905 [2d Dept 2007].)

Ejectment

The most common method to recover possession of real property is via a summary proceeding in the Civil Court under Article 7 of the Real Property Actions and Proceedings Law ("RPAPL"). Another method is a common-law action to recover possession of property known as an ejectment action brought in Supreme Court under Article 6 of the RPAPL. The summary proceeding is a highly defined statutory construction which was intended to produce a quicker disposition than the less regulated common-law action for ejectment. Indeed, the rich body of case law developed in an Article 7 statutory summary proceeding does not necessarily apply to the less restrictive common-law ejection action. (*Alleyne v Townsley*, 110 AD2d 674 [2d Dept 1985].)

In this case, it is clear that the Landlord had privity of contract with the Tenant and it adequately described the subject premises sought to be recovered. The real disputed issue is whether the Landlord has demonstrated by a preponderance of the credible evidence that the Tenant is wrongfully preventing the Landlord from recovering possession of the subject premises based on grounds set forth in the Notice of Termination and the amended claim that the Lease expired by its own terms.

Notice of Termination

Pursuant to sections 17.1(f) and 17.2(c) of the Lease, the Landlord exercised an option to terminate the Simply Seafood's tenancy due to "[t]he failure by Tenant to pay any Rental or other sum of money within seven (7) days after the same is due" under the Lease as a result of the Tenant's failure to pay \$5,975.68. As per the above detailed facts, the Landlord successfully demonstrated that \$5,975.68 was outstanding as of the date of the Notice of Termination and its billings for the cooking gas,⁶ electricity,⁷ or sales tax⁸ were proper under the terms of the Lease. Simply Seafood has failed to come forward with any credible evidence that said utility charges were improper. However, this legal conclusion does not end the inquiry, as this Court must also address equitable considerations and the possible waiver of strict enforcement of payment of rent and additional rent due to the parties' history and course of conduct, as will be addressed in more detail below.

6. Simply Seafood proffered in evidence the "Gas Allocation Study" which demonstrated the very gas factor that it seems to have historically disputed. (Plaintiffs Trial Exhibit 231, SEAP 59227.) The other tenant gas factors and the cost of the cooking gas came into evidence as a business record of the Landlord which has not been controverted. (Defendants' Trial Exhibit LLLLLL, SEAP 0078657.) Simply Seafood had the ability to retain an engineer (but did not do so) to examine the capacity of its gas using equipment which was in the control of the Tenant, or otherwise challenge the methodology of the gas survey and the Landlord's calculations.

7. Similar to the cooking gas, the Landlord introduced into evidence a business record of the estimated and actual electricity usage for 2005 which has not been controverted. (Defendants' Trial Exhibit LLLLLL, SEAP 0078651.)

8. The uncontroverted and credible testimony of Deborah Mathews is that the Landlord pays both the electricity bills and the sales tax thereon which are passed on to the Tenant. (Defendants' Trial Exhibit LLLLLL, SEAP 0078650.)

Expiration of Lease

While the Lease was set to expire on May 31, 2010, Simply Seafood purported to exercise its option to renew the Lease for an additional ten (10) years. This renewal option was conditioned upon the Tenant “not [be] in default under any of the terms, covenants and conditions of this Lease.” (Plaintiffs’ Trial Exhibit 210, ¶ 2, SP 000653.)

It is apparent that Simply Seafood was in monetary default at the time it purportedly exercised its conditional renewal option. Notwithstanding the defaults set forth in the Notice of Termination which could be arguably a genuine dispute over payment of utility charges, Simply Seafood acknowledged that it had deliberately under-reported gross sales to the Landlord for 2004 through 2007, immediately prior to the first time it attempted to exercise its renewal option in August 2008.⁹ (Plaintiffs’ Trial Exhibit 310.) Moreover, during the pendency of this action, the Tenant has failed to pay more than \$200,000 for utilities which represents approximately two-thirds of its rental and additional rental obligations under the Lease. (Defendants’ Trial Exhibit BBBBBBBB.) The court’s prior use and occupancy order which only provided for a minimum payment of \$673.14 does not shield the Tenant from paying any estimated or actual utility charges from 2005 through the present date. In other words, while the use and occupancy order certainly prevents the Landlord from ejecting the Tenant for non-payment of rent during the pendency of this action, it does not absolve the Tenant from fulfilling a covenant to pay utility charges as an agreed upon express condition to exercise its renewal option. This would not have left the Tenant without a remedy as it could have paid the disputed utility charges under

9. The Tenant’s testimony that it over-reported gross sales for prior years because it wanted to “impress” the Landlord was not credible. Even if were credible, the past over-reporting of gross sales would not justify the more credible and intentional under-reporting of gross sales from 2004 through 2007 as it would necessarily violate a substantial obligation of the terms of the Lease.

protest prior to the exercise of the renewal option, and later sought judicial intervention as to those disputed charges. Instead, the Tenant utilized cooking gas and electricity without any payment whatsoever for almost ten (10) years.

Since the Tenant was in default under the terms of the Lease, it was precluded from exercising its conditional renewal option in August 2008. (*457 Madison Avenue Corp. v Lederer De Paris, Inc.*, 51 AD3d 579 [1st Dept 2008]; *South Street Seaport Ltd. Partnership v Hayley Mfg, Inc.*, 21 Misc 3d 127(A) [App Term 1st Dept 2008].)

Waiver

In this case, the Lease contains a “no waiver” provision which permits the Landlord to accept rent without waiving its rights thereunder and specifically discounts the “prior course of performance” between the parties which would not be “relevant or admissible” in construing the terms of the Lease. (Plaintiffs’ Trial Exhibit 210, ¶ 20.5, SP 000705-6, ¶ 20.14, SP 000707.) The clear and unambiguous language of a “no waiver” provision negotiated between two sophisticated commercial entities is enforceable. (*Excel Graphics Tech., v CFG/AGSCB 75 Ninth Ave.*, 1 AD3d 65 [1st Dept 2003].)

In the landmark case of *JefPaul Garage Corp. v. Presbyterian Hospital in City of New York*, 61 NY2d 442 (1984), the Court of Appeals held that a no-waiver provision precludes an argument that the landlord waived conditions precedent to renewal contained in the lease as follows:

A waiver is the voluntary abandonment or relinquishment of a known right. It is essentially a matter of intent which must be proved (*Alsens Amer. Portland Cement Works v Degnon Contr. Co.*, 222 NY 34, 37; *Beacon Term. Corp. v Chemprene, Inc.*, 75 AD2d 350; 22 NY Jur 2d, Contracts, §330, p 212). While waiver may be inferred from the acceptance of rent in some

circumstances, it may not be inferred and certainly not as a matter of law, to frustrate the reasonable expectations of the parties embodied in a lease when they have expressly agreed otherwise. This lease contained a nonwaiver and merger clause which provided: "The receipt by Landlord of rent with knowledge of the breach of any covenant of this lease shall not be deemed a waiver of such breach and no provision of this lease shall be deemed to have been waived by Landlord unless such waiver be in writing signed by the Landlord."

Its language is clear and unambiguous. The parties having mutually assented to its terms, the clause should be enforced to preclude a finding of waiver of the conditions precedent to renewal (see *Matter of Wil-Low Cafeterias v 650 Madison Ave. Corp.*, 95 F2d 306, cert den 304 US 567; *Brainerd Mfg. Co. v Dewey Garden Lanes*, 78 AD2d 365, app dsmd 53 NY2d 701).

61 NY2d at 446.

However, in a situation where the course of conduct of the parties or their "active involvement" rose to the level "that are sufficient indicia that reasonable expectations of both parties under the original lease were supplanted by subsequent actions." (*Simon & Son Upholstery, v 601 W. Assoc.*, 268 AD2d 359, 360 [1st Dept 2000] [the course of dealings between the parties and the prior landlord's active involvement demonstrated that the prior landlord consented to the use of the premises for a studio notwithstanding the use clause which provided for the manufacture of upholstery furniture].) In contrast, where the landlord only has "passive involvement" in acceptance of late rent payments, that may insufficient to waive the breach of the terms of the lease. (*Id.*)

Here, the Landlord's course of conduct never amounted to "active involvement" so that it waived its right to terminate the tenancy based on late payment of rent without serving a rent demand. At best, the Landlord's actions only rose to the level of "passive involvement" which would not effectively waive its right to strictly enforce the terms of the Lease.

Equitable Considerations

It is a well established principle that the law abhors the forfeiture of a leasehold interest. (*Mooney v Bryne*, 163 NY 86 [1900].) In order to avoid a forfeiture, the Court of Appeals considers the tenant's excuse and weighs the prejudice to the parties. Where the tenant's fault was "as [Judge] Cardozo says 'mere venial inattention' . . . [no forfeiture is warranted because] the gravity of the loss is certainly out of all proportion to the gravity of the fault." (*J.N.A. Realty Corp. v Cross-Bay Chelsea*, 42 NY2d 392, 399 [1977].) However, such equitable relief will not be granted to relieve a forfeiture due to "wilful or gross neglect" (*id.*) or where the tenant has "wilfully committed some affirmative act in violation of his covenant." (*Giles v Austin*, 62 NY 486, 493 [1875].) Of course, equity will not allow for a forfeiture when the breach of the condition involves the payment of money after the tenant had already paid the entire amount. (*Id.*)

Simply Seafood's failure to pay less than \$6,000.00 alone would not normally be sufficient to allow for the forfeiture of a long-term lease because it primarily involved its long-standing dispute with the Landlord as to the legitimacy of the utility charges. However, considering Simply Seafood's deliberate and intentional misreporting of gross sales and its failure to pay any utility charges for about a decade, the above equitable considerations would not relieve the forfeiture since the Tenant has willfully committed an affirmative act in violation of its covenant.

CONCLUSION

Based on the preponderance of the credible evidence, it is

ORDERED AND ADJUDGED that defendants South Street Seaport Limited Partnership and Seaport Marketplace, L.L.C. are entitled to possession of commercial space 3095 on the third floor of the Pier 17 building in the South Street Seaport located at 89 South Street, New York, New York as against plaintiff Fulton Market Retail Fish Inc. d/b/a Simply Seafood, and the Sheriff of the City of New York, County of New York, upon receipt of a certified copy of this Order and Judgment and payment of the proper fees, is directed to place defendants in possession accordingly; and it is further


ORDERED AND ADJUDGED that immediately upon entry of this Order and Judgment, defendants South Street Seaport Limited Partnership and Seaport Marketplace, L.L.C. may exercise all acts of ownership and possession of commercial space 3095 on the third floor of the Pier 17 building in the South Street Seaport located at 89 South Street, New York, New York, including entry thereto, as against plaintiff Fulton Market Retail Fish Inc. d/b/a Simply Seafood; and it is further

ORDERED that the branch of the above-entitled action relating to recovery of damages is severed and continued.

The foregoing constitutes the decision and order of this Court. Courtesy copies of this decision and order have been sent to counsel for the parties.

ENTER :

Dated: November 13, 2013
New York, New York


Hon. Shlomo S. Hagler, J.S.C.