

**Sisters of Charity Health Care Sys. Nursing Home
Inc. v Jack Miceli, DDS, P.C.**

2007 NY Slip Op 32664(U)

August 21, 2007

Supreme Court, Richmond County

Docket Number: 0103896/2006

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND PART DCM 3**

**Index No.: 103896/2006
Motion No.: 2 & 3**

**SISTERS OF CHARITY HEALTH CARE SYSTEM
NURSING HOME INC., d/b/a BAYLEY SETON HOSPITAL
and SAINT VINCENT'S CATHOLIC MEDICAL CENTERS
OF NEW YORK,**

Plaintiff

against

JACK MICELI, D.D.S., P.C.,

Defendant

DECISION & ORDER

HON. JOSEPH J. MALTESE

The following items were considered in the review of this motion for summary judgment

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1, 2, 3, 4, 5, 6
Answering Affidavits	2, 6
Replying Papers	9
Exhibits	Attached to Papers
Memorandum of Law	7, 8

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

In motion number 2, the plaintiff moves this court for an order pursuant to CPLR § 3212 granting summary judgment and: 1) declaring that the defendant, Jack Miceli, DDS, PC may not validly exercise a lease renewal because Dr. Miceli breached the terms of the lease prior to the exercise date for failing to pay rent; 2) awarding the plaintiff possession of the leasehold premises; and, 3) awarding the plaintiff money damages for back rent. The defendant opposes the motion and cross moves for an order granting summary judgment and declaring that the defendant has validly exercised its right to renew its lease for a three (3) year term commencing January 1, 2007.

In January, 1992, the defendant entered into a lease [hereinafter "1992 Lease"] with the plaintiff for rental of commercial space in the building known as Building #7, 1st Floor, Northern

Section, at Bayley Seton Hospital, 75 Vanderbilt Avenue, Staten Island, New York 10304. The lease was for the defendant to use the space as a dental clinic and/or dental-related operations. The parties agreed that Dr. Miceli would rent the premises from the hospital for a period of five years at a price fixed amount for each year. Paragraph 2 of the lease gives the defendant the option to renew for two additional five year terms, as long as the defendant is not in default under the lease.

The 1992 lease was modified by an Amendment and Extension of Lease dated February 9, 2000, which extended the term of the 1992 lease at the end of December 2001 for an additional five years through December 31, 2006. Additionally, Paragraph 2 of the Amendment and Extension granted the defendant the right to renew the 1992 Lease for an additional three (3) years commencing January 1, 2007 to December 31, 2009, and for an additional six (6) months to June 2010 under certain circumstances. Furthermore, the parties agreed that the defendant would invest its own capital to improve the subject premises in consideration for the right to renew the 1992 Lease through 2010, as provided for in the Lease Amendment and Extension. According to the defendant, in consideration thereof, the defendant has invested in excess of \$500,000.00 toward the improvement of the premises, including the installation of state of the art trade fixtures and related equipment.

The plaintiff claims that Dr. Miceli has possessed, used and occupied the premises continuously since January 1992, however he did not make payment for possession and occupancy of the premise from November 1, 2003 through November 30, 2006. The plaintiff alleges that the hospital has demanded that Dr. Miceli make payment for the time period and that he has failed and refused to make payment. Finally, the plaintiff argues that the attempt to exercise the renewal option is “disingenuous given the multiple demands by the Hospital that Dr. Miceli pay the monthly rent due since November 1, 2003.” and that the “renewal option is clearly void due to Dr. Miceli’s continuing uncured default for failing to pay rent since November 2003.”

The defendant argues that the plaintiff's failure to maintain the premises as well as the physical structure of the building has resulted in the defendant's partial actual eviction. Specifically, the defendant points to the 1992 lease, Article 4(b) which states that the "Landlords sole obligation with respect to repairs and maintenance shall be to maintain the roof and utility distribution systems in good order and to make repairs to the utility distribution systems, exterior walls and foundations of the premises provided the need for such repairs is not due to the actions of the Tenant." The defendant alleges that the building's roof has not been maintained which results in water leaking into the building. The defendant claims that the windows, walls and ceiling tiles of the building have sustained extensive water damage, including the x-ray room and the main treatment area. Furthermore, the water condition has "grown" into a dangerous mold condition. Specifically, the defendant states that in January 2006, rainfall caused flooding in ten of the eleven treatment rooms causing the defendant eviction of his premises on that day.

It is well settled that a contract "is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed." (*Breed v. Insurance Co.* 46 NY2d 351 [1976].) Furthermore, the intent of the parties is to be determined by the plain and ordinary meaning of the language of the contract. (*Evans v. Famous Music Corp.* 1 NY3d 452 [2004]; *Edwards v. Poulmentis* 307 AD2d 1051 [2d Dept 2003].) However, "in cases of doubt or ambiguity, a contract must be construed most strongly against the party who prepared it, and favorably to a party who had no voice in the selection of its language. (*Jacobsen v. Sassower* 66 NY2d 991 [1985].)

In this action, both parties agree that the 1992 Lease was renewed for two additional five year terms extending the lease through December 31, 2007. At some point, the Lease Amendment and Extension was entered into which allowed for a third renewal. The defendant argues that the Lease Amendment does not condition the right for third renewal period on the satisfaction of the defendant's obligations under the 1992 Lease. Specifically, the defendant argues that the 1992 Leases's "no default" requirement applies only to the first two, five year renewals. The Court disagrees, Lease Amendment and Extension referenced the right to renewal upon the same terms, covenants and conditions." Therefore, the right to the third renewal was predicated upon the

defendant not being in default under the contract. However, the defendant does have a right to withhold rents for the partial eviction caused by the flooding and mold condition caused by the plaintiff's failure to maintain the premises.

Additionally, equity prevents the defendant's forfeiture of the lease as the defendant has invested approximately \$500,000.00 into the subject premises. (*Zaid Theatre Corp. v. Sona Realty Co.* 18 AD2d 352 [1st Dept 2005]; *Fifty States Mgm't Corp. v. Pioneer Auto Parks, Inc.* 46 NY2d 573 [1979]; *JNA Realty Corp. v. Cross Bay Chelsea, Inc.* 42 NY2d 392 [1977].) The Court of Appeals has held that a tenant's substantial investment into a premises must prevent the forfeiture of the tenant's rights in the premises. The plaintiff argues that the defendant's non-payment of rent should result in the forfeiture of the defendant's lease. However, the defendant argues that he was and remains fully within his rights to withhold the rent due to the hazardous conditions at the premises, as well as the numerous partial evictions that occur each time it rains.

The substantial investment made by the defendant into the maintenance and upkeep of the premises in this action prevents the forfeiture of the tenant's rights pursuant to the lease, even though the defendant may have been in default under the Lease Amendment and Extension; although the defendant may have been in its right to withhold rent payment due to the plaintiff's failure to maintain the premises. Therefore, summary judgment in favor of the plaintiff is improper and their motion is denied in its entirety. The defendant's motion, however, is granted and this court finds that the defendant has validly exercised its right to renew its lease for a three year term commencing on January 1, 2007.

Accordingly, it is hereby:

ORDERED, that the plaintiff's motion number 2 seeking summary judgment is denied in its entirety; and it is further

ORDERED, that defendant's motion number 3 seeking a declaration that the defendant has validly exercised its right to renew its lease for a three year term commencing January 1, 2007 is granted.

ENTER,

DATED: August 21, 2007

Joseph J. Maltese
Justice of the Supreme Court