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| E.F.L. Baking Corp. v Lowy Family Irrevocable Trust |
| 2008 NY Slip Op 32494(U) |
| September 2, 2008 |
| Supreme Court, Nassau County |
| Docket Number: 0188-05/ |
| Judge: Leonard B. Austin |
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INDEX
NO. 05-10188

Calendar No. 2006 N 2775

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 12 NASSAU COUNTY

PRESENT:

HONORABLE LEONARD B. AUSTIN
Justice

AMENDED ORDER

_____ x
E.F.L BAKING CORP.,

Motion R/D: 5-23-08
Submission Date: 5-23-08
Motion Sequence No.: 004/MOT D

Plaintiff,

- against -

COUNSEL FOR PLAINTIFF
Jaspan Schlesinger Hoffman, LLP
300 Garden City Plaza, 5th Floor
Garden City, New York 11530

THE LOWY FAMILY IRREVOCABLE
TRUST, MEYER LOWY a/k/a MICHAEL
LOWY, and KATY LOWY,

COUNSEL FOR DEFENDANTS
Jonathan A. Stein, P.C.
132 Spruce Street
Cedarhurst, New York 11516

Defendants.
_____ x

AMENDED ORDER

The following papers were read on Defendants' motion for partial summary judgment on their counterclaims:

- Notice of Motion dated April 10, 2008;
- Affidavit in Support of Allen M. Lowy, sworn to on April 7, 2008;
- Affirmation in Opposition of Levi Kramer, affirmed in May __, 2008 (undated);
- Affirmation in Opposition of William J. Garry, Esq. dated May 16, 2008;
- Reply Affirmation of Jonathan A. Stein, Esq. dated May 22, 2008.

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Pursuant to CPLR 3212, Defendants, Lowy Family Irrevocable Trust, Meyer Lowy and Katy Lowy, move for partial summary judgment on their counterclaims.

BACKGROUND

By lease dated October 31, 2001 (the "Lease"), Defendants Meyer Lowy a/k/a Michael Lowy and Katy Lowy leased the ground floor and basement of 1373 Coney Island Avenue, Brooklyn, New York (the "Premises") to Plaintiff E.F.L. Baking Corp. ("EFL"). EFL operates a bakery at the Premises.

The Lease gave EFL the option to purchase the Premises and a right of first refusal regarding the leasing of any space at the Premises that were not subject to the Lease.

At some point, title to the property was transferred to Defendant, The Lowy Family Irrevocable Trust ("Trust") and the Lease was assigned to the Trust.

EFL claimed it exercised its option to purchase the premises. The trust asserted that EFL did not properly exercise the option to purchase and refused to convey the Premises to EFL. EFL also claimed that the Trust rented units 1A and 2A at the Premises in violation of EFL's right of first refusal.

EFL commenced this action seeking specific performance of the option to purchase and money damages arising from the Trust's leasing units 1A and 2A without offering EFL the right of first refusal.

After discovery was completed, the parties agreed to submit the matter to the Court for decision on Stipulated Facts. By decision and Order, dated October 31, 2006,

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this Court held that EFL had not properly exercised its option to purchase and dismissed its cause of action for specific performance. This Court further held that the Trust violated EFL's right of first refusal when it leased units 1A and 2A without giving EFL the right to lease them and set the matter down for a hearing to determine the damages EFL sustained as a result thereof. That hearing has not yet been conducted.

On or about July 15, 2005, the Trust caused a Notice of Termination ("July Notice") to be served upon EFL. The July Notice stated that the Lease was being terminated because EFL had failed to pay rent and additional rent as required thereunder, had failed to pay its *pro rata* share of the insurance on the Premises as required by Paragraph 52 of the Lease, had failed to pay its agreed share of the real estate taxes due on the property and had failed to provide the Trust with a certificate of insurance indicating that it had obtained a fire and hazard insurance policy naming the landlord as an additional insured on the policy. The July Notice demanded the tenant to deliver possession of the Premises to the landlord on or before July 29, 2005. If EFL did not deliver possession by that date, the Trust would commence a proceeding in the appropriate court to recover possession of the Premises.

EFL did not comply with the July Notice. It claimed it was no longer subject to the terms of the Lease because, upon the exercise of its option to purchase, it became a vendee-in-possession. In view of this Court's October 31, 2006 decision and Order, EFL's position that it was a vendee-in-possession is not viable.

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Since EFL's argument that it was a vendee-in-possession is no longer viable, the Defendants now move for partial summary judgment on their counterclaims for: (a) judgment determining that the Lease was properly terminated and issuing them possession and a warrant of eviction of the Premises; (b) judgment awarding the Defendants the fair market value for the use and occupancy of the Premises for the dates of EFL's holdover; and (c) reasonable attorneys' fees.

DISCUSSION

A. *CPLR 3212—Summary Judgment Standard*

Generally, a party is entitled to summary judgment if there are no triable issues of fact. Matter of Suffolk County Dept. of Social Services v. James M., 83 N.Y.2d 178 (1994); and Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 (1957). The moving party has the burden of demonstrating that there is no genuine issue of material fact. Giufriada v. Citibank Corp., 100 N.Y.2d 72, 82 (2003); Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); and Tessier v. New York City Health and Hospitals Corporation, 177 A.D.2d 626 (2nd Dept. 1991).

In evaluating a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party and afford that party all favorable inferences which can be drawn from the evidence presented. Branham v. Loews Orpheum Cinemas, Inc., 8 N.Y.3d 931 (2007); and Negri v. Stop & Shop, 65 N.Y.2d 625 (1985). However, in opposing a summary judgment motion, the opponent must produce sufficient proof to require a trial of material questions of fact. Alvarez v. Prospect Hosp.,

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supra. Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a motion for summary judgment. Zuckerman v. City of New York, 49 N.Y.2d 557_(1980).

B. *Declaratory Judgment and Warrant of Eviction*

Where the terms of a contract are clear and unambiguous, the contract must be enforced according to its terms. South Road Assoc., LLC v. International Business Machines Corp., 4 N.Y.3d 272, 277 (2005); and Rocar Realty Northeast, Inc. v. Jefferson Valley Mall Ltd. Partnership, 38 A.D.3d 744 (2nd Dept. 2007). Paragraph 17(1) of the Lease allows the landlord to terminate the Lease if EFL defaults in payment of its rent. On July 18, 2005, the July Notice was faxed to EFL by the Trust demanding that EFL vacate the Premises pursuant to ¶ 17(1) of the Lease for failure to pay rent. EFL argued that it was not obligated to pay rent because it was a vendee-in-possession since it had elected to exercise its option to purchase the Premises. However, this Court determined, in its October 31, 2006 Order, that EFL did not strictly adhere to the terms and conditions of the option as required by law. Raanan v. Tom's Triangle, Inc., 303 A.D.2d 668 (2nd Dept. 2003). Therefore, EFL was a holdover tenant and the Trust's termination of the Lease was proper under ¶ 17(1). As such, Defendants are entitled to a judgment of possession.

After a judgment of possession has been awarded, the court shall issue a warrant directing law enforcement to remove all persons from the premises. A warrant

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of eviction terminates "any existing tenancy and annuls the landlord-tenant relationship by operation of law." RPAPL § 749(3); Rocar Realty Northeast, Inc. v. Jefferson Valley Mall Ltd. Partnership, *supra*. Since there are no issues of fact remaining regarding the status of EFL as a holdover tenant, the Defendants are entitled to summary judgment on their counterclaim for judgment of possession and a warrant of eviction.

C. *Use and Occupancy*

When a valid lease has terminated and the tenant continues to occupy the premises, the tenant must remit payment for the "use and occupancy" of the space based on the premises' fair market value. RPAPL § 749(3); 520 East 81st Street Assoc. v. Lenox Hill Hosp., 276 A.D.2d 395 (1st Dept. 2000). Occupants are obligated to pay for the space's fair market value assuming its most advantageous permitted use. Real Property Law § 220. Since EFL has continued to occupy the Premises after the Lease was properly terminated by the Defendants, EFL is obligated to pay the Defendants for the fair market value of its use and occupancy for that time. A hearing will be necessary to determine the amount owed.

D. *Reasonable Attorneys' Fees*

Attorneys' fees may be awarded pursuant to the terms of a contract only to an extent that is reasonable and warranted for services actually rendered. Kamco Supply Corp. v. Annex Contracting Inc., 261 A.D.2d 363 (2nd Dept. 1999). The amount of attorneys' fees awarded pursuant to a contractual provision is within the court's sound

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discretion, based upon such factors as time and labor required. SO/Bluestar, LLC v. Canarsie Hotel Corp., 33 A.D.3d 986 (2nd Dept. 2006). See also, Matter of Ury, 108 A.D.2d 816 (2nd Dept. 1985). When the court is not provided with enough information to make an informed assessment of the value of the legal services, a hearing must be held. Bankers Fed. Sav. Bank v. Off W. Broadway Developers, 224 A.D.2d 376 (1st Dept. 1996).

Provisions or stipulations in contracts for payment of attorneys' fees in the event it is necessary to resort to aid of counsel for enforcement or collection are valid and enforceable. Roe v. Smith, 278 N.Y 364 (1938); and National Bank of Westchester v. Pisani, 58 A.D.2d 597 (2nd Dept. 1977).

The terms of the Lease in question specify that the Plaintiff is to pay any attorneys' fees incurred by the Defendants in prosecuting or defending any actions relating to the default of the Plaintiff in paying rent. This Court's October 31, 2006 decision holding that EFL did not properly exercise the option to purchase defeated its only defense for not paying rent to Defendants. Given that EFL was not found to be a vendee-in-possession, it is in default of its rent payments to Defendants. As such, there is no question of fact regarding the status of EFL. EFL was a tenant in default of its payments of rent. Therefore, it is bound by the terms of the Lease it signed on October 31, 2001 and summary judgment is proper on Defendants' counterclaim for attorneys' fees. A hearing will be held to determine the reasonable amount of legal fees owed to

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Defendants. See, Simoni v. Time-Line Ltd., 272 A.D.2d 537 (2nd Dept. 2000); and Borg v. Belair Ridge Development Corp., 270 A.D.2d 377 (2nd Dept. 2000).

Accordingly, it is,

ORDERED, that Defendants' motion for partial summary judgment on their counterclaims is **granted**; and it is further,

ORDERED, that Defendants' motion for a judgment of possession and warrant of eviction for the Premises is **granted**. Defendants shall settle a judgment of possession and warrant of eviction on ten (10) days notice; and it is further,

ORDERED, that a hearing will be set down before Special Referee Frank Schellace to hear and determine the fair market value of EFL's use and occupancy of the Premises from July 15, 2005; past due rent and additional rent; EFL's damages arising from the violation of its right of first refusal as to Apartments 1A and 2A; and Defendants' reasonable attorneys' fees on October 28, 2008 at 10:00 a.m. provided that Defendant serves a copy of this order with notice of entry on counsel for Plaintiff on or before September 26, 2008; and it is further,

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ORDERED, that upon the determination of the Special Referee, the County Clerk shall enter judgment against Plaintiff and in favor of Defendants, together with costs and disbursements, as taxed by the Clerk.

This constitutes the decision and Order of the Court.

Dated: Mineola, New York
September 2, 2008



Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED
SEP 10 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE