

Sheen v Frank

2009 NY Slip Op 30173(U)

January 26, 2009

Supreme Court, New York County

Docket Number: 112276/07

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

DEBORAH SHEEN,
Plaintiff,

- v -

PAUL JARRAD FRANK, M.D.,
Defendant.

Index No.: 112276/07
Motion Date: 06/17/08
Motion Seq. No.: 002
Motion Cal. No.: _____

The following papers, numbered 1 to were read on this motion and cross motion for summary declaratory judgment .

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____	1
Answering Affidavits - Exhibits _____	2
Replying Affidavits - Exhibits _____	
Sur Replying Affidavits - Exhibits _____	

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1419).

Cross-Motion: Yes

Upon the foregoing papers,

The court shall deny plaintiff's motion for summary judgment on her complaint and, except with respect to his fourth counterclaim that is dismissed for failure to establish a prima facie case, the court shall grant defendant's cross motion for summary dismissal of plaintiff's complaint and for a declaration on his first, second and third counterclaims.

This declaratory judgment action challenging defendant's right to renew a Lease dated October 1, 2004 between the parties involves paragraph 54 of the Rider annexed to and incorporated

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

into the Lease. Paragraph 54 states "At the end of the Lease on September 20, 2007, Tenant shall have the right to renew the Lease at a rent of \$11,600 per month."

There is no dispute that the demised term ("Term") of the original Lease was for three years.

Plaintiff landlord argues that Lease ¶ 54 is unenforceable since it omits an essential term of the renewal Lease, i.e. the duration or period of such renewal. Defendant tenant counters that the Lease term is for the same period as the original Lease, i.e. three years.

This court disagrees with plaintiff that Lease ¶ 54 is unenforceable under Joseph Martin, Jr. Delicatessen v Schumacher, 52 NY2d 105 (1981). The renewal clause at issue in Martin Delicatessen provided that "[t]he Tenant may renew this lease for an additional period of five years at annual rentals to be agreed upon" (52 NY2d 105, 108). While clearly this was an "agreement to agree", which is unenforceable, the Lease at bar contains no such language.

The court also disagrees with both parties' argument that Masset v Ruh, 235 NY 464 (1923) has been modified by superceding cases that stand for the proposition that each renewal option must contain particular language with respect to the rental

amount.¹ In fact, Masset does not resolve the question of the interpretation of the provisions of the Lease at bar, but holds merely that a renewal does not result in a new lease but merely extends the original lease, a principle that has not been disturbed by subsequent precedent. Stated another way, the parties' assertion that this matter raises an issue of whether or not, as with rental amount, a Lease must include particular language pertaining to the demised term misses the point and misapprehends the law. See, for example, Geltzer v DuFour Pastry Kitchens, Inc., 34 AD3d 364 (1st Dept 2006).

Instead, the court opines that this matter is merely a question of contract interpretation.

It is hornbook law that any ambiguities in a contract are to be interpreted "'most strongly against the draftsman,'" as long as the particular interpretation would not lead to an absurd result." William A White v Stanislava Banko, 171 AD2d 401, 402 (1st Dept 1991). Further, "'The proper inquiry in determining whether a contract is ambiguous is 'whether the agreement on its face is reasonably susceptible of more than one interpretation

¹In Masset, the Court of Appeals reversed the lower court's determination that plaintiff was not entitled to specific performance with respect to an option purchase certain real estate because such option was untimely exercised only after his exercise of an action to renew the lease on such property. Citing earlier precedent, the Court of Appeals found that Masset had exercised his option to extend the term of the lease for the additional period of ten years as a present demise for the full term of twenty years.

(citations omitted)". St. Mary v Paul Smith's College of Arts and Sciences, 247 AD2d 859 (4th Dept 1998).

Plaintiff offers no evidence that rebuts defendant's statement under oath that plaintiff prepared the Lease. However, this court finds no occasion here to apply the principle of interpreting ambiguities against the drafter because the court concurs with parties to the extent that neither argues that Lease ¶ 54 is ambiguous. In fact, resting on their respective positions, neither party offers any extrinsic evidence of the intention of the parties with respect to the renewal option at the time that the Lease was executed.² Plaintiff refers to defendant's position about the expiration of the Lease made by e-mail prior to his exercise of the option, as a concession about the renewal option. However, given plaintiff's position that there is no ambiguity, plaintiff's reference is to inadmissible parol evidence. Furthermore, even were the court to find an ambiguity in the Lease clause, defendant's statements, which were not made contemporaneously with the Lease negotiations, would not

²At oral argument, the parties each made reference to tables that show the current market use and occupancy appraisal for the apartment, and plaintiff's affidavit refers to "Exhibit K"; however no such exhibit was appended to the motion papers at bar, (in fact the plaintiff's exhibits end at "Exhibit I"), so such table may not be considered by the court. The parties may have confused submission made on Motion Sequence No. 003 to compel the payment of use of occupancy, which was resolved by this court's Order of September 2008. Nonetheless, current evidence of market rent is not probative on the parties' intent as to the renewal option when they entered into the Lease in 2004.

be probative on the parties' intentions at the time they entered into the renewal option.

On its facts, the St. Mary decision is helpful in evaluating the Lease clause at issue here. In St. Mary, the Fourth Department considered the language in an employment contract that provided

"[t]his is a two year contract for employment, renewable annually.***[a]s with all administrative appointments, and in accordance with the policies of the Board of Trustees, this appointment is at the pleasure of the President". 247 AD2d at 814.

The St. Mary plaintiff employee contended that under that language his employment was for a definite two year term; contrarily, the defendant argued that plaintiff's employment was for a term of one year, renewable annually at the pleasure of the president. Agreeing with the parties that the language was reasonably susceptible of either interpretation and finding that both parties submitted extrinsic evidence in support of their interpretations, the Fourth Department reversed the trial court's "as a matter of law" determination of the duration of the employment contract.

Here, the court finds no ambiguity in the language "Tenant shall have the right to renew the Lease at a rent of \$11,600 per month". Instead, this court rules that the meaning of the clause is clear on its face. Nor does the court agree with plaintiff that duration of the Lease, assuredly an essential term, is

indefinite. Unlike the omission of an essential term in Joseph Martin Jr. Delicatessen, Inc. (there rental) this court finds that the option renewal includes all of the essential terms (here duration of the lease).

To summarize the court's reasons for its interpretation, the original Lease, which plaintiff concedes contains all the essential terms, has a Term (a demised term) of three years. Thus, the Term of the renewal, as in Muh, supra, is equivalent to the demised term of the original Lease, i.e., three years. The court determines that the language "right to renew the Lease at \$11,600 per month" is susceptible of only one interpretation, i.e. that except for a rental increase to \$11,600 per month, the Lease is renewed upon all the other terms and conditions of the original Lease, including its three year duration. In fact, such an interpretation is consistent with the fact that under the original Lease, the yearly rent for the three year period was fixed at \$11,000 per annum.

Finally, the plaintiff, by attorney affirmation, argues for the first time in opposition to defendant's cross motion that defendant failed to timely exercise his option. This argument fails because it is raised by an attorney who has no personal knowledge of the pertinent facts. In fact, on reflection, the court views plaintiff's argument as entirely disingenuous since plaintiff neither appends nor explains the content of defendant's

"letter dated June 30th, 2007 and his tenancy", to which her attorney refers in their letter dated July 5, 2007, addressed to defense counsel, which is before the court. Such letter from defendant, dated exactly three months before the expiration of the original Lease, is totally consistent with defendant's position, which, at all times, has been that he sent timely notice to plaintiff as required pursuant to the terms of the renewal option.

Accordingly, it is hereby

ORDERED that the plaintiff's motion is DENIED and her complaint is DISMISSED; and it is further

ORDERED that, except for defendant's fourth counterclaim, which is hereby DISMISSED on the merits, the defendant's cross motion for summary declaratory judgment on his first, second, and third counterclaims, is GRANTED, and it is

ORDERED and ADJUDGED that defendant has timely exercised its right to renew the Lease dated October 1, 2004 for an additional three year term at \$11,600 per month, and it is further

ORDERED and ADJUDGED that pursuant to Lease Rider ¶ 48, the fixed annual rent reserved in the Lease and payable thereunder shall be adjusted in the manner set forth in such Article, to wit, "*** November 1, 2004 - September 30, 2007- \$11,000 per month", and no Additional Rent is owed under either the original Lease or the Lease as extended by renewal, and it is further

ORDERED that defendant is entitled recover from plaintiff attorney's fees, costs and disbursements incurred in this action; and it is further

ORDERED that the issue of the amount of attorneys fees is hereby severed, and referred for determination pursuant CPLR 3215 (b) to a Special Referee and that within 60 days from the date of this Order the plaintiff shall cause a copy of this order with notice of entry, including proof of service thereof, to be filed with the Clerk of the Judicial Support Office (Room 311, 60 Centre Street) to arrange a date for the reference to a Special Referee; and it is further

ORDERED and ADJUDGED that pursuant to CPLR 3215 (b) the Clerk is directed to enter judgment against plaintiff in accordance with the report of the aforementioned Special Referee without any further application.

This is the decision and order of the court.

Dated: January 26, 2009

ENTER:

Debra A. James
DEBRA A. JAMES J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).