

Cancos Tile Corp. v Barnett Holding Corp.

2009 NY Slip Op 30412(U)

February 18, 2009

Supreme Court, Suffolk County

Docket Number: 10526/2006

Judge: Emily Pines

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present:

HON. EMILY PINES
J. S. C.

Action 1: 10526-2006
Original Motion Date: 01-20-2009
Motion Submit Date: 02-04-2009
Motion Sequence No's.: 004 MOTD
HEARING 08-04-2009

Action 2: 45913-2008
Original Motion Date: 02-11-2009
Motion Submit Date: 02-11-2009
Motion Sequence No's.: 005 MD

_____ X
ACTION ONE
INDEX NUMBER 10526-2006

CANCOS TILE CORPORATION,

Plaintiff,

-against-

BARNETT HOLDING CORPORATION,

Defendants.

_____ X
ACTION TWO
INDEX NUMBER 45913-2008

BARNETT HOLDING CORPORATION,

Plaintiff,

-against-

CANCOS TILE CORPORATION,

Defendant.

_____ X

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Defendant, Barnett Holding Corporation ("Barnett"), moves, by Notice of Motion (motion sequence # 004) for an Order pursuant to CPLR § 3212 1) granting that party

Summary Judgment, declaring that its tenant, Cancos Tile Corp, forfeited its option to extend the parties' lease due to existence of rent arrears and 2) granting Petitioner Barnett a Warrant of Eviction and Judgment in it's consolidated Summary Eviction Proceeding to remove Cancos from the premises that is the subject of a commercial lease between the parties. Plaintiff, Cancos Tile Corporation ("Cancos") also moves for Summary Judgment (motion sequence # 005), declaring that the tenant is not in arrears pursuant to the parties' commercial lease and dismissing the Summary Eviction proceeding against it.

According to Barnett, the parties entered into a lease Agreement for a ten year term, which stated that it began on January 18, 1995. The lease document set forth annual rent increases, which were to go into effect on the first day of each subsequent year of the term. A written lease modification did change the rental value on May 1, 1997 and stated that all other terms of the lease would remain in full force and effect. However, for the period from the beginning of the lease through the date of this litigation in 2006, the tenant, Cancos, paid its new increased rent on December of each year rather than on January, or in May. It was not until February of 2006 that Barnett notified Cancos in writing that it was in arrears on its lease payments in the amount of \$65,920.00. Accordingly, the Landlord took the position that Cancos was not entitled to an extension of a lease that had expired on January 18, 2005 - the end of the original ten year term. It is Barnett's argument that the clear language of the written agreement, including a "no waiver clause" entitles the landlord to Summary Judgment declaring the lease terminated according to its terms and Judgment on its eviction proceeding.

Cancos argues that at the time the lease was executed in January 1995, no building existed and that the payment of rent did not start until December as opposed to January of 1995, when the tenant actually took occupancy. Thereafter, over a ten year period, the tenant paid its annual increases in the rent each December without argument from the Landlord. In an "estoppel certificate" to its lender, European American Bank, the Landlord states that the term of the lease commenced on December 1, 1995 and numerous notices by the Landlord to the tenant over the ten year period have always

been consistent with a December rather than a January date as the time that increases in items such as taxes and insurance were calculated. Thus, Cancos argues that at the very least, the written agreement is ambiguous and should be construed against the drafter - landlord and/or that the parole evidence of the practices of the parties should be accepted as their acknowledgment that the lease began in December rather than January 1995. Cancos also argues that the notice to terminate the lease, was provided by a stranger to the transaction so that, at the very least, the Summary Eviction proceeding should be dismissed.

Landlord counters that the Notice was sent properly by the corporate entity and that, in any event, the Tenant has waived such argument by failing to raise it for two and one half years since the notice was delivered, by operation of law.

The lease between the parties provides in pertinent part that “(t)his lease (is) made as of this 18 day of Jan, 1995. . . “.

Article III, 3A provides that the term was to be “(f)or a period commencing on the date of this lease and continuing for a term of the lease as hereinafter defined. . . .”

Article III, 3B provides that “(t)he parties herein acknowledge and agree that the exercise of any . . .Options are subject to the following express conditions . . . (4) that at the time the tenant exercises its Option and at the time of the commencement of the Extension, tenant shall be in full compliance with all of the tenant’s obligations and covenants as set forth in the lease”.

Article III, 3C provides that “(t)he term of this lease shall mean TEN years . . .”

Article V provides that “(t)enant agrees to pay landlord . . ., without notice or demand the monthly sums set forth . . .during the term of the lease. . . .” It then goes on to state that “(t)he payment of rent during the first year of the lease shall commence when the doors and windows are installed, electric and water hookups have been completed

And the slab has been poured. . . .”

Article XXXIV provides that “(n)o delay or omission in the exercise of any right or remedy of landlord on any default by tenant shall impair such a right or remedy or be construed as a waiver. The receipt and acceptance by landlord of delinquent rent shall not constitute a waiver of any other default; it shall constitute only a waiver of timely payment for the particular rent payment involved. . . . Any waiver by landlord of any default must be in writing and shall not be a waiver of any other default concerning the same or any other provision of ths lease”.

A written May 7, 1997 Lease Amendment provided for a change in the amount of rental payments due to an “increase” in square footage. It also provides that “(a)ll other terms of the Lease shall remain the same, except for a new schedule of Rent. . .”

A party moving for Summary Judgment must, in the first instance, make a prima facie showing of entitlement to judgment as a matter of law, offering the Court evidence to demonstrate that no material issues of fact exist. **Goldberger v Brick & Ballerstein, Inc.**, 217 AD 2d 682, 629 NYS 2d 814 (2d Dep’t 1995) (internal citations omitted). The burden then shifts to the party opposing the motion to come forward with proof in admissible form demonstrating that genuine issues of fact still exist which preclude the granting of Judgment. **Zayas v Half Hollow Hills Cent. School Dist.**, 226 AD 2d 7143, 641 NYS 2d 701 (2d Dep’t 1996).

The determination of whether the provisions of a contract are ambiguous is left, in the first instance, for the Court to determine. **Master-Built Construction Co., Inc. v Thorne**, 22 AD 3d 535 (2d Dep’t 2005). Where the Court finds that the language of a written agreement is clear, it will glean its meaning from the four corners of the instrument without resort to extrinsic evidence. *Id.* Indeed, extrinsic and parole evidence is not admissible to create an ambiguity in a written agreement which appears clear on its face. **Reiss v Financial Performance Corp**, 97 NY 2d 195, 738 NYS 2d 658, 764 NE 2d 958 (2001). Thus, “(w)hen interpreting a contract, the court should arrive at a construction which will give fair meaning to all the language employed by the

parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized” (*Joseph v Creek & Pines*, 217 AD 2d 534,535, 629 NYS 2d 75; see *Fetner v Fetner*, 293 AD 2d 645, 741 NYS 2d 256); **Master Built Construction Co v Thorne**, *supra*.

Moreover, where parties set forth their agreement in a complete document, it will be enforced in accordance with its terms. **Vermont Teddy Bear Co v Madison Realty Co**, 1 NY 3d 470,475, 775 NYS 2d 765, 807 NE 2d876 (2004). In the commercial real estate context, where the parties are sophisticated entities, negotiating at arms length, this principle is particularly apt in order to preserve the necessity for commercial clarity. **South Rapid Associates v International Business Machines**, 4 NY 3d 272, 793 NYS 2d 835, 826 NE 2d 806 (2005).

The Court finds that the terms of the January 18, 1995 lease Agreement are clear in the following relevant respects. The lease is made as of January 18, 1995. By its terms, the Lease states that it is for a period commencing on the date it is written and continuing for a term as defined. The word “term” is defined as ten years, with two options for separate five year periods. The exercise of the options is made specifically conditional on the tenant being in full compliance with all of its obligations, including the payment of rent. The payment of rent is put off “during the first year” until certain items in the building, including installation of windows are completed. However, the first year of the lease is never extended and by its clear terms, the lease, absent the option periods, ends ten years from January 18, 1995. Pursuant to the clear terms of this document, Cancos should have begun paying the year 2 rental on January 1996. While it argues that such renders the lease meaningless because it would then have had the lower rental of year 1 for only one month, it also was not required to pay any rental for 11 months of that year. Two sophisticated commercial entities entered into this agreement and they should be bound by its terms. The May 1997 Amendment , while changing the rental amount as of May 1997 for additional space does not change the term and specifications of the lease and states that all other terms are in full force and effect. Accordingly, the increases still went in effect on January of each subsequent year and the

lease still terminated at the beginning of 2005.

Cancos submits much evidence that Barnett accepted payments for many years, as proof of agreement that the rental years commenced in December as opposed to January as well as correspondence to the same effect. However, the lease contains a clause stating that “(n)o delay or omission in the exercise of any right or remedy of landlord on any default by tenant shall impair such a right or remedy or be construed as a waiver. The receipt and acceptance by landlord of delinquent rent shall not constitute a waiver of any other default; it shall constitute only a waiver of timely payment for the particular rent payment involved. . . .” Like the other provisions of the written agreement, this provision is clear on its face and will be enforced in accordance with its terms. Thus where a lease contains as clear “no-waiver” clause, the acceptance by the landlord of the incorrect rent does not create a triable issue of fact and will not defeat Summary Judgment. **see, Reiss v Financial Performance Corp, supra.**

SUMMARY EVICTION

Cancos argues that the Summary Eviction proceeding should be dismissed since the Tenant objects to the sufficiency of the termination notice as it was signed by an attorney without proof of his authority to bind the Landlord. **see, Siegel v Kentucky Fried Chicken**, 108 AD 2d 218, 488 NYS 2d 744 (2d Dep’t 1985), **aff’d**, 67 NY 2d 792, 501 NYS 2d 317, 492 NE 2d 390 (1986). However, the Court of Appeals in **Siegel, supra**, makes clear that the doctrine cannot be used by a tenant who, for an extended period acknowledges the validity of such notice. In this case, the notice was not rejected by Cancos; but, rather, utilized by that party as the basis for obtaining a preliminary injunction which has allowed the Tenant to remain in possession for over two years. **see, Metropolitan Transportation Authority v Cosmopolitan Aviation Corp**, 99 AD 2d 767,768, 471 NYS 2d 872, 874 (2d Dep’t 1984), **aff’d**, 64 NY 2d 623, 485 NYS 2d 37, 474 NE 2d 245 (1984).

Accordingly, based on the above, the Court (1) denies Cancos' motion for Summary Judgment in its entirety and dismisses its Complaint; (2) grants Barnett's motion for Summary Judgment declaring Cancos in default on the date when its option to extend the lease was to be exercised, and that the Lease is, therefore terminated; and (3) declares that Barnett is entitled to a Warrant and Judgment of eviction directing the Sheriff of Suffolk County to remove Cancos from the subject premises. The Landlord's claim for arrears and attorney's fees under the terms of the Lease are remanded for trial August 4 and August 5, 2009.

This constitutes the *DECISION* and *ORDER* of the Court. Submit Judgment on Notice in accordance with the terms of this Decision.

Dated: February 18, 2009
Riverhead, New York



EMILY PINES
J. S. C.