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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU : IAS PART 25
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NORTH ISLAND CHECK CASHING CORP.

Plaintiff,

-against-

Index No. 018844/06
Calendar No. 2008N0139

HACK REAL ESTATE ASSOCIATES and
YAMA RAFFINZADA,

Defendants.

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Present: Hon. TIMOTHY S. DRISCOLL, J.S.C.

Attorney for Plaintiff

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DECISION AFTER TRIAL

This action was commenced by Plaintiff, North Island Check Cashing Corp. ("North Island"), filing a complaint against defendants Hack Real Estate Associates ("Hack") and Yama Rahimzada ("Rahimzada," whose last name was misspelled in the complaint as "Raffinzada") alleging breach of contract for the defendants' alleged failure to deliver possession of real property pursuant to a lease agreement. The action against Hack was eventually discontinued, and the case against Rahimzada proceeded to trial. North Island seeks damages that include (a) $59,028, representing the amount it has paid to its current landlord minus the amount it would have paid under the lease

with defendant, (b) $7,000 that was paid to Rahimzada upon the signing of the lease, and (c) attorney's fees. Rahimzada denied the essential allegations of the complaint and counterclaimed based on North Island's alleged breach of the lease.

The plaintiff's case at trial consisted of the testimony of William Mulqueen, who is the Vice President of Planning for North Island, and Joe Sarra, who works as a handyman for North Island's parent company. The defense case consisted of the testimony of Juan Morocho and defendant Rahimzada. Each witness was subject to cross-examination, and various documents were admitted in evidence during the course of the testimony.

FINDINGS OF FACT

North Island operates various check cashing businesses throughout Long Island and Queens. Check cashing businesses are licensed and regulated by the State of New York, including the New York State Banking Department.

North Island operated one such check cashing business at 241-01 Linden Boulevard in Elmont. In spring 2006, the company's Vice President of Planning, William Mulqueen, learned that the lease at a building a block to the west at 240-07 Linden Boulevard [the "Premises"] was scheduled to expire in January 2007. Mulqueen became interested in the Premises because he believed that the landlord at 241-01 Linden Boulevard would demand an increase in rent for North Island to remain there.

Mulqueen then initiated discussions with an individual broker for Hack, which is itself a real estate brokerage, regarding the Premises. He learned that the Premises were owned by defendant Rahimzada.

Negotiations ensued between Mulqueen and Rahimzada. Neither party sought

the aid of counsel during the negotiations. A form lease was originally presented by Rahimzada to Mulqueen, but both parties then sent various corrections, additions and changes back and forth via e-mail and fax. A lease was then executed on or about July 27, 2006. (Px 1[1])

The lease provided for a five-year term of occupancy at the Premises, commencing October 1, 2006. (Px 1) The rent provided for an annual increase of 3%, compounded annually, as follows:

Year	Monthly rent	Yearly rent
1	$3,500	$42,000
2	$3,605	$43,260
3	$3,713.15	$44,557.80
4	$3,824.54	$45,894.48
5	$3,939.27	$47,271.24

A rider to the lease further provided that the premises shall be broom clean, with the landlord (Rahimzada) to be responsible to tender the premises in safe condition. Further, the landlord was required to return any deposit if the landlord failed to ensure that the existing tenant vacated the Premises. The lease further provided that the lessor would not be liable for any damages caused by failure to deliver possession of the premises at the commencement of the lease, but rather that the lessee would not be liable for any rent until possession is delivered. The lessee then had the option to terminate the lease if possession was not delivered, although the lease is silent as to

[1] Plaintiff's trial exhibits will be designated herein as "Px__". Defendant's trial exhibits will be designated as "Dx__".

the number of days subsequent to the commencement of the lease that the lessee could trigger this termination provision. (Px 1).

There is no mention in the lease of whether the Premises includes a basement, the measurements of any basement, or if the lease to the Premises includes a basement. Nevertheless, Mulqueen believed the lease to include a basement because his current location, which was nearby, had a basement, and he believed that a storefront property that had a basement would not have a separate lease for that basement.

Central to North Island's interest in the premises was its demand that it required tenancy no later than October 1, 2006. This would allow North Island to arrange for the significant architectural and design improvements to enable it to obtain regulatory approval to operate its business there by January 1, 2007, when North Island's existing lease would terminate. Mulqueen estimated that those improvements would cost between $80,000 to $100,000. A further complication was the fact that a furniture repair business was already a tenant at the premises. North Island solved this dilemma by paying $7,000 to Rahimzada at his request. Rahimzada in turn paid $5,400 to the tenant to ensure that it vacated the premises in a timely fashion, and paid M.J. Nixon another $2,200 to clean the Premises.

The parties then had discussions after the lease signing as to when North Island could begin occupancy of the premises. On September 5, 2006, Mulqueen sent Rahimzada a fax in which he expressed his desire to learn about the progress being made to make the Premises available by October 1, 2006. (Px 2). Mulqueen also stated in the letter that North Island wished to "get an architect in there as soon as

possible." Neither Mulqueen nor Rahimzada recalled whether Rahimzada responded to this fax.

The existing tenant vacated the Premises on October 13, 2006. On October 18, 2006, Mulqueen sent Rahimzada another fax in which he stated that the condition of the basement at the Premises was unacceptable. (Px 3). He further stated that the condition of the premises was both a fire hazard and violated the lease. To remedy this condition, Mulqueen stated in the letter that he would obtain an estimate from a cleanup contractor and submit that estimate to Rahimzada either for him to pay or to allow North Island to deduct from the rent any amount that it paid for the cleanup.

On October 30, 2006, Joe Sarra, who has worked as a handyman at North Island's parent company for 20 years, went to the Premises at Mulqueen's direction for an inspection. He obtained keys to the Premises from a nearby florist, and unsuccessfully attempted to duplicate those keys. He then installed a new lock, conducted his inspection, and made an extensive handwritten report of what he observed.

Sarra described the Premises as in disarray throughout. The door through which he entered the Premises was hanging off its hinges. Garbage was strewn throughout the first floor of the Premises. Broken mirror glass and broken light bulbs littered the floors. Wooden doors and remnants of furniture were also strewn about. (Px 5).

There were two openings to the basement in the Premises. One opening was covered by a piece of wood, and there was neither a staircase nor a ladder to the basement. The other opening was covered by a cut-out wooden door on hinges,

which led to an eight to nine step staircase to the basement. The basement itself was in worse condition than the first floor. Torn furniture cushions and other debris were waist-deep in certain areas, and five-gallon cans with dried paint drippings lined the floor. The basement also contained the water meters and heating system for the Premises. Access to the heating system was blocked by the debris.

Based on Sarra's report, Mulqueen sent Rahimzada a fax later that day describing the street level as "not broom clean; broken glass, pieces of furniture, mirrors, etc.," and stated that the basement "still contains paint buckets, furniture, other debris." (Px 4). Thus, Mulqueen concluded that the architect could not begin work until the Premises were cleaned.

Sarra then returned to the Premises at Mulqueen's instructions on October 31 to return the keys to Rahimzada's representative. Rahimzada then made arrangements with a service to clean the Premises. (Dx C). Juan Morocho, who works for M.J. Nixon Construction, went to the Premises with four other individuals. They filled a 20 cubic yard and 10 cubic yard container with debris from the first floor and basement of the Premises. There was nothing in the store after Morocho and his crew left. Morocho did not remember the date he was at the Premises to do the clean-up, but did produce an estimate for the work dated October 26, 2006. Rahimzada also believed that the work at the Premises was done prior to October 30.

Rahimzada did not believe the basement to be part of the lease to the Premises, as there was no certificate of occupancy for the basement. Moreover, he claimed that the previous tenant did not have use of the basement.

Muqueen did not, however, wait for Rahimzada to conduct any remediation at

the Premises. Instead, he contacted the landlord at 241-01 Linden Boulevard to discuss renewal of that lease. Ultimately, Mulqueen and the landlord signed a lease for February 1, 2007 through January 31, 2013. (Px 6). Rent was to be paid as follows:

Period	Annual Rent	Monthly Rent
2/1/07 - 1/31/09	$54,000	$4,500
2/1/09 - 1/31/11	$57,000	$4,750
2/1/11 - 1/31/13	$60,000	$5,000

Rahimzada claimed that Mulqueen did not make clear that North Island needed to take possession of the premises by October 1, 2006. He also explained that he did not return the $7,000 deposit that Mulqueen had given because North Island had received the key to the premises. In sum, Rahimzada believed that Mulqueen used the lease for the Premises as a negotiating tool with his current landlord, and never intended to move North Island to the Premises — even though the lease for the Premises was less than the lease North Island signed at its current location. Significantly, North Island did not produce any evidence that it expended any funds renovating 241-01 Linden Boulevard. Thus, it appears that by not occupying the Premises, North Island did, in fact, save the $80-100,000 that Mulqueen estimated would be necessary to renovate the Premises.

CONCLUSIONS OF LAW

The law is clear that, in construing a contract, the Court must read the contract "as a whole to determine its purpose and intent," and give a "practical interpretation" to

the language employed to conform to the reasonable expectation of the parties in making the contract. *Sutton v. East River Savings Bank*, 55 N.Y.2d 550, 555 (1982). There can be little question that the Premises here included the basement. There was no practical way for any other potential tenant to access the basement to the Premises. Moreover, the utilities meters and heating system for the Premises were housed in the basement, and thus a tenant would reasonably expect sole access to the Premises. Finally, the Court fully credits Mulqueen's testimony regarding his expectation of sole access to the basement given that his current lease provided this access.

The Court also credits the testimony of Joe Sarra that the premises were unhabitable and unsafe nearly a month after the beginning of the lease. Thus, by not delivering the Premises to North Island in a safe condition within a reasonable time after the beginning of the lease, defendant Rahimzada breached the lease.

The damages to which plaintiff is entitled are somewhat less than it claims to have suffered. To be sure, there is no question that plaintiff gave defendant $7,000 which defendant in turn used to clean the Premises and pay the existing tenant to vacate the Premises. Plaintiff is entitled to recover this amount as damages that were a foreseeable injury caused by defendant's breach. *See, e.g., Freund v. Washington Square Press*, 34 N.Y.2d 379 (1974) (party injured by contract breach entitled to foreseeable and ascertainable damages).

Plaintiff shall not, however, recover damages for the difference between the amount it has paid and will pay under its current lease and the amount it would have paid to lease the Premises. In fact, plaintiff's claim for these damages is foreclosed by the lease itself, which precludes lessor from liability for any damages caused by failure

to deliver possession of the premises at the commencement of the lease. Even putting this clear language aside, North Island did not suffer any damages after Rahimzada failed to deliver the premises. Indeed, although the cost of that lease was, as North Island asserts, over $59,000 more than the comparable term of years for the lease at the Premises, North Island did save the $80 - 100,000 that Mulqueen testified would be necessary to renovate the Premises. There was no testimony regarding any similar repairs that were necessary, much less completed, at 241-01 Linden Boulevard. Moreover, there was no testimony that North Island's business was negatively affected as a result of its inability to move into the Premises. Thus, North Island did not suffer any actual damages after Rahimzada breached the lease.

Finally, plaintiff is entitled to attorney's fees. The lease provides that the prevailing party is entitled to costs and reasonable attorney's fees resulting from any act arising out of the possession of the Premises. Here, plaintiff's lawsuit and ultimate recovery of $7,000 clearly arise out of the possession (or, more appropriately, the inability of the defendant to deliver timely possession) of the Premises. Thus, attorney's fees are warranted.

Plaintiff's claim for fees and costs of $13,267.96 is, however, excessive particularly given plaintiff's recovery of just more than one-half of that amount. The Court views the appropriate amount of attorney's fees and costs as $5,000, as an award of counsel fees pursuant to a contractual provision may only be enforced to the extent that the amount is reasonable and warranted for the services actually rendered. *See, e.g., Kamco Supply v. Annex Contracting*, 261 A.D.2d 363 (2d Dept. 1999).

Settle judgment on ten days notice.

Dated: Mineola, NY
April 29, 2009

Hon. Timothy S. Driscoll, J.S.C.