

Moriano v Provident N.Y. Bancorp

2010 NY Slip Op 34037(U)

August 23, 2010

Supreme Court, Orange County

Docket Number: 3159-2009

Judge: Elaine Slobod

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----X
PATRICIA MORIANO, as Executrix of the Estate of
Arthur Moriano, Deceased,

Plaintiff,

3159
Index No. 3129-2009

-against-

**AMENDED
DECISION AFTER NON-JURY
TRIAL**

PROVIDENT NEW YORK BANCORP,

Defendant.

-----X
SLOBOD, J.

The court conducted an inquest in this action for four days in February and March of this year to determine the amount of property damage to plaintiff's property caused by defendant's removal of a bank vault from plaintiff's premises following termination of a lease between the parties or their predecessors in title and other breaches of covenants contained in that lease.

The commercial lease between the parties was dated March 20, 1974. The original lease term was for ten years and contemplated that the lessee, defendant's predecessor in title, would construct a new colonial style building on the property. Defendant had an option to buy the land.

In 2004, the parties modified the lease pursuant to a further agreement providing that the leasehold would end on December 31, 2008, because defendant was moving to a new building.

The lease contained the following provision for the termination of the tenancy:

ARTICLE XVIII: SURRENDER OF PREMISES

A. At the expiration or earlier termination of the lease the Lessee covenants that it will peaceably and quietly leave and surrender the leased premises, together with all alterations, additions and improvements then a part of such premises in good order and condition reasonable wear and tear, restoration, repairs, and replacements required to be made by the Lessor and loss of damage by fire, the elements and casualty excepted, and at

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the Lessee's expense to remove all fixtures and furniture of the Lessee and to restore the leased premises for ordinary commercial or business purposes in such condition as provided for above. Any property not so removed shall be deemed to have been abandoned by Lessee and may be retained or disposed of by Lessor as Lessor shall desire.

B. It is the intention of the Lessee to install a safe deposit vault on the premises in furtherance of its business purposes. Since such vault would be contrary to the needs and requirements of future tenants of the Lessor and without limiting any of the rights of the Lessor by the foregoing, the Lessor hereby requires and Lessee agrees to have such vault removed from the premises within sixty (60) days of the termination of the lease and Lessee will restore the said premises as heretofore provided.

The lease also contained the following provision which the court finds relevant to this action:

ARTICLE XVII: REPAIRS

The Lessee shall be responsible for making all necessary repairs and replacements with respect to the building to be constructed upon the leased premises at its sole cost and expense. Any repairs of a structural nature shall first have the written consent of the Lessor. Such structural repairs shall be at the expenses of the Lessor, but the cost of same including any counsel fees expended for recovering such cost and expenses from the contractor shall be added to the base determination rent as hereinabove defined at such time as such repair is completed, and payment for such increase shall be due in the month following the completion of such repairs. Notwithstanding any of the foregoing Lessee shall have the prior right to sue the contractor in its own name for structural defects which right shall not exceed thirty (30) days from the date such right accrues. The Lessee shall do everything necessary to maintain the premises in a safe and tenantable condition and in good order and repair.

Defendant defaulted in answering the summons and complaint. The undersigned denied its application to vacate that default. The order entered denying that application was affirmed by the Appellate Division, Second Department (Moriano v Provident New York Bancorp, 71 AD3d 747 [2010]). Accordingly, plaintiff has obtained a ruling in its favor on defendant's liability. Defendant disagreed with plaintiff at the inquest with respect to the scope of available damages

flowing from defendant's breach of the lease. The court does not find that plaintiff is entitled to all of the damages she claims.

Where, as here, a tenant covenants to keep the premises in good repair and deliver the premises at the end of the leasehold in tenantable condition, the court must have regard for the age and class of the building (see 2 PJI2d 6:21, at 1312-1313). Plaintiff was not entitled to a new building at the end of the tenancy. For example, she was not entitled to a building with a new roof at the end of the leasehold, but she was entitled to a patched one which did not leak (see Centre Great Neck Co. v Penn Encord, Inc., 276 AD2d 735 [2000]).

The clean up of the dust containing asbestos was occasioned by defendant's removal of its vault and the clean up costs were exacerbated by the manner in which the vault was removed. Plaintiff is entitled to recover the costs thereof in the total sum of \$113,652.00 (the amounts paid to Empire Environmental Solutions, Inc. and Bocran). Defendant argues, in essence, that it is not its fault that asbestos was contained in the building materials, which is true. It is also true, however, that its contractor could have ascertained that the vault removal would involve the release of materials containing that substance and taken reasonable care that the dust would not spread. The court further finds that plaintiff was entitled at the end of the tenancy to premises free from dust. Accordingly, defendant shall bear this cost.

With regard to the plumbing, heating and air conditioning work, the court will award plaintiff the sums associated with replacing the vent lines in the sum of \$4,500.00 (see plaintiff's Exhibit 5). The court rejects plaintiff's contention that she is entitled to recover the other claimed amounts, including installation of a new furnace, in a building which is over thirty years old.

As previously indicated, plaintiff is not entitled to the cost of replacing the roof. She is entitled to the \$300.00 cost of repairing the roof (plaintiff's Exhibit 6).

With respect to the estimates from Bufalo Construction Co. (plaintiff's Exhibit 3), the court awards the cost of repairing the floor in the vault area (\$2,860.00), the cost of repairing the exterior wall where the drive-in teller drawer was removed (\$2,145.00) and the cost of replacing the interior walls (\$19,600.00) and insulation (\$12,085.00). The court finds that the other claimed items represent work necessitated by normal "wear and tear".

The court does not award the amount billed by JK Tec, Inc. for structural review and drawings since it includes replacement since the work would appear to include items to be performed by Bufalo Construction, Co., which the court did not award.

The court will award the electrical costs of replacing components damaged by asbestos in the amount of \$4,500.00. The court does not award the amount claimed for providing temporary power during construction. Similarly, the court will award the cost of replacing the drop ceilings in the amount of \$5,600.00.

The court awards the amount of \$9,210.00 representing repair work to the parking lot performed by Dee Bee Contracting. The court rejects plaintiff's contention that defendant should pay for a new parking lot on the same principle involved in its decision with respect to the roof.

The court rejects the other claims for, *inter alia*, insurance, carrying costs, snow plowing, lost rent revenue, building permits and the property manager's fee finding that plaintiff has failed to sustain her burden of demonstrating that defendant's breach of the lease covenant was the sole cause of these expenses.

In sum, the court awards \$174,452.00 in compensatory damages.

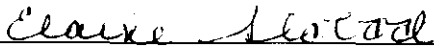
Finally, with respect to counsel fees, the court awards plaintiff counsel fees pro rata based upon counsel's success in recovering the damages claimed, i.e., \$10,775.00. The court rejects the claim for disbursements. The bulk of the disbursements claimed are for expenses like telephone, postage, computer research charges, fax expenses and the like which the undersigned regards as normal office overhead expenses. The other fees, i.e., the costs of the index number, request for judicial intervention, and the like may be included in the bill of costs.

Settle judgment with a bill of costs.

The foregoing constitutes the decision and order of the court.

Dated: August 23, 2010
Goshen, New York

ENTER


HON. ELAINE SLOBOD, J.S.C.

TO: JACOBOWITZ & GUBITS,
Attorneys for Plaintiff
P.O. Box 367
Walden, New York 12586

MCGIVNEY & KLUGER, P.C.
Attorneys for Defendant
80 Broad Street, 23rd Floor
New York, New York 10004