

Fucile v L.C.R. Dev., Ltd.
2011 NY Slip Op 32256(U)
August 11, 2011
Sup Ct, Nassau County
Docket Number: 000525/11
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

LEONARD FUCILE and JOSEPH FUCILE,

Plaintiffs,

INDEX No. 000525/11

MOTION DATE: June 16, 2011
Motion Sequence # 002, 003

-against-

L.C.R. DEVELOPMENT, LTD.,

Defendant.

The following papers read on this motion:

Notice of Motion.....	X
Cross-Motion.....	X
Affirmation in Opposition.....	X
Reply Affirmation.....	XX

Motion by defendant to dismiss the complaint is **granted** in part and **denied** in part.
Cross-motion by plaintiffs for sanctions is **denied**.

This is an action for a declaratory judgment that plaintiff tenant is in compliance with the terms of a lease with respect to the payment of rent. On September 30, 1997, defendant L.C.R. Development, Ltd leased premises located at 1619 Jericho Turnpike in New Hyde Park to Child Site Corp for a term of 20 years. The lease provided that the tenant had two options to renew for additional 5-year periods. The lease further provided that landlord shall provide the tenant with a "turnkey facility" in substantial compliance with the "Tutor Time Plans and Specifications Book."

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Plaintiffs Leonard and Joseph Fucile are franchisees of Tutor Time Child Care Systems, Inc and operate a child care center at the premises. On January 4, 2001, plaintiffs entered into an assignment and assumption agreement, whereby they assumed the tenant's obligations under the lease provisions (Reply aff of Kevin Walsh, ex A).

The lease provided that the base rent was \$15,208.33 per month. Commencing in the third year, the rent was to be adjusted in accordance with the consumer price index, provided that the increase did not exceed 4%. The consumer price index to which the lease refers is that for "Urban Wage Earners and Clerical Workers (New York, Northern New Jersey, Long Island Average)." The lease provided that it was a net lease, and tenant was responsible for real taxes, maintenance, and insurance.

Addendum 1 to the lease provided that the rent for the first six months was 18% of gross income or 1/4 of the rent, whichever is greater, capped at base rent plus "triple net charges." The addendum further provides that for the next six months the rent was 18% of gross income or 1/2 rent, whichever is greater, capped at base rent plus triple net charges. The addendum provides that for the second year the rent was \$18.25 per square foot, which corresponds to the "base rent" provided in the lease.

The lease provides if the tenant defaults in fulfilling any of the covenants of the lease "other than the covenants for the payment of rent or additional rent," landlord may serve a 15 day notice specifying the nature of the default. The lease further provides that if tenant fails to cure within 15 days, landlord may serve a five day notice of cancellation of the lease.

On November 4, 2010, the landlord served plaintiffs with notice that they were in default in the payment of rent, effective January 4, 2004. In the letter, the landlord asserted that the total arrears, including rent, taxes, and insurance, was \$279,831.50. The rent arrears were calculated based upon an annual increase of 4% each year. The landlord demanded that plaintiffs cure the default within ten days, or landlord would terminate the lease. On December 23, 2010, the landlord wrote to the plaintiffs again and stated that, after deducting a payment in the amount of \$60,000, the balance due of \$219,831.50 was required to be paid within 15 days or the lease would be terminated.

On January 13, 2011, plaintiffs commenced this action seeking a declaratory judgment that they are not in default in the payment of rent. Plaintiffs assert that rent is to be calculated based upon an initial lease year commencing June 1, 2001. Plaintiffs further assert that the consumer price index is to be calculated based upon the ratio of the index for the prior month

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to the index for the previous 13 month period. Finally, plaintiffs assert that, under the terms of the lease, non-payment of rent is not a basis for termination. In their second cause of action, plaintiffs allege that because of mutual mistake, the written lease agreement does not reflect what the parties intended. Thus, plaintiffs seek reformation of the lease to reflect the parties' true intention.

By order dated April 15, 2011, the court granted plaintiffs a Yellowstone injunction, restraining defendant from terminating plaintiffs' tenancy, pending a determination as to whether plaintiffs were in default of the rent provisions of the lease. The court determined that plaintiffs had standing to seek the injunction because the lease contemplated that the tenant might assign its interest. Since defendant had served notice of default on plaintiffs, it was not prejudiced by the tenant's failure to comply with the lease provision requiring the tenant to deliver a duplicate original of the assignment to the landlord.

Defendant moves to dismiss the complaint based upon a defense founded upon documentary evidence, failure to state a cause of action, and statute of limitations. Defendants argue that the statute of limitations governing this action is six years and plaintiffs' claim accrued when they assumed the lease on January 4, 2001.

In order to determine the statute of limitations applicable to a particular declaratory judgment action, the court must examine the substance of that action to identify the relationship out of which the claim arises and the relief sought (*Save Pine Bush v Albany*, 70 NY2d 193, 202 [1987]). If the court determines that the underlying dispute can or could have been resolved through a form of action or proceeding for which a specific limitation period is statutorily provided, that limitation period governs the declaratory judgment action (Id).

Since plaintiffs' claim arises out of the landlord-tenant relationship, the action sounds in breach of contract and is governed by a contract statute of limitations. The general rule is that a cause of action for breach of contract accrues at the time of the breach. However, where a tenant challenges the method whereby lease escalation payments are calculated, the tenant's claim accrues on the date it obtains constructive knowledge of the landlord's method of computation (*J.C. Penney Corp. v Carousel Center Co.*, 635 F. Supp. 2d 126 [NDNY 2008]). Plaintiff acquired constructive knowledge of the landlord's method of calculating the rent escalation when the landlord served notice of default on November 4, 2010. Since plaintiffs' claim for a declaratory judgment was asserted within six years of that date, it is timely.

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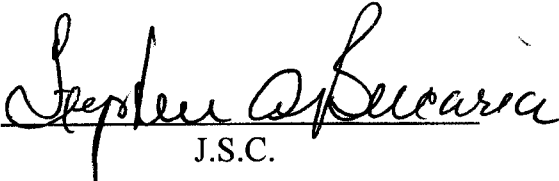
However, the statute of limitations on a claim of reformation based upon mistake is six years, accruing on the date of the mistake (*1414 APF v Deer Stags, Inc.*, 39 AD3d 329 [1st Dept 2007]). The mistake occurred on January 4, 2001, the date on which plaintiffs assumed the lease. Because plaintiffs' claim for reformation was not brought within six years of that date, it is untimely. Accordingly, defendants' motion to dismiss the complaint based upon the statute of limitations is **denied** as to the first cause of action but **granted** as to the second cause of action.

The duty to pay rent is a primary obligation of the tenant (*Tehan v Peters Print*, 71 AD2d 101, 106 [4th Dept 1979]). However, the non-payment of rent does not operate as a forfeiture of the leasehold or confer upon the lessor any right of re-entry in the absence of a provision in the lease or a statute so declaring (74A NY Juris2d § 835). Real Property Actions and Proceedings Law § 711(2) provides for a summary eviction proceeding based upon a default in the payment of rent and three days written notice. Nevertheless, upon the present motion, the court cannot render a declaratory judgment as to whether defendant would be entitled to relief in a nonpayment proceeding. Defendant's motion to dismiss plaintiffs' first cause of action for a defense founded upon documentary evidence or failure to state a cause of action is **denied**.

On May 4, 2011, defendant served a three day notice on the tenant, asserting that the rent outstanding was \$219,831.50, the same amount stated in the rent demand dated December 23, 2010. Since no other action to terminate plaintiffs' tenancy was taken, the court does not construe the three day notice as a violation of the Yellowstone injunction. Plaintiffs' cross-motion for sanctions is **denied**.

So ordered.

Dated AUG 11 2011


J.S.C.

ENTERED

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AUG 12 2011

NASSAU COUNTY
COUNTY CLERK'S OFFICE