

30 Broadway, LLC v Grand Cent. Dental Group LLP

2011 NY Slip Op 34258(U)

January 7, 2011

Supreme Court, Nassau County

Docket Number: 017247/08

Judge: Randy Sue Marber

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. RANDY SUE MARBER

IAS/TRIAL PART 18

Index No.:017247/08

Cal. #2010N0685

30 BROADWAY, LLC

DECISION AFTER TRIAL

Plaintiff,

-against-

GRAND CENTRAL DENTAL GROUP LLP,

Defendant,

A trial on the issue of damages was held before this Court on September 28, October 13, 20 and 21, 2010. Thereafter, post-trial Memoranda of Law were submitted. Summary Judgment was previously granted to the Plaintiff (Marber, J., August 13, 2009) in this action as a result of the Defendant's breach of a commercial lease agreement between the parties. The general factual background is set forth in said Order.

The primary witness who testified on behalf of the Plaintiff was Steven Fine who is the owner of the Plaintiff, 30 Broadway LLC ("30 Broadway"). That company owns the building located at 30 Broadway in Massapequa, New York. The property was acquired in the Spring of 2005 and subsequently renovated. In December 2006, a portion of the building was leased to the Defendant, Grand Central Dental ("Grand Central"). Upon the

signing of the lease, 30 Broadway was paid one month's advance rent of \$5,200.00 along with two months rent of \$10,400.00 as security. A period of approximately three and one half months was built into the initial term of the lease whereby no rent would be paid by Grand Central.

The lease was prepared by Steven Fine. Two different signed versions of the lease were proffered. One was only signed by Dale Goldschlag, who was one of the principals of Grand Central. It ends on "Page 27 of 28". The other version of the lease, ending on "Page 28 of 28", is signed by both partners of Grand Central as well as Steven Fine on behalf of 30 Broadway.

Ultimately, Grand Central never moved in and continued to pay rent through July 2008, according to Mr. Fine. In August 2008, an acceleration letter was sent from Mr. Fine to Grand Central when the rent was not paid and the keys had been sent back to him from Grand Central.

A dispute ensued when Grand Central posted signs at the premises in an effort to sublet the premises. Mr. Fine gave conflicting testimony as to whether or not he removed all or part of the signs.

Mr. Fine conceded that he did not keep accurate business records. He did not keep the ledgers or take in the rent money. No rent ledger or invoices were produced. This was done primarily by his wife (who did not testify). He acknowledged that the \$10,400.00 security was never returned to Grand Central. He acknowledged keeping various monthly

rent overpayments.

Additionally, varying figures for the allegedly outstanding rent were proffered by Mr. Fine. This, along with Mr. Fine's multiple areas of conflicting testimony, his absence of knowledge on key areas and his interference with Grand Central's efforts to sublet the premises and offset any potential damages, wrongfully and intentionally interfered with the tenant's attempts to re-let the premises, unreasonably preventing the tenant from minimizing the rent for which it would be ultimately be liable. Here, the landlord's unreasonable conduct can be analogized to a circumstance where a landlord unreasonably withholds consent to a sublease. By removing a portion of an advertisement posted by the tenant, the landlord wrongfully frustrated the tenant's attempts to sublet the premises. Good faith and fair dealing between landlords and tenants is read into the lease. *Tai On Luck Corp. v. Cirola*, 35 A.D.2d 380 (1st Dept. 1970); *Howard Stores Corp. v. Robison Rayon Co., Inc.*, 36 A.D.2d 911 (1st Dept. 1971).

The Plaintiff's attorney, Richard Hutchinson, Esq., testified and submitted a supplemental affirmation as to the attorney's fees incurred in this action, which he seeks recovery of pursuant to the lease provisions contained in ¶ 55.01 (a). He seeks in excess of \$27,000.00.

The Court is troubled by the discrepancies in Mr. Fine's testimony and gaps in proof by the Plaintiff. However, no witnesses testified on behalf of the Defendant. In light of the frustration of the Defendant's efforts to sublet (albeit at an unknown time frame),

the Court is constrained to equitably limit the damages to be awarded to the Plaintiff. Had the Defendant's efforts not been frustrated, it is reasonable to conclude that the premises would have been re-let by the Defendant. An inequitable detriment was suffered herein by the Defendant. *See 25 Park Associates v. Admaster, Inc.*, NYLJ (May 6, 1998, at 29, col 1); *see also Riverside Research Institute v. KMGA, Inc., et al.*, 108 A.D.2d 365 (1st Dept. 1985). The lease in question is also somewhat ambiguous as to when each year of the term begins. The Court determines that the "Year 1" term began April 1, 2007 and ended March 31, 2008 with each successive year following the same pattern. Past due rent during "Year 2" from August 2008 through March 2009 is awarded at \$5,460.00 per month for a total of \$43,680.00. The "Year 3" rent of \$68,796.00 is similarly awarded. During the first seven months of "Year 4", the amount of \$42,137.55 is awarded. Therefore, the total past due rent awarded is \$154,613.55, plus interest at 9% per year from August 1, 2008.

As to the amount of attorney's fees, the Court awards the sum of \$15,000.00 to the Plaintiff. With regard to the security held and the various \$40.00 monthly overpayments, these are considered to be an offset to any reasonable preparatory expenses incurred by the Plaintiff.

With respect to the Defendant's counsel's oral motion to dismiss, same is denied as to all claims for rent by the Plaintiff preceding the time of trial. The balance of the Plaintiff's claims are dismissed. *See 29 Holding Corp. v. Diaz, et al.*, 3 Misc.3d 808 (Bronx County 2004).

This constitutes the decision and order of the Court.

Submit judgment on notice.

Dated: Mineola, New York
January 7, 2011



Hon. Randy Sue Marber, J.S.C.

ENTERED
JAN 24 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE