

Split Rock Devs., LLC v Zartab, Inc.

2013 NY Slip Op 34099(U)

September 11, 2013

Supreme Court, Nassau County

Docket Number: 1886/11

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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SPLIT ROCK DEVELOPERS, LLC,

Plaintiff(s),

Index No. 1886/11

-against-

Motion Submitted: N/A

**ZARTAB, INC.; Zartab, Inc. d/b/a Royal Palace;
SHAHRAM ZARNIGHIAN; and ALYEA TOHAR,**

Defendant(s).

_____ x

A non-jury trial was held on July 9, 11, 12 and 15, 2013. Plaintiff called the following individuals to testify: Roger Fisher, President of AH Scott & Company, Inc., the authorized agent for the Landlord Split Rock Developer, LLC; Shahram Zarnighian, the Defendant herein; and Michael Fink, a licensed real estate broker. Plaintiff offered the following into evidence: Seven photographs of the subject location, a sub-lease agreement dated 8/30/2000 between Split Rock Developers, LLC and the Estate of Frank Cornell; a lease dated July 1, 2007 between Split Rock Developers, LLC and First Call Funding LLC; a transcript of Zarnighian's guilty plea, in the United States District Court, Eastern District on February 25, 2005, to a violation of 31 United States Code Section 5324(a)(3); certified copies of Building Department records from the Town of North Hempstead pertaining to 105/103 Northern Boulevard, Great Neck, also known as Section 2, Block 50, Lots 266 and part of (P/O) 267; and a copy of the 2007-2008 School Tax bill for the parcel identified as Section 2, Block 50, Lot 267.

Defendant offered the testimony of Richard Levine of Eisenoff Appraisals and introduced the report of Plaintiff's expert, Michael Fink; the *curriculum vitae* of Michael Fink; and the Appraisal Report of Eisenoff Appraisers into evidence.

Both parties presented Trial Memos and Post Trial Memos for the Court's consideration.

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The parties had entered into a sublease for the premises known as 103 Northern Boulevard, Great Neck (103) a number of years prior to the year 2000. In or about August, 2000 Plaintiff sold the parcel known as 105 Northern Boulevard to Defendant and leased the adjacent property known as 103 Northern Boulevard, Great Neck, N.Y. to Defendants for \$1,450.00 per month. The parcels were to be used in conjunction with Defendants high end used car business. Due to the criminal indictment of Defendant Zarnighian, he ceased operating his business at 105 and 103 Northern Boulevard. A holdover proceeding was commenced by Plaintiff in Third District Court in 2005 based upon a breach of the lease due to Royal Palace's failure to conduct business at the location. Ultimately the holdover proceeding was settled.

The subject premises is located in an affluent area of Nassau County and is one of many parcels along Northern Boulevard, that have been and continue to be used in conjunction with the sale or lease of vehicles, many of which are high end dealerships. The property in question is known as 103 Northern Boulevard, Great Neck, New York. It consists of approximately 4200 square feet and is a triangular shaped parcel. It is the upper portion of Lot 267 facing Northern Boulevard, vacant and surrounded by a fence, which divides it from the lower portion of lot 267. The lower portion of Lot 267 faces Great Neck Road and is rented to another tenant for use as a service station and has no bearing on the matters *sub judice*.

The parties have stipulated that the period of time over which Defendants held over was twenty eight (28) months between February, 2005 and June, 2007. In dispute is the fair market value of the use and occupancy of the premises for the time the Defendants were in possession of the premises.

Real Property Law § 220 provides that a landlord may recover a reasonable compensation for the use and occupation of real property and that a parcel lease or other agreement may be used as evidence of the amount to which he is entitled. The burden of proof rests with the landlord to establish the fair market value. (*Mushlam, Inc. v Nazor*, 80 AD3d 471 [1st Dept 2011]).

A court has broad discretion in awarding use and occupancy (*43rd Street Deli Inc. v Paramount Leasehold LP*, 107 AD3d 501 [1st Dept 2013]). Prior rent is probative though not dispositive on the issue of the value of use and occupancy. An occupant's duty to pay the landlord for its use and occupancy of the premises is predicated upon a theory of *quantum meruit*, and is imposed by law for the purpose of bringing about justice. (*Eighteen Associates, LLC v Nanjim Leasing Corp.*, 257 AD2d 559 [2d Dept 1999]).

According to the records of the Board of Zoning Appeals for the Town of North

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Hempstead the subject parcel, known as Section 2, Block 50, P/O Lot 267, is in a B-A District. While the matter before the Court pertains to the value of the use and occupancy of 103, the Court notes that historically 103 has been used in conjunction with 105.

The Board of Zoning Appeals first granted a conditional use permit to Steven Baron/E.V. Cornell for the parking and storage of automobiles on lot 267 on January 7, 1987 for a period of two years, expiring on August 18, 1989. Steven Baron was granted permission for the continued use of the premises for the sale, lease and/or rental of automobiles for a two year period expiring on August 18, 1990 for Section 2, Block 50, Lot 266.

National Car Rental was permitted to continue the use of the premises known as Section 2, Block 50, Lot 266 (known as 105 Northern Blvd.) and P/O Lot 267 (known as 103 Northern Boulevard) for the sale, lease and/or rental of automobiles for 2 years expiring on September 26, 1992.

Auto Network of Great Neck/Roger Fisher was granted a permit to continue the use of Section 2, Block 50, Lot 266 and P/O Lot 267 for sale, lease and/or rental of automobiles for a two year period expiring on April 1, 2000. The Board noted that its approval was not to be construed to approve or condone the applicant's failure to timely renew existing permits which had expired. The approval was also conditioned upon the following limitation: outdoor storage of 18 automobiles on Lot 266 and 18 automobiles on P/O Lot 267.

Royal Palace of Great Neck/Zartab, Inc. applied for and was granted permission to use the premises (lot 266 & P/O 267) for parking, storage and sale of automobiles for a period of one year expiring on February 26, 2004.

All of the aforementioned conditional use permits were granted pursuant to section 70-126.D which permits "Parking space for the parking, storage and sale of automobiles." The permits do not specify which activity is to be conducted on P/O lot 267, known as 103, nor whether any of the activities are prohibited. It appears that over the years, despite the various applicants failing to promptly renew the permits, they were nonetheless approved for the continued use of the property for the storage, sale and parking of automobiles pursuant to 70-126.D.

The Court notes that the only application made to the Board of Zoning Appeals pertaining only to the use of Lot 267 was that made by Steven Baron/E.V. Cornell in 1987. Permission was granted to use the premises for the parking and storage of automobiles, under Section 70-126.D. The application was not provided to the Court so there is no evidence as to whether permission to sell cars was sought and denied or whether the sale of cars was even contemplated at that time. Furthermore, that decision pertains to all of Lot 267. As

previously stated, only the upper portion of lot 267, known as 103 Northern Boulevard is at issue herein.

Since 1990, however, all of the applications were to continue the use of Section 2, Block 50, Lot 266 and P/O Lot 267 for the sale, lease and/or rental of automobiles. In 1998 a condition was added to the conditional use permit limiting outdoor storage of 18 automobiles on Lot 266 and 18 automobiles on P/O Lot 267.

Under the circumstances, while there are no guarantees, there is no reason to believe that the conditional use permit, which last expired on February 26, 2004, would not have been continued upon further application. No such application has been made, thus none has been denied. Accordingly, the value of 103 must be determined based on the potential storage of 18 cars as well as the sale of cars pursuant to 70-126.D. Whether an applicant wanted to park, store or sell automobiles, the application would be made pursuant to 70-126.D, as that is the only section applicable to selling, storing or parking cars.

Defendants interpretation of the prior approved conditional use permits as only permitting parking of 18 cars on P/O Lot 267 is without foundation. That condition applies equally to Lot 266. No differentiation is made as to where sale of the cars can take place in the approved conditional use permits as presented to the Court.

Turning now to the expert testimony, Defendant's witness, Richard Levine found the value for the use and occupancy for 103 was \$2,867.00 per month for the relevant time period. He based that value on what he considered the highest and best use of the property, "continued use as a parking lot for storage of a maximum of 20 cars. The zoning Code does not permit the selling of cars from the site." (Ex C, page 7 and 10). The evidence, however, does not support his assertion that up to 20 cars are permitted to be parked there, nor that cars may not be sold from that site.

The comparable sales listed in the appraisal are significantly larger parcels, located in inferior commercial locales and were leased since 2011. The largest parcel, however, a TD Bank in Rockville Centre was leased in May, 2008. None of the comparable listings were in the Great Neck vicinity; none were automobile related; and none were during the 2005-2007 time period. While adjustments were made to reflect the differences, the conclusion that the ground rent for the subject property between January 2005 and February 2007 was \$8.00 sq. ft. or \$2,867.00 per month was not persuasive especially in light of the faulty basis for that opinion with regard to the number of cars permitted and the potential for sale of cars.

Plaintiff's expert, Michael Fink looked at leases for car storage transactions. He found that none of the four he listed as comparable offered the visibility or traffic associated with

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103. Fink also considered the sublease dated August 30, 2000 between Plaintiff and the Estate of Frank Cornell as well as the sublease dated July 1, 2007, between Split Rock Developers LLC and First Call Funding LLC. He adjusted his "valuation of the property based upon market forces in the year 2005 when the property would be leased. In 2005, the economy and the rental market was exceptionally strong and after considering all the four (4) criteria, placing emphasis on the location, I would appraise the market value rent for the subject Lease Period at \$9,000.00 per month based upon (i) prevailing market conditions in 2005, (ii) the criteria evaluating market value of a lease, (iii) the lease between Split Rock and First Call paying \$9,000.00 per month, (iv) general conditions of the use of the property in the vicinity of the subject location . . . and (v) market conditions in 2007" (Ex. A).

Fink was unable to locate any similar rental transactions for the subject time period, however he did base his opinion as to the value of the property on the highest and best use of the parcel, which was for the sale and storage of cars. He noted that the neighboring car dealership Darcy Automotive, a non-party, would be the primary use of such property. Such an assumption has some foundation considering the history of 103/105, however, there was no evidence whatsoever that Darcy Automotive had any interest in 103 Northern Boulevard.

Plaintiff contends that \$1,450.00 monthly rent pursuant to the lease between the parties was a sweetheart deal entered into in conjunction with Defendants purchase of 105 Northern Boulevard. Based upon the testimony of both expert witnesses, that amount is clearly below market value and will not be considered further by the Court. Both experts recognized that the market during the holdover period was strong. Both examined the First Call Funding lease, Fink agreeing that it represents the fair market value of the premises and Levine rejecting it out of hand and not mentioning it in his appraisal.

In the context of real property transactions where commercial certainty is a paramount concern and where the instrument was negotiated between sophisticated, counseled business people negotiating at arms length, the contract shall be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed (*Wallace v 600 Partners Co.*, 86 NY2d 543 (1995) internal citations omitted; *Vermont Teddy Bear Co. Inc. v 538 Madison Realty Co.*, 1 NY3d 470 (2004); *M & R Rockaway, LLC v SK Rockaway Real Estate Co., LLC* 74 AD3d 759 [2d Dept 2010]).

The lease between Split Rock Developers and First Call Funding is probative in considering the market value of the subject premises. The lease was the result of an arms length transaction negotiated by sophisticated, counseled business people. First Call operates a high end used car dealership on Northern Boulevard in Great Neck, similar to Defendant's dealership. Plaintiff and First Call negotiated a lease for "any legal use in conjunction with

sale and leasing of automobiles” in the amount of \$9,000.00 per month commencing August 1, 2007. Article Nine of the lease addressed the use of premises and the need for the tenant to obtain and pay for all permits.

I find that the modification of the lease with First Call Funding on July 21, 2008, is not dispositive of the value of the fair use and occupancy of 103 during the subject time period. The recession, which was in full swing during 2008, would have had an adverse impact on property values not present during the holdover period. Further, it is clear from the amendment that no application for the Special Use Permit had been submitted as of that date, so there is no evidence that 103 Northern Boulevard would not be granted a special use permit allowing the storage and sale of cars from the premises pursuant to 70-126.D.

Thus, I find the First Call Funding lease entered into on July 1, 2007, is the best evidence of the value of the use and occupancy of the premises during the period of time during which Defendant held over. Plaintiff is therefore entitled to the reasonable value of use and occupancy for the premises known as 103 Northern Boulevard, Great Neck, N.Y., which is determined to be \$9,000.00 per month for twenty eight months.

Settle Judgment on notice.

The foregoing constitutes the Order of this Court.

Dated: September 11, 2013
Mineola, N.Y.


J. S. C.

ENTERED

SEP 13 2013

NASSAU COUNTY
COUNTY CLERK'S OFFICE