

Lali Assoc., LLC v 875 Turnpike Realty, LLC

2014 NY Slip Op 31882(U)

July 15, 2014

Sup Ct, Suffolk County

Docket Number: 01640/2011

Judge: Ralph T. Gazzillo

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SHORT FORM ORDER

Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY

Post-Trial Decision

Hon. RALPH T. GAZZILLO
A.J.S.C.

	X	
Lali Associates, LLC,	:	Jacobson & Falcon, Esqs.
	:	197 Merrick Road
Plaintiff(s),	:	Lynbrook, N.Y. 11563
	:	
- against -	:	Alan Ross, Esq.
	:	1772 East Jericho Tpke.
875 Turnpike Realty, LLC,	:	Suite 2
	:	Huntington, N.Y. 11743
Defendant(s),	:	
	X	

The non-jury trial of this matter was conducted before the undersigned on May 5th, 2014. Prior to the testimony, a number of items were pre-marked as exhibits. In addition to those items, the parties relied upon the testimony of three (3) witnesses. The plaintiff called Shawn Elliot and Dr. Abdul Malik; the defendant called Maryann Caputo and recalled Elliot. At the conclusion of the proceedings and in lieu of summations, each side was invited to submit written factual and legal arguments as well as any requests for findings of fact pursuant to CPLR § 4213 by July 3, 2013. Those memoranda having been received and reviewed, the Court's decision is as follows:

Preliminarily, there are a number of matters and background facts which are not in serious dispute. For example, the central focus of this proceeding is a lease dated July 7, 2006. That document governed the rental of a premises located at 875 West Jericho Turnpike, Huntington Station, Suffolk County, New York, more specifically two stores known as "1" and "2".

The plaintiff has put forth two (2) causes of action. In essence, the first claim is based upon the lease and the second for account stated. As to its damages, the plaintiff seeks in excess of \$100,000.00 for non-payment of rent, taxes, common charges, insurance, utilities, the cost of repairs to the property, commissions, and the difference between the rental income due under the

lease and those received from a tenant secured to mitigate damages. The defense asserts an affirmative defense which, in essence, claims they “were locked out.”

THE TESTIMONY

What immediately follows is an unassessed and condensed version of the testimony of the various witnesses regarding the relevant and germane facts of this matter as was portrayed, purported and alleged by each.

Elliot indicated he is a licensed real estate broker. He reviewed those portions of the lease which indicated that it was for five years, *viz*, from July 1, 2006 to June 30, 2011. It also provides for a base rent of \$4243.33 per month and includes an increase each year which, essentially, would be as follows: 2nd year, 2007-08: \$52,447.60; 3rd year, 2008-09 \$54,021.03; 4th year, 2009-10: \$55,641.66; and the 5th and final year, 2010-11: \$57,310.91. Additionally, the anticipated commission would have been approximately \$14,800, which he paid in advance in expectation of the rent and increases as provided within the lease.

He further indicated that the defendant vacated the premises in January of 2009 as it wasn't doing any business there, nor has it done any since. When its employees left, they took the files and a computer with them and put them in storage. He didn't remember giving any notice he was leaving, but thinks he may have tried. He also didn't remember what he did with the keys or if he kept them. By February, 2009, they were two months in arrears of rent but he didn't recall if anyone ever contacted him regarding the rent or if there were any subsequent conversations.

On cross-examination he made reference to the broker's commission as well as that he had rented through an agent named Peter Cavanagh who may have had the keys. Cavanagh was at the time working for another company, Coach Realty.

Dr. Abdul Malik, M.D., a cardiologist, testified that he is the main principal of the plaintiff firm. It was stipulated that it owns the property. He stated that the plaintiff stopped paying rent in January of 2009; that is, as of that time he hadn't been paid either the rent for January or February. He asked his attorneys to send a letter to the defendant and he, himself, had spoken with employees of the defendant including the broker who had obtained the real estate commission. This was in mid-January to February of 2009 and he asked an employee to speak to the defendant about the overdue rent. He also stated he had never received any notice from defendant that it was vacating and only learned of it when he passed by. This occurred in late March of 2009 when he noticed the building had been abandoned, had no desks nor computers, and it otherwise appeared that the business was closed. Thereafter, he re-rented the premises using Cavanagh and the Coach Realty firm. The locks were never changed and the subsequent tenant leased the premises, plus a similarly sized third unit, for a term commencing April 1, 2010 and ending April 1, 2015 at an annual rent of \$48,612.00, plus annual increases and including free rent for the months of April, May, and June of 2010. As indicated, this was for three somewhat equally sized stores, specifically the original two the defendant has leased plus a third. During its tenancy, the defendant had made changes to the premises (chiefly a

kitchen) but when the location was vacated it was left behind. He asked the new tenant to restore the premises to the original fashion and told them he'd reimburse them for the expenses. He indicated that figure came to \$6,000.00 but he had no receipts and stated that the amount was an "arbitrary number." He also indicated the brokerage commission was paid by the tenant.

On cross examination he stated he had nothing in writing as to the brokerage agreement with the defendant but has the \$14,800.00 check he paid to the defendant. He also added he never had the keys and didn't hire anyone to repair the premises. On his re-direct examination he reviewed paragraph 6 of the lease, viz, the late fee of 5% plus the 30-day delay fee of \$50.00 as well as the legal fees clause.

The defendant's case began with Maryann Caputo, the general manager of the defendant firm. She admitted the defendant had moved out of the premises in early 2009. As to Peter Cavanagh, he had been a sales agent and had a key. Towards the end of 2003, he left and went to Coach Realty. When she asked him for the keys' return, he didn't comply. She authored some photographs which indicated Coach's occupancy of the premises. These were taken after she learned Coach had taken over, perhaps two or three weeks after they had left. She also indicated listing under such circumstances would be an ethical violation.

On cross-examination she stated that she has worked for the defendant firm for eight years and they had vacated the premises sometime in March of 2009. Additionally, she also indicated that the defendant is her sole source of employment income.

Upon recall, Eliot stated that to his knowledge he had never received a notice as to any increase in rent, nor notices of tax increase, common charges, late fee notices or brokerage commissions, nor had he received any bill for any repairs to the premises.

LAW

First and foremost, having observed the witnesses, "the very whites of their eyes," on direct as well as cross-examination, the so-called "greatest engine for ascertaining the truth," *Wigmore on Evidence*, §1367, the Court is satisfied that the exercise has been fruitful and more than sufficient to determine the credible information as well as to simultaneously filter that which is less than reliable. Secondly, it should go without saying that in evaluating each witness' contributions to the resolution of the controversies in this matter – as well as all such determination – it is hornbook law that the quality of the witnesses, not the quantity, is determinative. *See e.g. Fisch on New York Evidence*, 2d ed., §1090. As to the quality of any given witness, the flavor of the testimony, its quirks, the witness' bearing, mannerisms, tone and overall deportment cannot be fully captured by the cold record; the fact-finder, of course, enjoys a unique perspective for all of this, and the ability to absorb any such subtleties and nuances. Indeed, appellate courts' respect and recognition of that perspective as well as its advantages is historic and well-settled in the law. *See e.g. N. Westchester Prof. Park Assn. v. Town of Bedford*, 60 NY2d 492 (1983); *Latora v. Ferreira*, 102 AD3d 838 (2d Dept 2013); *Zero Real Estate Servs., Inc v. Parr Gen. Contr. Co., Inc.*, 102 AD3d 770 (2d Dept 2013); *Hom v. Hom*, 101

AD3d 816 (2d Dept 2012); *Marinoff v. Natty Realty Corp.*, 34 AD3d 765 (2d Dept 2006). Indeed, as one unanimous appellate bench reiterated, “[o]n a bench trial, the decision of the fact finding court should not be disturbed on appeal unless it is obvious that the court’s conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witness.” *Reichman v. Warehouse One*, 173 AD2d 250 (1st Dept 1991)(citing *Nightingdale Rest. Corp. v. Shak Food Corp.*, 155 AD3d 297 [1st Dept 1989], *lv denied* 76 NY2d 7020 [1990]).

Also worthy of examination is any witness' interest in the litigation. *See e.g.*, 1 NYPJI3d 1:91 *et seq.*, at p. 172. The length of time taken by either side's case or any witness' testimony is, however, clearly non-conclusive. What can, however, be devastating to a witness' presentation is the fact-finder's determination that a witness testified falsely about a material fact; under such circumstances and pursuant to the maxim *falsus in uno, falsus in omnibus*, the law has long permitted—but not required—the finder of fact to disregard those portions or even *all* of the testimony. *See Deering v. Metcalf*, 74 NY 501 (1878); *see also*, 1 NY PJI3d 1:22. Lastly, it should be underscored and acknowledged that during the course of gauging a witness' credibility as well as conducting the fact-finding analysis, the undersigned's continuous tasks also included, of course, segregating the competent evidence from that which was not, an undertaking for which the law presupposes a court's unassisted ability. *See e.g. People v. Brown*, 24 NY2d 168 (1969); *Matter of Onuoha v. Onuoha*, 28 AD3d 563 (2d Dept 2006).

Those tasks and duties aside, there is also the purpose and goal of the trial, *viz*, to try or test the case. It is hornbook law that the yardstick for measuring causes of actions such as the matter at bar is the same whether the trial is by bench or jury; The burden of proof rests with the plaintiff who must establish the truth and validity of each claim by a fair preponderance of the credible evidence. Stated otherwise, in order for a plaintiff to prevail on any individual claim, the evidence that supports that claim must appeal to the fact-finder as more nearly representing what took place than the evidence opposed to it; if the evidence does not, or if that evidence weighs so evenly that the fact-finder is unable to indicate that there is a preponderance on either side, then the question is decided in favor of the defendant. Only when the evidence favoring a plaintiff's claim outweighs the evidence opposed to it may that plaintiff prevail. *See e.g.* 1 NY PJI3d 1:23.

As to the analysis of the legal claims presented, it begins with the plaintiff's action on the lease. To begin with, in order for an agreement to be enforceable as a lease, all the essential terms must be agreed upon, including the area to be leased, the duration, and the price. *Calkins Corporate Park, LLC v. Eye Physicians & Surgeons of W. N.Y., P.L.L.C.*, 56 AD3d 1122 (4th Dept. 2008). Moreover, a lease is subject to the same rules of construction as any other agreement or contract. *Backer Mgt. Corp. v. Acme Quilting Co.*, 46 NY 211 (1978). “If the lease and its modifications are straightforward and unambiguous, the interpretation of the entire contract is a question of law for the court to make without resort to extrinsic evidence.” 350 E.

30th *Parking v. Board of Mgrs. of 350 Condominium*, 280 AD2d 284 at 287 (1st Dept. 2001 (citations omitted). Moreover, “[a]n agreement is unambiguous if the language it uses has a definite and precise meaning, unattended by a danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion.” *Texas 1845, LLC v. Kyaw*, ___AD3d___, 2014 NY Slip OP 03822, NYLJ 5-30-14, p. 31, col. 6 (2d Dept)(citation omitted). If it is complete, clear and unambiguous on its face, a lease must be enforced in a manner which gives effect to the reasonable meaning of its terms without resort to extrinsic evidence. *Id.*

As to the second cause of action, account stated, “[a]n account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and the balance due” and it “assumes the existence of some indebtedness between the parties, or an express agreement to treat the statement as an account stated” but “[i]t cannot be used to create liability where none exists.” *Ryan Graphics, Inc. v. Bailin*, 39 AD3d 249, 241 (1st Dept 2007) (citations omitted). Of its multiple rules, there is one that applies in situations where an account has been rendered and thereafter no reasonable objection was made to it in a reasonable time. In such cases the law requires more, *viz*, that there must be between the parties either some indebtedness or an express agreement to treat the statement as an account stated; this is despite the fact that it may encompass amounts as yet not due if there remain no further obligations to be performed by the party claiming payment. *Gurney, Becker & Bourne v. Benderson Dev. Co.*, 47 NY2d 995 (1979). Also, and as to the “account” which is stated, the invoice or statement, however, need not be itemized. *ERE LLP v. Spanierman Gallery, LLC*, 94 AD3d 492 (1st Dept 2012).

Finally, where an award of money damages is sought in a civil action, one of the basic premises in gauging the viability of such an action is the maxim of *damnum sine injuria est injuria sine damnum*: liability without damages is the same as damages without liability. In the absence of proof of both liability by the defendant as well as damages by the plaintiff, the plaintiff will typically not receive any compensation. Also, and assuming the issues of liability and damage are found in the plaintiffs favor, there is a further caveat, *viz*, the proof must contain evidence to support a valid calculation of any monetary award for the damages. Stated otherwise, an award of money damages should not be measured or determined by a whim or caprice; there must be a rational, well-established basis for any such award. Obviously, this rule is not only logical and just, it also reflects the established and historic admonition to avoid awarding damages on whim and/or naked speculation as opposed to some proven, satisfactory method which has some acceptable measure of precision. *See e.g. Goldberg v. Besdine*, 76 AD 451 (2d Dept 1902); *see also Kenford Co. v. County of Erie*, 67 NY2d 257 (1986); *R. B. v. M.S.*, ___

Misc.3d ___, 303455/10, NYLJ 1202642854926 (Sup NY 2014). Indeed, in addressing the issue of a claim for damaged personal property the unanimous *Goldberg v. Besdine* panel wrote,

“There is proof as to the first cost of the articles which the plaintiff claims were injured or destroyed, but they were all in use, and had been in use for some time, and no proof was made of their condition or value at the time of the fire. Under these circumstances, the estimate of the value made by the court was necessarily conjectural, and is not based upon that reasonably precise proof which it was within the power of the plaintiff to furnish and which the law requires.”

Goldberg v. Besdine, supra at 452-53.

Although the rule that requires "that damages be reasonably certain, [it] does not require absolute certainty." *Ashland Mgt. v. Janien*, 82 NY2d 395 at 404 (1993). Indeed, it has been noted that as long as based upon reliable factors but without any undue speculation, damages from loss of future profits are often an approximation. *Id.* The law's latitude, however, is not unlimited. *See Vasquez v. Geshler Realty Corp. & B & B Mgt.*, ___ Misc.3d ___, 2014 NY Slip Op 24036 (App Term 1st Dept 2014) (in the absence of articulated basis for estimated lost profits, claimed amount for damages indicated as "more or less" insufficient). Under appropriate circumstances where the proof does not provide a sufficient degree of preciseness but there is some support in the record and it is not legally erroneous, the fact-finder may rely upon "reasonable conjectures and probable estimates and to make the best approximation possible through the exercise of good judgement and common sense in arriving at [an] amount." *Matter of Rothko*, 43 NY2d 305 at 323 (1977). "The rule of certainty as applied to the recovery of damages does not require absolute certainty or exactness, but only that the loss or damage be capable of ascertainment with reasonable certainty. 36 NY Jur Damages, § 15. Recognition of that logic and the rule is long and well established. *See, e.g., Gombert v. New York Cent. & Hudson Riv. R.R. Co.*, 195 NY 273 (1909).

DETERMINATIONS

The Witnesses

The initial focus of the analysis is upon the witnesses' credibility. Elliot appeared to be obstructive, less than cooperative, and some of his responses were unduly parsimonious if not evasive. Clearly, of the three witnesses both he and Dr. Malik have more than a passing interest in the litigation but, at least in that category, they tend to somewhat neutralize each other. That

equilibrium is not, however, found elsewhere. For example, the chief and most distracting flaw in Elliot's testimony was his lack of recall. This is not easily overlooked nor excused. Indeed, the fact that he is in the real estate business cannot be easily reconciled with his repeated lack of recall as to this event, a real estate transaction. Stated otherwise, while he may be technically a "lay" witness he testified as to events that one may safely assume are the typical and everyday transactions of his professional life – essentially, his "bread and butter." Notwithstanding that familiarity, he claimed his memory failed him regarding similar but personal affairs to which he was a central figure. That imbalance produces a puzzling inconsistency. Moreover, such an obvious incongruity, coupled with the nuances of his physical presentation, so undermine his credibility as to minimize any credit attributable to his version of the facts.

Conversely, Dr. Malik's testimony was internally consistent as well as harmonious with the documentary and other evidence. Additionally, he appeared to be open and straightforward, while quite obviously striving to be helpful. Moreover, on the whole, his account of the various events which marked the history of the events and the parties was logical and flowed smoothly. Indeed, it appears that his acts in response to the defendant's omissions were plausible, practical, and appropriate. That overall harmony, his bearing and presentation were undisturbed by cross-examination. As a result, he satisfactorily proved the majority of the plaintiff's case. As noted below, however, those unproven portions were not due in any fashion to his lack of credibility but instead caused by a technical deficiency in one area of the proof.

Moreover, Ms. Caputo's brief testimony appeared credible, but as indicated below, not pivotal.

In sum, in the competition between the two accounts, the plaintiff's prevails. Stated otherwise, by a preponderance of the evidence, that version is accepted and the defendant's is rejected. As discussed below, when the results of those findings and the proven facts are juxtaposed to the law, the plaintiff prevails. Additionally, the defense's affirmative defense is rejected.

Findings

Focusing on the law and its requirements on the matter at bar's causes of action, and after reviewing the evidence under the light of the law and logic, the undersigned finds that the credible evidence more than supports the plaintiff's contentions. In fact, it is not only persuasive and convincing, but when measured against any contrary arguments, is overwhelming and by much more than a mere preponderance. This result is undeterred by Ms. Caputo's opinion as to the ethics of listing the property. In the first instance, other than perhaps by inference, there was no showing that there was any such listing. Secondarily, while that may be unethical, immoral, unprofessional or whatever, that sin - if any - would not appear to fall upon the plaintiff's side of the equation. If anywhere and for what it is worth, it attaches to Cavanagh, a non-party.

As to the credible evidence, it is clear that the defendant, without cause, vacated the leased premises during the pendency of that lease. Indeed, as was noted in the plaintiffs post-trial

memorandum, there is no question that the defendant breached their contract and this was without notice, warning, or consent. The last rent received was in December of 2009 and no rent was received for the balance of the lease, or June 30, 2011. The plaintiff's efforts to resolve that deficiency were unrewarded and fruitless. Thereafter, the plaintiff mitigated its damages by re-renting the premises, plus a third unit, to a new tenant. The rent from that tenant began on April 1, 2010; this was, however, at a smaller monthly rent.

Determining the unpaid rent due under the lease with the defendant, less the rent due under the new lease, produces the following:

Rent due via first lease (from last rent paid to end of lease):

January 1, 2009 to June 30, 2009, (6 months, or ½ of the 3 rd year annual rate)	\$27,010.52
July 1, 2009 to June 30, 2010 (at 4 th year rate)	\$55,641.66
July 1, 2010 to June 30, 2011 (at 5 th and final year rate)	<u>\$57,310.91</u>
Total rent due under lease with defendant =	\$139,963.09

Rent under lease with new tenant:

July 1, 2010 ¹ to June 30, 2011 (expiration of prior lease), 12 months @ \$4,051.00 a month times 2/3 ²	<u>\$32,408.00</u>
Difference between rent under first and new lease	\$107,555.09
Less security held by landlord (lease para. 3 ³)	<u>\$4,243.33</u>
Total owed to plaintiff for lost rent	\$103,311.74

As regards the plaintiffs claim for damage to the property, that is denied. In this regard, there is no proof of the damage other than the witness' testimony that the figure selected—\$6,000.00—was an "arbitrary number." Clearly, that will not satisfy the law. *See, e.g., Matter of Rothko, supra.* Similarly denied is the application for the \$14,800.00 brokerage commission. That was predicated upon monthly rent receipts but there has been some partial performance. Additionally, the proof of that aspect of the plaintiffs claim is otherwise unpersuasive.

¹ The first three months of the lease (April, May, June) were "rent free."

² The defendant rented two (3) units while the new tenant is paying rent for those two plus a third.

³ Non-interest bearing; see lease, para. 3(d).

Similarly unpersuasive is the defendant's defense. Indeed, the proof indicates that the defendant left without cause, much less without any notice.

Finally, with respect to the plaintiffs application for counsel fees pursuant to paragraph 38 of the lease, that is to be submitted in the appropriate manner and fashion, on notice to the defendant. *See generally, Lenox Gardens Apartment Corp. v. Jonathan Sandville, 58037/2012, NYLJ 1202657553838 at 1 (Civ., NY Decided May 28, 2014).*

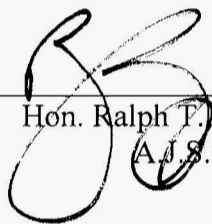
Therefore, the Court finds for the plaintiff on Count One of its complaint and awards it judgment in the amount of \$103,311.74, plus interest, as well as counsel fees in an amount to be subsequently determined as indicated above.

As to Count Two, the claim of account stated, that is dismissed. In so finding, the undersigned is not satisfied that the essential elements of such an action have been demonstrated. *See, e.g., Gurney, Becker & Bourne v. Benderson Dev.Co., supra.*

The foregoing constitutes the decision of the Court.

Submit judgement on notice.

Dated: 2/15/14
Riverhead, N.Y.



Hon. Ralph T. Gazzillo
A.J.S.C.

Final Disposition