

Castle VII. Owners, Corp. v C.V. Parking Corp.

2016 NY Slip Op 30135(U)

January 25, 2016

Supreme Court, New York County

Docket Number: 158721/15

Judge: Barry R. Ostrager

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 61

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CASTLE VILLAGE OWNERS, CORP.

Plaintiff,

-against-

C.V. PARKING CORP., GARAGE MANAGEMENT
COMPANY, LLC, GORDON HAMM, RICHARD
CHAPMAN and PATRICK MILNER,

Defendants.

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DECISION AND ORDER

MOT. SEQ. 005

OSTRAGER, J:

Reference is made to the opinions of the Court dated November 16, 2015 and December 21, 2015, the contents of which are incorporated by reference in this opinion. The November 16, 2015 opinion granted plaintiff judgment on its motion to eject defendants from premises from which plaintiff was "holding over" after the expiration of a lease that expired at the latest on August 31, 2015. The November 16 opinion preserved for future resolution plaintiff's other claims for damages and defendants' counterclaims. On December 21, 2015 the Court denied a stay of the ejectment order and scheduled a hearing to commence on January 15, 2016 to fix the fair market value of the use and occupancy defendants should pay for the time defendants are in possession of the garage after the expiration of the lease. This decision does not address any of plaintiff's damage claims other than the fair market value of use and occupancy for the post-August 31, 2015 holdover period. Nor does this decision address the merits of defendants' counterclaims.

Prior to the expiration of the lease, defendants withheld rent, asserting entitlement to do so on the basis of their counterclaims. The Court directed the defendants to pay "use and

occupancy” for the period of time that defendants were in possession of the garage, including periods prior to the expiration of the lease. (See decision dated October 2, 2015, also incorporated herein by reference, and the December 21, 2015 decision). A Justice of the Appellate Division granted a limited stay of the ejectment order on December 22, 2015 pending review of the ejectment order by a full panel of the Appellate Division. The Appellate Division did not stay the January 15 trial and so, accordingly, testimony was taken on January 15, January 19, January 21 and January 25 to determine the fair market value of the use and occupancy defendants should have paid for the months of September, October, November, and December 2015 and for any time thereafter that defendants remain in possession of the garage. It is undisputed that defendants have withheld rent for the months of November and December, notwithstanding the Order of the Court directing the defendants to pay use and occupancy post-August 31, 2015 at the rate set forth in the expired lease pending a determination of the use and occupancy that should be paid after August 31, 2015.¹ The failure of the defendants to pay the November and December use and occupancy is of a piece with the bad faith conduct of the defendants referenced in the December 21 opinion of the Court.

In connection with the trial that was held on the issue of the fair market value of the use and occupancy due plaintiff, the Court granted on January 15 and January 21 limited 11th hour requests by defendants for discovery, even though discovery could have been sought earlier in the case and even though defendants were advised of the January 15 trial date almost a month before January 15. The Court’s determination of fair market value applies to each month after

¹ Notwithstanding that this Court had previously ordered the payment of use and occupancy and had set the January 15, 2016 hearing date to determine the amount, plaintiff filed the instant Order to Show Cause dated January 4, 2016 seeking (a) to compel defendants to immediately pay plaintiff all back rent due prior to the expiration of the lease; and (b) to compel defendants to pay use and occupancy going forward at the fair market rate of \$91,666.67 monthly. Other than as indicated in the body of this opinion, the Court reserves for future disposition all claims among the parties.

August 31, 2015, with a reduction for the payments defendants made for the months of September and October.

The testimony adduced at the multi-day trial on the issue of fair market value of the premises wrongfully occupied by defendants after August 31, 2015 established that in March, 2015 the Board of Directors of plaintiff Castle Village Owners Corp decided to solicit bids for the leasehold of the garage as of the date of the expiration of the defendants' lease. Toward that end, a request for proposal ("RFP") was prepared and circulated to numerous parties, including the defendants. Significantly, during the course of the RFP process defendants offered to increase the lease payments it was making to \$950,000 per annum or \$79,166.66 a month. The defendants' proposed \$79,166.66 monthly offer was more than double the \$34,142.50 monthly lease payment (plus electric charge) that the defendants were obligated to pay under the expired lease. Among the other parties that responded to the RFP was Laz Parking, which made a proposal to manage the garage for an annual charge of \$19,200 plus an incentive payment in the event the net operating income of the garage exceeded \$950,000.

The business manager of Laz Parking, Christian DeLeon, made a detailed submission to the Board of Castle Village Owners Corp that included an extensive analysis of future projected income and expenses of the garage based in part on a comprehensive survey of rates charged by garages in the area of the Castle Village garage.² Mr. DeLeon has more than 20 years of experience in the parking industry, including parking management, budget development, as well as leasing and marketing of parking facilities. Mr. DeLeon oversees a portfolio of more than a

² Mr. DeLeon and/or Laz Parking failed to maintain the notes on which Mr. DeLeon based his March submission.

dozen garages in Manhattan as well as garages in other locations, some of which are leased and others of which are managed by Laz Parking.

Mr. DeLeon testified that the projections he made in the March 2015 Laz Parking proposal were predicated in part on potential rates for both monthly tenants and transient customers in garages in the same geographic area as the Castle Village garage as well as on-the-scene car counts by Mr. DeLeon at the various garages surveyed. The testimony adduced from Mr. DeLeon, primarily during his cross-examination by defendants' counsel over parts of four days, established that Mr. DeLeon has a commanding knowledge of the geographic area in which the Castle Village garage is located and a detailed knowledge of parking fees charged in the area for monthly and transient customers. Mr. DeLeon personally prepared for the Castle Village Board of Directors detailed projected income and expense statements in the months of March, June and December 2015. Mr. DeLeon's assessment of the prospective net annual operating profit of the Castle Village garage post-August 31, 2015 ranged between \$960,273 and \$1,358,822 annually. Mr. DeLeon's calculations were based in part on plaintiff's representation that 400 of the spaces in the garage are occupied by residents of Castle Village that park in the garage as monthly tenants.

The Court found Mr. DeLeon to be highly articulate and completely credible and that Mr. DeLeon diligently provided the Castle Village Board with a reasonable analysis of the income potential of the garage and, derivatively, the fair market value of a lease of the garage. A number of the income components of Mr. DeLeon's analysis were based on assumptions the Castle Village Board of Directors asked all respondents to the RFP to make. In all events, in July, 2015 the Board of Directors of plaintiff voted to award a management contract to Laz Parking effective September 1, 2015. This action was filed in August 2015 when it became clear

to the plaintiff that the defendants would not vacate the garage when their lease expired. The Court finds that it was reasonable for the Castle Village Board of Directors to opt for a management arrangement rather than the ten-year lease renewal offered by defendants as the management arrangement potentially affords Castle Village the opportunity to earn more money than it would under the defendants' proposed lease extension. Laz Parking is obviously unable to commence the management of the garage management agreement with the plaintiff while defendants are occupying the garage which they have no legal right to occupy.

The principal affirmative proof offered by defendants was the expert testimony of Mr. Sidney Rosenthal, an experienced and qualified expert in the parking industry. Since Mr. Rosenthal was apparently unavailable to appear in person at the trial on any of the four days the trial was conducted, notwithstanding substantial advance notice of the hearing date, the Court directed that Mr. Rosenthal's expert opinion be submitted in affidavit form, despite plaintiff's objection that this procedure deprived plaintiff of the right to cross-examine Mr. Rosenthal. The affidavit of Mr. Rosenthal asserts, among other things, that defendants' \$950,000 a year offer for a 10-year lease was "front loaded" inasmuch as the defendants could presumably increase parking rates over the course of a 10-year lease. The Court accepts this testimony as true but also generally accepts the projections in Mr. DeLeon's schedules, two of which project an annual net operating income in excess of \$1.3 million. Mr. Rosenthal also contends that Mr. DeLeon's projected expense calculations are grossly understated and his income calculations are overstated. Perhaps there is merit to some of Mr. Rosenthal's assertions, but Mr. Rosenthal cannot dispute that defendants believed a lease extension was worth \$79,166.66 commencing September, 2015 and made that offer to plaintiff. Consequently, notwithstanding the testimony of Mr. Rosenthal, it seems clear to the Court that the defendants' proposal to pay plaintiff

\$79,166.66 a month established the minimum level of the fair market value of the lease during the holdover period. Defendant is obligated to pay that amount monthly effective September 1, 2015, with appropriate credit for the use and occupancy payments made for the months of September and October.

The above constitute the findings of fact and conclusions of law of the Court, as well as the determination of the pending Order to Show Cause (seq. 005). Plaintiff is directed to prepare a judgment reflecting the findings of the Court, with interest at the statutory rate to be calculated by the Clerk of the Court from the intermediate date of October 31, 2015 pursuant to CPLR 5001(b).

The parties are directed to appear for a compliance conference on March 8, 2016 at 9:30 a.m. to fix deadlines for the completion of discovery on the remaining issues in the case, the filing of a note of issue, and the scheduling of a trial date.

Dated: January 25, 2016



J.S.C.

BARRY R. OSTRAGER
JSC