SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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GETTY PROPERTIES CORP., et al.,

Plaintiffs,

-against-

GETTY PETROLEUM MARKETING, INC., et al.,

Defendants.

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DECISION AND ORDER

Index No. 651762/2012

HON. ANIL C. SINGH, J.:

Motion sequence 027, 028 and 029 are consolidated for disposition.

In motion sequence 027, plaintiff/landlord moves pursuant to CPLR 4403 for an order: a) confirming the report of the special referee recommending an award of attorneys' fees based on indemnification clauses in the master lease and sublease agreements in the sum of $1,438,474.80. Defendants Robert Del Gadio and the sixteen limited liability companies managed by him (the "Del Gadio defendants") oppose the motion. Defendant Frank Mascolo and the three limited liability companies managed by him (the "Mascolo defendants") oppose the motion in separate opposition papers.

In motion sequence 028, the Del Gadio defendants move: 1) for leave to reargue/renew the order dated May 15, 2015, confirming the report of the special

referee recommending an award to landlord of double use and occupancy for the fair rental value of the demised premises during the holdover period; and 2) to the extent the motion to reargue/renew is denied, staying any proceedings to enter judgment against defendants. Plaintiff opposes the motion.

In motion sequence 029, the Mascolo defendants move: 1) to reargue/renew the order dated May 5, 2014, confirming the special referee's recommendation of double use and occupancy; and 2) to the extent the motion is denied, staying any proceedings to enter judgment. Plaintiff opposes the motion.

Background

Plaintiffs Getty Properties Corp., and Gettymart Inc., (collectively, "landlord") leased gasoline service stations to defendant Getty Petroleum Marketing Inc. ("GPMI" or "tenant") pursuant to a master lease agreement dated November 2, 2003. In turn, GPMI entered into subleases with nineteen subtenants.

Defendant Robert Del Gadio, as principal, managed sixteen of the LLC subtenant gas stations. He executed written personal guarantees for those sublease agreements.

Defendant Frank Mascolo, as principal, managed three of the LLC subtenant gas stations. He executed written personal guarantees for those sublease

agreements.

Paragraph 16.3 of the master lease provided that all subleases entered into by tenant with a subtenant "shall be subject to and subordinate to the terms and conditions of [the master] lease," and shall terminate upon the termination of the master lease.

Each sublease provided that:

a. it is "subject and subordinate to the master lease;" and

b. if the subtenant thereunder breaches the sublease, that the subtenant shall "indemnify and hold harmless ... Getty Properties Corp., Getty Realty Corp., and each of their parent and subsidiary companies and affiliates ... from and against any and all losses, claims, demands, suits, actions, judgments, fines, costs, expenses or payments, environmental or otherwise, for, or in connection with this sublease ... and from and against all costs, expenses or payments, environmental or otherwise, for, or in connection with this sublease ... and from and against all costs, expenses and liabilities incurred whether or not in connection with any such claim or proceeding brought in connection therewith.

On April 30, 2012, after the master lease and subleases were terminated, and after GPMI filed for bankruptcy, the U.S. Bankruptcy Court issued an order directing defendants to vacate the demised premises.

Subsequently, landlord commenced the instant action by filing a summons and verified complaint in May 2012, alleging five causes of action. The first cause of action was for ejectment. The second cause of action sought an award of use

and occupancy for the fair rental value of the premises based on the defendants' holding over. The third cause of action was for indemnification pursuant to paragraph 23 of each of the subleases, including an award of attorneys' fees. The fourth and fifth causes of action were against defendant Robert Del Gadio and defendant Frank Mascolo individually based on personal guarantees. The complaint sought monetary damages; a declaratory judgment; and warrants of eviction.

The Del Gadio defendants filed verified answers and counterclaims, alleging that the Del Gadio defendants spent over $1 million in renovating and refurbishing the stations, upgrading equipment, providing for new equipment, modern technologies, cash registers, lighting, landscaping, bathroom facilities, painting, physical improvements to stores and bays, and canopies. The Del Gadio defendants first counterclaim alleged tortious interference with contract, and the second counterclaim alleged unfair competition.

The Mascolo defendants filed verified answers and counterclaims for costs and sanctions pursuant to Part 130 of the New York Rules of Court. Unlike the Del Gadio defendants, the Mascolo defendants did not assert counterclaims for tortious interference with contract and unfair competition.

Landlord moved by order to show cause in June 2012 for an order requiring

the defendants to pay landlord use and occupancy damages *pendente lite*, without prejudice to seek a higher amount. On June 11, 2012, the Court issued a temporary restraining order requiring the defendants to place into court the monies that they had collected, or were to collect, from the service station operators by June 12, 2012.

In an order dated July 2, 2012, Justice Schweitzer awarded use and occupancy in the total amount of $341,966.04 for the months of May and June 2012, without prejudice to all of landlord's rights and remedies.

When defendants failed to comply with the court's July 2, 2012 use-and-occupancy order, landlord sought to enforce the use-and-occupancy order and, at hearings on July 26, 2012, and August 2, 2012, the court granted landlord's request for a preliminary injunction giving landlord possession and monetary damages. The court issued an order and judgment directing defendants to pay landlord the sum of $434,233.80. At the July 26, 2012 hearing, however, the court permitted defendants to seek an offset against the $434,233.80 judgment which, if granted, would be a separate judgment in their favor reducing the amount of the judgment the court granted landlord, and the court issued a supplemental order to that effect. The defendants appealed and, with one minor exception, the court's order and judgment was affirmed by the Appellate Division, First Department

(Getty Props. Corp. v. Getty Petroleum Mktg. Inc., 106 A.D.3d 429 [1st Dept., 2013]).

Subsequently, the landlord and defendants filed a motion and cross-motion seeking various relief. Specifically, the landlord cross-moved for an order: a) granting summary judgment on liability on its five causes of action; and b) setting the matter down for a hearing on the amount of landlord's damages.

Justice Melvin Schweitzer issued a memorandum opinion dated June 13, 2013, stating in pertinent part as follows:

> Landlord is entitled to summary judgment on its second cause of action for U&O as a matter of law because the Appellate Division affirmed the U&O Order. Specifically, the Appellate Division held that:
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> > "The lack of privity of contract between the LLC defendants (the subtenants) and plaintiffs (the over-landlords) does not prevent the court from ordering the LLC defendants to pay use and occupancy to plaintiffs.... Nor is such an order prevented by the LLCs defendants' not being in possession of the subject premises (they had sub-subleased the properties to the operators of the gas stations), because their subleases with GPMI provide '[i]n the event of ... [sub-]sub-letting, or other transfer, ... Lessee [the relevant LLC defendant] shall continue to remain jointly and severally liable with its transferee to Lessor [GPMI] for the performance of all of Lessees' obligations for the remainder of the Term" (brackets and ellipses in original). AD Order, pp. 2-3.
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> Accordingly, the LLCs are liable for U&O. The issue now becomes

> how much is due. The amounts awarded in the U&O Order were based upon the last month's rents that GPMI was paying to Landlord before termination of the Master Lease. Such relief was expressly "without prejudice" to Landlord's seeking higher amounts from the LLCs.
>
> Landlord argues that the amount of U&O damages awarded should be increased based upon the terms of the subleases, pointing out that each of the subleases expressly provides that, if the LLC holds over after the expiration or termination of the subtenancy, that it is liable for "two (2) times the previous month's rent." Accordingly, Landlord may be entitled to a higher amount and the court directs that there be a hearing before a referee to determine the amount due during the holdover period for each of the sites.

(Memorandum Opinion dated June 13, 2013).

By order and judgment dated July 23, 2013, the court referred the matter to a special referee to hear and report with respect to landlord's claims for expenses, including attorneys' fees and all damages.

The court's award of attorneys' fees was affirmed by the Appellate Division by decision and order entered March 27, 2014 (Getty Props. Corp. v. Getty Petroleum Mktg. Inc., 115 A.D.3d 616 [1st Dept., 2014]) .

Subsequently, the parties appeared for a hearing before Special Referee Ira Gammerman. The referee declined to award any attorneys' fees, stating that, in his judgment, Justice Schweitzer had not stated any basis for an award of attorneys' fees.

Regarding the issue of use and occupancy, the referee recommended an award of use and occupancy but declined to decide whether the clause in the subleases providing for use and occupancy at two times the rent was an enforceable liquidated damages provision or an unenforceable penalty. Referee Gammerman stated that it was a legal issue, so his report states that "Judge Schweitzer ... decides whether or not it should be doubled" (Transcript of Hearing Before Referee Gammerman dated June 25, 2014, p. 31, lines 13-15).

On August 8, 2014, landlord moved to reject the report of the referee to the extent the referee denied landlord the right to seek attorneys' fees, and to confirm the report to the extent the referee awarded use and occupancy to landlord.

Justice Schweitzer issued a memorandum opinion dated August 20, 2014, stating that attorneys' fees "are rightfully due to the plaintiffs" and explaining the basis for such an award under specific enumerated sections of the master lease and subleases. The Court issued a renewed reference and resubmitted the matter to the referee.

Following a hearing, Referee Gammerman recommend an award of attorneys' fees in the sum of $1,438,474.80. He recommended further that the parties should be held jointly and severally liable for the entire fee.

In a memorandum opinion dated May 14, 2015, this Court awarding

landlord double use and occupancy, holding that where, as here, a provision in a commercial lease agreement provides for use and occupancy at two times the rent in the event of a holdover, such a provision is not a penalty as a matter of law.

I. Plaintiffs' Motion to Confirm Referee's Report Regarding Attorneys' Fees (Mot. Seq. 027)

Defendants' first contention is that there should have been no award of attorneys' fees pursuant to the indemnification provisions contained in the subleases. Defendants assert that Justice Schweitzer's order of renewed reference was an abuse of discretion and that attorneys' fees are not recoverable under the cited provisions of the master lease and sublease agreements.

Justice Schweitzer's order of renewed reference directing the referee to calculate the amount of damages is law of the case. Because this Court is bound by Justice Schweitzer's ruling, defendants' contention is without merit.

Defendants' second contention is that the amount of attorneys' fees recommended by the referee should be rejected as the amount is excessive and unreasonable as a matter of law. Defendants point out that the referee's recommended award of approximately $1.4 million is almost 400% the amount of the judgment obtained.

The determination of what constitutes a reasonable attorneys' fee is a matter

within the sound discretion of the court. "The attorney bears the burden of establishing the reasonable value of the services rendered, based upon a showing of the hours reasonably expended and the prevailing hourly rate for similar legal work in the community" (Lancer Indem. v. JKH Realty Group, LLC, 127 A.D.3d 1035, 1036 [2d Dept., 2015]). "The court should consider factors such as (1) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; (2) the lawyer's experience, ability, and reputation; (3) the amount involved and benefit resulting to the client from the services; (4) the customary fee charged for similar services; (5) the contingency or certainty of compensation; and (7) the responsibility involved" (Lancer Indem., 127 A.D.3d at 357-358 (internal quotation marks omitted)).

The record reflects that the special referee considered the enumerated factors. Landlord sought approximately $1.8 million in attorneys' fees, and the referee discounted the amount sought by 20%. The amount recommended by Referee Gammerman is not excessive in view of the circumstance that this contentious action has been vigorously litigated for several years, having during that time been the subject of extensive motion practice, litigation in federal court, actions commenced in Nassau County, and appearances before the Appellate Division (see, for example, Sempra Energy Trading Corp v. PG&E Texas VGM,

L.P., 284 A.D.2d 253 [1st Dept., 2001]).

Defendants' third contention is that any award of attorneys' fees should not be joint and several among each of the LLC defendants; instead, it should be apportioned *per capita* or *pro rata* based on each defendant LLC's share of the judgment in this action. Defendants point out that none of the subleases provides that a sublessee is liable for damages, including attorneys' fees, arising from a breach of any other sublease, so there is no contractual basis for imposing joint and several liability upon each of them for landlord's attorneys' fees.

The Mascolo defendants contend that the actions for which plaintiffs seek their defense costs were commenced by Mr. Del Gadio on behalf of several of the Del Gadio LLCs as part of his attempt to recover approximately $2 million in fixtures and other property that Mr. Del Gadio contended was being held wrongfully by landlord. The Mascolo defendants contend that those claims have nothing to do with the Mascolo LLC defendants. According to Mascolo, the counterclaims asserted against landlord in the instant action for any monetary damages were not made by any of the Mascolo defendants. Rather, such counterclaims were made only by thirteen of the Del Gadio LLCs. In other words, the Mascolo defendants' interests were different than the Del Gadio defendants' interests, inasmuch as Mr. Del Gadio alone decided to pursue his misappropriation

claims against landlord.

In response, landlord argues that Mascolo was "joined at the hip" with Del Gadio and defendants litigated the action as if they were one. Accordingly, liability for attorneys' fees should be joint and several.

In Becker v. Empire of America Federal Savings Bank, 177 A.D.2d 958 [4th Dept., 1991], the Court held that it was an abuse of discretion to make multiple defendants jointly and severally liable for an award of attorneys' fees where there was no indication that the defendants engaged in concerted action.

In the present matter, it is clear to the Court that the Del Gadio defendants dogged pursuit of their counterclaims and claims for misappropriation of trade fixtures significantly increased landlord's attorneys' fees. The Court notes that the Mascolo defendants did not assert such counterclaims. In this sense, it cannot be said that the Mascolo defendants engaged in entirely "concerted action" with the Del Gadio defendants. Under such circumstances, lumping all of the defendants together and making the Mascolo defendants jointly and severally liable for the entire award of attorneys' fees would be unjust. Apportionment is appropriate.

II. Defendants' Motions to Reargue/Renew (Mot. Seq. 028 and 029)

Defendants move for: 1) leave to reargue/renew the order dated May 15, 2015, confirming the report of the special referee to the extent that it awarded

landlord double use and occupancy in the sum of $417,298.54; and 2) staying the entry of the proposed judgment against defendants. Landlord opposes the motion.

The rule that "a motion for renewal be based upon newly discovered evidence is a flexible one, and a court, in its discretion, may grant renewal even where the additional facts were known to the party seeking renewal at the time of the original motion, provided the moving party offers a reasonable justification for the failure to submit the additional facts on the original motion" (Grantat v. Walbaum's Inc., 289 AD2d 289, 290 [2nd Dept. 2001] (other citations omitted)).

"A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided. Nor does reargument serve to provide a party an opportunity to advance arguments different from those tendered on the original application. It may not be employed as a device for the unsuccessful party to assume a different position inconsistent with that taken on the original motion." (Foley v. Roche, 68 A.D.2d 558, 567-568 [1st Dept., 1979]).

Defendants contend that the Court erred in awarding double use-and-occupancy to the landlord. Specifically, defendants assert that landlord should be

required to disclose all amounts it has received from any occupant of a premise previously leased to a defendant LLC to enable defendants to demonstrate in an evidentiary hearing that, in the circumstances of this case, the doubling of rent constitutes an unenforceable penalty.

Defendants assert that our memorandum opinion awarding landlord double use-and-occupancy overlooked the decision of the Court of Appeals in Truck Rent-A-Center v. Puritan Farms 2nd, Inc., 41 N.Y.2d 420 (1977).

The principal issue before the Court in Truck Rent-A-Center was whether a provision in a truck lease agreement which required the payment of a specified amount of money to the lessor in the event of the lessee's breach was an enforceable liquidated damages clause, or, instead, provided for an unenforceable penalty. The Court held that a provision which requires, in the event of contractual breach, the payment of a sum of money grossly disproportionate to the amount of actual damages provides for a penalty and is unenforceable.

Truck Rent-A-Canter is distinguishable in key respects. There, the defendant was in the business of furnishing milk and milk products through home delivery. Defendant leased a fleet of 25 new milk delivery trucks from plaintiff. By contrast, the instant matter involves real estate. As we pointed out in our previous memorandum opinion, it is well settled under New York law that an

award of double use-and-occupancy based on a holdover of leased premises is not a penalty as a matter of law. Truck Rent-A-Center does not overrule that line of cases, nor does it state that an evidentiary hearing is required in every liquidated damages case.

The second case cited by defendants is 172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Association, 24 N.Y.3d 528 (2014).

In Van Duzer, a landlord sued a tenant for breach of a commercial lease agreement. The trial court awarded summary judgment to landlord. The Court of Appeals modified and remitted for a hearing, holding that the trial court should have permitted the tenant to present evidence in support of their contention that the undiscounted acceleration of all future rents constituted an unlawful penalty.

Van Duzer is readily distinguishable. As we stated above, the sublease agreements at issue in the present matter contain holdover clauses providing for double use-and-occupancy. By contrast, the lease agreement in Van Duzer contained an acceleration clause, which provided that if the lease was terminated, the tenant was liable for all future amounts due, undiscounted, for the 8 ½ years remaining on the lease, while the tenant was not in possession.

Because the facts of Truck Rent-A-Center and Van Duzer are fundamentally different from the present facts, defendants have failed to show that the Court

misconstrued the facts or misapplied any controlling principles of law.

Accordingly, it is

ORDERED that the motion to confirm the report of the referee as to attorneys' fees (Mot. Seq. 027) is granted in part; and it is further

ORDERED that the motions to reargue/renew (Mot. Seq. 028 and 029) are denied; and it is further

ORDERED that the motion for permission to file an undertaking to stay enforcement of the judgment pending appeal pursuant to CPLR 2301 and 5519(a)(2) is granted.

Settle judgment on notice.

Date: JAN 25, 16
New York, New York

Anil C. Singh