SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: TRIAL PART 6

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JCF ASSOCIATES LLC,

Plaintiff,

-against-

TAKE TWO OUTDOOR MEDIA LLC,

Defendant.

_____ X

INDEX NO. 514942/2016

HON. JOY F. CAMPANELLI
J.S.C.

DECISION AND ORDER AFTER TRIAL

A bench trial was conducted on the above-referenced ejectment and trespass action on November 1 and 2, 2022. Findings of facts and conclusions of law were electronically filed on January 20, 2023. Melanie Wiener Esq., Justin Kelton, Esq, from Abrams Fensterman, LLP and Chris Georgoulis, Esq of Georgoulis PLLC appeared on behalf of Plaintiff, while Evan Weintraub, Esq. from Wachtel Missry and Peter Pruzan, Esq. appeared on behalf of Defendant. This action seeks an ejectment of the defendant and monetary damages for trespass.

Plaintiff called Chris Georgoulis, (hereinafter Georgoulis), who testified in relevant part, as follows: He has a 50% membership interest in JCF Associates LLC, (hereinafter JCF), and serves as a managing member of JCF. Georgoulis and another JCF member handle all the office administration, including paperwork, paying of bills and lease drafting. Georgoulis testified that he is the ultimate decision maker for JCF as he stated that, “it’s always, I say we do it.” JCF owns and operates commercial property in Brooklyn, and said property contains a billboard, which is the subject of this lawsuit. The billboard is located at the mouth of the Brooklyn Battery Tunnel as you enter the tunnel to go into Manhattan.

JCF had purchased the property from Robson Sales Corp. at a time when Bob Sloan was the representative of Robson Sales Corp. The lease was drafted by Albert Cohen, who was a representative of the defendant. When JCF bought the property, JCF understood that Sign Up USA, Inc. would be their tenant for the billboard. Section 18A of the lease contains handwritten notes that say Bob Sloan's consent must be given and shall not be unreasonably withheld. JCF did not receive notice from Sign Up USA, Inc. that it wanted to assign the lease to another entity, nor did JCF receive any request from Sign Up USA, Inc. for consent to assign the lease. JCF learned that Sign Up USA, Inc. was dissolved during a Civil Court proceeding between the parties. JCF initiated the Civil Court proceeding against Sign Up USA, Inc. after it received a complaint that work being done on the billboard was blocking access to the hotel. Georgoulis checked the insurance certificates and realized that the certificates did not contain an endorsement naming JCF as an additional insured as required. Consequently, JCF sent a letter to Sign Up USA, Inc., hired an attorney and commenced an action in Civil Court against Sign Up USA, Inc.

During the Civil Court litigation Georgoulis claimed that the lease was invalid as Bob Sloan had no authority to execute the lease. Bob Sloan was deceased at that time. In that Civil Court litigation, the parties reached an agreement and stipulated that JCF would continue to accept payment for rent as use and occupancy without prejudice. In addition, JCF discovered that Sign Up, USA, Inc. had assigned the lease. JCF had been receiving checks initially from Sign Up USA, Inc. At some point, the name on the checks changed to Sign Up USA without the suffix. JCF continued to deposit the checks regardless of the changes. During the course of the civil litigation, JCF became aware that Take Two Outdoor Media LLC, (hereinafter Take Two) claimed to be the assignee of Sign Up USA, Inc. Georgoulis admitted that he never served a

notice of default as it was not required, despite the fact he believed a default occurred due to the impermissible assignment. There is no paragraph or reference in the lease that provides for termination. The Civil Court action ended in 2018, after the Appellate Division upheld the dismissal of that action.

The lease in question expired on December 31, 2016 and contained a renewal option. JCF received a letter at the beginning of May 2016 exercising the option to renew the lease. The addressor was Take Two. Since 2014 Georgoulis was aware that Take Two claimed to be the assignee in possession at the time. However, JCF ignored the letter because, according to Georgoulis, the renewal was not done properly. He stated that the lease could be renewed only at the lease expiration on December 31, 2016.

In addition, Georgoulis testified that he received rent checks for the first three months of 2017 but that they were not for the correct amount, which transformed the lease into a "month to month." The checks he received for January, February and March 2017 contained a payment in the same amount of the old rent, not the renewal rent. The payor on the checks was Sign Up USA, LLC. In April 2017, Georgoulis received a payment of the proper renewal rent and a payment containing the difference between the old and renewal rent for the first three months of 2017. The checks were endorsed by JCF and did not bear any limitation or condition that the checks were accepted without prejudice.

Georgoulis is seeking ejectment for possession of the sign and damages from the time Defendants breached the lease to present. He started calculating damages based on actual figures he received from the gaming commission, but then hired an expert. However, Georgoulis testified that a portion of his calculations are estimates and he reduced the estimates purposely. Those calculations are not in evidence.

Plaintiff's witness, Fred Marziano, (hereinafter Marziano), testified, in relevant part, as follows: He is an expert in the insurance industry and specializes in commercial insurance. He was retained by Plaintiff approximately two years ago to present his opinions regarding the legitimacy, accuracy, and the enforceability of the certificates of insurance relating to the subject lease. Marziano testified that the lease contains an insurance requirement provision, which requires the lessee to provide lessor as an additional insured. If the additional insured is not named by endorsement or named within the body of the insurance itself, they are not covered. Naming the additional insured by certificate is not sufficient to qualify or confirm coverage. Upon reviewing insurance documents, Marziano testified that the insured, Take Two's certificate of liability insurance produced by the policyholder's broker was issued indicating that the certificate holder is JCF Associates. However, the additional insured is not confirmed without the endorsement. According to the testimony, Defendant's insurance certificates do not meet the requirements set out in the lease.

The 2008-2009 certificate of insurance does not satisfy the lessee's obligation to provide lessor with insurance per the lease's requirement, as the certificate of insurance was not provided 30 days in advance, but it was produced on May 3, 2012, for a policy that was incepted December 31, 2009. In addition, there is no endorsement on the policy and the documents do not list the requisite limits of $5 million bodily injury and $100,000 property damage.

The 2010-2011 certificates were also issued multiple years after their effective date, and not within the 30-day advance requirement of the lease. There is no endorsement that indicates that JCF is named as an additional insured. The 2011-2012 certificates have no endorsement naming JCF as an additional named insured and do not include the proper notice requirements of modification and cancellation. Also, they were issued years after their effective date.

In addition, the 2012-2013 certificates contain no endorsement naming JCF as an additional insured and were issued years after their effective date. Also, they do not contain a notification requirement if there is a modification to the policy. The 2013-2014 certificate indicates that there was coverage for the additional insured JCF. Lastly, Marziano testified that he had not seen any endorsements for the policy years 2009-2013 for JCF.

After the testimony of Marziano, Plaintiff rested, and motions were reserved.

Defendant's witness, Albert Cohen, (hereinafter Cohen), testified, in relevant part, as follows: Cohen has been in the real estate and billboard business for more than twenty-five years and is a member in the ownership interest of Sign Up USA, Inc. Cohen was an employee and officer starting from 1997/1998 though the end of 2005, beginning of 2006. While a member of Sign Up USA, Inc., Cohen's duties included everything related to the daily operation of the company such as acquiring sites, developing relationship with landlord and getting new locations for the company.

Cohen negotiated the lease and the 15-year renewal option for the billboard at 120 Hamilton Avenue between Sign Up USA, Inc and Robson Sales Corp. During the renewal period the rent increased by three percent per annum. The option to renew could be exercised during the term of the lease. This was initialed by Robert Sloan and Cohen. Cohen testified that they were supposed to keep Robert Sloan in the loop and let him know if they sold the business.

With respect to the checks, Sign Up USA LLC served as a back-office management of the company and would write out the checks to be issued and send them out. They acted as a management company for more than one entity. The checks were signed by Ralph Tawil, who is a member in the ownership interest of Sign Up USA LLC, American Signs and Take Two. In 2005, there was a sale of Sign Up USA, Inc's business and all the assets were sold off. Cohen

testified that Take Two sent a letter to JCF Associates, to extend the lease for 15 years by certified mail return receipt. However, they never received a response from JCF Associates. After the expiration of the existing lease on December 31, 2016, for the first three months of 2017, they sent checks using the rent amount of the original lease. In April 2017, they sent the check containing the rent amount of the renewed lease and the catch-up rent for January, February, and March. Accounting caught the error and rectified it. Cohen testified that they never received communication from the landlord regarding the rental amounts that were being paid during the term of the original lease or after the expiration of the initial term of the lease.

Defendant's witness, Ralph Tawil, (hereinafter Tawil) testified, in relevant part, as follows: Tawil formed Sign Up USA, Inc. in the late 1990's primarily for the purpose of management and operations of outdoor advertising. He was a shareholder along with his father, Saul Tawil. Tawil's duties included all operations and management of the corporation. Sign Up USA, Inc. procured a lease at the subject property located at 120 Hamilton Avenue in order to operate the outdoor advertising billboard. Tawil testified that at the time of the lease signing, Bob Sloan was present.

In September 2005, Sign Up USA, Inc. assigned the lease to a joint venture formed with Van Wagner (or an affiliate of Van Wagner) where Sign Up USA, Inc. would contribute some assets. Tawil and his father signed the assignment in their personal capacity, and Tawil also signed on behalf of Sign Up USA, Inc. According to the assignment, Take Two was the new company that was created as a result of the joint venture between Van Wagner and Sign Up USA, Inc. There are seven addresses listed on the assignment, each of those addresses represent a stand for a lease that was in place for maintaining outdoor advertising structures. All these leases were contributed to the new company Take Two, as a result of the joint venture. Sign Up

USA, Inc. owned two leases out of the seven – one for the property located at 120 Hamilton Avenue while the other for the property located at 150 East 153rd Street. The operating agreement for American Sign Company was executed by Tawil, his father and Albert Cohen. American Sign Company was owned by Tawil, his father and Cohen. Cohen is not a member of the Tawil family and has a 15% membership interest in the company. American Sign Company contributed its three sign locations to Take Two. The operating agreement of Take Two was signed by Tawil and his father. Tawil also signed on behalf of American Sign Company LLC, which was an entity in which Tawil was a partner and was formed for the purpose of maintaining and operating outdoor advertising signage. Tawil's father and Cohen were also members of the American Sign Company. Mark Johnston signed for Van Wagner Communications, LLC. Mark Johnston was the chief operating officer of Van Wagner back in 2005. American Sign Company and Van Wagner each had a 50% membership interest in Take Two. There was an assignment and assumption agreement between Sign Up, USA, Inc. and American Sign Company LLC. There was also an assignment agreement between American Sign Company LLC and Take Two where American Sign Company LLC contributed sign locations to the new venture, Take Two.

After the assignment by Sign Up USA, Inc. of the lease at 120 Hamilton Avenue to American Sign Company and the creation of Take Two, Sign Up, USA, Inc. dissolved on January 13, 2006. There were no assets left in the company, hence the dissolution. Sign Up USA, Inc. received $14,000,000.00 in consideration for assigning its assets to Van Wagner, which was distributed to the partners. Tawil testified that the landlord was never notified of the lease assignment. Outfront Media is currently operating the billboard.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court finds that the Defendant timely exercised its option to renew, and the renewal of the lease is valid. It is undisputed that the Plaintiff received Defendant's lease renewal notice approximately six (6) months prior to the termination of the lease. Plaintiff's argument that the renewal was required to arrive on December 31, 2016, and no other date, is unavailing. The Court agrees with Defendant's argument that New York does not permit such a restrictive interpretation of the renewal provision. However, even if it did, the Court finds that Plaintiff waived any objections to the renewal.

The law is clear that, under similar circumstances, when a landlord accepts rent from a tenant "with knowledge of particular conduct which is claimed to be a default, the acceptance of such rent constitutes a waiver by the landlord of the default. (Woollard v. Schaffer Stores Co., 272 N.Y. 304, 312, 5 N.E.2d 829, 832; Murray v. Harway, 56 N.Y. 337.) The acceptance of the rent is in effect an election by the landlord to continue the relationship of landlord and tenant. […] The lease is to be given a reasonable construction in light of that which the parties intended and that which was sought to be achieved by the parties. (See Farrell Lines v. City of New York, 30 N.Y.2d 76, 82, 330 N.Y.S.2d 358, 361, 281 N.E.2d 162, 164.)" Atkin's Waste Materials, Inc. v. May, 34 N.Y.2d 422 (1974).

Here, Plaintiff chose to willfully ignore the renewal notice and continued to accept rent during the pendency of the lease and after its alleged expiration. In addition, Plaintiff failed to send Defendant a notice that the renewal was rejected. This is particularly troubling to the Court considering that Plaintiff, a seasoned attorney, testified that the renewal notice was rife with issues that would render the renewal invalid. However, even if the renewal notice was invalid, as Plaintiff asserts, Defendant was not given the opportunity to cure. Instead, Plaintiff lulled Defendant into a false sense of security by continuing to accept rental payments.

With respect to the assignment, this Court finds that the assignment of the lease did not require Lessor's consent, and is, therefore, valid. Plaintiff relies on the handwritten addition to Paragraph 18A of the lease requiring that, "Mr. Bob Sloan's consent must be given which shall not be unreasonably withheld" to argue that Plaintiff's consent as the new Lessor, was required for the assignment. The Court disagrees with Plaintiff's argument and finds that the provision applies only to Bob Sloan personally. Clearly, upon Bob Sloan's death, there was no requirement to obtain Lessor's consent for an assignment. Moreover, Georgoulis testified that he had knowledge of the lease assignment to the Defendant since 2014. However, although he testified that he believed that the assignment constituted a default since it was done without his consent, Georgoulis failed to send a notice of default to Sign Up, USA, Inc. or Take Two. Instead, he continued accepting checks from the Defendant.

Furthermore, Plaintiff unavailingly tries to argue that his acceptance of rent was justified as a result of a stipulation that was executed during the Civil Court action. The Court finds that said stipulation did not survive the Civil Court action. The Civil Court action was a summary proceeding, while the instant matter is a common law ejectment proceeding.

More importantly, the evidence presented at trial demonstrates that there is a subsisting landlord tenant relationship between the parties and predicate notice is required to terminate the lease. "It is well-settled law in the Second Department that "when there is a valid landlord-tenant relationship, a predicate notice must be served on the defendant before commencement of an ejectment action." (Ricciardo v Ricciardo, 6 Misc 3d 223, 225 [Civ Ct, Kings County 2004] [citations omitted]; see also, Commercial Hotel v White, 194 Misc 2d 26 [App Term, 2d Dept 2002]; Gerolemou v Soliz, 184 Misc. 2d 579 [App Term, 2d Dept 2000]; Kaur v Sobhey, 5 Misc 3d 1012[A], 2004 NY Slip Op 51341[U] [Civ Ct, Kings County 2004].) In the absence of the

giving of such notice, an ejectment action will not lie. (Gerolemou v. Soliz, *supra*.)" Prana Growth Fund I, L.P. v Lazala, 8 Misc.3d 667 (Supreme Ct, New York County 2005).

Here, the evidence is uncontroverted that Plaintiff failed to serve a notice of termination to Defendants. Instead, Plaintiff failed to reject Plaintiff's renewal and continued to accept rent payments even after the alleged expiration of the original lease. Accordingly, this Court finds that, in light of the above, a landlord-tenant relationship exists, that acceptance of the rent constituted a waiver of known defaults, and the action cannot be maintained absent a predicate notice.

Accordingly, Defendant's motion for a directed verdict dismissing Plaintiff's complaint is granted.

This constitutes the decision and order of this Court.

Dated: March 16, 2023
Brooklyn, NY

Joy F. Campanelli
HON. JOY F. CAMPANELLI, J.S.C.