Aryeh Realty Corp. v 18 E. 69th St. Tenant, LLC
2023 NY Slip Op 34804(U)
September 20, 2023
Civil Court of the City of New York, New York County
Docket Number: Index No. LT-308603-21/NY
Judge: Aija Tingling
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Civil Court of the City of New York

County of New York: Part 52

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ARYEH REALTY CORP.

Petitioner-Landlord,

-against-

18 E. 69TH STREET TENANT, LLC a/k/a.,
18 EAST 69TH STREET TENANT, LLC,
FIVESTORY NEW YORK
KAREN MURRAY
1020 Madison Avenue
Ground Floor, Second Floor and Basement
New York, New York 10075,

Respondents-Tenants

"XYZ Corporation"

Respondents-Undertenants.

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Index No.: LT-308603-21/NY

DECISION/ORDER

Aija Tingling, J.

Appearances

Petitioner, by Lisa Faham-Selzer, Esq of Kucker Marino Winiarsky & Bittens, LLP and Doreen Fischman, Esq. of Fischman & Fischman

Respondent by Ned H. Bassen, Esq. of Dentons US LLP

Petitioner commenced this non-payment action on or about December 14, 2021, seeking $339,250 in rental arrears plus late fees and attorney's fees in connection with a three-year commercial lease agreement effective March 10, 2020, through February 28, 2023. The central dispute of this case is monthly rental rate and amount of the arrears.

A bench trial was conducted and completed on June 13, 2023. The court heard testimony from Andrew Aryeh on behalf of Petitioner and Karen Murray on behalf of Respondents. The court received and review Petitioner's Evidence marked as Exhibits 1 through 6 and Respondent's Evidence marked as Exhibits A through E. The court had the ability to observe the demeanor and credibility of the witnesses and determine the veracity of their testimony and evidence in this matter. The court makes the following findings of fact and conclusions of law.

Testimony

Andrew Aryeh a managing agent of Petitioner, which owns the commercial space located at 1020 Madison Avenue. Respondent, 18 East 69th Street Tenant is owned and run by Karen Murray and occupies space as a commercial tenant. In 2020, the parties entered into a commercial lease agreement, signed by his father Benjamin Aryeh and Respondent Murry, for $75,000 a month.

In preparation for his testimony, Andrew Aryeh reviewed the rent statements and ledger created in his office for the period of the lease terms, including and through June 2023. According to Petitioner's rent ledger, Respondents paid the monthly rent per the lease for a period of time before accruing arrears. The security and deposit were applied towards the arrears and Respondents were served with a notice to cure and replenish the security and deposit. When Respondents did not comply, Petitioner served a fourteen-day notice to cure. The lease expired at the end of February 2023, but Respondents remained in possession. As a holdover tenant, Respondents are now liable for triple rent per the terms of the lease, in addition to the base rent arrearage.

On cross-examination, he testified that after the lease expired, Respondent paid $60,000 per month instead of $75,000. He was unaware of whether rent statements were sent to Respondent after the lease expired. He was shown checks written out by his father to Respondents' company with an indication they were for March rent and the security deposit. He testified that his father is an art dealer and leased the premises to Respondents in order to hang his art in the leased space. He was aware that his father sometimes borrowed money from the corporation for investments, but regardless of any ancillary arrangements, the monthly rent was $75,000.

In support of its case, Petitioner submitted copies of the deed for the property, tenant statement, fourteen-day notice to cure, the lease agreement and email communication between Respondent and Benjamin Aryeh concerning a side agreement. The court took judicial notice of the notice of petition and petition and a Supreme Court summons and complaint filed by Respondent against Petitioner and Benjamin Aryeh. Petitioner is also seeking to amend the petition to reflect all arrears through June 2023.

Karen Murray testified that Respondent, 18 East 69th Street Tenant LLC, owns her company, Five Story, a women's boutique. When she met Benjamin Aryeh in early 2020 she made it clear that she could not afford more than $60,000 a month in rent to which Mr. Aryeh agreed. On March 10, 2020, the parties signed the lease and Benjamin Aryeh acknowledged that she would receive a monthly rent credit of $15,000. She paid $225,000 for as a three-month security deposit and another $75,000 for one month's rent. Benjamin Aryeh wrote her a check to her company for $45,000 and another for $15,000.

Respondent Murray spent $450,000 to build out the space and sustained $5.7 million in losses due to the closure of her store between March 10, 2020, and July 8, 2020, due to COVID-19. She did not receive any COVID relief money, but pursuant to the lease agreement, she received rent credit for April, May and June 2020. Each month Mr. Aryeh's handyman delivered

a rent statement for $75,000, with a handwritten note indicating a credit for $15,000. She never paid the full $75,000 rent. Between March 2020 and May 2020 Mr. Aryeh had a professional hang paintings on the wall in her store. Although she and Mr. Aryeh discussed sharing profits and losses, nothing was reduced to writing and denied that the $15,000 rent credit on her rent statements were in exchange for displaying the paintings on the wall.

The lease expired on February 28, 2023. She testified that Andrew Aryeh asked her to remain in the space after the expiration of the lease or at least until they could find another tenant, which she did. She paid $60,000 a month, until she received notice to terminate on June 1, 2023. She planned to vacate the premises on June 30, 2023.

On cross-examination, Ms. Murray testified that she has been in business as a retailer since she signed the lease. She purchased Five Story from another owner who was leaving its previous location. Although she had an attorney review the lease, over the phone, he did not assist with any negotiations.

In support of their defense, Respondents submitted copies of checks written from Benjamin Aryeh to Five Story, copies of the rent statements documenting monthly $15,000 rent credits, email correspondence between Benjamin Aryeh and Karen Murray concerning the $15,000 credit, a notice to cure sent in May 2021 and Respondents' own expense ledger.

Arguments

Petitioner maintains that the monthly rent was $75,000. Respondents admittedly never paid the full $75,000 per month and acceptance of any money by Petitioner did not waive any rights to seek the full rent. Petitioner acknowledges that Respondents paid $60,000 a month and was extended a $15,000 a month credit, however, the credit was issued from Benjamin Aryeh's personal account in exchange for an 11% interest in Respondents' business. Further, the lease agreement contained a no oral modification clause. As Respondent failed to pay rent per the terms of the lease, Petitioner is entitled to recover the three-month rent concession. Additionally, Petitioner is entitled to holdover rent as Respondents remained in possession after the expiration of the lease. Petitioner also seeks attorney's fees.

Respondents argue that the lease was modified pursuant to an oral agreement based on the conduct of the parties and therefore the doctrine of equitable estoppel applies. Notwithstanding the lease terms, the landlord agreed to refund $15,000 a month, wrote checks for $15,000 to Five Story and Respondent's ledger also indicates a $15,000 credit each month. Petitioner introduced a new rent ledger, created the day of trial, which excluded the $15,000 credits and should not be considered. Further, Respondents did not holdover as the landlord requested that they remain in possession and did not serve a notice of termination until June 1, 2023.

Respondent cites to several cases in support of her claim for equitable estoppel.[1] It is Respondents' position that these cases stand for the proposition that "where there is partial performance of oral modification sought to be enforced, court may consider not only past oral exchanges, but also conduct of parties." *Rose v. Spa Realty Assocs*., 42 N.Y.2d 338, 366 N.E.2d 1279 (1977). "Even where a contract contains a no-oral-modification clause, a party can overcome a no-oral-modification clause by showing either partial performance or equitable estoppel." *Butler v. Sheerer*, 51 Misc. 3d 1209(A), 37 N.Y.S.3d 206 (2016).

Discussion and Analysis

Amendment of Petition

Petitioner seeks to amend the complaint to reflect arrearage through June 2023, with interest, fees, costs and disbursements. Petitioner argues that the court permits amending the pleadings at any stage to conform to the evidence and should be freely given absent surprise or prejudice.

The court finds that there would be no surprise or prejudice to Respondents by conforming the pleadings to the evidence as this action was commenced two years prior to the case being heard for trial. *Am. Sci. Lighting Corp. v. Hamilton Plaza Assocs*., 144 A.D.3d 614, 40 N.Y.S.3d 485 (2016). Accordingly, the request to amend the pleadings to conform to the evidence is granted.

Lease Modification and Base Rent

"A lease, like any other contract, is to be interpreted in light of the purposes sought to be attained by the parties." (*Farrell Lines v. City of New York*, 30 N.Y.2d 76, 281 N.E.2d 162, 330 N.Y.S.2d 358 (1972). Generally, when a "lease contains a clause requiring modification of its terms to be in a writing signed by the landlord, oral modification is precluded" (*see Aris Indus. v 1411 Trizechahn-Swig*, 294 A.D.2d 107, 744 N.Y.S.2d 362 (1st Dep't 2002); General Obligations Law § 15-301(1). However, there are limited exceptions created through case law which permit the enforcement of an oral modification to a written contract.

In *Rose v. Spa Realty Assocs.*, 42 N.Y.2d 338, 366 N.E.2d 1279, 397 N.Y.S.2d 922 (1977), cited by Respondents, the Court of Appeals held that an oral amendment is enforceable where there is partial performance by the parties, "only if the partial performance be unequivocally referable to the oral modification is the requirement of a writing under section 15-301 avoided." *Id.* at 344. Alternatively, an oral change to a written contract may also be enforced under the principle of equitable estoppel in that "once a party to a written agreement has induced another's significant and substantial reliance upon an oral modification, the first party may be estopped from invoking the statute to bar proof of that oral modification." (*Id.*)

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[1] *Juan RAO, a/k/a, Sherry Rao and Lima China, Ltd., Plaintiffs, v. International Licensing Industry Merchandisers' Association, Charles M. Riotto, China Toy & Juvenile Products Association and Mei Liang, Defendants*., 2012 WL 10125045 (N.Y.Sup.); *Butler v. Sheerer*, 51 Misc. 3d 1209(A), 37 N.Y.S.3d 206 (2016); *Rose v. Spa Realty Assocs*., 42 N.Y.2d 338, 366 N.E.2d 1279 (1977).

As defined by the Court of Appeals, an estoppel

> is imposed by law in the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought." *Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 N.Y.2d 175, 436 N.E.2d 1265, 451 N.Y.S.2d 663 (1982), citing *White v. La Due & Fitch*, 303 N.Y. 122, 100 N.E.2d 167 (1951).

According to the lease terms monthly rent was $75,000 for the first year, $77,250 for the second year and $79,567.50 for the third year. Section 104 of the lease rider also required that any modification to the lease be reduced to writing signed by the parties.

Respondent Murray credibly testified that she signed the lease in reliance upon Benjamin Aryeh's agreement to refund her $15,000 each month. This is supported by Petitioner's original ledger, documenting the credit through May 2021. A notice to cure sent by Petitioner in May 2021 also documented the reduced rental amount as the arrearage. The $15,000 monthly credit was further confirmed in an email correspondence between Benjamin Aryeh and Karen Murray. The email did not state the period for which the credit would be extended, or that it was in conjunction with a side partnership deal. Based on the evidence submitted, it is apparent to this court that Benjamin Aryeh made an agreement with Karen Murray, and acted in accordance with that agreement, which he confirmed in writing.

The court finds that Andrew Aryeh testified credibly. However, his testimony was limited to the standard terms of the lease document and a rent ledger generated the day of the trial. Notably, Petitioner's rent ledger did not document any of the $15,000 credits extended to Respondents by Benjamin Aryeh, who as President, negotiated and signed the lease on behalf of Petitioner. Andrew Aryeh was neither privy to any of the discussions, negotiations or agreements between Benjamin Aryeh or Respondent Murray nor did he have any independent knowledge of the performance of the parties under the lease. His conclusory statement that the $15,000 credits were part of a side agreement between Benjamin Aryeh and Respondent Murray for a stake in Respondents' business and/or profits are not supported by the evidence. Such information would be in the possession of Benjamin Aryeh; however, he was not produced as a witness in this trial.

Accordingly, the court finds that Respondents are entitled to the $15,000 credit each month for the lease terms, based upon both the partial performance of the parties and the doctrine of equitable estoppel. As Petitioner's President, Benjamin Aryeh's actions in extending a $15,000 monthly rent credit is "unequivocally referable to the oral modification" at issue here and is documented by the evidence submitted by both parties as discussed above. *Rose, supra.* Thus, the parties' performance of the oral modification is sufficient to avoid the application of GOL 15-301. Furthermore, the court finds that Respondents justifiably relied upon the oral modification of the reduced rental amount as they paid that amount for the majority of the lease period except for the months when no or partial payments were tendered). To now hold and enforce Petitioner's reserved rights in spite of the parties conduct to the detriment of

Respondents would result in an unjust result. As such, Petitioner is equitably estopped from seeking the full rent under the lease or recoupment of the three-month rent concession.

The court concludes on the issue of monthly rent that Respondents are liable for $60,000 a month for the first year, $62,250 a month for the second year, and $64,567.50 a month for the third year, inclusive of the $15,000 monthly rent credit. For the first year of the lease, with payments starting July 2020 through February 2021, Respondent made payments in the amount of $220,000 towards the yearly rent of $495,000 (accounting for the three-month concession and $15,000 monthly credit). This left a rent balance of $275,000. In the second year of the lease, March 2021 through February 2022, Respondents made total rent payments of $622,500 towards the yearly rent of $747,000, leaving a balance of $124,500. In the third year of the lease, March 2022 through February 2023, Respondents made total rent payments of $774, 804 towards the yearly rent of $774,810, leaving a balance of $6. Thus, Respondents are liable for $399,506 in base rent for the lease period.

Additionally, the lease provides that Respondents are responsible for electricity charges as additional rent. The evidence reveals that there remain three outstanding electricity bills as follows: $15,836.23 for March 23, 2021, through December 20, 2022; $1,886.38 for December 20, 2022, through March 22, 2023; and $1,139.17 for March 22, 2023, through May 18, 2023. Respondents have not disputed the electricity charges totaling $18,861.78 and thus are liable for this amount in addition to the outstanding base rent.

Holdover Rent

Petitioner argues that it is entitled to holdover rent at three times the amount of the base rent as Respondents remained in possession of the premises for an additional four months beyond the expiration of the lease. Yet, this action was commenced as a "non-payment" proceeding in 2021 and not a "holdover." "Petitioner's choice to pursue a non-payment proceeding under RPAPL 711(2) is in fact the very antithesis of declaring respondent's default and terminating the lease. The nonpayment proceeding necessarily is premised on respondent being a tenant that has failed to pay rent under an unexpired rental agreement." *Tower Cleaners, Inc. v. Parker Fairway Cleaners, Inc.*, 2013 N.Y. Misc. LEXIS 4974 (Sup. Ct. N.Y. Cnty 2012)(quoting *Frost Equities Co., LLC v. New York Brasserie Ltd.*, 5 Misc.3d 1004(A), 798 N.Y.S.2d 709 (Civ. Ct., N.Y. Cty., 2004)).

As the lease was still in effect at the time this non-payment action was commenced, and Petitioner did not seek to terminate the lease by serving a notice of termination, Petitioner cannot now recover against Respondents as a holdover tenant herein. Notwithstanding, Respondents continued to pay $64,567 in monthly rent for March 2023 through June 2023. Respondents are in arrears an additional $2 as the rent at that time was $64,567.50,

Attorneys' Fees

Courts have long held that lease provisions for recovery of attorney's fees are valid and enforceable, where a landlord prevails in a summary proceeding brought because of a tenant's breach of the lease. *Cier Indus. Co. v. Hessen, 136 A.D.2d 145, 526 N.Y.S.2d 77* (1st Dep't.1988), *see also Stribula v. Tisdale*, 21 Misc. 3d 137(A), 873 N.Y.S.2d 515 (App. Term, 1st Dep't.

2008). The lease agreement herein provided for Petitioner's recovery reasonable attorneys' fees as the prevailing party in prosecuting or defending any action or proceeding for Respondents' default in the covenant to pay rent. The prevailing party is considered to be the party that prevails with respect to "the central relief sought". *Wiederhorn v. J. Ezra Merkin*, 98 A.D.3d 859, 952 N.Y.S 2d 478 (1st Dep't 2012).

The central issue of Petitioner's case was not whether Respondents owed arrears, but whether Respondents' monthly rent was the amount designated in the lease. As such, the court does not find Petitioner to be the prevailing party herein. Therefore, the application or attorneys' fees is denied.

Based on the foregoing, it is hereby

ORDERED that Petitioner is granted a money judgment in the amount of $399,508 with interest from December 14, 2021, for rental arrears.

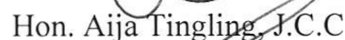
ORDERED that Petitioner is granted a money judgment of $18,861.78 for outstanding electricity charges.

ORDERED that an award of attorneys' fees is denied as Petitioner is not the prevailing party.

ORDERED that a copy of this order be served upon the parties with Notice of Entry.

This constitutes the Decision and Order of the Court.

Dated: September 20, 2023
New York, New York



Hon. Aija Tingling, J.C.C