SUPERIOR COURT OF NEW JERSEY

Bruno Mongiardo
JUDGE, CIVIL DIVISION

PASSAIC COUNTY COURTHOUSE
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JJF Realty LLC v. Rhonda Mallek, Jon Mallek and Jonda Essentials Inc.
t/a The Fine Grind
Docket No. LT-5835-13

OPINION OF THE COURT

This matter comes before the Court on Plaintiff's summary dispossess action seeking the eviction of Defendants on a commercial lease. The Plaintiff asserts three grounds for the basis of the eviction: the filing for Bankruptcy by the individual Defendants, the failure to pay rent or late fees in a timely manner, and the failure to pay water bills in a timely manner. This case was tried on September 6, 2013 wherein the Court considered the testimony of Joseph Farnese, Rhonda Mallek and Rick Ricciardelli, Plaintiff's property manager. The Court has also considered the summations of both counsel as well as written submissions provided to the Court subsequent to the conclusion of the trial.

This case involves a commercial lease for premises known as Suite 8, 101 Newark Pompton Turnpike, Little Falls, New Jersey. A written lease was executed by the parties along with an Addendum on September 8, 2008. The lease term was to commence on October 1, 2008 and continue to September 30, 2013. The tenants were provided with a sole option to renew the lease. The monthly rent was to be $3,039.58 through September 30, 2009 with set yearly increments thereafter. The term "Tenant" in the lease refers to "Rhonda Mallek and Jon Mallek h/w and Jonda Essentials Inc. t/a The Fine Grind. The business known as The Fine Grind is a coffee bar.

On or about November 27, 2009, the parties did enter into an agreement which modified some of the provisions of the lease. This was due to the fact that Defendants had an exclusivity clause pertaining to the sale of coffee on the Plaintiff's property which is known as Piazza Farnese. Plaintiff now wanted to bring in a convenience store as a tenant in one of the suites which would sell coffee. The Plaintiff thus offered certain concessions or modifications to Defendants in exchange for their waiver of the Exclusive/Restrictive Covenant as written in the original lease. The Plaintiff did allow Defendants to split the monthly rent payments into four (4) checks per month until December 31, 2010. Even with this arrangement, Defendants were late in the payment of rent and water bills. They were advised by letters dated October 6, 2010, December 6, 2010 and January 10, 2011 that "these outstanding issues" are considered violations of the lease. The letters also requested a remittance of any

outstanding amount. Apparently, all of these issues were rectified and satisfied.

On or about August 31, 2010, the individual Defendants did file for bankruptcy. A Discharge of Debtor was Ordered by the Bankruptcy Court on December 23, 2010. Plaintiff was aware of the filing and of the discharge. Defendants, in spite of the filing, continued to pay rent. Joseph Farnese testified that he allowed the lease to continue because he wanted to give the Defendants a chance because he felt sorry for them. He believed he could do this and wait to terminate the lease because of a non-waiver clause (Paragraph 24 in the lease).

It is also noteworthy that at no time has Plaintiff enforced the rental increase provisions as provided for in the lease. He also has not asked for increases in tax payments. Joseph Farnese testified that he did this because he knew Defendants were struggling.

Beginning in January 2011 through July 2012, Defendants paid the rent by two checks, one post-dated to the 15th of the month. The Plaintiff never agreed to this, but, nonetheless, accepted and cashed the rent checks. From August 2012 to the present, Defendants have paid the rent in one check. There is no specific allegation in the Complaint of any rent balance claimed to be due and owing.

On or about January 6, 2013, Joseph Farnese sent a letter to the Defendant's reminding them that the lease ends on September 30, 2013. The letter states, "Unfortunately, we will not be offering you another Lease for multiple reasons." There is no specification of the reasons which the Landlord cites as justification for termination of the lease. On February 28, 2013, counsel for Defendants sent a notice to Plaintiff advising that the Tenant was exercising its option to renew. This option is granted solely to the Tenant pursuant to Paragraph 1 of the Lease Addendum. Counsel also directs the attention of the Landlord to the aforementioned letter of January 6, 2013 asking for clarification of the reasons Landlord is citing as justification for non-renewal of the lease. Finally, on July 3, 2013, counsel for Plaintiff sent a Notice to Quit to Defendants declaring the lease to be terminated effective July 9, 2013.

The Court will now address the issues raised by Plaintiff and the reasons cited as constituting defaults of the lease.

First, Plaintiff alleges a breach of the Lease pursuant to Paragraph 21e because the individual tenants filed for bankruptcy. It must be noted that the Tenant Jonda Essentials Inc. did not file for bankruptcy. Plaintiff was aware in 2010 that Defendants filed for bankruptcy but allowed them to continue with the tenancy.

There would be no breach as to Jonda Essentials Inc. because it never filed for bankruptcy. Paragraph 21 of the Lease only refers to the conduct of

"the Tenant". The Lease does not state that a default would occur if "any one of the Tenants" or "a Tenant" filed for bankruptcy. In essence, the real tenant herein is the business, Jonda Essentials Inc. t/a The Fine Grind. The individuals are listed as or referred to as tenants but in reality are signatories as guarantors. They in fact signed a Guaranty on September 8, 2008 which is the last page of the Lease. Furthermore, ipso facto clauses such as Paragraph 21e are deemed unenforceable as a matter of law under the Bankruptcy Code. This is so because the enforcement of such clauses would negate the central purpose of the Bankruptcy Code by punishing debtors. See In re W.R. Grace & Co., 475 B.R. 34 (D. Del. 2012). This Court, using the Bankruptcy Code and the aforementioned decision as guidance, deems the ipso facto clause as contrary to public policy. General contract principles apply to making a lease except that any provision is a lease that violates public policy will not be enforced. Varsalona et al. v. Breen Capital Services, 360 NJ Super 292 (App. Div. 2003) aff'd as modified, 180 NJ 605 (2004).

Even if one were to view and find the bankruptcy filing to constitute a breach, the landlord did not act upon it for almost three years. He continued to accept rent. There is no doubt that acceptance of rent with knowledge of the breach constitutes a waiver of all past breaches. Carteret Properties v. Variety Donuts, Inc., 49 NJ 116 (1967). The Supreme Court in Carteret Properties held that a broad "non-waiver provision" such as that contained in Paragraph 24 of the Lease did not give the landlord the right to continuously collect rent and plan for the tenant's eviction at the same time.

Standing alone, the acceptance of rent would not necessarily operate as a waiver. It would be no more than evidence of waiver. Montgomery Gateway East I v. Herrera, 261 NJ Super 235 (App. Div. 1992). It must also be shown that the party charged with the waiver knew of his or her legal rights and deliberately intended to relinquish them. Scibek v. Longette, 339 NJ Super 72 (App. Div. 2001). Herein, there is no question of Plaintiff's knowledge of his rights and his deliberate intention to relinquish those rights. This is most evident in the letters cited above sent to Defendants by Plaintiff. Plaintiff also took other steps to help Defendants because he knew Defendants were struggling.

The Court must also strictly construe Paragraph 24 of the Lease. It provides that "...acceptance by the Landlord of any installment of rent after any breach by the Tenant... will not be construed or deemed to be a waiver or relinquishment for the future (emphasis added) by the Landlord of any such conditions and covenants, options, elections, or remedies, but the same will continue in full force and effect." The landlord has waived past breaches, if any, by accepting rent during and after the alleged period of breach.

As for the fact that in the past, rent was paid in an imperfect way, this was specifically permitted by the landlord through December 2010. While he did not approve the method of payment commenced in January, 2011 (bi-monthly payments), he allowed it to continue for approximately 19 months. He has never sought the increased rent permitted by the Lease. Now, he has been

accepting rent paid in full by one check since August 2012. There are no rental arrearages alleged. If the landlord induced the tenants to believe that strict observance of their covenant to pay rent was not required, it is inequitable under the circumstances to seek to enforce a forfeiture. Sparks v. Lorentowicz, 106 NJ Eq. 178 (E & A 1929). Courts do retain the authority, even in a commercial lease context, to consider equitable factors that at times may warrant the denial of the remedy of eviction. See Olympic Industrial Park v. P.L. Inc., 208 NJ Super 577 (App. Div.) certif. denied 104 NJ 453 (1986).

This Court rejects the defense argument that Plaintiff breached the covenant of good faith and fair dealing. That covenant cannot override an express termination clause. Where the contractual right to terminate is express and unambiguous, the motive of the terminating part is irrelevant. Sons of Thunder Inc. v. Borden Inc., 148 NJ 396 (1996). Therefore, even if the Plaintiff did not act in a way that is honest and faithful to the agreed upon purposes of the contract, the landlord's conduct and motives which are somewhat questionable will not factor in to the Court's decision.

For the reasons expressed above, the Court is satisfied that the Plaintiff by its conduct waived all past breaches. Defendants are entitled to exercise their option to renew. Plaintiff did not sustain its burden of proof. This Court finds Defendants not presently in default.

Accordingly, the Court will Dismiss the Complaint with Prejudice.

Dated: 9/26/13

HON. BRUNO MONGIARDO, J.S.C.