BEWAY REALTY LLC, f/k/a BEWAY REALTY ASSOCIATES, Petitioner, v. C.N. FULTON DELI, INC., Respondent.

62209/2004

CIVIL COURT OF THE CITY OF NEW YORK, NEW YORK COUNTY

5 Misc. 3d 1015A*; *798 N.Y.S.2d 707*; *2004 N.Y. Misc. LEXIS 2201*; *2004 NY Slip Op 51385U

August 27, 2004, Decided

NOTICE: [*1]** THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

DISPOSITION: Judgment awarded to petitioner.

CORE TERMS: rent, constructive eviction, modification, oral modifications, partial performance, lease, detrimental reliance, referable, written lease, reopening, undisputed, written contract, equitable estoppel, unequivocally, tendered, tenant, rested, paying, credible, forgive, forgave, modification agreement, incompatible, enforceable, forbearance, withholding, nonpayment, resumption, modified, estoppel

HEADNOTES

[707] [*1015A]** Frauds, Statute of--Oral Modification of Written Agreement.

COUNSEL: For Petitioner: Steven Shackman Esq., Lambert & Shackman, PLLC, New York, NY.

For Respondent: Ronald D. Degan Esq., O'Rourke & Degan, PLLC, New York, NY.

JUDGES: LUCY BILLINGS, J.C.C.

OPINION BY: LUCY BILLINGS

OPINION

Lucy Billings, J.

This commercial nonpayment proceeding presents the questions of whether and when the landlord's oral waiver of the right to collect rent under a written lease is admissible and effective even though the lease requires modifications of its terms to be in writing. Petitioner landlord seeks $24,229.00 in rent from respondent tenant for December 2003 through March 2004, at 136 Fulton Street, New York County, where respondent operates a restaurant under the parties' written lease. Respondent only disputes owing the December 2003 rent of $5,915.00.

I.*INITIAL FINDINGS OF FACT AND PROCEDURAL BACKGROUND*

Based on the credible and undisputed testimony and documentary evidence at the trial of this proceeding, the court finds the following facts. On December 9, 2003, after **[***2]** petitioner's construction worker negligently severed the gas line to the premises November 18, 2003, leaving respondent without gas and unable to serve food, respondent's president, Jinah Han, met with David Koeppel, one of petitioner's five manager members. At that meeting, Koeppel agreed on petitioner's behalf to forgive the December 2003 rent.

On January 7, 2004, Han and Koeppel met again. After Koeppel advised Han that the premises' ventilation system would be disabled for building renovations in the near future, and Han questioned the feasibility of remaining on the premises, Koeppel separately agreed on petitioner's behalf that respondent could wait to pay the January 2004 rent until the end of the month while they discussed a lease extension.

The parties' written lease contains the standard provision prohibiting oral modifications:

> Any executory agreement hereafter made shall be ineffective to change, modify, discharge or effect an abandonment of it in whole or in part, unless such executory agreement is in writing and signed by the party against whom enforcement of the change, modification, discharge or abandonment is sought.

Ex. 1 P. 20.

Respondent **[***3]** paid the March 2004 rent on time, including the rent increase effective that month, but petitioner rejected respondent's payment because prior rent remained outstanding. On March 24, 2004, and again April 7, 2004, respondent tendered the rent for January through March 2004, but petitioner rejected these payments as well.

Respondent's third affirmative defense claims, as borne out by the trial testimony, that petitioner forgave the December 2003 rent. After respondent rested its case, respondent moved to amend its answer to add the defense of constructive eviction, claiming a set-off of one month's rent against the four months' rent sought, based on respondent's inability to use the premises for over a month beginning November 18, 2003. Respondent maintained that it did not raise the constructive eviction defense originally in reliance on uncontroverted evidence that petitioner waived one month's rent. While the petition does claim December 2003 rent, petitioner never contended that it disputed the rent concession because it was not in writing, until after respondent rested.

II.*ENFORCEABILITY OF THE ORAL WAIVER OF RENT*

Written contract provisions that the contract may not **[***4]** be modified orally are enforceable. *NY Gen. Oblig. Law § 15-301(1)*. This bar to an oral modification may be avoided, however, by partial performance pursuant to the modification or by equitable estoppel. *Messner Vetere Berger McNamee Schmetterer Euro RSCG v. Aegis Group, 93 N.Y.2d 229, 235, 711 N.E.2d 953, 689 N.Y.S.2d 674 (1999)*; *Rose v. Spa Realty Assocs., 42 N.Y.2d 338, 343-44, 366 N.E.2d 1279, 397 N.Y.S.2d 922 (1977)*; *Richardson & Lucas, Inc. v. New York Athletic Club of City of NY, 304 A.D.2d 462, 463, 758 N.Y.S.2d 321 (1st Dep't 2003)*.

A.*Partial Performance*

Oral modification of a written contract is enforceable based on partial performance of the modified terms only if "the party seeking to uphold the modification partially performs under its terms, detrimentally relies on the modification, and the partial performance is unequivocally referable to the modification." *Martini v. Rogers, 6 A.D.3d 404, 774 N.Y.S.2d 378 (2d Dep't 2004)*. Actions by the party seeking to enforce the modification when those actions are consistent with the party's original contract obligations do not constitute the requisite partial performance. *SAA-A, Inc. v. Morgan Stanley Dean Witter & Co., 281 A.D.2d 201, 203, 721 N.Y.S.2d 640* **[***5]** *(1st Dep't 2001)*.

Respondent claims partial performance through forbearance from paying the December 2003 rent and late tender of the January 2004 rent, as well as resumption of the original lease obligations, including the rent increase in March 2004. Petitioner points out that respondent did not tender the January 2004 rent as orally agreed, either at the end of January or at the beginning of February 2004, nor did respondent tender the February 2004 rent on time, which was not waived or postponed.

Petitioner's waiver of the December 2003 rent December 9, 2003, and postponement of the January 2004 rent payment January 7, 2004, are separate oral lease modifications. Because respondent's late tender of the January 2004 rent, as well as resumption of ongoing lease obligations, are consistent with the tenant's lease obligations to pay rent, these actions are not partial performance "unequivocally referable" to the second modification agreement. *SAA-A, Inc. v. Morgan Stanley Dean Witter & Co., 281 A.D.2d at 203*; *Martini v. Rogers, 6 A.D.3d 404, 774 N.Y.S.2d 378*. *See Joseph P. Day Realty Corp. v. Lawrence Assocs., 270 A.D.2d 140, 142, 704 N.Y.S.2d 587 (1st Dep't 2000)*. Respondent's

[*6]** forbearance from paying the December 2003 rent is consistent with performance of the first oral modification, but such inaction does not demonstrate an unequivocal act or attempt to perform the oral agreement. *Messner Vetere Berger McNamee Schmetterer Euro RSCG v. Aegis Group, 93 N.Y.2d at 236*.

The claim, if proved, that respondent purposefully withheld its potential constructive eviction defense, however, would more persuasively demonstrate action in detrimental reliance on and referable to the modification. *Id.*; *Martini v. Rogers, 6 A.D.3d 404, 774 N.Y.S.2d 378*. Moreover, even if the two modifications December 9, 2003, and January 7, 2004, constitute one agreement, which admittedly respondent did not fully perform, respondent's withholding of the constructive eviction defense may constitute the alternative basis to enforce the modification agreement: equitable estoppel. *Rose v. Spa Realty Assocs., 42 N.Y.2d at 344*; *Richardson & Lucas, Inc. v. New York Athletic Club of City of NY, 304 A.D.2d at 463*; *American Prescription Plan v. American Postal Workers Union, AFL-CIO Health Plan, 170 A.D.2d 471, 472, 565 N.Y.S.2d 830 (2d Dep't 1991)*. **[***7]**

B.*Equitable Estoppel*

Equitable estoppel is established where one party to a written contract and its oral modification induces another party's "significant and substantial" detrimental reliance on the oral modification. *Rose v. Spa Realty Assocs., 42 N.Y.2d at 344*. *See Stendig, Inc. v. Thom Rock Realty Co., 163 A.D.2d 46, 49, 558 N.Y.S.2d 917 (1st Dep't 1990)*. This reliance estops the inducing party from raising the writing requirement to bar the oral modification's enforcement. *Rose v. Spa Realty Assocs., 42 N.Y.2d at 344, 346*. Conduct constituting the reliance and triggering the estoppel must be incompatible with the written contract. *Id. at 344*; *American Prescription Plan v. American Postal Workers Union, AFL-CIO Health Plan, 170 A.D.2d at 472*. Unlike respondent's nonpayment of the December 2003 rent, respondent's withholding of the constructive eviction defense, when the tenant was entitled under the lease to occupy and use the premises fully, is both referable to the oral modification and incompatible with the written lease. Whether petitioner actually induced respondent to withhold the defense as well as **[***8]** not pay that rent and delay paying subsequent rent and the withheld defense is both unequivocally referable to and in detrimental reliance on the oral concession depends on the evidence.

III.*FURTHER PROCEEDINGS AND FINDINGS OF FACT*

Applying this analysis, and regardless whether respondent moved to amend its answer, the court admitted and considered evidence of petitioner's oral waiver of the right to collect rent to the following limited extent and on the following conditions. First, the court permitted respondent to reopen its case to prove that respondent gave up its constructive eviction claim in detrimental reliance on petitioner's oral waiver of one month's rent. If respondent sustained its burden on this threshold issue, the court permitted respondent to prove that it was constructively evicted from the premises for up to one month.

No further evidence was presented between when respondent first rested and the reopening of respondent's case. Petitioner did not claim that the hiatus caused petitioner difficulty or other harm in contesting either the detrimental reliance or the constructive eviction claim. Petitioner thus failed to show, and the court does not discern, **[***9]** any prejudice from this reopening. *C.P.L.R. § 4011*; *Feldsberg v. Nitschke, 49 N.Y.2d 636, 643, 404 N.E.2d 1293, 427 N.Y.S.2d 751 (1980)*; *Harding v. Noble Taxi Corp., 182 A.D.2d 365, 370, 582 N.Y.S.2d 1003 (1st Dep't 1992)*; *Morgan v. Pascal, 274 A.D.2d 561, 712 N.Y.S.2d 48 (2d Dep't 2000)*; *Dutchess County Dept. of Social Servs. v. Shirley U., 266 A.D.2d 459, 460, 698 N.Y.S.2d 535 (2d Dep't 1999)*.

Based on the further credible and undisputed testimony upon reopening the trial, the court finds the following facts. Ronald Degan, respondent's attorney, whom petitioner did not object to or seek to disqualify, made the legal decisions regarding respondent's valid defenses based on Han's thorough factual account. Respondent did not claim that it gave up its constructive eviction claim in exchange for and as part of the agreement to forgive the December 2003 rent. In fact Koeppel confirmed that petitioner's promise to forgive the month's rent was not contingent on respondent taking or refraining from any action and that he and Han did not discuss legal claims. Instead, respondent's attorney, relying on the facts as recounted, in particular the undisputed fact that petitioner forgave the **[***10]** December 2003 rent, concluded that the constructive eviction defense was inapplicable. When the petition nonetheless claimed that month's rent, respondent raised

the defense applicable to the facts: that petitioner forgave that rent. Respondent thus gave up its constructive eviction claim in detrimental reliance on petitioner's oral waiver of one month's rent.

Proceeding to the merits of the constructive eviction defense, based on the credible and undisputed evidence adduced both on the first day of trial, as part of the circumstances surrounding petitioner's oral promises, and after the reopening, petitioner's construction work prevented respondent from using the premises for at least 30 days beginning November 18, 2003. On that day, the construction workers inadvertently severed the gas line to the premises, requiring the gas pipes' replacement, which in turn necessitated repair work through the walls to the premises. This repair work pushed respondent's grills and fryers out of place, prevented respondent from opening its refrigerators, and created a disarray sufficient to discourage any prospective customers.

Respondent was compelled to wait until petitioner's workers replaced **[***11]** the pipes, reconstructed the walls, restored the grills and fryers into position, and requested reconnection of gas service. Petitioner completed this work by mid-December 2003. Only then was respondent able to clean up the debris. Gas service was not actually reconnected until December 26, 2003, enabling respondent to reopen for business the next day. Although the delay until December 26 in reconnecting the gas may not have been attributable solely to petitioner's actions, and respondent may have been responsible for part of this delay, petitioner's actions alone caused the delay in respondent's use of the premises until at least December 18, 2003.

IV.*THE FINAL AWARD*

Based on the evidence and the applicable law delineated above, the court awards petitioner a judgment of $18,314.00. The judgment and applicable interest are calculated are follows: (1) $5,915.00 per month in rent for two months, January and February 2004, a total of $11,830.00, with interest from February 1, 2004, Ex. 1 P. 40, until March 24, 2004, when respondent tendered this amount, and (2) $6,484.00 for March 2004, without interest, since respondent tendered this amount when due. *San-Dar Assocs. v. Toro, 213 A.D.2d 233, 234-35, 623 N.Y.S.2d 865* **[***12]** *(1st Dep't 1995)*; *Kips Bay Towers Assocs. v. Yuceoglu, 134 A.D.2d 164, 165, 520 N.Y.S.2d 754 (1st Dep't 1987)*. Petitioner's additional claim of $5,915.00 for December 2003 rent is offset by respondent's complete inability to use the leased premises and constructive eviction for at least one month beginning November 18 and extending through December 18, 2003.

If petitioner seeks to pursue a claim that petitioner is the prevailing party entitled to attorneys' fees and expenses, it shall move for that relief within 30 days after service of this order with notice of entry. The motion must be returnable in Part 52, but may be referred to Part 56. Petitioner shall support such a motion with the law entitling petitioner to prevailing party status, given this proceeding's disposition and respondent's prior tender of the judgment amount, and by the evidence of the time, rates, and services devoted to claims on which petitioner prevailed, as distinct from claims on which it did not prevail, to the extent possible.

This decision constitutes the court's order and judgment.

DATED: August 27, 2004

LUCY BILLINGS, J.C.C.