Coliseum Tenants Corp. v. Benmark, 75911/2015

May 17, 2017

- Civil Court, New York County, Housing Part R
- 75911/2015
- Judge Anne Katz
- For Plaintiff: For Petitioner: Axelrod, Fingerhut & Dennis.
- For Defendant: For Respondent: Nadel & Ciarlo PC.

Cite as: Coliseum Tenants Corp. v. Benmark, 75911/2015, NYLJ 1202786328576, at *1 (Civ., NY, Decided April 19, 2017)

CASENAME

Read Summary of Decision

Decided: April 19, 2017

DECISION/ORDER

*1

At the conclusion of trial, it is it decided by this Court as follows:

Background

The premises which are the subject of this holdover proceeding are located at 30 West 60th Street, Apartment 8D, New York, New York 10023 ("premises"). The premises are not subject to the Rent Control Law, Rent Stabilization Law of 1969 as amended or the Emergency Protection Act of 1974. The premises are part and parcel of a Cooperative Corporation and occupied by respondent, Gadi Benmark a/k/a Gadi B. Markovitch ("Benmark") pursuant to a Proprietary Lease Agreement assigned to Benmark on September 10, 2007 ("lease").

Petitioner served Benmark with a Notice to Cure dated April 9, 2015 ("notice") which alleged that the "subdivision of the premises, from a one-bedroom to a one-bedroom with a separate guest room constituted an "unauthorized alteration" in violation of paragraph 21 (a) of the lease". The notice also alleged that "pursuant to paragraph 18(d) of the lease, Benmark was obligated to comply with all laws, ordinances, rules and regulations with respect to the occupancy and use of the subject *2 premises and that the addition of the free standing wall without a permit issued by the New York City Department of Buildings was a violation of the New York City Administrative Code regardless if the wall was installed by a prior lessee". Lastly petitioner alleged that "paragraph 31 of the lease, allowed petitioner the right to terminate Benmark's lease five days after the occurrence of an event so long as the alleged default continued for thirty days after written notice". The notice demanded Benmark remove the wall ("alteration") and restore the premises to its original condition on or before May 11, 2015. After receipt of the notice, Benmark engaged in conversations with the Board of Directors ("Board") to allow him to legalize the alteration. Petitioner subsequently served Benmark with a second Notice to Cure dated July 23, 2015 ("second notice") which alleged the same facts as the notice and further stated that the Board declined Benmark's proposal to legalize the alteration. The second notice extended Benmark's time to remove the alteration to August 6, 2015. Benmark failed to remove the alteration and petitioner served a Notice of Termination dated August 10, 2015. The Notice of Termination required Benmark to vacate or surrender possession of the premises by August 17, 2015. Benmark failed to vacate or surrender the premises and petitioner commenced the within proceeding by Notice of Petition and Petition dated September 1, 2015.

The proceeding first appeared on the Part C calendar on September 17, 2015. Benmark appeared by counsel, and subsequently submitted a Verified Answer with Affirmative Defenses and Counterclaim dated October 9, 2015 ("Answer"). The Answer contained numerous affirmative defenses which included failure to state a cause of action; the notice which alleged a violation of paragraph 21 (a) was not substantiated as Benmark did not make the alteration and had not received a notice of violation from the Department of Buildings ("DOB"); Benmark purchased the subject premises in 2007 and petitioner had knowledge of the alteration and did not raise the issue at that time, or during prior sales, and petitioner's claim was barred by waiver; the alteration had been in place for at least 18 years with petitioner's knowledge and petitioner only raised the issue in April 2015 thereby asserting laches; that Benmark received notice from petitioner of the alteration and offered to legalize the alteration but petitioner unreasonably refused and petitioner's claim is barred by unclean hands; requiring Benmark to remove the alteration because of petitioner's unreasonable refusal to legalize the alteration reduces the value of the premises and petitioner's claim is barred by culpable conduct; and that Benmark submitted an alteration form and pald the fee to remove the wall but petitioner failed to give consent.[1] Benmark also counterclaimed for legal fees, costs and disbursements pursuant to RPAPL §234.

The Court conducted a trial on these issues.

Petitioner's first witness was Robert Abelson ("Abelson"). Abelson testified that he has been employed by AKAM Management Corp, petitioner's managing agent, for the past three years and for five years in the 1990's. Abelson's position at AKAM is managing director and he is also the assigned property manager for the building. In his capacity as managing director, Abelson oversees other managers and has the power to make decisions as to the affairs of the cooperative corporation. Through Abelson, petitioner put in its prima facie case which consisted of the Deed (P1); MDR (P2); alteration application in which Benmark sought permission to restore the premises to its original *3 condition (P3); petitioner's Notice to Admit (P1A); Benmark's Response to the Notice to Admit which admitted the genuiness of the documents (P1B); 1986 proprietary lease (P1C); and blank proprietary lease (P1D).

Abelson testified that as part of his employment, it is his duty to maintain files for the apartments which include the subject premises. Although Abelson is responsible for maintaining the file for the subject premises, during testimony, Abelson admitted that he only possessed part of the file and that the original file was misplaced.[2] Abelson also testified that he had no personal knowledge as to whether the prior management company turned over, to petitioner, a file for the subject premises. Abelson testified that he did not know who made the alteration and after a search of his file, he was unable to determine if authorization was given to construct the alteration by the petitioner or the prior owner and/or whether the alteration violated the New York City Administrative Code. According to Abelson, he observed the alteration in the spring of 2015, after viewing the premises on Airbnb's website. At that time, according to Abelson, he determined there was a room off the living room that was not "standard" in the line and thus, commenced the within proceeding. After commencement, the Board granted Benmark permission to remove the alteration. On rebuttal Abelson conceded, that petitioner's architect issued a report which stated the alteration could be legalized and filed with the DOB as such, subject to possible fines and penalties. After Abelson testified, petitioner rested.

Linz Wolfgang ("Wolfgang"), who lives on the same floor as Benmark in apartment 8CN, was the first witness to testify for Benmark. Wolfgang testified he bought the shares to his apartment in 1988 and moved into his apartment in 1989. Wolfgang testified that he has been acquainted with Benmark since 2007 when Benmark moved to apartment 8D. Wolfgang testified that he has visited the premises five to six times, since 2011, and the lay out of the premises has not changed. According to Wolfgang, the premises were the same when the prior tenants, the LaFerrara's, resided in the apartment. Wolfgang further testified that the Landress', the tenants prior to the LaFerraras, constructed the wall in the 1990's. Wolfgang's claimed his knowledge of the alteration was based upon his observation of workers coming in and out of the premises, conversations with building staff and the super and the Landress' statement, in the 1990's, that they were building an addition to start a family.

Nikolai Katz ("Katz"), respondent's architect, was the next witness to testify for Benmark. Benmark hired Katz, a self-employed architect for 20 years in

September 2015, to assess the legality of the alteration. After an inspection of the premises, Katz informed Benmark that the alteration could be legalized provided Benmark installed smoke alarms and a kitchenette soffit, completed a survey of the premises, prepared permit applications, that approval was received from the co-op and the applications were filed with the City. Subsequently, a permit with a licensed contractor would need to be pulled. On cross examination, Katz admitted that although the alteration could be legalized taking the steps above, the alteration could also be legalized by removal of the alteration and restoring the premises to its original condition. *4

Miriam Weingarten (Weingarten"), the broker who sold the premises to Benmark, stated she has 29 years experience in New York City real estate and testified on behalf of Benmark. Weingarten's testimony was that prior to Benmark's purchase of the premises, she and Benmark went to an open house at the premises where they were given a floor plan by the seller's broker. In the floor plan, the premises were described as a "Jumbo south facing one bedroom plus office, den, nursery featuring an eat in kitchen.…".(RB). Weingarten testified that the use of the word "jumbo" connoted a larger than normal one bedroom apartment or "junior four". After Benmark purchased the premises, Weingarten testified she prepared a board package which was submitted to the managing agent for approval. In Weingarten's opinion, a "junior four" lay out is more valuable than a one bedroom and Weingarten believed that Benmark would lose $150,000.00 in value if he were required to remove the alteration.

Benmark testified that he purchased the shares to the premises in September 2007 from Antonio LaFerrera ("LaFerrera") and Lori McCloskey ("McCloskey")(collectively the "LaFerreras"). Prior to his purchase, Benmark attended an open house and was provided a floor plan which showed the premises as a junior four. (RB). Benmark made an offer for the premises which was accepted by the Board and subsequently an application was prepared by Weingarten and submitted to the Board. The application that was submitted included the floor plan which showed the alteration. Benmark later had an interview with the Board and was approved as a shareholder and tenant. In addition to offering the floor plan into evidence, Benmark testified that the alteration existed when he purchased the premises. Benmark also alleged that building staff

visited the premises for on-going repairs over the years and saw the alteration. Further, Benmark testified that Mr. Pearlman, the president of the Board, visited the premises years ago while campaigning for his Board seat and saw the alteration.

According to Benmark, after he received the first notice to remove the alteration, in April 2015, he reached out to the Board to de-escalate the problem and explained that when he purchased the premises the alteration existed. Benmark suggested to the prior attorney, Mr. Berg ("Berg") that the building's engineer inspect the premises and determine if the alteration could be legalized. On May 27, 2016, an inspection took place with petitioner's architect and after the inspection, Benmark contacted Berg requesting a copy of the report. He never received a copy of the report. Benmark reiterated that the Board refused to allow him to legalize the alteration and insisted that Benmark restore the premises to its original condition. Benmark believes that the Board refused to allow him to legalize the alteration in retaliation for his run for Board. According to Benmark, at the time that he was negotiating to legalize the alteration, he ran for the Board and believed the Board was not happy with his platform which required transparency, respect and connectedness with unit owners. Although Benmark desired to legalize the alteration and the legalization was possible, Benmark admitted, on cross examination, that after receipt of the termination notice from the Board, Benmark forwarded an application to remove the alteration with an application fee of $500.00 fee, letter and drawing from his architect which showed how the alteration could legally be removed (RA) and he was granted permission to remove the alteration. Benmark alleged that he did not remove the alteration because he believed an agreement existed between him and Berg that if the building's engineer's report showed the alteration could be legalized, that would end the issue. To Benmark's surprise, despite his understanding with Berg, in late July Benmark was told the Board would not grant approval to legalize the alteration and the second notice was served which granted Benmark two additional weeks to remove the alteration. *5

Shlomit Ophir-Harel ("Harel"), Benmark's friend of 25 years, who lives in Israel, testified on behalf of Benmark. She testified that she stayed at Benmark's apartment with her family when they visited New York. Harel also testified that

she and her family stayed at the subject premises when Benmark was not present. According to Harel, she and her family all stayed in the main bedroom. Harel and her husband allegedly slept in Benmark's bed and her three children, ages 13, 10 and 4, used an air mattress as a second bed. Harel claimed that she did not recall if she had brought a sleeping bag with her and denied using the second room, created by the alteration, as a sleeping area for either her and her husband or any of her three children (one boy and two girls).

Laurie McCloskey testified, the previous shareholder and tenant of the premises, testified that she and LaFerrera purchased the premises in 1997 from Scott Landress and, at the time of the purchase, the alteration was already there. According to McCloskey, the premises was sold to Benmark with the alteration. McCloskey testified that building staff visited the premises many times for maintenance and the alteration was visible upon entry to the premises. McCloskey also testified that LaFerrera's friend, who was on the Board, visited them at the premises and never raised any issue about the alteration. McCloskey testified that when selling the premises, marketing material was left with the doorman, which was provided to brokers and prospective buyers (RB), which included the lay out of the premises.

Michael Perlman ("Perlman"), a tenant and board member, testified on rebuttal for petitioner. Perlman testified that he visited Benmark's apartment approximately nine years ago and noticed something "different" about the premises. Despite Perlman's observation years ago, he never expressed any concern until April 2015 while discussing Benmark's alleged Airbnb activity. Perlman also testified that he was not sure whether Benmark or any of his predecessors were granted permission for the alteration.

Lastly, Csaba Villamyhi ("Villamyhi"), superintendent of the building from 1988 to 1999 testified that it was impossible for a tenant to perform this alteration without his knowledge or knowledge of the building as it was impossible to bring in sheet rock, studs, paint, joint plaster and all "those things" without "someone" from the building being aware that construction was taking place. On cross-examination, Villamyi admitted however, that there are eight entrances to the building and perhaps the materials were brought in through a side entrance.

The issue in this proceeding is whether the alleged unauthorized alteration constitutes a default under Paragraph 31 (e) of the lease which allows petitioner to terminate the lease. According to petitioner, the alteration is a violation of paragraph 21 (a) of the lease as it was done without the permission of the Board. Petitioner also alleges that the alteration violated paragraph 18(d) of the lease because it was constructed without filing with the DOB. Petitioner argues that even if Benmark did not make the alteration, Benmark "stands in the shoes" of the original lessee and is therefore responsible for the pre-existing breaches of the lease.

After a full trial was conducted, this Court finds that petitioner has failed to state a cause of action with reference to a violation of paragraph 21(a) of the lease. The testimony of Benmark, Wolfgang, Weingarten, Harel and McCloskey, discussed above, all demonstrate that Benmark did *6 not perform the alteration and that the alteration was constructed in the 1990's by the Landresses'. Petitioner failed to prove that authorization was not given to the Landresses or any other tenant for the alteration. Petitioner's managing agent testified that the he did not possess a complete file for the premises, and was not sure whether the prior owner turned over a file for the premises. Petitioner's managing agent was also not able to determine if authorization was given to Benmark or any other tenant or shareholder for the alteration. Perlman, a member of the board, also testified that he was not able to determine if authorization was ever granted for the alteration. Accordingly, petitioner cannot prove the alteration was performed without authorization and petitioner did not prove a violation of paragraph 21(a) of the lease.

Benmark's fifth affirmative defense in the Answer verified October 9, 2015 asserts laches. The doctrine of laches requires the tenant to show four elements to satisfy the standard and meet the burden to establish the claim of the equitable defense. Once a tenant has met all four elements of laches, the burden of proof shifts to the landlord to demonstrate a reasonable excuse for its delay. Rodriguez v. Torres, NYLJ, Jan 22, 2003, at pg. 22 col 1. The elements that Benmark must show to make out its fifth affirmative defense of laches are: (1) petitioner has a valid claim; (2) petitioner delayed asserting its claim without good cause; (3) there was a lack of notice that petitioner would pursue the claim; and (4) the tenant will be

prejudiced if petitioner is allowed to pursue the claim. Dwyer by Dwyer v. Mazzola 171 A.D.2d 726, 567 N.Y.S.2d 281 (1991). The two most essential elements of laches are undue delay and prejudice caused to the opposing party by such a delay. Capruso v. Village of Kings Point, 23 N.Y.3d 631, 992 N.Y.S.2d 469 (2014). This Court finds that respondent has met all four elements and petitioner has failed to offer valid proof as to why it timely failed to asset its claim. Petitioner has alleged a breach of paragraph 18(d) in that Benmark failed to comply with all laws, ordinances, rules and regulations with respect to the occupancy and use of the premises and the alteration, without a permit, was in violation of the New York City Administrative Code, even if installed by a prior lessee. Although Benmark claims that he did not receive a violation and testimony from both petitioner's and respondent's architects verify the alteration could be legalized as a storage room/office, there appears to be no permit. Thus, petitioner has asserted a valid cause of action. Although petitioner alleges it took immediate action upon learning of the alteration through its observation of the premises on an Airbnb website in April 2015, the overwhelming trial testimony does not support such a finding. Testimony shows that building staff and board members viewed the alteration numerous times since the 1990's and failed to take issue and/or action until after Benmark's alleged Airbnb activity. As stated herein, testimony revealed, inter alia, that the Board was aware of the alteration for years and the Landress' added the room in the 1990's to start a family. Testimony revealed that Benmark was provided with a floor plan that described the premises as one bedroom plus office, den, nursery, (RB). Benmark testified that the application and floor plan were submitted for board approval. Benmark testified that when he purchased the premises in September, 2007, the alteration existed and the premises was marketed as a junior four. McCloskey corroborated that marketing materials, which showed the existing alteration, were given to prospective purchasers (RB) Perlman, a member of Board, admitted that he visited the premises years ago and noticed something "different". Lastly, Villamyhi, testified it was impossible to perform the alteration without the staff seeing building material being delivered to the apartment. The cumulative affect of the testimony overwhelmingly proved that petitioner knew *7 or should have known of the alteration since the 1990's, more than 20 years ago. Petitioner failed to present evidence as to why it failed to take action years ago and severe prejudice will enure to Benmark if he is required to now defend the within proceeding. Benmark will face major obstacles if required

to dig up evidence, which may or may no longer be in possession of a tenant who resided in the premises over 20 years ago. Lastly, Benmark will be prejudiced if he is required to remove the alteration as the premises was marketed as a junior four, he was approved by the Board with the existing alteration submitted to the Board and if now required to remove the alteration, according to Weingarten, the value of the premises will be reduced by approximately $150,000.00. Benmark has satisfied all four elements of laches and must be protected from the loss of the premises and/or value in the premises caused by a petitioner's failure to timely commence a proceeding. Accordingly, the within petition must be dismissed.

Although petitioner believes that Benmark is not entitled to invoke the equitable doctrine of laches because respondent has unclean hands, M2R Ginsburg, LLC v. Orange Canyon Development Co. LLC, 84 A.D.3dd 1470, 23 N.Y.S.2d 226 (3rd Dept 2011), this Court does not agree. Benmark bought the premises with the existing alteration, purchased the premises three years prior to the establishment of Airbnb, and did not construct the alteration for the purpose of subletting through Airbnb.

This Court also believes that petitioner's claim is barred by the doctrine of waiver. A waiver is the voluntary abandonment or relinquishment of a known right. Jefpaul Garage Corp. V. Presbyterian Hospital in City of N.Y., 61 N.Y.2d 442, 446 (1984). It is essentially a matter of intent which must be proved. Jefpaul, supra. A waiver occurs when there is "such conduct or failure to act to evince an intent not to claim the purported advantage. Hadden v. Consolidated Edison Co., N.Y., 45 N.Y.2d 446, 469 (1978). While waiver may be inferred from the acceptance of rent in some circumstances, it may not be inferred, and certainly not as a matter of law, to frustrate the reasonable expectations of the parties embodied in a lease when they have expressly agreed otherwise. Jefpaul, supra. In Jefpaul, there was a clear and unambiguous non-waiver and merger clause in the lease and the court held that the lessor's acceptance of rent, with knowledge of the breach did not constitute a wavier of the condition precedent to the renewal of a lease. Petitioner argues that even though Benmark may not have constructed the alteration, Benmark as an assignee of the lease, stands in the shoes of the assignor and like, Jefpaul, Benmark may not assert waiver since there was a clear and unambiguous waiver clause in the assigned lease. Petitioner cites three cases to support its allegation that

Benmark, as assignee, "stands in the shoes of the assignor" however the cases cited are irrelevant under the circumstances herein. The first case of Zinwell Co., v. Ilkovitz, 83 Misc 42, 144 N.Y.S. 815 (1913) is from 1913 and stands for the proposition that the original assignee remains liable for rent to the end of the term and is not discharged from its obligation despite a subsequent assignment. In the case at bar, petitioner actually seeks to hold the assignee liable for alterations made by prior tenants. Mann v. Munch Brewery, 225 N.Y.189, 121 N.E. 746 (1919) is equally as unpersuasive. In Mann, the assignee specifically contracted with the landlord that he would remain liable for rent for the term even after possession had terminated. The court held that although liability of an assignee grows out of privity of estate only as the covenant to pay runs with the land, parties are free to change the obligations of the payment of rent by contract. The within proceeding *8 does not deal with the obligation to pay rent nor has Benmark made any specific contract of agreement with regard to the alteration. Lastly, in the proceeding of Hart v. Socony-Vacuum Oil Co., 291 N.Y.13, 50 N.E.2d 285, 148 A.L.R. 390 (1943) the court specifically refused to hold that a defendant adopts the lease in all parts as if the defendant were the original assignor thereof. The court said that one must look to the circumstances which surround the signing of the lease as well as the real intent of the parties. Therefore, there appears to be no hard and fast rule that an assignee always stands in the shoes of the assignor. As Benmark purchased the subject premises with the alteration, was approved by the Board with the floor plan submitted, there were prior sales of the premises with the alteration and building staff and board members were present at the premises with the visible alteration for years, petitioner waived its right to maintain this proceeding.

Petitioner argues that under the Business Judgement Rule the Board of Directors was within their right not refuse to permit respondent to legalize the unauthorized alteration so as to eliminate and/or reduce the possibility of further illegal Airbnb activity by Benmark. Benmark however, argues that the Board acted in bad faith which did not legitimately further its corporate purpose and solely in retaliation for Benmark's running for board and Airbnb activity. This Court will not determine whether the Board is entitled to demand the removal of the alteration based upon the Business Judgment Rule or whether petitioner's refusal to give Benmark

consent for the alteration is unreasonable since the within proceeding is dismissed based upon failure to state a cause of action, laches and waiver.

Legal Fees
The parties shall appear for a legal fees hearing on June 6, 2017 at 2:15 p.m. in Part R, Room 851. This constitutes the Decision and Order of this Court. The parties may also pick up their exhibits from the file in room 851.
Date: April 19, 2017
New York, New York

1. After commencement of the within proceeding, petitioner granted Benmark permission to remove however Benmark has failed to do so.
2. The only items contained in Abelson's file were the assignment of the proprietary lease, signature page of the proprietary lease and copy of the stock certificate for the premises.