MEMORANDUM

Supreme Court of the State of New York
County of Suffolk: I.A.S. Part 43
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By: Arthur G. Pitts, J.S.C.
Date: September 28, 2015
Index # 500-2012

STERN FAMILY LIMITED PARTNERSHIP,

Plaintiff,

-against-

ROLLIN DAIRY CORP. and
ROLLIN GIANELLA

Defendants.
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PLTF'S/PET'S ATTY
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On June 2, 3 and 5, 2015, this Court conducted a non-jury trial in this commercial landlord/tenant action. After due consideration of all the testimony, the exhibits, and the post trial Memorandums of Law submitted by the parties, the Plaintiff is entitled to enter judgment against both defendants in the amounts set forth below.

Plaintiff, Stern Family Limited Partnership, brought this action to recover damages for unpaid rent and other costs allegedly due under a lease agreement with defendant, Rollin Dairy Corp., executed in June 2004. The lease agreement was for a five-year term and the parties agreed the five-year lease term would run from December 1, 2004 to November 30, 2009. Performance of Rollin Dairy's obligations under the lease was secured by the personal guaranty of defendant Rollin Gianella, an owner of the closely-held corporation, who serves as its president and chief executive.

The lease agreement (Plaintiff's Ex. 3) consists of the "standard form of loft lease" of the Real Estate Board of New York, a rider, and a "lease commencement letter" allegedly issued by plaintiff on November 30, 2004. As relevant to the instant motion, paragraph 65 of the rider, entitled Option to Renew, states, in part, as follows:

> . . .Tenant shall have the option to renew this Lease . . . The Tenant hereby agrees to give the Landlord written notice sent by certified mail, return receipt requested of its intention to either exercise or not exercise its option to renew hereunder no later than six (6) months prior to the expiration of the initial term. In the event the Tenant fails to give the required notice to the Landlord in the time allocated therefor, then and in that event the Tenant's right to exercise the option hereunder shall lapse and become null and void as if such option never existed in the first place.

Paragraph 73 of the rider sets forth the base rent payable during the renewal term. Such paragraph provides, in part, that for the first year of the renewal term, Rollin Dairy, as Tenant, agrees to pay annual net rent

> . . . which shall be equal to the greater of (i) One Hundred Twenty-Eight Thousand Eight Hundred Dollars ($128,800.00) ($6.44 per square foot) payable in monthly installments . . . or (ii) . . . equal to One Hundred Twenty-One Thousand Four Hundred Dollars ($124,000.00) plus an amount equal to the sum of One Hundred Twenty-One Thousand Four Hundred Dollars ($124,00.00) multiplied by the percentage of the increase of the Consumer Price Index from the month preceding the first month of the Lease Term and the fifty-third month of the Lease Term (it being understood that the rent for the first year of the Renewal Term shall in no event be less than One Hundred Twenty-Eight Thousand Eight Hundred Dollars [$128,800.00]).

Such paragraph also sets out the annual base rental amounts for the second through fifth years of the renewal term, and provides that "[u]nder no circumstances shall the annual rent payable during the first through fifth years of the Renewal Term be less than" the amounts specified thereafter. The lease requires Rollin Dairy to pay, as additional rent during the original five-year lease term, among other things, all increases in amount of real estate taxes on the property and the cost incurred by plaintiff in constructing loading docks at the premises. It also provides at paragraph 71 that Tenant is taking possession in an "as is" condition, "with the mechanical systems . . .and air conditioning systems in working order and with the improvements contemplated by this Lease as specified in paragraph 77."

Further, Paragraph 32 of the lease, entitled Security Deposit, states that Tenant deposited the sum of $24,192 with plaintiff, referred to as Owner, " as security for the faithful performance and observance by Tenant of the terms, provisions and conditions of this Lease," and that, in the event Tenant defaults on any of its lease obligations, plaintiff "may use, apply or retain" the amount deposited "for the payment of any rent and additional rent . . . or for any sum which Owner may expend, by reason of Tenant's default . . . including but not limited to, any damages or deficiency in the re-letting of the demised premises." Paragraph 75 of the rider states that Tenant agrees that it shall maintain, at all times during the lease and the renewal term, a security deposit with plaintiff in an amount not less than two months of the gross rental payments owed under the agreement.

By correspondence from Rollin Dairy to plaintiff dated May 4, 2009 (Plaintiff's Ex. 4), Rollin Gianella advised "[w]e hereby exercise our option to renew our lease for a period of five years as per clause 65 of the lease" agreement between the parties. The letter was sent "certified mail, return receipt requested" (Plaintiff's Ex. 5) as required by the lease. It is worth noting that Plaintiff did not submit this proof that the mailing was done "certified mail, return receipt requested" in it's summary judgment motion, which caused this court to deny summary judgment.(*cf.* ***Baygold Assocs., Inc. v Congregation Yetev Lev of Monsey, Inc.***, 81 AD3d 763, 916 NYS2d 639 [2d Dept 2011], *affd* 19 NY3d 223, 947 NYS2d 794 [2012]; ***Matter of 2039 Jericho Turnpike Corp. v Caglayan***, 64 AD3d 609, 882 NYS2d 311 [2d Dept 2009]). Furthermore, leave to renew was denied, as the "new fact" offered by Plaintiff in it's renewal motion, namely a copy of a

certified mailing receipt that accompanied Rollin Dairy's May 4, 2009 letter, did not constitute evidence unavailable to it at the time of the prior summary judgment motion which would change the determination of such motion (*see* ***Deutsche Bank Trust Co. v Ghaness***, 100 AD3d 585, 953 NYS2d 301 [2d Dept 2012]; ***Semenov v Semenov***, 98 AD3d 962, 950 NYS2d 570 [2d Dept 2012]). Further, plaintiff failed to provide a reasonable excuse for failing to include such evidence, which had previously been in the possession of its president and was available to it, with its initial moving papers (*see* ***Bazile v City of New York***, 94 AD3d 929, 943 NYS2d 131 [2d Dept 2012]; ***Matter of Leone Props., LLC v Board of Assessors for Town of Cornwall***, 81 AD3d 649, 916 NYS2d 149; ***Huma v Patel***, 68 AD3d 821, 890 NYS2d 639; ***Worrell v Parkway Estates, LLC***, 43 AD3d 436, 840 NYS2d 817).

Thereafter, by correspondence to plaintiff dated May 29, 2009 (Plaintiff's Ex. 6), Rollin Dairy again advised that it was exercising its option to renew the lease agreement for another five-year term, but with certain "exceptions," including a reduction in the rental amount and a second five-year renewal option "at a 3% increase per year." As the parties engaged in negotiations regarding the terms of the lease, including plaintiff's obligations to make certain repairs to the property, Rollin Dairy continued to operate its business out of the subject premises. Various draft lease extension agreements apparently were exchanged by the parties' counsel. A proposed lease extension agreement (Plaintiff's Ex. 10) prepared by its counsel allegedly was signed by Rollin Dairy and forwarded to plaintiff sometime in the summer of 2010. Plaintiff never executed it.

Meanwhile, on August 2, 2010, plaintiff brought a holdover proceeding against Rollin Dairy (Plaintiff's Ex. 8) to recover possession of the premises, alleging that the lease term ended on June 30, 2010 pursuant to a 30-day notice of lease termination (Plaintiff's Ex. 7), that Rollin Dairy remained in possession of the property after the termination date, and that it had not accepted any payments for rent or use and occupancy for the period beginning July 1, 2010. By e-mail correspondence to defendants' counsel from plaintiff's counsel dated September 3, 2010 (Plaintiff's Ex. 14), plaintiff indicated, in part, that, in light of the apparent conflict between the May 4, 2009 letter and the May 29, 2009 letter, it viewed Rollin Dairy's "refusal to conclude the lease extension on the terms set forth in the Lease as a revocation of the notice of exercise of Rollin Dairy's renewal option." Moreover, in the same e-mail correspondence, plaintiff, after stating it "has no desire to debate with tenant the issue of whether it properly exercised the renewal option," states as follows:

> Accordingly, landlord now elects to take the following action:
>
> (1) Landlord will voluntarily discontinue the holdover proceeding; and
>
> (2) Landlord shall accept Rollin Dairy's exercise of its option and the continuance of the Lease in accordance with the original terms which includes without limitation paragraph 73 of the Lease; and
>
> (3) Landlord will pay Finkelstein Realty and A.J. Finkelstein Realty brokerage commission in accordance with the Commission Agreement dated March 8, 2007 previously signed by landlord and such brokers.

> The effect of landlord's action will be that
>
> (i) Rollin Dairy will continue to pay basic rent commencing at the rate of $128,800 for the first year of the renewal term (commencing December 1, 2009) and that such basic rent will increase 3% each year in the second through fifth years of such renewal term,
>
> (ii) there will be no further extension of the Lease beyond November 30, 2014, and
>
> (iii) the landlord, tenant and broker need not execute any further documents for the foregoing to be effective.

Subsequently, the holdover proceeding was withdrawn by plaintiff, without prejudice, pursuant to a written stipulation (Plaintiff's Ex. 15), which was filed with the Suffolk County District Court on September 20, 2010.

Thereafter, by correspondence dated December 13, 2010 (Plaintiff's Ex. 17), Rollin Dairy advised Plaintiff that it would be vacating the premises "early next year," and that it would notify plaintiff "of a definitive date of termination as early as possible." By separate letter, also dated December 13, 2010 (Plaintiff's Ex. 16), Rollin Gianella advised "I am using the two months rent we have on deposit as payment for the last two months of rental of your facilities." By correspondence dated March 11, 2011 (Plaintiff's Ex. 19), plaintiff notified Rollin Dairy that it was in default of its obligation to pay rent, taxes, insurance and operating expenses, that $17,234 was due as of the date of such notice, and that Plaintiff would pursue "any and all remedies available at law and in equity" if Rollin Dairy did not pay the amount due within 10 days of the receipt of such notice. Rollin Dairy vacated the premises in April 2011. In August 2011, Plaintiff entered into a new lease agreement (Plaintiff's Ex. 25) with a third party for the subject premises, with such lease term commencing on December 1, 2011.

At trial, Gianella testified that when he sent the 5/4/09 letter he intended to exercise the option to renew the lease. That intention is repeated in an August 26, 2010 e-mail from Gianella to Plaintiff's counsel((Plaintiff's Ex. 13). Furthermore, Gianella verified the Answer to Petition (Plaintiff's Ex. 9) in the above noted Landlord/Tenant proceeding which contained the following language in Paragraph 12, "Respondent has timely exercised its renewal option.... Lease has not been terminated." Finally, Gianella testified that beginning in December, 2009, the commencement of the five year extension, Defendant paid the increased rent as set forth in the original lease extension provision in the amount of $128,800.

An option "is a continuing offer, binding for the time specified the one who makes it, but not the one to whom it is made, unless he accepts, when it becomes binding on both. It neither transfers nor agrees to transfer title to property, but confers the bare right to accept an offer within the time limited and upon the terms provided" (***Benedict v Pincus***, 191 NY 377, 382, 84 NE 284 [1908]). While an option constitutes a unilateral contract binding on the offeror, the exercise of the option transforms the parties' obligations into a bilateral contract (*see* ***Heller v Pope***, 250 NY 132, 164 NE 881 [1928]; ***Goldman v Orange County Ch., N.Y. State Assn. for Retarded Children***, 121 AD2d 683, 503 NYS2d 884 [2d Dept 1986]; ***Toroy Realty Corp. v Ronka Realty Corp.***, 113 AD2d 882, 493 NYS2d 800 [2d Dept 1985]). "Once the option [to renew] is exercised, the original lease is deemed a unitary one for the extended term and a new lease is not

necessary" (***Dime Sav. Bank of N.Y. v Montague St. Realty Assoc.***, 90 NY2d 539, 543, 664 NYS2d 246 [1997]; *see* ***Orr v Doubleday, Page & Co.***, 223 NY 334, 119 NE 552 [1918] ***Atkin's Waste Materials v May***, 34 NY2d 422, 358 NYS2d 129 [1974]). Furthermore, an election to exercise an option must be timely, definite, unequivocal and in strict compliance with the terms of the lease (*see* ***Orr v Doubleday, Page & Co.***, 223 NY 334, 119 NE 552; ***Matter of Joyous Holdings v Volkswagen of Oneonta***, 128 AD2d 1002, 513 NYS2d 841 [3d Dept 1987]).

Based on the foregoing, it is clear that Defendant exercised it's option to renew the lease in a timely and appropriate fashion. While it was also clear from the testimony and the actions of the parties that there were attempts to renegotiate some of the terms of the agreement, the terms were not successfully renegotiated. Accordingly the parties were bound by the original terms of the lease, and their rights and responsibilities continued based upon that document. Defendant breached the original lease agreement and is answerable to Plaintiff in damages.

The complaint contains four causes of action. The first cause of action is based on the failure to pay rent from failing to pay rent from December 1, 2010 through the end of the renewal which would be November 30, 2014, although there were partial rent payments for December, 2010 through February, 2010. As a result of such breach, Plaintiff would have received $749,207.92 in rent, and would have also received late charges in the amount of $26,780.00, totaling $775,987.92. However, Defendant is entitled to offsets against that total for $11,000. for a licensing fee from the replacement tenant, $406,175.82 for rent and additional rent from the replacement tenant, and $24,192.82 representing Defendant's security deposit that had been held by Plaintiff since the inception of the tenancy. Such offsets total $441,368.64 entitling Plaintiff to a judgment on the first cause of action in the sum of $334,619.28 (See Plaintiff's Ex. #39), plus pre-judgment interest at the rate of 9% from April 30, 2011, the date of the Landlord Agreement to Accept Possession(Plaintiff's Ex. #20).

The second cause of action is based on Paragraph "19" of the Lease Agreement, which obligates Defendant to pay for the costs and fees that Plaintiff incurred in re-letting the premises. A brokerage commission (Plaintiff's Ex. #35) was paid to Newmark of Long Island LLC d/b/a Newmark Knight Frank in the sum of $36,348.63 on August 30, 2011 (Plaintiff's Ex. #36) in connection with the re-letting of the premises. Additionally, there was a $1,000. fee charged to Plaintiff to clean the premises before the new tenant moved in. Plaintiff is entitled to a judgment on the second cause of action in the sum of $37,348.63 plus pre-judgment interest at the rate of 9% from August 30, 2011.

The third cause of action is based on Paragraph "49(A)" of the Lease Agreement, which obligates Defendant to pay reasonable attorneys' fees incurred by Plaintiff in connection with this action and the review of any documents concerning the Lease. Although total legal fees and disbursements were billed of $169,004.88, the Court sets the amount of reasonable attorneys' fees $120,000. and disbursements of $8,174.88, entitling Plaintiff to a judgment on the third cause of action in the sum of $128,174.88. No pre-judgment interest is awarded.

The fourth cause of action asserts a claim against Rollin Gianella personally for all damages to Plaintiff based on the personal guaranty as set forth in Paragraph "80" of the Lease Agreement, which reads in pertinent part:

> The Tenant herein is a corporation whose principal is Rollin Gianella(hereinafter "Principal") who have (sic) executed this Rider on behalf of Tenant. Principal personally guarantees to Landlord the payment of all base or net rental payments and additional rental payments for the demised premises from the date of any non-payment of any rent by the Tenant until the date Tenant. . . . surrenders possession of the demised premises to Landlord in broom clean condition. Principal confirms and agrees that he is responsible in full for any such payments of base or net rent or additional rent not made by the Tenant. This limited personal guarantee of rental payments shall cease on the date that the Tenant delivers possession of the Premises vacant and broom clean to Landlord ***with all base or net rents and additional rents paid to the date of deliver of possession.***(Emphasis added)

It was conceded that at the time Defendants delivered possession of the premises to Plaintiff, Rollin Dairy Corp. was in arrears. As such, there can be no dispute that pursuant to the express terms of the guaranty provisions of Paragraph "80", Gianella was not relieved of his obligations since all of the conditions for the extinguishment of his guaranty obligation were clearly not met. See, e.g., ***Senex Greenwich Realty Assocs., LLC v. 120 Greenwich Street Care Corp.,*** 2011 N.Y. Misc. LEXIS 4223 10-11(Sup. Ct. N.Y. Co. Aug.18, 2011; ***Broadway 36th Realty, LLC v. London***, 29 Misc. 3d 1238A NY Slip Op 52192(U) Lexis 6111 14-15 (Sup. Ct. N.Y. Co. Dec. 14, 2010); ***Sidley Holding Corp. v. Ruderman***, 2009 U.S. Dist. LEXIS 126040, 21-22 (S.D.N.Y. Dec. 30, 2009)

Rollin Gianella is therefore obligated, jointly and severally, with Rollin Dairy Corp. for all amounts as set forth above. Costs and disbursements will be taxed by the Suffolk County Clerk.

Settle judgment on notice.

The foregoing is the decision and order of this Court.

Dated: Riverhead, New York

J.S.C.

CHECK ONE: __XX__ FINAL DISPOSITION _____NON-FINAL DISPOSITION _____ DO NOT SCAN