

Grand Baldwin Associates v. Birnak, SP003096/08
Decided: November 14, 2008

Judge Scott Fairgrieve

NASSAU COUNTY
District Court

Attorney for Respondent: Marc P. Gershman, Esq.

Attorneys for Petitioner: Westerman, Ball, Ederer, Miller & Sharfstein, LLP

Judge Fairgrieve

BACKGROUND

Petitioner-Landlord, Grand Baldwin Associates, commenced this summary proceeding against Respondent-Tenant, Dr. Jason Birnak and ABC Corporation for non-payment of rent concerning Unit No. 0014 of Baldwin Shopping Center located at 1771 Grand Ave, Baldwin, New York. Initially, the Respondent took possession of the premises on August 8, 2002, with the five-year lease set to commence on January 21, 2003. Presently, the Respondent remains in possession of the subject premises and no rent has been paid since January of 2008.

In its June 18, 2008 petition, the Petitioner contends that the Respondent agreed to pay the Petitioner rent and additional rent, including real estate taxes and common area charges in accordance with the terms of the lease. However, since January 31, 2008 the Respondent has failed to pay the Petitioner any monetary compensation for rent owed, while Respondent continues to operate his medical practice on the premises. Accordingly, Petitioner seeks a money judgment against Respondent in the amount of \$41,913.87 for rent owed for the months of January 2008 through June 2008.

In his counterclaim, the Respondent claims that prior to the termination date of the lease he inquired with the Petitioner about becoming a month-to-month tenant, with the monthly rental payments being equal to what he paid during the lease. Respondent alleges that the Petitioner orally informed him that he could remain in possession as a month-to-month tenant and that a

lease would be prepared. During the month of January, the Respondent claims that upon his inquiries, Petitioner consistently assured him that the monthly lease agreement would be completed by the end of January. Consequently, when Respondent had an opportunity to relocate his medical practice, he declined the offer because of the Plaintiff's representations that Respondent could maintain his lease as a month-to-month tenant. While Respondent claims that on January 28, 2008, the Petitioner informed him that a month-to-month lease would not be issued, Respondent's argues that Petitioner failed to inform him that it would seek to enforce the liquidated damages provision of the lease.

Additionally, Respondent alleges that he never received a rental invoice for the month of February and that not until mid March did the Petitioner send him an invoice including treble rent for both February and March, as well as, additional rent of real estate taxes and common area charges. Meanwhile, Respondent alleges that he attempted to pay rent to the Petitioner, but the Petitioner refused.

As a result, Respondent contends that pursuant to CPLR §3212 the petition should be dismissed on grounds that: (a) the liquidated damages provision entered into between the parties is unconscionable; and that (b) Petitioner waived its right and is estopped from asserting the liquidated damages provision of the lease entered into between the parties. In addition, Respondent claims that he is only liable for payment of rent in the amount equal to the fair market value of the premises, which he claims is \$18 per square foot. In addition, Respondent seeks a money judgment in the sum of \$50,000 for damages he incurred as a result of Petitioner's actions.

Conversely, Petitioner alleges that in his discussions with Respondent in January the parties discussed the option of the Respondent remaining on the subject premises only for a short amount of time until his place of relocation was ready. Petitioner alleges that he would entertain the idea of entering into a month-to-month tenancy with Respondent so long as the Respondent promised to pay all current rental arrears. As a result of Respondent's failure to satisfy his debt, the Petitioner sent the Respondent a certified letter on January 21, 2008 advising the Respondent that his lease would be terminated on January 31, 2008. As a result of Respondent's failure to vacate the premises by January 31, 2008, the Petitioner sent the Respondent another certified letter on February 6, 2008, informing him that his monthly base rent on the subject premises has increased to \$6,562.50, and he would

receive such monthly invoices until he had vacated the subject premises. Since January 31, 2008, the Petitioner claims the Respondent has failed to tender any rent.

DISCUSSION

The ultimate issue presented before this court is whether the Petitioner is entitled to recover treble damages of the minimum amount of rent due on the premises as provided in the liquidated damages provision of the lease. §21.02 of the lease provides:

EFFECT OF HOLDING OVER; RENT. If Tenant or any party claiming under Tenant remains in possession of the Premises, or any part thereof, after any termination of this Lease, no tenancy or interest in the Premises shall result there from, but such holding over shall be an unlawful detainer and all such parties shall be subject to immediate eviction and removal, and Tenant shall upon demand pay to Landlord, as liquidated damages, a sum equal to all Additional Rent provided for in this Lease during any period which Tenant shall hold the Premises after the Term has expired plus an amount computed at the rate of treble the Minimum Annual Rent for such period.

Furthermore, in §1.01(d) of the lease, the parties agreed to payment in the minimum amount of the rent due as follows:

Year one (1) = \$22,750.00 per annum (\$1,895.84 per month)

Year two (2) = \$23,625.00 per annum (\$1,968.75 per month)

Year three (3) = \$24,500.00 per annum (\$2,041.67 per moth)

Year four (4) = \$25,375.00 per annum (\$2,114.59 per month)

Year five (5) = \$26,250.00 per annum (\$2,187.50 per month)

In addition, §5.01 of the lease provides that the Respondent is responsible for paying as additional rent, real estate taxes, totaling at a minimum \$6.56 per square foot or \$11,480.00 per annum, equaling \$956.67 per month. Also, §7.07 of the lease provides that the Respondent is obligated to pay as additional rent a common area maintenance fee for the operations and maintenance of the common areas and facilities of the shopping center. At a

minimum, the Respondent is responsible for payment in the sum of \$1.65 per square foot or \$2,887.50 per annum, equaling \$240.63 per month.

According to 3 Dolan, Rasch's Landlord and Tenant-Summary Proceedings, §2:8, at 112 [4th Ed] "Leases are subject to judicial scrutiny under the concept of unconscionability, and if the lease or any provision thereof is found to have been unconscionable when made, the court may refuse to enforce the lease or the unconscionable provision. Equity will not relieve parties from bargains simply because they are unreasonable or unprofitable."

Furthermore, it is well settled that "A contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation," [Truck Rent-A-Center, Inc. v. Puritan Farms 2nd, Inc.](#), 41 N.Y.2d 420, 425, 361 N.E.2d 1015, 393 N.Y.S.2d 365 (1977), (citing, [City of Rye v. Public Serv. Mut. Ins. Co.](#), 34 NY2d 470, 473, [Wirth & Hamid Fair Booking v. Wirth](#), 265 NY 214, 223, [Curtis v. Van Bergh](#), 161 NY 47, [Ward v. Hudson Riv. Bldg. Co.](#), 125 NY 230, Restatement, Contracts, §339). "If, however, the amount fixed is plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced," [Truck Rent-A-Center, Inc.](#), 41 N.Y.2d at 425, (citing, [Equitable Lbr. Co. v. IPA Land Dev. Corp.](#), 38 NY2d 516, 521-522, [Seidlitz v. Auerbach](#), 230 NY 167, 172-173, 14 NY Jur, Damages, §155).

In [Thirty-Third Equities Company LLC. v. Americo Group, Inc.](#), (294 A.D.2d 222, 743 N.Y.S.2d 10 (1st Dept. 2002)), the Court held that a liquidated damages clause calling for a 250 percent increase in rent is enforceable where the landlord had already found a new tenant to rent the premise at a 250 percent increase from what the original tenant was paying in rent. Unlike [Thirty-Third Equities](#), the Petitioner in the case at bar has failed to find a new tenant to lease the premises at treble the minimum amount of rent. Accordingly, awarding the Petitioner such an amount is grossly disproportionate to any harm the Petitioner has actually suffered as a result of Respondent's breach of the lease agreement.

Furthermore, in [Chatham Green Management Corp. v. AAFE Management Company](#), 2003 WL 22299083, 2003 N.Y. Slip Op. 51298(U) (N.Y.City Civ Ct.), the parties had entered into a short-term commercial lease, with the option to renew for five consecutive years. In [Chatham](#), the court held that

the lease provision awarded the landlord three times the base rent was unenforceable. The court reasoned that such an amount was not reasonably proportionate to the injury the landlord incurred as a result of tenant's failure to vacate the premises.

Similarly, in the case at bar, the Petitioner is seeking to enforce a liquidation clause that calls trebling the minimum amount of rent. Such an amount bears no relation to harm actually suffered by the Petitioner. For the five years of the subject lease, the Petitioner consistently increased the annual rent in increments of \$875.00. Accordingly, it would seem unjust and unconscionable to award Petitioner treble rent when the value of the premises gradually increased throughout the last five years in steady increments of \$875.00.

Furthermore, liquidated damages provisions are valuable in situations where it is difficult to ascertain the actual damage. It is the right of the parties to agree upon liquidated damages that would be paid in case of a breach of the lease, rather than leaving such an amount to the discretion of the court or jury. [Truck Rent-A-Center, Inc., 41 N.Y.2d at 424](#), (citing, 14 NY Jur, Damages, §155, pp. 4-5). However, where a liquidated damages clause is absolute and unjustly enriches one party over another, such a clause should be considered unconscionable and held unenforceable by law because same constitutes a penalty, (see, 3 Dolan, Rasch's Landlord and Tenant-Summary Proceedings, §6.13, at 282 [4th Ed]).

Accordingly, in the case at bar, it would be unjust to enforce a liquidated damages clause that awards the Petitioner treble rent, as a consequence of Respondents holding over of the subject premises.

CONCLUSION

Accordingly, this Court finds that the liquidated damages provision in the lease is a penalty and not enforceable by law.

Therefore, the Court sets this case down for trial to determine all pending issues on December 5, 2008.

So Ordered: