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Real Estate Update

221-06 Merrick Blvd. Associates LLC v. Crescent Electric Acquisition Corp.

Before: Pesce, P.J., Golia and Rios, JJ.
APPELLATE TERM

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DECIDED

Appeal from a final judgment of the Civil Court of the City of New York, Queens County (Rudolph E. Greco, Jr., J.), entered March 31, 2008. The final judgment, after a nonjury trial, dismissed the petition in a holdover summary proceeding.

Final judgment reversed without costs, petition reinstated, and matter remitted to the Civil Court for the entry of a final judgment awarding possession to landlord.

On September 3, 2002, Crescent Electric Acquisition Corporation (tenant) and landlord's predecessor entered into a five-year commercial lease for the subject premises. The lease gave tenant an option to renew the lease for two additional three-year terms. In order to exercise that option, tenant was required to provide landlord with written notice at least 120 days prior to the expiration of the term. Pursuant to the lease, all notices had to be sent by certified mail.

It is undisputed that tenant failed to send landlord a notice that was timely and made in accordance with the terms of the lease. About two months prior to the deadline to renew, tenant's regional manager sent landlord an e-mail inquiring as to the procedure to exercise the option. Landlord responded by stating, in effect, that strict compliance with the lease terms would be required. Subsequently, about a month after the deadline to renew had passed, tenant sent landlord a letter expressing its intent to renew. In response, landlord informed tenant that its letter had been received past the deadline and that the lease was not renewed. Upon the expiration of tenant's initial term, landlord commenced this holdover proceeding. After a nonjury trial, the Civil Court found that the lease had been renewed at the same rental rate as the original lease and dismissed the petition.

On appeal, landlord contends, inter alia, that tenant failed to properly exercise the renewal option, and, accordingly, that judgment should be directed to be entered awarding it possession. Tenant contends that the e-mail sent to landlord constituted proper notice of its election to renew the lease.

An election to renew "must be timely, definite, unequivocal and strictly in compliance with the lease term" (American Realty Co. v. 64 B Venture, 176 AD2d 226, 227 [1991]). The e-mail sent by tenant was not in strict compliance with the terms of the lease, nor was it sent by someone who had the authority to bind tenant to a renewal lease. In any event, the e-mail message was not unequivocal. Instead, it merely indicated that tenant intended to renew the option in the future and inquired as to the proper procedure to do so. Accordingly, tenant's e-mail was not a proper notice of its intent to renew.

Furthermore, landlord responded to tenant's e-mail by informing tenant that its election to renew would have to be done in compliance with the lease procedures. Landlord's response was sent to tenant over two months before the deadline for tenant to timely renew, and tenant provided no explanation at trial for its failure to act after landlord's rejection of its e-mail.

Tenant also argues that it is entitled in equity to a renewal of the lease. Equity will relieve a tenant from a failure to timely exercise an option to renew if "(1) the tenant in good faith made substantial improvements to the premises and would otherwise suffer a forfeiture, (2) the tenant's delay was the result of an excusable default, and (3) the landlord was not prejudiced by the delay" (Vitarelli v. Excel Automotive Tech. Ctr., Inc., 25 AD3d 691, 691 [2006]; see J.N.A. Realty Corp. v. Cross Bay Chelsea, 42 NY2d 392 [1977]). Tenant failed to establish that it is entitled to such equitable relief.

The requirements of the lease as to when and how notice was to be given were clear and unambiguous, and tenant has offered no testimony or other evidence that its failure to timely send a proper notice was the result of mistake or inadvertence. Moreover, tenant failed to offer sufficient proof that it made improvements in reliance upon renewal. Both tenant's witnesses and its documentary proof submitted at trial failed to distinguish between repairs which tenant was required to perform by the lease and any actual improvements made by tenant. In addition, tenant has not alleged that it would lose any goodwill if it had to change locations. Accordingly, tenant failed to establish that it would suffer a forfeiture if the lease were not renewed.

In light of the foregoing, the Civil Court erred in finding either that tenant had given proper notice of renewal or that tenant was entitled to equitable renewal of the lease. Therefore, the final judgment is reversed, the petition is reinstated, and the matter is remitted to the Civil Court for the entry of a final judgment awarding possession to landlord.

Pesce, P.J., Golia and Rios, JJ., concur.

The above named appellant having appealed to this court from a FINAL JUDGMENT of the CIVIL COURT, CITY OF NEW YORK, QUEENS COUNTY entered on MARCH 31, 2008 and the said appeal having been argued by JEFFREY R. METZ, ESQ. counsel for the appellant and argued by BURTON R. ROSS, ESQ. counsel for the respondent and due deliberation having been had thereon; it is hereby,

ORDERED AND ADJUDGED that the final judgment is reversed without costs, the petition reinstated, and the matter remitted to the Civil Court for the entry of a final judgment awarding possession to the landlord.

Pesce, P.J., Golia and Rios, JJ., concur.

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Memorandum