VERMONT SUPERIOR COURT

SUPERIOR COURT
Windsor Unit

CIVIL DIVISION
Docket No. 698-11-13 Wrcv

Christos Panagiotidis Hrisanthi Panagiotidis Plaintiff v. Alexandros Galanis and other occupants Defendant	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The above matter came on for hearing on Plaintiff's claim for ejectment and Defendant's counterclaim on June 11, 2014. Plaintiff Christos Panagiotidis was present with his counsel, Cabot Teachout, Esq. Defendant was present with his counsel, Lisa Wellman-Ally, Esq. Also present was a Greek interpreter, Dorothy Gakis. By agreement of the parties, only the liability portion of the claims was heard. Based upon the evidence presented, the Court makes the following findings, conclusions, and order:

Findings of Fact

This dispute arises out of a commercial transaction between the parties involving the leasing of premises located at 842 Hartford Ave. in Hartford (hereinafter "the building"). Plaintiffs own the building and attempted to lease it to the Defendant. The parties entered into a written lease of the building (P. Ex. 1) on March 1, 2013.

The Plaintiffs[1] had been running a pizza restaurant, Hartford Pizza, out of the building before deciding to sell the business and lease the building. The business was operated by a corporation controlled by Plaintiffs but the building was owned by Plaintiffs in their individual capacity. There is separate litigation between the Defendant and the corporation concerning the sale of the business pursuant to the purchase and sale contract (D. Ex. B).

At issue here are Plaintiffs' claims for breach of the lease agreement and for recovery of possession of the rented premises. Plaintiffs claim that Defendant is in breach of the lease agreement by non-payment of rent. During the hearing it was learned that Defendant was living in the building, contrary to the terms of the written lease, and Plaintiffs' assert that as an additional grounds for breach.

[1] The Plaintiffs are husband and wife. Only Christos Panagiotides appeared at the hearing and testified. For ease of reference, the Court will refer to Christos Panagiotides as Plaintiff Christos hereafter when referring to his testimony.

Defendant counterclaims that he was fraudulently induced into entering the lease agreement and that the lease should be voided. In the alternative, Defendant alleges that he has cured any breach of the lease, if there was one, by payment of monies out of an escrow fund. Further, Defendant asserts that he only learned of the alleged breach of the non-residential aspects of the lease at hearing and that he has an opportunity to cure that alleged breach as per the terms of the lease.

Sometime in 2012, if not before, Plaintiffs decided to sell their restaurant business and lease the premises where the business was located, the 2100 square foot building in Hartford they had bought in 2008. Defendant learned of the opportunity through a broker, one Pappas, in early 2012.

There is a significant dispute about many of the facts leading up to and surrounding the lease and the purchase of the business. The resolution of these disputed facts depends largely on the credibility of the witnesses as there are no documents which assist to any degree in reconciling the testimony which is directly contradictory in many instances.

After learning of the potential business opportunity, Defendant visited the building with Pappas sometime during 2012. Although claiming to not be particularly interested, Defendant says he was persuaded by Pappas to look into the opportunity further. After doing so, Defendant decided to proceed with his efforts to purchase the business and lease the building.

Defendant speaks very limited English and does not read or write English. Pappas and Plaintiff Christos are bilingual in English and Greek and can read and write in both languages.

In January, 2013, and prior to the purchase of the business or the lease of the building, Defendant began working at the pizza restaurant. He put a $10,000 deposit down with Plaintiffs sometime during January. It is undisputed that Defendant worked in the restaurant practically every day between January and the time of the closing on the lease and business purchase on March 1, 2013. Plaintiff Christos claims Defendant was involved in the full operation of the business, Defendant say he was only learning the menu and doing cooking.

Defendant claims that during the time before entering the lease agreement he repeatedly asked for access to business records and receipts. He claims Plaintiffs refused to allow him access to the records. He claims he only ran the cash register a few times during that period and that he was unable to form any impression of the scope of the business, despite being in the restaurant daily. Both parties agree the cash register requires a code in order to access the daily receipts. Plaintiff Christos says Defendant had the code, Defendant denies that he did. Defendant claims that Plaintiff Christos told him that it was a slow period for the business and ignored Defendant's request for more information. Plaintiff denies this and claims Defendant ran the cash register many times during that period, and was able to see how much business the restaurant was doing while working there.

The business operation was conducted out of one location. Defendant's daily presence at the business provided him an ample opportunity to gauge the volume of business being conducted.

Defendant also claims that he went to the closing on March 1st without having the opportunity to review the lease agreement or the purchase and sale agreement prior to the time of the closing. He claims he did not have an attorney of his own because he was assured by Plaintiff Christos that his attorney would "take care of everything." He claims that he did not read the documents because he

could not read the documents since they were in English, and did not ask any questions about them because he wanted to get back to work in the restaurant.

Plaintiff Christos claims the purchase and sale agreement came about through a negotiation with Defendant which occurred through several discussions which the parties conducted in Greek. Additionally, Plaintiff Christos claims that drafts of the purchase and sale agreement and of the lease were prepared by his attorney and given to Defendant several weeks prior to the closing to review. Plaintiff Christos further asserts that he, Pappas, and Defendant went over the drafts documents in the restaurant well before the closing took place, discussing them in Greek to review them for accuracy. At that meeting, Defendant expressed satisfaction with them.

Defendant signed the documents on March 1, 2013. Among its provisions, the lease required a monthly rental payment of $2200 for a term of 5 years. Defendant paid the rent due of $2200 monthly until October, 2013, when he stopped making direct payments of the rent and instead began paying it into an escrow account at his attorney's office (P. Ex. 2). Plaintiffs did not assent to this unilateral decision and brought this action for ejectment. For several months the payments were made into the attorneys trust account where they were held until the parties agreed, in March 2014, that they could be paid into Court and then disbursed to the mortgagee. The funds held by the attorney were disbursed through to the mortgagee in this manner. During the time the funds were being held in escrow the Plaintiffs became delinquent on their mortgage concerning the building. No interest or court costs have been paid to Plaintiffs as part of any cure.

Sometime shortly after purchasing the pizza business, Defendant became dissatisfied. He sent a letter (D. Ex. A), through his attorney, to Plaintiffs on August 29, 2013 seeking to renegotiate the purchase of the pizza business, alleging that misrepresentations were made which impacted on the purchase price.[2] This dissatisfaction apparently triggered Defendant's decision to escrow the building rent.

Between the purchase price of the pizza business and the rental payments owed during the lease, Defendant would be required to pay approximately $500,000 to Plaintiffs in these tranactions. According to Defendant's testimony, he entered into these transactions without receiving any financial information from the business, which he says he requested. He claims he had no opportunity to negotiate the terms of the lease or the purchase and sale agreement. He admittedly had no representation by an attorney. He claims he was given no opportunity to review the purchase and sale agreement or the lease agreement prior to closing. Lastly, he claims he signed the documents without knowing what they said or asking any questions about them.

The Court does not find Defendant's version of events to be credible. It is highly unlikely that anyone would enter into significant business transactions such as these admittedly were without having at least some basic questions answered. It is undisputed that Defendant had put down a $10,000 deposit several weeks before deciding to sign the lease agreement. This considerable investment is unlikely to be made without some understanding of the agreement. The credible evidence is that the lease agreement was the result of a negotiated transaction in which Defendant had the opportunity to, and did, participate. He was aware of the content of the lease document and agreed with it.

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[2] While some of the findings here may impact the litigation concerning the sale of the business, the Court's findings are addressed at the claims raised in this litigation, which do not directly concern the sale of the business except as discussed herein.

Even if Defendant's testimony is to be believed, the Plaintiff did not make any misrepresentations. If Defendant requested financial information and did not receive it prior to signing the lease, he was fully aware he did not have the information. Defendant was aware he did not have an attorney representing him. If Defendant is correct that he did not have any opportunity to negotiate the lease terms or review the proposed lease prior to signing it, which the Court does not find credible, Defendant was aware of these things as well. Defendant was fully cognizant that he did not speak English well and did not read or write it at all. Thus, he knew before he signed the documents that they were in English and that he could not read them. Although the Court has found that the documents were reviewed by Defendant with Pappas and that terms were negotiated with Plaintiffs, if they were not, Defendant knew they had not been. Everyone agrees that Defendant asked no questions of the attorney at the time the documents were signed, although he was admittedly free to do so.

In short, Defendant's testimony, even if it were un-contradicted, establishes that he was voluntarily ignorant of the lease terms, not mislead into agreeing to them. Any shortcomings in information or the opportunity for information from Plaintiffs to Defendant, as Defendant asserts, were fully known by him before he decided to proceed with one exception. That one exception involves the claim that certain outstanding bills of the pizza business had not been paid at the time of closing and thus representations made by Plaintiff that they had been were incorrect.

In that regard, the testimony by Plaintiff Christos was that every bill he was aware of at the time of closing had been paid and that the utility meters had been read prior to closing. Plaintiffs' accountant apparently had a medical issue at the time of closing and had not paid rooms and meals taxes. Once that was determined, Plaintiffs paid those taxes. Plaintiffs left Vermont shortly after the sale of the business and lease of the building, providing Defendant with a forwarding address.

Defendant claims that he was hounded by collectors for unpaid electrical, telephone and other bills of the Plaintiffs' business. The lease contained a provision requiring that these expenses incurred prior to closing were the Plaintiffs' responsibility. Defendant claims he tried to contact Plaintiff Christos about these bills several times by telephone and had difficulty reaching him. Plaintiff claims he received no phone calls from Defendant about unpaid bills, which the Court finds credible. Defendant further claims he wrote Plaintiffs' new address on the bills and "returned them" so they could be sent to Plaintiffs. Plaintiff Christos told Defendant that if he got any other bills those should be forwarded to him so they could be paid in accordance with the lease.

The testimony does not establish that Plaintiffs ever received actual notice of any outstanding bills from Plaintiffs' business. It would have been simple enough for Defendant to gather the bills and send them in an envelope to Plaintiffs. His decision to write a new address on the bills and put them back in the mail does not persuade the Court that the bills actually got to the Plaintiffs. Further, his testimony about whether he actually spoke with Plaintiffs about any outstanding bills was equivocal at best. The Court finds more credible that Plaintiffs were unaware of the bills, especially in the face of an indemnification agreement in the lease which made Plaintiffs responsible for them, and their payment of the unpaid rooms and meals taxes once they became aware that those taxes were outstanding.

With respect to the unpaid bills, the Court finds that neither the Plaintiff nor the Defendant knew of the unpaid bills at the time of closing. The bills which were presented to Plaintiffs have been paid. To the extent that other pre-closing bills have yet to be paid, those remain the responsibility of Plaintiffs per the terms of the lease. Certainly the parties contemplated that such bills might exist as the

contract provided an indemnification from Plaintiffs to Defendant in the event he was called upon to pay any pre-closing bills.

Conclusions of Law

Plaintiffs seek enforcement of the written contract with Defendant, claiming breach by non-payment and a recently asserted claim of breach by using the premises for residential purposes. Defendant claims he should be relieved of his contractual obligations due to fraud in the inducement by Plaintiffs. Further, Defendant claims that if a valid contractual agreement exists, he is not in breach of it by virtue of "curing" the breach due to payment into escrow and ultimately by agreement into the Court for disbursement.[3]

Fundamental to both claims is the determination of whether a valid contract exists between the parties. Concurrent with this is right to possession of the property. Plaintiffs argue that if there is no valid contract as Defendant asserts due to misrepresentations, Defendant has no right to possession of the premises, as a right of possession can only exist through a contractual agreement. Plaintiff further asserts that if there was a valid contract, Defendant's decision to pay rent to his attorney's escrow account constituted a breach of the contract. Further, Plaintiff's claim there has been no valid cure of the breach. Thus, Plaintiff argue that under any scenario they are entitled to a writ of possession.

Defendant concedes that if he prevails in his argument that no valid contract exists he must surrender possession of the premises. However, he argues that if there is a valid contract, he has successfully cured the non-payment breach. He further argues that he has yet to be afforded the opportunity to cure any breach of the residential prohibition in the lease as he just received oral notice of it at the time of the hearing.

The starting point in the analysis is the determination of the existence of a valid contractual agreement between the parties. A party induced into entering a contract by fraud or misrepresentation is entitled to rescind the contract and avoid any liability for its breach. *Sarvais v. Vermont State Colleges*, 172 Vt. 76 (2001). A representation is fraudulent when made with knowledge that the statement is false. *Smith v. DeMetre*, 119 Vt. 73 (1955). The Plaintiffs made no statement to Defendant which they knew to be false. Defendant has not shown any knowing falsity, with regard to matters leading up to the execution of the lease.

Nor were any representations of Plaintiffs incorrect except for the status of unpaid bills. It is true that not all bills of the prior business had been paid as of the time of the closing. This was unknown to Plaintiffs at the time the closing took place and thus any representation concerning the status of the bills was unintentional, not knowingly false.

A contract may also be avoided where an unintentional mistake or false statement is made where the statement is "likely to induce a reasonable person to manifest his assent, or if the maker

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[3] Defendant also makes certain claims as to misrepresentations by Plaintiffs concerning the existence of liens, relying on paragraph 7 of the purchase and sale agreement (D. Ex. B). The lease provides that breach of the purchase and sale agreement by the lessee is a breach of the lease agreement (paragraph 15). That provision does not apply to breaches of the purchase and sale contract by the lessor. Thus, the issues raised in the counterclaim concerning alleged breaches of the P&S agreement by lessor are not, under the terms of the lease agreement, breaches of that agreement even if established.

knows that it would be likely to induce" such assent. *Sarvais,* 172 Vt. at 80. The parties to this contract both clearly realized that bills which should have been the responsibility of Plaintiffs might not get paid before the lease transaction was completed. The existence of the indemnification provision in the contract is clear evidence of this. Consequently, there was no inducement here based upon the unintentional mistake or false statement about the unpaid bills. Defendant entered the transaction based upon the representation that all pre-closing bills had been paid or if not that they would be Plaintiffs' responsibility. This was the basis upon which Defendant gave his assent to the transaction. All pre-closing bills which have been presented to Plaintiffs for payment have been paid. No evidence has been introduced to show Defendant has paid any bills which were Plaintiffs' responsibility.

Because Defendant has not shown any fraudulent representations by Plaintiffs and has shown no mistake or false statement which is material, there are no grounds to void this contract. *Sarvais, Id.* The lease agreement between the parties was valid and enforceable.

Vermont law provides a right to cure a lease breach for non-payment of rent. 12 V.S.A. § 4773. This right to cure requires payment of all unpaid rents, interest, and court costs in order to be effective. In this case, the Defendant has made payment of the past-due rent and is now current with his rent obligations. However, he has not made payment of the Plaintiff's costs and interest as required under the statute providing the right to cure for non-payment.

The lease provided a separate right to cure (paragraph 15) which did not require the payment of interest and costs and was not confined to non-payment breaches. However, this opportunity to cure required that it be exercised within 10 days of written notice of the breach. Plaintiffs brought their claim for ejectment in November, 2013, thus providing Defendant with written notice of the claimed non-payment breach. Monies were not paid into the Court through the agreement of counsel until March, 2014, well outside the 10 day lease provision.

Defendant argues that termination of the lease agreement must be done in accordance with the terms of the lease. Defendant is correct in that premise. *Deschenes v. Congel*, 149 Vt. 579 (1988). In *Deschenes*, the lease required written notice of termination and payment of rent up to the termination date in order for the lease to be terminated by the lessee. The Court held that the failure to pay the rents due up to the time of termination was a failure of compliance with the lease term.

Here, the lease requires that written notice of breach be given and that the breaching party has 10 days to cure the breach from receipt of the written notice (paragraph 15). The lease also contained a provision regarding notices providing that notices shall be deemed to be given when mailed to specified addresses (paragraph 20). Paragraph 20 provides an agreement that a certain method of providing written notice is acceptable. The lease does not require that written notices may only be given by mail, only that they are effective when given in the manner specified in the lease. This is a significant difference from the lease termination provision in *Deschenes*. The notice provided exceeded that which was permissible under the lease as personal service was made on Defendant on November 6, 2013. While a lesser means of service would have been adequate under the lease, it does not follow that a more effective means of service is prohibited by the lease.

Plaintiff's complaint suggests a written notice of breach was given to Defendant prior to the serving of the complaint. That notice was never entered into evidence for reasons which are unclear. However, the complaint for ejectment based upon non-payment was served upon Defendant and

provided him with written notice of the claimed breach (see paragraph 5). [4] Under the terms of the lease, Defendant had 10 days thereafter in which to bring the rental payments current. He did not do so.

The Defendant elected to pay rents into escrow to his attorney rather than to the Plaintiffs. There was no authority to do this under the lease terms and no authority to do so under the law has been provided. Defendant's unilateral decision to not make rent payments as required by the lease was unauthorized and done in an effort to force a renegotiation of the business purchase. Rental payments were not received by or on behalf of Plaintiffs for several months resulting in a delinquency in the mortgage payments until a stipulation as to disbursement was made.

As a result, Defendant has not effectively availed himself of either the statutory right to cure for non-payment since interest and costs were not paid, nor the lease provision allowing for cure since more than 10 days passed before rental payments were made current after written demand to do so. Because no effective cure has been made, Defendant is in breach of the lease. Plaintiffs are entitled to a judgment for possession of the leased premises due to Defendant's breach.

There has been no evidence put before the Court that the claimed breach of the lease due to Defendant using the leased premises as a residence was ever the subject of written notice by Plaintiffs as required under the lease. Accordingly, Plaintiffs' claim that the lease has been breached on that basis has been brought without compliance with the condition precedent in the lease requiring written notice and time to cure. Plaintiffs are not entitled to relief based upon the claimed breach of the residential restrictions in the lease.

Order

Plaintiffs are entitled to partial judgment for possession and to judgment on Defendant's counterclaim. Plaintiffs are to prepare a submit a proposed judgment order and writ of possession within 10 days. The damages hearing on Plaintiffs' claims shall be scheduled for hearing.

Dated at White River Jct. this 25th day of June, 2014.

Harold E. Eaton, Jr.
Civil Division Judge

FILED

JUN 26 2014

VERMONT SUPERIOR COURT
WINDSOR UNIT

[4] Unlike residential leases, no notice to quit for non-payment is apparently required in a commercial lease agreement. 12 V.S.A. § 4773. Nonetheless, the lease itself required notice of the breach to be given. It has not been made to appear why a complaint setting forth the basis for the claimed breach, as this one does, is insufficient notice, which would then trigger the 10 day right to cure.