SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5465-14T3

PILGRIM PLAZA, LLC,

Plaintiff-Respondent/
Cross-Appellant,

v.

XIU FANG LIU,

Defendant-Appellant/
Cross-Respondent.

Argued November 30, 2016 – Decided April 11, 2017

Before Judges Alvarez and Accurso.[1]

On appeal from Superior Court of New Jersey, Chancery Division, Essex County, Docket No. C-293-12.

Benjamin B. Xue argued the cause for appellant/cross-respondent (Xue & Associates, P.C., attorneys; Mr. Xue, on the brief).

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[1] Hon. Carol E. Higbee participated in the panel before whom this case was argued. The opinion was not approved for filing prior to Judge Higbee's death on January 3, 2017. Pursuant to R. 2:12-2(b), "Appeals shall be decided by panels of 2 judges designated by the presiding judge of the part except when the presiding judge determines that an appeal should be determined by a panel of 3 judges." The presiding judge has determined that this appeal shall be decided by two judges.

Richard L. Zucker argued the cause for respondent/cross-appellant (Lasser Hochman, LLC, attorneys; Mr. Zucker, of counsel and on the brief).

PER CURIAM

In this shopping center tenancy dispute tried in the Chancery Division, defendant tenant, Xiu Fang Liu, appeals from an amended final judgment reforming the parties' lease, declaring her in default of the lease as reformed and as failing to have exercised an option to renew and awarding the landlord damages, including attorneys' fees. The landlord, plaintiff Pilgrim Plaza, LLC, cross-appeals claiming the Chancery judge erred in denying its demand for holdover rent, late charges and interest in accordance with the reformed lease and in determining its fee award. Because there is substantial, credible evidence in the record to support Judge Moore's findings and fee award, we affirm, substantially for the reasons expressed in his comprehensive and cogent opinions delivered from the bench on May 19 and June 26, 2015.

The Pilgrim Plaza Shopping Center straddles the line between Cedar Grove and Verona. In 2007, defendant took an assignment of a triple net lease from the owner of a Chinese restaurant on the Cedar Grove side. In the lease plaintiff inherited, the tenant's proportional share of real estate taxes

was 5.18 percent, which defendant began paying when she assumed the lease. In 2008, defendant negotiated a new lease with the landlord, plaintiff's predecessor and the entity which filed the original complaint in the case.[2]

The landlord was at that time using a new form lease for the shopping center. The negotiations were conducted through counsel, as defendant averred she spoke "very limited English and can read even less." Although there were discussions over the amount of the base rent for the space, the parties were in agreement that the triple net arrangement for defendant's pro rata share of real estate taxes and common area maintenance (CAM) charges would remain. The new lease called for defendant

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[2] In her post-trial submissions, defendant argued for the first time that Pilgrim Plaza, substituted in as plaintiff in a "supplemental" complaint filed in 2013, lacked standing because it acquired its title from an entity different from her prior landlord. Although this issue was not included in the pre-trial order, see R. 4:25(b)(7), and was not raised at trial, Judge Moore addressed it for sake of completeness. Relying on plaintiff's deed in evidence and accepting plaintiff's explanation of the obvious connection between the related entities of defendant's former landlord and plaintiff's predecessor in title, the judge dismissed defendant's belated standing challenge as without merit. See R. 4:26-1; Crescent Park Tenants Ass'n v. Realty Equities Corp. of N.Y., 58 N.J. 98, 101 (1971). As plaintiff, the owner of the shopping center, would appear an obvious proper party to prosecute this tenancy action, see Port Liberte II Condo. Ass'n, Inc. v. New Liberty Residential Urban Renewal Co., LLC, 435 N.J. Super. 51, 64 (App. Div. 2014), we consider the issue without sufficient merit to warrant discussion in this opinion. R. 2:11-3(e)(1)(E).

to pay as "additional rent" her proportionate share of the real estate taxes and CAM charges, calculated "by dividing the total ground floor demised area of the Premises by the total leasable ground floor area of all buildings in the Shopping Center[,] which percentage is currently 1.58%." The lease provided that "[n]otwithstanding the foregoing," defendant's share of the real property taxes "which relate solely to the portion of the Shopping Center located in Cedar Grove . . . shall be equal to 2.23%." The lease further provided defendant's share "shall be modified from time to time in the event of a change in the ground floor area of the Premises or the total leasable ground floor area of all buildings in the Shopping Center."

Apparently unnoticed by either party was that defendant's pro rata share of the real estate taxes as calculated by the method set out in the lease was then 5.18 percent, not 2.23 percent. At trial, the landlord's attorney surmised she miscalculated the percentage by relying on the ratios for space on the Verona side of the shopping center. She, however, sent an email to the landlord's representative confirming the correctness of the 2.23 percent figure before providing defendant the new lease for execution. The landlord's representative acknowledged his receipt of the email, but testified he had not focused on the error, being more interested

in the part of the email advising that defendant was bringing her rent arrears current.

After the lease was executed but before the start of the new term in August 2009, the landlord advised defendant, along with all the other tenants of the shopping center, that it had hired an architect to re-measure the entire shopping center. As a result, defendant's pro rata share of the shopping center's real estate taxes to Cedar Grove rose from 5.18 to 5.3 percent. The landlord billed defendant for her 5.3 percent share, and defendant paid the increased rate, although the tax reconciliation statement explaining the change was sent in February 2010 to defendant's old address in Jackson Heights, New York.[3]

In May 2010, nearly ten months into the new lease term, defendant asked the landlord for a thirty percent reduction in her base rent because the movie theatre in the shopping center had closed, and the effect that and the economic downturn were having on her business. The landlord agreed to a one-year, ten

[3] Defendant's counsel had advised the landlord's counsel in May 2008, before execution of the lease, to change defendant's address from Jackson Heights to the restaurant in the shopping center. This was apparently not done and the landlord continued to send tax reconciliation statements to defendant at her Jackson Heights address until January 2013, when it sent the 2012 reconciliation to her at the restaurant.

percent reduction. At the end of that period, defendant asked the landlord to allow her to continue paying the same reduced base rent through the end of the lease term in 2014. The landlord refused.

In February 2012, the landlord's attorney wrote to defendant's counsel enclosing the most recent tax reconciliation statement for the Cedar Grove portion of the shopping center and advised that defendant owed $2778.93 in unpaid real estate taxes and CAM charges. Counsel for defendant responded that his client would immediately pay any arrears, but expressed confusion over defendant's pro rata share of 5.3 percent of real estate taxes as the executed lease listed the percentage as 2.23 percent. He also claimed he could not tell whether the CAM charge was calculated in accordance with the 1.58 percent rate included in the lease.

In response, the landlord's counsel attached the CAM reconciliation demonstrating that defendant was charged a 1.52 percent pro rata CAM charge, slightly less than the 1.58 pro rata charge included in the lease. As to the real estate tax charge, the landlord's counsel did not address the discrepancy in the lease but instead attached the results of the 2009 remeasurement of the shopping center, quoting the provision of the lease permitting the modification of the tenant's share of

the taxes. Based on the architect's conclusion that defendant occupied 5.3 percent "of the ground floor area of the Cedar Grove portion of the Shopping Center," counsel asserted defendant's "[pro rata] share of the Cedar Grove taxes is 5.3%." Following that exchange and in accordance with defendant's counsel's representation, defendant brought her rent current, including the outstanding CAM charges and her share of the Cedar Grove real estate taxes.

In December 2012, defendant owed the landlord slightly over $6500, less than one month's rent. The landlord filed a complaint seeking reformation of the lease to correct its "scrivener's error" regarding defendant's pro rata share of the Cedar Grove taxes, possession and damages, including a service fee of eight percent and default interest of eighteen percent.

The case was very aggressively litigated and closely overseen, first by Judge Klein and then, following her retirement, by Judge Moore. Judge Moore noted seventy-two separate filings in the matter over the case's two-and-a-half-year existence. Plaintiff filed four motions within the first three-and-a-half months of the case.

In the middle of this hotly contested matter, the tenant faced the deadline to exercise her option to extend the lease for another five-year term. The landlord's representative wrote

directly to defendant on July 18, 2013, advising her that "should [she] wish to exercise [her] option which shall become effective on August 1, 2014[,] [she] must so notify the landlord in writing no later than July 31, 2013." He wrote defendant another letter the very next day, stating that, notwithstanding his earlier letter, plaintiff could not exercise her option because she was in default of her lease obligations.

Defendant claimed she wrote back on July 24, 2013, exercising her option. When she did not receive any response from the landlord, she made inquiry with her counsel. He wrote to the landlord's counsel on September 20, 2013, approximately seven weeks after the option deadline, requesting the letter be considered "another confirmation/notice to the Landlord" that defendant was exercising her option to renew the lease.

Plaintiff's counsel emailed his response the following day, noting the landlord had no record of any renewal notice. Plaintiff's counsel asserted not only was the option not exercised timely, but because defendant was in default of her lease obligations, she had no right to "extend the term of the tenancy beyond July 31, 2014."

Plaintiff filed a second "supplemental" complaint in November 2013 seeking a declaratory judgment that defendant

failed to timely exercise her option to renew.[4] In April 2014, plaintiff made its second motion for partial summary judgment, including on the count asserting defendant's failure to timely renew the lease. Although denying plaintiff relief on the other counts, Judge Moore granted plaintiff summary judgment on defendant's failure to timely exercise the option. The judge subsequently denied defendant's request for reconsideration.

Without advising the court, plaintiff instituted a summary dispossess action in landlord/tenant court against defendant. Judge Moore subsequently advised the parties of his intention to sua sponte reconsider the partial summary judgment on the option. Following argument, Judge Moore vacated his prior orders, ordered the dismissal of the summary dispossess action and required defendant to pay plaintiff the base rent called for under the lease's extension option rider and real estate taxes and CAM charges without prejudice to plaintiff's application for holdover rent.

The case was tried over six non-consecutive days from December 2014 to February 2015. As Judge Moore noted, notwithstanding the intensity with which the case was litigated,

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[4] Plaintiff's first "supplemental" complaint asserted additional grounds for defendant's default relating to her failure to perform certain non-monetary obligations required by the lease, which the landlord had not previously asserted.

the trial mainly concerned just two issues, whether plaintiff was entitled to reformation of the lease and whether defendant had timely exercised her option to renew. In the event the court decided the second issue against defendant, it also had to resolve whether equity should relieve the forfeiture.

Plaintiff argued the parties were in agreement the triple net feature of the old lease would remain unchanged, and the words of the lease accurately reflected their agreement. It contended the inaccurate percentages inserted into the lease was simply a "scrivener's error" entitling it to reformation. Plaintiff maintained defendant was always well aware of the actual percentages and simply latched onto the error in bad faith when it refused to reduce defendant's base rent in 2012. As to exercise of the option, plaintiff argued time was of the essence and defendant never sent the landlord's representative any letter exercising the option. Plaintiff asserted defendant's testimony to the contrary was a lie and she manufactured her letter of July 24, 2013 after the fact.

Defendant maintained calculating her pro rata share of the Cedar Grove real estate taxes was the exclusive responsibility of the landlord, who negligently discharged that duty. Relying on the landlord's counsel's testimony that she did not simply fail to copy the percentages correctly but miscalculated them by

relying on the ratios for the Verona side of the shopping center, defendant contended the mistake could not fairly be characterized as a scrivener's error. Defendant also noted the lawyer testified she sent her calculations to the landlord's representative for review before finalizing the lease and sending it to defendant for execution. Defendant asserted those facts made clear that the error was simply a negligent, unilateral mistake by the landlord precluding reformation of the lease.

As for her exercise of the option, defendant maintained her son typed the one-sentence letter to the landlord, and her husband addressed the envelope and sent it to the landlord's representative by regular mail, just as he had sent his two letters to her. She also contended that even if the landlord never received her letter, her counsel made clear she was exercising her option only a few weeks after the deadline. As the option deadline was a full year before expiration of the lease, and the landlord had not taken any steps to advertise or re-let the space in the interim, defendant argued forfeiture was too harsh a penalty. Defendant testified she had invested nearly $100,000 in the restaurant, in which her entire family worked. She emphasized the inequity of allowing the landlord, with its superior resources, relief from its unilateral mistake

while holding her to the letter of the lease, resulting in the complete loss of the business she had worked hard to build.

After hearing the testimony of the witnesses and reviewing the parties' extensive post-trial proposed findings of fact and conclusions of law, Judge Moore entered judgment for plaintiff reforming the lease and granting it possession and damages. The judge found the percentages in the lease for defendant's pro rata share of the Cedar Grove real estate taxes did not accurately reflect the parties' actual agreement to continue the triple net arrangement under the prior lease. Although rejecting plaintiff's theory that defendant raised the issue in bad faith, the judge did not find any evidence defendant had relied on the erroneous percentage, so as to preclude relief to plaintiff. Concluding that reformation was appropriate to cure what the judge agreed was a scrivener's error, he granted judgment to plaintiff reforming the lease.

Determining whether defendant had timely exercised her option to renew was clearly a closer question. After hearing the parties testify, Judge Moore concluded defendant did not properly exercise the option. The judge found the landlord's representative "more credible" than defendant on the issue. In making that finding, the judge found "the one fact that

shift[ed] the weight" to the landlord's representative was the posture of the litigation.

The landlord's representative copied his lawyer on his first letter to defendant about the deadline for exercising the option. The following day, he wrote another letter, again copying his counsel, basically retracting the first, telling defendant she cannot exercise the option because she was in default, referencing the ongoing litigation. Judge Moore concluded in the context of "a very lawyered case with extensive motion practice," he was "certain, based upon all the facts" that the landlord's representative would have shared any letter he received from defendant with his counsel. The judge further found "the credible evidence is that [defendant] was in default both on the rent issue and on the maintenance issue at the end of July under that paragraph of the extension option rider making the tenant unable to exercise the option."

Having concluded the option was not timely exercised, the judge considered whether equity should relieve the forfeiture. Relying on Dunkin' Donuts of America, Inc. v. Middletown Donut Corporation, 100 N.J. 166, 183-84 (1985) and Brick Plaza, Inc. v. Humble Oil & Refining Company, 218 N.J. Super. 101, 104 (App. Div. 1987), the judge found no "fraud, accident, surprise or

improper practice" that would justify "alter[ing] the very clear language of the lease agreement."

Turning to damages, the judge calculated rent due in accordance with the lease as reformed, but denied plaintiff's request for interest, late fees and holdover rent, finding those charges improper under the circumstances. The judge noted it was plaintiff's lease error that led the parties into litigation. Further, he found defendant was in good faith paying rent during the pendency of the matter and should not be penalized by the imposition of interest, late fees and holdover rent in order to fairly litigate legitimate issues. Accordingly, relying on plaintiff's tenant ledger, the judge awarded plaintiff damages of $23,633.66 along with $7533.95 in rent coming due after the court's decision and a $602.72 late fee for failure to pay that sum when due.

After considering plaintiff's request for attorneys' fees of $240,710.53 and expenses of $2760, he judge awarded $35,000 in fees and $1461 in expenses. The judge acknowledged both parties' arguments as to an appropriate fee award and reviewed the request in light of the eight factors of RPC 1.5(a). Scrutinizing the certification in support of the application, the judge's central finding was the case was litigated in a manner all out of proportion with the amount of money at issue.

See Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 387 (2009).

Specifically, the judge found the hours grossly excessive, noting plaintiff sought over $100,000 for basic litigation services including preparation for trial, trial exhibits, document reviews and preparing and responding to proposed findings of fact and conclusions of law. The judge acknowledged plaintiff's counsel's experience and reputation but concluded a great many tasks could have been performed competently by a lawyer with less experience and a much reduced billing rate.

Final determinations made by the trial court sitting in a non-jury case are subject to a limited and well-established scope of review: "'we do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice[.]'" In re Trust Created By Agreement Dated Dec. 20, 1961, ex rel. Johnson, 194 N.J. 276, 284 (2008) (quoting Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974)).

Having reviewed the record as well as the parties' extensive briefing of the issues, and applying that standard here, we have no reason to quarrel with any of Judge Moore's

findings or conclusions. The issues in this case were limited and uncomplicated. The law is well-settled and the outcome turned largely on the judge's assessment of the credibility of the witnesses, which we are in no position to second-guess. The judge considered whether equitable relief should be afforded defendant and determined it was not warranted, notwithstanding that enforcement of the contract would undoubtedly cause hardship to her. See Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 223 (2005).

Judge Moore made detailed factual findings and explained the reasons for his conclusions. We are satisfied that his legal conclusions were sound and his damage award reasonable based on the facts in evidence. Plaintiff applied to a court of equity for relief in the form of reformation of a contract made necessary by its own error. The litigation was prolonged by its own litigation strategy and the inability of the court to provide the parties consecutive trial days. We find nothing unremarkable or inequitable in limiting the landlord under such circumstances to the rent owed without late fees and interest of eighteen percent. See Graziano v. Grant, 326 N.J. Super. 328, 342 (App. Div. 1999) (noting "a court of equity should not permit a rigid principle of law to smother the factual realities to which it is sought to be applied"). To do otherwise would

unfairly penalize the tenant for litigating what the court found were legitimate issues pursued in good faith. See Rehberger v. Rosenfeld, 100 N.J. Eq. 18, 23 (Ch. 1926) ("Cases could be multiplied to show that one party to a suit cannot correct his own mistake with costs as against those in nowise responsible for the errors complained of.").

Our standard of review of a fee award is even more restrictive. "[A] reviewing court will disturb a trial court's award of counsel fees 'only on the rarest of occasions, and then only because of a clear abuse of discretion.'" Litton Indus., Inc., supra, 200 N.J. at 386 (quoting Packard-Bamberger & Co., Inc. v. Collier, 167 N.J. 427, 444 (2001)). We find no such abuse of discretion here.

Plaintiff sought fees of over $240,000 in a landlord/tenant matter begun when the tenant owed the landlord only slightly over $6500, less than one month's rent. Over $147,000 of what plaintiff's counsel sought from defendant it had not even billed its own client. Judge Moore's careful findings about the amount of time spent on specific tasks make clear he scrutinized the billings. We agree that charging defendant over $240,000 in attorney's fees in a landlord/tenant dispute in which plaintiff recovered less than $24,000 could not be justified under applicable law. See id. at 389 ("[T]he relationship between the

fee requested and the damages recovered is a factor to be considered by the trial court because the notion of proportionality is integral to contract fee-shifting in order to meet the reasonable expectations of the parties.").

Judge Moore clearly identified the time and fees he found excessive for the tasks performed. He likewise clearly explained the expenses he found unjustified. Having reviewed the billings and counsel's arguments, we cannot find the judge abused his considerable discretion in this matter, notwithstanding that the fees awarded exceeded plaintiff's damages.

Having reviewed the record and considered the parties' arguments in light of applicable law, we affirm the judgment, substantially for the reasons expressed by Judge Moore in his thorough and thoughtful opinions from the bench on May 19 and June 26, 2015.

Affirmed.