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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4876-14T1

FRIENDS OF THE LOEW'S, INC.,

Plaintiff-Respondent,

v.

CITY OF JERSEY CITY,

Defendant-Appellant,

and

JERSEY CITY REDEVELOPMENT AGENCY,

Defendant.

Submitted March 21, 2017 – Decided April 24, 2017

Before Judges Yannotti, Gilson and Sapp-
Peterson.

On appeal from Superior Court of New Jersey,
Chancery Division, Hudson County, Docket No.
C-32-14.

Jeremy Farrell, Corporation Counsel, attorney
for appellant (Jason T. Watson, on the
briefs).

Roberta L. Tarkan, attorney for respondent.

PER CURIAM

The City of Jersey City (City) appeals from orders filed by the trial court on June 3, 2015, granting summary judgment in favor of plaintiff, Friends of The Loew's, Inc. (FOL), and denying the City's motion for summary judgment. We affirm in part, reverse in part, and remand for further proceedings.

I.

This appeal arises from the following facts. Loew's Jersey Theater is located in Journal Square in the City. The theater opened in 1929. It was one of several so-called "movie palaces" built in the New York City area. The theater later fell into disrepair. The theater was closed and the City considered demolishing it. FOL, a non-profit organization, was established to save the theater, restore it, and renew its operation.

In 1993, the City purchased the theater. Acting through the Jersey City Redevelopment Agency (JCRA), the City spent its own funds, plus monies obtained from the New Jersey Historic Trust, to stabilize the building and make it available for special events. Several years later, FOL made additional repairs and renovations, using its own funds and volunteer labor. FOL also assumed responsibility for the ordinary maintenance of the theater.

On October 15, 2004, the City and FOL entered into an agreement under which FOL leased the theater for the purpose of

restoring, operating, and maintaining the theater as a multi-use cultural arts, entertainment, and event center, with nominal rent of one dollar per year, payable yearly in advance. The initial term of the lease was sixty-three months from the date of its execution.

Under the terms of the lease, FOL has full and exclusive authority for the theater's management and planning. In the lease, FOL agreed to seek funds to perform certain construction projects, which would be undertaken in two phases. The City agreed to make a good faith effort to secure funding and undertake certain capital improvements. The parties also agreed to seek funds from the County of Hudson (County) for certain work, and to share responsibility for the building's repairs and maintenance.

Among other things, the lease states that FOL has an option to renew the term for two, five-year renewal periods. In addition, the lease sets forth certain events of default, which include the failure by FOL to pay any installment of basic or additional rent, within twenty days after such payment is due. In the event of default, the City may avail itself of certain remedies including termination of the lease.

On November 10, 2004, the City's Municipal Council adopted Ordinance 04-073. The ordinance authorized the Mayor or the City's Business Administrator to enter into the lease with FOL for the

theater, at a nominal rate of one dollar per year, pursuant to N.J.S.A. 40A:12-14(c), a provision of the Local Lands and Building Law, N.J.S.A. 40A:12-1 to -38.

The ordinance states that the lease shall be for an initial term of five years, which runs from the date of approval by the Council. The ordinance also states that subject to the mutual consent of the parties, the lease could be extended for two additional five-year periods, for a "total maximum term of not more than" fifteen years.

Thereafter, certain differences arose between the City and FOL, including a dispute as to the validity of the lease. Accordingly, the City and FOL entered into a memorandum of understanding (MOU), dated January 30, 2009, to resolve those differences and continue their working relationship with regard to the theater.

Among other provisions, the MOU states that the relationship between the City and FOL is governed by the terms of the lease dated October 15, 2004, "which remains in full force and effect." The MOU states that "[t]he parties agree that the [l]ease is valid and binding." The MOU also states that the parties agree "that the terms and conditions of the [l]ease apply to both parties and that each party will abide by the terms and conditions of the [l]ease."

In addition, the MOU provides that if there is any inconsistency between the lease and MOU, the provisions of the MOU govern.

In the MOU, the City committed to make a good faith effort to secure funding for capital improvements and other purposes, and to make such capital improvements in coordination with FOL. The parties further agreed to cooperate in the design, planning, and execution of the work on the theater's structure and systems. FOL also agreed to keep the City fully advised of any contract negotiations, and to comply with all applicable laws.

On May 20, 2009, the City's Council adopted Ordinance 09-061, which authorized the MOU. Ordinance 09-061 states that the City and FOL had executed the original lease, which had been approved by the Council by the adoption of Ordinance 04-073. Ordinance 09-061 also states that "[a]ll ordinances and parts of ordinances inconsistent herewith are hereby repealed."

The term of the original lease was scheduled to end in February 2010. In October 2009, FOL wrote to the City's Business Administrator, providing notice that it intended to exercise its option to extend the term of the lease for five years. The City asserts that plaintiff presented no proof that FOL's letter was actually delivered to the City.

In 2013, the City announced its intention to bring in new management to operate the theater, and the JCRA issued a request

for proposals for the redevelopment and management of the facility (RFP), in accordance with a redevelopment plan adopted by the Council. According to FOL, the City then directed the theater's architect to cease construction on work being undertaken with funds provided by the County.

In March 2014, FOL filed a verified complaint against the City and the JCRA, alleging that defendants breached the lease and MOU by failing to provide funds for construction; acting to displace FOL as the theater's manager; failing to act on FOL's applications for funds; and directing the theater's architect to stop construction.

FOL also claimed the City breached the implied covenant of quiet enjoyment; breached the implied covenant of good faith and fair dealing; slandered title; and interfered with its prospective economic advantage. FOL sought an injunction enjoining and restraining the City and the JCRA from acting contrary to the terms of the lease and MOU. It also sought the award of damages, costs of suit, and attorney's fees.

In addition, FOL sought a preliminary injunction, seeking to restrain defendants from representing to any party that FOL was not the tenant and manager of the theater, precluding defendants from taking any action concerning the RFP, and requiring defendants to notify certain third parties about this litigation. The court

entered an order requiring defendants to show cause why the preliminary injunction should not be granted.

On March 28, 2014, FOL filed a first amended verified complaint. Defendants responded on April 24, 2014, by filing answers and counterclaims, alleging that the lease and any extension of the lease are void because they were not authorized by ordinance, as required by N.J.S.A. 40:12-14; and because FOL breached the lease by failing to submit annual financial reports to the City, provide proof of liability insurance, and pay the annual lease payments.

On April 28, 2014, the City filed a motion for summary judgment, and on April 29, 2014, the JCRA filed a motion to dismiss the claims against it. On the return date of the order to show cause, the court entered a consent order restraining the JCRA from proceeding with the redevelopment until the motions were resolved.

On June 4, 2014, the court entered an opinion and order, granting the City's motion to dismiss the complaint. The court found that because the City never ratified the purported lease extension and never consented to it, the City had the right to treat the lease and the extension as void and to refuse to comply therewith. On June 6, 2014, the court entered an order granting the JCRA's motion to dismiss.

On June 20, 2014, FOL filed a motion for reconsideration of the June 4, 2014 order, and the court entered an order dated July 25, 2014, which granted the motion and restored FOL's complaint against the City. On April 14, 2015, the City filed its second motion for summary judgment, and FOL thereafter cross-moved for summary judgment.

The trial court heard oral argument on the motions on May 29, 2015. The court granted FOL's motion and denied the City's motion. The court found that the original lease remains in full force and effect and has not been invalidated in any way. The court memorialized its decision in orders filed on June 3, 2015.

The order granting FOL's motion states that the City is enjoined and restrained from taking any action contrary to the lease and the MOU, and from withholding any action required under the agreements. The order also enjoins the City from preventing access to the theater or otherwise interfering with FOL's quiet enjoyment, possession, management, or operation of the theater. In addition, the order states that FOL had withdrawn all other requests for relief in the complaint, including the request for damages and attorney's fees.

The City's appeal followed. On appeal, the City argues that the trial court erred by: (1) refusing to adjudicate the issue of whether plaintiff breached the lease; (2) rejecting the City's

contention that the lease is void because any purported extension of the lease was not ratified by ordinance, as required by N.J.S.A. 40A:12-14(c); and (3) finding that Ordinance 09-061 repealed in part provisions of Ordinance 04-073, and modified certain lease terms in the earlier ordinance.

II.

We turn first to the City's contention that the trial court erred by granting summary judgment to FOL. The City contends that the original lease is void because any purported extension of the lease was not authorized by an ordinance, which the City contends is required by N.J.S.A. 40A:12-14(c).

A trial court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). We apply the same standard when reviewing a trial court's order granting summary judgment. Globe Motor Co. v. Igdaley, 225 N.J. 469, 479 (2016) (citing Bhaqat v. Bhaqat, 217 N.J. 22, 38 (2014)).

Here, the parties agree that N.J.S.A. 40A:12-14(c) applies to the lease between the City and FOL. The statute provides in relevant part that, "[i]n the case of a lease to a nonprofit

corporation or association for a public purpose, the lease shall be authorized by resolution, in the case of a county, or by ordinance, in the case of a municipality, and may be for nominal or other consideration." Ibid. The statute also requires that the ordinance or resolution specify "the term of the lease." Ibid.

FOL asserts that, on October 2, 2009, it sent a letter to the City's Business Administrator advising that it was exercising its option to renew the lease for five years. The City argues that, assuming FOL sent such a letter, the letter was ineffective to extend the lease term for the five-year period. The City argues that N.J.S.A. 40A:12-14(c) required the Council to adopt an ordinance expressly authorizing the extension of the lease. The City contends that because the Council never adopted an ordinance approving the extension, the lease was not extended and has been void since the end of the initial lease term.¹

In support of its argument that another ordinance was required to approve the extension, the City relies upon City of Jersey City v. Roosevelt Stadium Marina, Inc., 210 N.J. Super. 315 (App. Div. 1986), certif. denied, 110 N.J. 152 (1988). We are convinced, however, that the City's reliance upon Roosevelt Stadium Marina, Inc. is misplaced.

¹ We note that in 2014, FOL informed the City that it was exercising its option to extend the lease for the second five-year extension.

In that case, the City filed a lawsuit, seeking rescission of a thirty-year lease with private parties, based on alleged breaches of the lease. Id. at 318-19. The parties then entered into negotiations, which resulted in a settlement that provided for a fifteen-year extension of the lease. Id. at 321, n. 2. The settlement was incorporated in a judgment, which the City later sought to vacate on various grounds, one of which was that the settlement required approval of the City's Council. Id. at 323-24.

We noted that the settlement would clearly have violated N.J.S.A. 40A:12-14, which was in effect at the time. Id. at 328. We pointed out that N.J.S.A. 40A:12-14(a) required public bidding for a lease to a private person, and the City's governing body had to accept or reject the bids. Ibid. We stated that the statute applied "equally to extensions of leases or new leases" and failure to comply with the statute "renders any purported lease extension illegal and void." Ibid. (citations omitted). We added, however, "[t]here was no claim made by any party of any preexisting entitlement to an extension of the lease, such as by option." Id. at 329.

In this case, the parties recognize that N.J.S.A. 40A:12-14(c) applies to the lease with FOL. The statute authorizes the City to lease property to non-profit entities for a nominal

consideration without public bidding, but requires a municipality to authorize the lease by ordinance. Ibid. The 2004 ordinance specifically approved the lease with FOL for an initial term of five years, with two lease extensions, each consisting of five years. Because the 2004 ordinance approved the initial term of the lease, as well as two five-year extensions, the City was not required to adopt another ordinance authorizing the extensions of the lease.

The City further argues that the lease did not comply with the 2004 ordinance, which states that the initial term shall be for five years, commencing on the date of the Council's approval, and any extension of the lease was "subject to the mutual consent of the parties." As we noted previously, the lease states that the initial term was for sixty-three months, from the date of execution. In addition, the lease provides that FOL had the option to renew the lease for two five-year periods, which FOL could exercise by providing written notice to the City.

However, the Council adopted Ordinance 09-061, which authorized the Mayor or the City's Business Administrator to execute the amendment to the lease, in the form of the MOU. The 2009 ordinance stated that "[a]ll ordinances and parts of ordinances inconsistent herewith are hereby repealed."

Therefore, the MOU expressly reaffirms the validity of the October 15, 2004 lease, and states that the lease remains in full force and effect. To the extent any provision of the October 15, 2004 lease or the MOU was inconsistent with the 2004 ordinance, that part of the 2004 ordinance was repealed by Ordinance 09-061.

The City further argues that the 2009 ordinance does not satisfy the requirements of N.J.S.A. 40A:12-14(c) because the ordinance does not include a new or amended term of the lease. Again, we disagree. The 2004 ordinance authorized the October 15, 2004 lease, and expressly set forth the term of the initial lease and the two five-year extensions. Since the 2004 ordinance specified the approved lease term and the extensions, the statute did not require the City to adopt another ordinance including a new or amended term of the lease.

We therefore conclude that the trial court correctly determined that the October 15, 2004 lease and the initial extension thereof complied with the requirements of N.J.S.A. 40A:12-14(c) and the ordinances adopted by the Council in 2004 and 2009.

III.

Next, the City argues that the trial court erred by refusing to adjudicate its counterclaim that FOL violated the lease. The City contends that, based on FOL's alleged breaches of the lease,

it had the right to terminate the agreement. The trial court refused to adjudicate this claim. The court stated that these issues had not been properly pled.

Here, the City filed a counterclaim in which it alleged that FOL breached the lease by, among other things, failing to: submit annual financial reports to the City, and semi-annual reports to the City's Business Administrator; provide the City with proof of liability insurance; and pay annual lease payments.

We agree that the trial court erred by failing to address the City's counterclaim for breach of contract. The court erroneously suggested that the claim had not been properly pled. We remand the matter to the trial court for further proceedings on the City's claim that, because FOL allegedly breached certain terms of the lease, it has the right to terminate the lease.

In summary, the trial court correctly determined that the lease and the initial extension thereof had been properly approved pursuant to N.J.S.A. 40A:12-14(c), and complied with the ordinances adopted by the Council in 2004 and 2009. The court erred, however, by failing to address the City's claim that, because FOL allegedly breached the agreement, it had a right to terminate the lease. We remand the matter to the trial court to address that claim.

Affirmed in part, reversed in part, and remanded to the trial court for further proceedings in conformity with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.



CLERK OF THE APPELLATE DIVISION