SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3404-16T3

ELIZABETH FERNANDES and
ANTOINE EL-GHOUL,

Plaintiffs-Respondents,

v.

NIRAJ JIVANI and RASIK
JIVANI,

Defendants-Appellants.

Submitted April 11, 2018 – Decided April 30, 2018

Before Judges Nugent and Geiger.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Docket Nos. L-4765-15 and L-7429-12.

Dominic J. Cerminaro, attorney for appellants.

Epstein Ostrove, LLC, attorneys for respondents (Raymond J. Stine, on the brief).

PER CURIAM

Defendants Niraj Jivani and Rasik Jivani[1] appeal from a June 14, 2016 order for judgment in favor of Elizabeth Fernandes and Antoine El-Ghoul and a March 3, 2017 order awarding attorney's fees and costs to plaintiffs. We affirm.

Fernandes owns a building (the property) located in New Brunswick with commercial space on the first floor and apartments on the upper floor. On October 17, 2007, Fernandes entered into a written five-year commercial lease with El-Ghoul for the lease of the commercial unit on the property. The commercial lease set forth all the terms and conditions of the lease. Notably, Article XXI, entitled "Net Net Lease," was crossed out.[2] However, pursuant to Article VI, entitled "Additional Rent, Taxes, ETC.," the parties agreed:

> The Tenant shall pay as additional rent to Landlord, one quarter of Landlord's insurance premium[,] . . . one quarter [of] all real estate taxes[,] . . . assessments, water rents and water charges, and other governmental levies and charges, general and special, ordinary and extraordinary, unforeseen as well as foreseen, of any kind, which are assessed or imposed upon the entire

[1] Because defendants have the same surname, we will refer to them by their first names in this opinion. We intend no disrespect in doing so.

[2] Had it not been stricken, Article XXI would have made the commercial tenant responsible for payment of "taxes, assessments, water rents and water charges, and other levies and charges" assessed against the commercial unit during the leasehold as well as "all [required] repairs and replacements, structural or otherwise."

> building . . . in which the leased premises are located, or which become payable during the term of this Lease, provided.

Article VIII, entitled "Maintenance and Repairs, Covenant Against Waste," imposed significant repair and maintenance responsibilities on the tenant. It stated: "Tenant shall promptly make all repairs to the building in which the demised premises are located, of every kind and nature, structural and nonstructural, interior and exterior, ordinary as well as extraordinary, foreseen as well as unforeseen, necessary to keep the premises in good and lawful order and condition." However, the parties agreed that during the final three years of the lease, repairs or replacements exceeding $20,000 and having a useful life beyond the term of the lease, were to be allocated between the landlord and tenant according to the remaining length of the lease divided by the useful life or the repair or replacement.

The commercial lease also contains an integration clause (Article XXXV) and a lengthy non-waiver clause (Article XXV), which states, in part: "Failure of either party to complain of any act or omission on the part of the other party, no matter how long same may continue, shall not be deemed a waiver by said party of any of its rights hereunder."

Subsequently, El-Ghoul assigned "all rights and interest" in the commercial lease to Rasik. When the lease was assigned, Rasik

provided El-Ghoul with $130,000 to obtain the right to open a restaurant in the commercial unit. During the lease term, leaks caused water damage to the restaurant. While Rasik alleged Fernandez's failure to properly maintain the property caused the water damage, Fernandes alleged Rasik's improper installation of a HVAC unit caused the water damage.

On June 9, 2008, Fernandes and Niraj entered into a lease agreement for a residential unit also located on the property. Rasik was not a tenant on the residential lease.

The residential lease agreement provides: "The Tenant shall take possession of and use the Residence only as a private residence. . . . The Tenant shall not use the Residence for any business . . . purpose." The residential lease also prohibits the tenant from assigning the lease, subletting all or any portion of the residence, or permitting any other person to use the residence except as a temporary guest. The residential lease includes non-waiver and integration clauses.

Niraj was incarcerated for almost three years while the lease was in effect. Fernandes alleged Niraj allowed restaurant employees to live in the residential unit in violation of the lease during Niraj's incarceration and after his release. Niraj alleged there were continuous leaks causing water damage to the unit, which Fernandes failed to repair.

On June 7, 2012, Fernandes filed two eviction complaints against Rasik, alleging he failed to remit required payments under both the commercial and residential leases. On October 25, 2012, both actions were transferred to the Law Division and consolidated.

Upon realizing the residential eviction complaint incorrectly named Rasik as the defendant, Fernandes filed an eviction complaint against Niraj, alleging he failed to remit required payments on the residential unit. This complaint was later transferred to the Law Division and consolidated with the other two actions for trial.

In April 2016, the trial judge conducted a five-day bench trial on the consolidated actions and delivered a lengthy oral decision in which he found defendants owed Fernandes substantial sums under both the commercial and residential leases.

Despite the absence of a net-net provision, the judge held that Article VI of the commercial lease, as well as other provisions, made "the tenant responsible" for insurance premiums, realty taxes, and utility expenses associated with the unit. The judge found Fernandes presented sufficient evidence of the costs of water and sewer charges, insurance premiums, and real estate taxes that she had a right to collect under the terms of the lease.

In calculating the amount of damages, the judge held Rasik responsible for one quarter of the water use during the entire lease term. However, he limited Rasik's responsibility for payment

of one quarter of the insurance premiums and realty taxes to the period after January 1, 2010. The judge declined to award insurance costs and taxes for the entire lease term due to Fernandes's "failure to provide the notices on a timely basis," which he deemed "a substantial detriment to the tenant who was deprived of the opportunity to adjust his income and earnings capacity to account for them."

When calculating the amounts due, the court admitted a spreadsheet setting forth the various charges, finding the amounts contained therein to be reliable and "backed up" with documentation from the utility companies and taxing authorities. The judge admitted the spreadsheets into evidence as a business record kept in the ordinary course of business.

The judge also addressed Rasik's argument that he was entitled to rent abatement because Fernandes failed to install a proper gas line and caused the continuous leaks, which created water damage to the restaurant. The judge found Fernandes responsible for the installation cost of the gas line as "an ordinary business expense," and awarded a $16,600 rent credit to Rasik. As to the water damage, the judge found Rasik failed to demonstrate Fernandes caused the water leaks. He further found Rasik failed to mitigate the damages caused by the water leaks. In reaching those conclusions, the judge rejected Rasik's claim that the landlord

caused the leaks by watering plants on the roof, finding the contention "absurd." Fernandes contended the leaks were caused by HVAC ductwork that was defectively installed by Rasik. The judge emphasized the lack of evidence, noting neither side had presented any evidence from a plumber, HVAC person, or an engineer to explain the cause of the leak. The judge concluded the evidence regarding the cause of the leaks was inconclusive, noting it was equally likely Rasik had defectively installed HVAC duct work causing the leaks. Accordingly, the judge held the tenant had not met his burden of proving the right to an abatement of the rent by a preponderance of the evidence.

The judge found Niraj breached the residential lease by using the unit as a dormitory for restaurant employees rather than as his private residence. Additionally, the judge found Fernandes "made the repairs necessary" to ensure that the leaks did not occur, although Niraj alleged there were continuous water leaks and damage to the unit. For those reasons, the judge concluded rent was due, in full, to Fernandes.

The judge entered a June 14, 2016 order for judgment which specified the amount owed by defendants under each of the leases. The order provided:

> 1. Rent is due in full from the residential tenant to the Landlord in full under the terms of the residential lease between the parties without any deduction

whatsoever except that from this day forward until the landlord is able to arrange a modification of the electricity so that defendants are not providing electricity to the common area, the tenant is entitled to a [one] percent abatement of the rent.

. . . .

3. Because the tenant violated the lease by allowing the property to be used as a dormitory to house his commercial workers and not as a residence for himself, the tenant cannot claim damages to the property.

4. With regard to the Commercial Lease, rent and additional rent is due in full from the tenant to the Landlord with the following deductions:

a) $16,600 deduction for the installation of gas line

b) $2686.20 deduction for real estate taxes for 2008

c) $2790.27 deduction for real estate taxes for 2009

d) $1007.25 deduction for insurance reimbursement for 2008

e) $1089.29 deduction for insurance reimbursement for 2009

5. Article [VI] of the Commercial Lease is fully enforceable, that is the Landlord has a right to collect additional rent, i.e. water/sewer, real estate taxes and insurance going forward (from the first quarter of 2015) under the terms of the lease.

6. The defendant must pay all additional rent owing under the Commercial Lease. Relative to the charges through 2015 the [c]ourt finds as reliable the amounts

> presented by plaintiff for the additional rent under the Commercial lease, including real estate taxes, insurance and water and sewer calculated through the first quarter of 2015 . . . . These amounts are $11,944 for water and sewer, $22545.96 for Real Estate Taxes, and $9087.29 for Insurance. It is acknowledged between the parties (subsequent to the hearing and the [c]ourt's findings[)] that the water charges chargeable to the tenant total $2986.00 (as opposed to $11,944 as originally presented).

The judge directed the parties to confer regarding appropriate attorney's fees and costs to be awarded plaintiffs for enforcing both leases, and established a procedure in the event an agreement was not reached. The parties were unable to resolve the issue of attorney's fees and costs. A subsequent March 3, 2017 order awarded attorney's fees of $5582.78 and costs of $1079.15 to plaintiffs.[3] This appeal followed.

On appeal, defendants raise the following arguments:

> I. THE COMMERCIAL LEASE
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> A. The "ultimate goal" of contract interpretation is to "discover the intent of the parties." Here, the extrinsic evidence offered by the Jivanis, in conjunction with the parties' decision to strike out Article XXI of the commercial lease, indicated that

[3] Although defendants included the March 3, 2017 order in their notice of appeal, they did not brief the issue of counsel fees and costs awarded to plaintiffs or include the submissions leading to the award in their appendix. Therefore, we deem any issue regarding the award of counsel fees and costs to be waived. See Telebright Corp. v. Dir., N.J. Div. of Taxation, 424 N.J. Super. 384, 393 (App. Div. 2012); Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 2:6-2 (2018).

at the time of signing, the parties had not intended that the lease require payment of "additional rent." The lower court's judgment to the contrary must be reversed.

B. Assuming arguendo that the lease required payment of "additional rent," the amounts that the court ordered Dr. Jivani to pay cannot stand. In determining those amounts, the court relied entirely on spreadsheets prepared by Ms. Fernandes's lawyers in preparation for the litigation of this case. The sheets contained inadmissible hearsay and should have been excluded on defense counsel's motion. This Court should remand for a determination, based on admissible evidence, of any "additional rent" owed.

C. Assuming arguendo that the lease required payment of "additional rent," the court below erred in determining that equitable principles permitted it to charge Dr. Jivani for insurance and property tax payments for 2010 and 2011 (but not for 2008 and 2009). In fact, the doctrine of laches extended to foreclose back payments for those years. To the extent that the court's judgment held otherwise, it must be reversed.

D. The court held that Dr. Jivani would be entitled to an abatement in rent only if he could prove that the HVAC system his contractor installed was not the cause of the water leaking from the roof. Furthermore, the court held that even if Dr. Jivani had been able to exculpate his HVAC system, abatement was precluded by their failure to mitigate damages by repairing the roof themselves. On both points, the court erred as a matter of law.

II. THE RESIDENTIAL LEASE: Niraj Jivani presented evidence that Ms. Fernandes had breached the implied covenant of habitability applicable to the apartment. The court, however, found that (1) Niraj had permitted

> restaurant employees to live in the apartment, in violation of the lease; such that (2) he was not entitled to any abatement of rent. The court erred in finding that Niraj had violated the lease, in finding that Niraj's violation had contributed to the water damage, and in implicitly ruling that a violation by Niraj would bar abatement.

Final determinations made by the trial court "premised on the testimony of witnesses and written evidence at a bench trial" are reviewed in accordance with a deferential standard. D'Agostino v. Maldonado, 216 N.J. 168, 182 (2013). Appellate courts defer to the trial court's credibility determinations because it "'hears the case, sees and observes the witnesses, and hears them testify,' affording it 'a better perspective than a reviewing court in evaluating the veracity of a witness.'" Gnall v. Gnall, 222 N.J. 414, 428 (2015) (quoting Cesare v. Cesare, 154 N.J. 394, 412 (1998)). "[W]e 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[.]" Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011) (second alteration in original) (quoting In re Trust Agreement Dated Dec. 20, 1961, 194 N.J. 276, 284 (2008)). However, a trial court's legal determinations are not entitled to any special deference and are reviewed de novo.

D'Agostino, 216 N.J. at 182 (citing Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

Rasik argues the trial court erred by applying Article VI of the commercial lease to require the payment of additional rent. We disagree.

New Jersey courts "have shown an increasing tendency to analogize landlord-tenant law to conventional doctrines of contract law." McGuire v. Jersey City, 125 N.J. 310, 321 (1991) (citations omitted). "The polestar of contract construction is to discover the intention of the parties as revealed by the language used by them." Karl's Sales & Serv. v. Gimbel Bros., 249 N.J. Super. 487, 492 (App. Div. 1991) (citations omitted).

"Generally, the terms of an agreement are to be given their plain and ordinary meaning." M.J. Paquet v. N.J. DOT, 171 N.J. 378, 396 (2002) (citing Nester v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997)). "[W]here the terms of a contract are clear and unambiguous there is no room for interpretation or construction and the courts must enforce those terms as written." Karl's Sales, 249 N.J. Super. at 493; accord Cty. of Morris v. Fauver, 153 N.J. 80, 103 (1998). "The court has no right to rewrite the contract . . . ." Karl's Sales, 249 N.J. Super. at 493 (citations omitted).

The commercial lease entered had Articles XXI and XXXVII crossed out. The trial judge properly found those provisions

unenforceable. In contrast, Article VI (Additional Rent, Taxes, ETC.) remained in full force and effect and required the tenant to pay one fourth of the insurance premiums, real estate taxes, water charges, and other assessments incurred by the landlord on the property as additional rent. This clear and unambiguous contractual term revealed the intention of the parties to impose the obligation to pay those amounts to the landlord as additional rent.

No changes were made to the commercial lease when El-Ghoul assigned "all rights and interest" in the lease to Rasik; the assignment did not limit Rasik's duty to pay additional rent to the landlord. Accordingly, the trial judge properly held Article VI was enforceable and, upon assignment of the lease, made Rasik responsible for one-fourth of the insurance premiums, real estate taxes, water charges, and other assessments the additional rent and taxes levied on the property.

Rasik argues the trial court erred in admitting spreadsheets evidencing the additional rent owed to Fernandes because they were inadmissible hearsay. We disagree.

"[T]he decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion." Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010). Evidentiary decisions will be upheld "if they are supported by

adequate, substantial and credible evidence on the record." Ibid. (quoting MacKinnon v. Mackinnon, 191 N.J. 240, 253-54 (2007)).

Fernandes moved to admit the spreadsheets into evidence under the business records exception to the hearsay rule. Pursuant to the business records exception, the following statements are not excluded by the hearsay rule:

> A statement contained in a writing or other record of acts, events [and] conditions . . . made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make it . . . .
>
> [N.J.R.E. 803(c)(6).]

At trial, Fernandes testified to the amount of additional rent owed by Rasik pursuant to Article VI. She also presented spreadsheets which clearly outlined all of the charges and the remittance she sought. The judge found the spreadsheets were admissible as "business records kept in the ordinary course by [Fernandes] who was the sole owner of the property." The judge also found the amounts set forth in the spreadsheets were reliable, reasoning: "Fernandes testified to them. They're business records kept in the ordinary course of business and they're backed up with documentation from official records from the utilities and taxes . . . [and] insurance to the landlord."

We discern no abuse of discretion in admitting the spreadsheets into evidence. There was sufficient credible evidence in the record to support the trial court's decision that the spreadsheets qualified as business records, which were admissible under N.J.R.E. 803(c)(6). The trial court properly considered the information contained in the spreadsheets to determine the amount owed to Fernandes for additional rent pursuant to Article VI.

Rasik further argues Fernandes's claim for additional rent is barred by the doctrine of laches. The trial court determined plaintiffs were entitled to judgment for unpaid additional rent for 2010 and 2011, but not 2008 and 2009.

Whether the doctrine of laches applies "depends upon the facts of the particular case and is a matter within the sound discretion of the trial court." Mancini v. Twp. of Teaneck, 179 N.J. 425, 436 (2004) (quoting Garrett v. Gen. Motors Corp., 844 F.2d 559, 562 (8th Cir. 1988)). "Laches is an equitable doctrine, operating as an affirmative defense that precludes relief when there is an 'unexplainable and inexcusable delay' in exercising a right, which results in prejudice to another party." Fox v. Millman, 210 N.J. 401, 417 (2012) (quoting Fauver, 153 N.J. at 105). "Laches may only be enforced when the delaying party had sufficient opportunity to assert the right in the proper forum and

the prejudiced party acted in good faith believing that the right had been abandoned." Knorr v. Smeal, 178 N.J. 169, 181 (2003) (citations omitted).

In determining whether to apply laches, the court should consider the length of the delay, the reasons for the delay, and any changing circumstances of the parties during the delay. Fauver, 153 N.J. at 105. The trial court must also consider the applicable statute of limitations. See Fox, 210 N.J. at 422. The Fox Court cautioned, however, that "even were we to agree in principle that laches might be applied so as to shorten an otherwise permissible period for initiation of litigation, we would nonetheless conclude that only the rarest of circumstances and only overwhelming equitable concerns would allow for that result." Ibid. (citing Chance v. McCann, 405 N.J. Super. 547, 569 (App. Div. 2009)). The statute of limitations for contract claims is six years. N.J.S.A. 2A:14-1.

Here, the commercial lease was assigned from El-Ghoul to Rasik in October 2007. The unpaid additional rent accrued from 2008 to 2011. Fernandes filed her complaint on June 7, 2012, well within the six-year statute of limitations for contract claims.

The judge appropriately considered the length of Fernandes's delay in providing Rasik with notice of the additional rent owed pursuant to Article VI, the reasons for the delay, and any changing

circumstances of the parties during the delay. In that regard, the judge found the delay deprived Rasik of the opportunity to adjust his business income and earning capacity to cover the additional rent. Taking these circumstances into account, the judge determined Fernandes was not entitled to payment of additional rent for 2008 and 2009, but the doctrine of laches did not bar enforcement of Article VI for 2010 and 2011. We find no basis to disturb that ruling.

Finally, Rasik argues the court erred in finding he was not entitled to rent abatement for damage to the commercial unit caused by water leaks. We are unpersuaded by this argument.

Generally, rent abatement is applied to residential tenancies where the landlord "has broken his covenant to maintain the premises in a habitable condition." Berzito v. Gambino, 63 N.J. 460, 469 (1973); accord Marini v. Ireland, 56 N.J. 130, 144 (1970). At least two courts have applied the Marini doctrine to commercial tenancies. See Demirci v. Burns, 124 N.J. Super. 274 (App. Div. 1973); Westrich v. McBride, 204 N.J. Super. 550 (Law Div. 1984). Of course, the parties may agree the tenant is responsible for repair and maintenance of the demised premises. See N.J. Indus. Properties v. Y.C. & V.L., Inc., 100 N.J. 432, 434 (1985).

Under Article VIII, Rasik was responsible for maintaining the commercial unit and making "all repairs . . . [including those]

structural and nonstructural, interior and exterior, ordinary as well as extraordinary, foreseen as well as unforeseen, necessary to keep the premises in good and lawful order and condition." Rasik argued Fernandes caused the water leaks by Fernandes's watering plants on the roof and, therefore, not within his responsibility to cure. Fernandes alleged Rasik's improper installation of a HVAC unit caused the leaks. The judge rejected Rasik's argument, stating: "Plants being watered on the roof with a hose isn't going to cause a roof to leak, that's absurd, unless there is a defect in the roof."

The judge concluded the evidence did not explain the cause of the interior leaks, noting: "Neither side has presented by evidence from a plumber -- from a HVAC person or an engineer, structural engineer or anybody to explain . . . the cause of the leak." These findings are supported by the record.

A trial court's determination regarding rent abatement "is a factual finding and will be affirmed if supported by credible evidence in [the] record." C.F. Seabrook Co. v. Beck, 174 N.J. Super. 577, 596 (App. Div. 1980) (citing Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474, 483-84 (1974)). Given the lack of probative evidence on the cause of the water leaks, Rasik did not establish he was entitled to a rent abatement.

Niraj argues the trial court erred in finding he was not entitled to a rent abatement on the residential lease. We disagree. The tenant's covenant to pay rent and the landlord's covenant to maintain demised premises in a habitable condition are mutually dependent. Berzito, 63 N.J. at 469. In order to be entitled to rent abatement, "[t]he condition complained of must be such as truly to render the premises uninhabitable in the eyes of a reasonable person." Ibid. Additionally, the tenant must provide his landlord with seasonable notice of the alleged defect, request its correction, and allow the landlord a reasonable period to effectuate repairs. Ibid.

At trial, Niraj testified a roof leak caused water damage. He also presented photographs of the residential unit in an effort to support this testimony. After reviewing that evidence, the judge found Fernandes had made the repairs necessary to address the leaks. In addition, the trial judge found Niraj had violated the residential lease by allowing restaurant employees to reside there. There is sufficient credible evidence in the record supporting those findings and the trial judge's conclusion that there was no breach of the implied warranty of habitability. Therefore, we discern no basis to disturb the denial of Niraj's claim for rent abatement.

Defendants' remaining arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.