SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2357-21

GARFIELD PARTNERS 2, LLC,

Plaintiff-Appellant,

v.

WASHING TOWN, LLC,

Defendant-Respondent.

Submitted May 16, 2023 – Decided June 5, 2023

Before Judges Geiger and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. LT-002324-21.

Ehrlich, Petriello, Gudin, Plaza & Reed, PC, attorneys for appellant (John J. Petriello and Bruce E. Gudin, on the briefs).

Sammarro & Zalarick, PA, attorneys for respondent (Gary J. Zalarick, on the brief).

PER CURIAM

Plaintiff Garfield Partners 2 LLC appeals from a Special Civil Part order denying a judgment for possession and dismissing plaintiff's complaint in this commercial summary eviction case. We affirm.

In 2017, defendant Washing Town, LLC entered into a three-year commercial lease agreement with plaintiff's predecessor, Carrino Boulevard, LLC, to rent approximately 1,000 square feet as a "Laundromat Space" in a building in Hasbrouck Heights. The lease term commenced on September 1, 2017, and ended on August 31, 2020. The monthly rent was $950 the first year, $1,050 the second year, and $1,081.50 the third year. The lease contained the following renewal option:

> 26. RENEWAL OPTION: Tenant has the option of extending this lease for three (3) additional periods of three (3) years under the same terms and conditions except that the rent will increase 3% per year for each and every year of the renewals as specified above. Tenants shall provide the Landlord with written notice of its intention to renew this lease at least six (6) months prior to the expiration of the then current term, TIME OF THE ESSENCE. Said notifications shall be sent by Certified Mail, Return Receipt Requested. If and in the event Tenant fails to exercise this option in accordance with the above, then the said option shall become "Null and Void".

It also contained the following holdover and non-waiver provisions:

> 21. HOLDING OVER: If Tenant shall remain in the Demised Premises after the expiration of the Term

without having executed and delivered a new lease with Landlord, such holding over shall not constitute a renewal or extension of this Lease. Landlord may, at its option, elect to treat Tenant as one who has not removed at the end of its Term, and thereupon be entitled to all the remedies against Tenant provided by law in that situation, or Landlord may elect, at its option, to construe such holding over as a tenancy from month to month, subject to all the terms and conditions of this Lease, except as to duration thereof, and in that event Tenant shall pay Monthly Basic Rent and Additional Rent in advance in the amount of 150% of the amount due for the month immediately preceding expiration of the Term. Any such tenancy shall continue until terminated by Landlord by notice to Tenant given at least thirty (30) days prior to the intended date of termination, or until Tenant shall have given to Landlord, at least sixty (60) days prior to the intended date of termination, a written notice of intent to terminate such tenancy, which termination date must be as of the end of a calendar month. The time limitation described in this Section 17 shall not be subject to extension for Force Majeure.

22. NON-WAIVER BY LANDLORD: The various rights, remedies, options and election of Landlord, expressed herein are cumulative, and the failure of Landlord to enforce strict performance by Tenant of the conditions and covenants of this lease or to exercise any election or option or to resort or have recourse to any remedy herein conferred or by the acceptance by Landlord of any installment of rent after any breach by Tenant, in any one or more instances, shall not be construed or deemed to be a waiver or relinquishment for the future by Landlord of any such condition and covenants, options, elections or remedies, but the same shall continue in full force and effect.

Plaintiff purchased the property from Carrino Boulevard on February 25, 2021, and is the current owner of the rental premises. The lease allowed defendant to extend the term of the lease for three additional three-year periods, with rent increasing three percent per year. The lease required defendant to give the landlord written notice of its intent to exercise the renewal option by March 1, 2020, by certified mail, return receipt requested. Defendant did not do so. Plaintiff contends defendant did not orally express its intention to renew the lease.

Plaintiff did not yet own the property when the lease term expired on August 31, 2020. After acquiring the property, plaintiff waited more than a year to serve a one-month notice to quit and demand for possession on defendant on September 22, 2021, terminating the tenancy as of October 31, 2021. When defendant did not vacate the rental premises by that date, plaintiff filed this eviction action on November 15, 2021. The complaint stated the following ground for eviction:

> Your written Lease Agreement contained a renewal provision, but you failed to properly exercise that renewal as you did not "provide the Landlord with written notice of its intent to renew this Lease at least six (6) months prior to the expiration of the term." By remaining in possession of the premises and continuing to pay rent after the stated expiration of the term the

> Lease continued in full force and effect on a month-to-month basis.

The complaint then recited the renewal option (paragraph 26 of the lease).

The trial court conducted a bench trial in March 2022. Christopher Blum, a principal of plaintiff, testified that the lease had expired, and defendant did not exercise the option to renew the lease. He testified that plaintiff served defendant with a thirty-day notice to quit and demand for possession that terminated the tenancy on October 31, 2021. Blum further testified that plaintiff had not accepted any rent from defendant since October 31, 2021.

On cross-examination, Blum indicated he was unaware of any agreement between the prior owner and defendant regarding renewing the lease. He acknowledged accepting rent from defendant for seven months after the initial lease term expired. On redirect, Blum indicated that defendant did not provide written notice of its intent to renew the lease. On re-cross, Blum acknowledged plaintiff had not received a tenant estoppel certificate[1] from defendant. He also acknowledged the rent plaintiff paid was $1,115 per month, as required under the lease for a second renewal. Blum nevertheless stated he thought the lease was month-to-month at that point and accepted it on that basis.

[1] A tenant estoppel certificate is a binding document that verifies the terms of the lease.

Thomas Cerwas, the principal of defendant, testified that defendant had made major renovations to the rental premises. He acknowledged that the rent for the first year of the lease was $950 per month, which increased to $1,050 for the second year and $1,081.50 for the third year of the lease. Cerwas communicated with the prior owner by email regarding renewal of the lease. The prior owner indicated the rent would increase to $1,115 per month. The increased rent was paid to the prior owner from September 2020 to February 2021. Cerwas stated he was never notified the building was sold to plaintiff, was never provided with a tenant estoppel certificate, and never indicated the rent payments were made as a month-to-month tenant. From March to October 2021, defendant paid the rent to plaintiff at $1,115 per month until he received a letter from plaintiff to stop paying the rent. On cross-examination, Cerwas acknowledged he never sent a written notice of intent to renew the lease to the landlord at least six months prior to the expiration of the initial lease term.

Defendant presented a text message from Liz Carrino, the prior landlord's daughter, to Cerwas on September 2, 2020, stating: "Hope all is well. As per your lease as of 9-1 rent is $1,115. Just confirming." Cerwas responded: "Okay, thanks." Cerwas then texted: "It's not updated on the pay your rent app." Liz Carrino replied: "It will be."

Defendant argued that parties to a lease agreement can make changes to the lease. Defendant contended the increased rent was paid as a renewal and accepted by the landlord, not as a holdover tenant. Defendant argued the landlord cannot accept the rent at the increased level without the renewal of the lease since the rent level would not change as a holdover tenant, and no tenant estoppel certificate to the contrary was provided.

Plaintiff argued that merely paying rent at the increased level did not meet the technical requirements for the lease to be renewed, which required the tenant to give six months' prior written notice via certified mail to the landlord of the intent to renew the lease.

In an oral decision, the judge ruled in favor of defendant and dismissed the complaint, stating:

> The law in New Jersey is clear. Parties to a written agreement such as a lease may modify the terms by their conduct. Such a case is presented here. The terms of the lease require the exercise of a renewal option to be accomplished in a certain manner including time to exercise and method of written notice and service. Defendants contend that an email chain satisfies -- which was Exhibit B to Mr. Zalarick's letter brief -- satisfies the intent of the renewal provision.
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> Whether (indiscernible) or not, the conduct of the parties here leads the [c]ourt to conclude that a renewal of the lease occurred. The reasoning is set forth in . . . Mr. Zalarick's memo which the [c]ourt adopts. It is

> beyond dispute that the prior owner/landlord established and accepted rent payment which were greater than the initial lease and did so for a period of five months. Thereafter, a sale occurred unbeknownst to the tenant and the new owner/landlord accepted the higher rent payment for a period of seven months but then started eviction claiming that the defendant was a holdover tenant whose lease had expired.
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> The [c]ourt rejects the plaintiff's contention. Not only were the terms and the exercise of the renewal option waived by plaintiff's acceptance of the increased rent payments for seven months, but Exhibit B to the defendant's brief, and email chain between the former landlord's daughter who was clearly acting as an agent for her father, the owner/landlord, and the defendant recognizes the increased rent (indiscernible) serves as circumstantial evidence that both parties accepted that a lease renewal had occurred.

The judge did not express any credibility findings. He declined to adopt the reasoning in the unpublished appellate opinion plaintiff relied on, noting it had no precedential value and was "factually inaccurate." This appeal followed.

Plaintiff raises the following points for our consideration:

> I. THE LOWER COURT'S RULING CONTRADICTS ESTABLISHED NEW JERSEY LAW.
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> II. THE LOWER COURT'S DECISION IS BASED ON SPECULATION AND CANNOT STAND.
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> III. THE LOWER COURT ERRED IN FINDING A WAIVER BY PLAINTIFF.

"The scope of appellate review of a trial court's fact-finding function is limited." Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011) (quoting Cesare v. Cesare, 154 N.J. 394, 411 (1998)). "[W]e do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice[.]" Ibid. (second alteration in original) (quoting In re Tr. Created by Agreement Dated Dec. 20, 1961, 194 N.J. 276, 284 (2008)). We do not, however, owe any deference to the trial court's legal conclusions, which we review de novo. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Here, the undisputed evidence shows that defendant did not exercise its option by giving written notice of its intent to do so, by certified mail, return receipt requested, six months prior to the expiration of the lease. Instead, relying on text messages with the prior landlord, defendant simply continued to pay the rent each month for some twelve months, at the increased rent level required upon renewal, until told not to do so by plaintiff.

We are mindful of N.J.S.A. 46:8-10, which provides:

> Whenever a tenant whose original term of leasing shall be for a period of one month or longer shall hold over or remain in possession of the demised premises beyond the term of the letting, the tenancy created by

> or resulting from acceptance of rent by the landlord shall be a tenancy from month to month in the absence of any agreement to the contrary.

This is a commercial lease between two business ventures. The lease contained specific requirements for the tenant to exercise its option to renew. Defendant did not comply with those requirements. We are thus left to consider whether the actions of the parties constituted a renewal. If so, defendant was not a holdover tenant, N.J.S.A. 46:8-10 does not apply, and the trial court correctly dismissed the complaint. If not, defendant was a holdover tenant and the tenancy created by the landlord accepting rent payments was month-to-month, permitting the landlord to terminate the tenancy on thirty days' notice by serving a notice to quit and demand for possession, even if the tenant was current in its rent payments until told by the landlord to stop making payments.

As was explained by our Supreme Court more than seventy years ago, "[a] waiver or novation may be made by oral agreement of the parties." Van Dusen Aircraft Supplies v. Terminal Constr. Corp., 3 N.J. 321, 326 (1949). Thus, "[n]o matter how stringently [a contractual clause is] worded, it is always open for the parties to agree orally or otherwise upon proper consideration, that they shall be partially or entirely disregarded[,] and another arrangement substituted." Ibid. (quoting Headley v. Cavileer, 82 N.J.L. 635, 638 (E. & A. 1912)).

Despite the renewal option provision being clear and unambiguous, defendant did not follow it. Yet, the prior and current landlords accepted rent payments at the higher renewal rate for a year before the eviction action was commenced without obtaining an estoppel certificate from defendant. These "special circumstances" warrant relaxation of the formal renewal requirements. See Sosanie v. Pernetti Holding Corp., 115 N.J. Super. 409, 414 (Ch. Div. 1971) (explaining that the general contractual rule that time is of the essence is modified in regard to renewal options of a lease "so that failure to give timely notice may be relieved . . . where there are . . . special circumstances which warrant a court of equity to grant relief against the consequences of the [tenant's] failure to notify the lessor within the stipulated time or in the specific form or manner prescribed").

Here, the parties' conduct bespeaks a waiver of the formal renewal requirements and an agreement to allow defendant to continue to occupy the rental premises. Allowing plaintiff to evict defendant under these circumstances would be inequitable, unfair, and unjust, particularly where defendant, believing the lease was renewed, made major renovations to the rental premises. Given the conduct of the parties, we do not view defendant as a holdover tenant. Therefore, N.J.S.A. 46:8-10 does not apply. Instead, the acceptance of the

increased rent for so long without any indication by the landlords that the lease had terminated was a tacit waiver of the formal renewal requirements. See Dries v. Trenton Oil Co., 17 N.J. Super. 591, 596 (App. Div. 1952) ("The requirement in the . . . lease for written notice of intention to renew could be waived and such a waiver could be effected either by parol agreement or by the actions of the parties."); Sosanie, 115 N.J. Super. at 413 (noting "the notice requirement for renewal of the lease is for the benefit of the lessor and thus can be waived or extended by the lessor"). By this conduct, the lease was renewed, and plaintiff is estopped from enforcing the formal lease renewal provision. See Dries, 17 N.J. Super. at 596-97 (explaining that evidence of an oral agreement to renew the lease, and reliance thereon by the tenant, "might well warrant the . . . finding the plaintiff had waived the necessity for the written notice and was, therefore, estopped from enforcing its action for possession"). Accordingly, the trial court correctly ruled in defendant's favor and dismissed the complaint.

Affirmed.