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SC Court of Appeals

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

BAMAR LLC)

Civil Action Number: 2014-CP-40-1815

Plaintiff,)

vs.)

Xiaolan Michelle Wang)

Defendant.)

ORDER DENYING
MOTION TO
RECONSIDER ORDER
GRANTING SUMMARY
JUDGMENT IN FAVOR
OF DEFENDANT-
COUNTERCLAIMANT

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THIS CAUSE having come before the Court by motion by Plaintiff Reconsideration of this Court's Order Granting Summary Judgment in favor of Defendant Xiaolan Michelle Wang (hereinafter "Tenant" or "Defendant") on all claims of Plaintiff Bamar, LLC ("Landlord" or "Plaintiff"), and on the claims of liability asserted by Tenant on Tenant's counterclaims against Landlord. The Court, having fully considered the filings, submissions and arguments of the Plaintiff, hereby finds and ORDERS as follows:

The Court hereby DENIES the motion for reconsideration of Plaintiff. A review of the record and the submissions and argument of Plaintiff in its motion reveals that there is no genuine issue of material fact as to the undisputed facts and admissions of Landlord, which show that Landlord was the first to materially breach the lease¹ at issue in a number of respects, including by dispossessing Tenant during the paid up term of the lease, without notice.

Tenant is the operator of fine dining businesses in the Columbia area some of which are known as "Miyos." On November 29, 2013, without notice to Tenant, and in

¹ Per para. 2 of the Complaint, Landlord attached "a copy" of the Lease to the Summons and Complaint in this case. It is also Exhibit 2 to the Bamar, LLC 30B6 Deposition.

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violation of the express terms of the lease, Landlord evicted Tenant from the leased premises *during the paid up lease term* by breaking the locks, changing the locks on the leased premises, and locking Tenant out of the leased premises.

There is no dispute, and nothing in the motion to reconsider casts any doubt on the fact that the November 29, 2013 lockout was during Tenant's leasehold term, during a time when rent was fully paid² and when no written notice whatsoever of any eviction or breach on the part of Tenant was given or made, as required by the lease³.

Nothing in the motion to reconsider is offered to contradict in any material way the undisputed facts that during the lockout, Landlord admitted it locked away, exercised control over, and withheld goods owned by Tenant located within the leased premises and detained them on November 29, 2013. In Plaintiff's 30 (b)(6) deposition at page 30, Plaintiff-Landlord testified as follows regarding the Landlord's exercise of control over the Tenant's goods in the leased premises upon the lockout when Tenant's representative came to the site:

Q. Now, who decided what he was allowed to take and not take?

A. I did.

Bamar Depo, page 30, lines 2-4.

The Landlord thus exercised control over the premises and over the Tenant's goods on the premises during the paid up leasehold term. The undisputed facts show that this dispossession was during the paid up leasehold term. Such actions are a clear breach of

² Bamar Depo at 20:

" Q. Let's see here. And you indicated the lease was to terminate in February of 2014?

A. Yes.

Q. Was rent paid up until -- when?

A. December 15th."

³ Article VIII, para. 1 of the Lease at page 5 governs any alleged default by Tenant, and provides that Landlord shall give Tenant "written notice" of any default stating intent to terminate the Lease in 30 days and a 30 day cure period. No such written notice was given by Landlord.

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the Tenant's rights under the lease. Nothing in the motion to reconsider changes that result.

As of the date of dispossession, Tenant had not given 30 day written notice to Landlord (as would be required under the Lease, Article VIII para. 2) of an intent to relinquish her leasehold rights for the remainder of the term. Instead, evidence (in the form of a notice letter from Tenant's counsel) indicates that Tenant had specifically notified Landlord that Landlord was in breach, and that as of late November 2013, Tenant was considering all of her options. *See* Correspondence of Tenant's Counsel, of November, 2013, presented at the hearing on the motion for summary judgment.

It is also undisputed that as of November 29, 2013, Landlord had given no notice to Tenant, as required by the lease, of any breach by Tenant of any kind whatsoever.

This plain violation of tenancy rights was admitted by the Landlord, Bamar LLC, in its Rule 30B6 deposition:

Q. Did there come a time that you changed the locks on the doors of the property?

A. Yes.

Q: When was that?

A. November 29th.

Q. What was your reason for doing that?

A. Because she had changed the locks prior and I -- my key would not allow me in and I wanted to get into the building because it had been vacated.

Q. Now, let me ask you: How do you know it was vacated?

A. Because you could see in the windows and there was no furniture in there and it was -- I mean, it was empty.

Q. Was there anything else?

A. As far as what?

Q. That told you it was vacated. Any other way you knew it was vacated as of November 29, 2013?

A. Yeah. No.

Bamar Depo. at 26-27.

By locking Tenant out of the leased premises during the tenancy, when rents were fully current, and when no notice of any kind whatsoever had been given by Landlord to Tenant as required by the lease, Landlord breached the most fundamental rights of Tenant under the lease - the right of possession (Lease, Article I at p. 1) and the rights under the covenant of quiet enjoyment (Lease, Article X, para. 2 at p. 7).

As a result, there is no genuine issue of material fact that all of Landlord's claims for breach of the lease fail, and that summary judgment in favor of Tenant as to such claims was properly entered by the court notwithstanding any matters set forth in the motion for reconsideration.

Thus, as a matter of law, Landlord is entitled to no rent whatsoever after its wrongful eviction of Tenant. It is axiomatic that a landlord who wrongly evicts a tenant cannot claim for the rent incurred after such eviction. *See Simon v. Kirkpatrick*, 141 S.C. 251, 263, 139 S.E. 614, 618 (1927) ("The termination of a lease during its term by surrender, by re-entry, or by eviction, without more, discharges the lessee from liability for rents that have not accrued....").⁴ Even if the Court considers the affidavits and arguments offered by the Landlord in its reconsideration motion, nothing changes the result of this analysis in any way.

Likewise, Landlord's claim for taxes and the payment of insurance incurred after the lockout and wrongful eviction of Tenant must fail, for the same reasons. *Id.*

⁴ Landlord's assertion that the Tenant had already "vacated" the premises by letter of counsel is contrary to the express content of that letter, which clearly states that the Tenant intended to continue to use the premises at least for storage during the remaining paid up dates.

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~~Further, Landlord's claims related to a dispute over the payment of insurance~~
premiums also fail as a matter of law, because such claims are barred by the Statute of Limitations.

In South Carolina, the three year Statute of Limitations for breach of contract applies to the Landlord's claim for a breach of lease, which is a contract. S.C. Code. Ann §15-3-530. The undisputed deposition testimony of the Corporate representative for Plaintiff/Landlord Bamar, LLC under SCRCF 30B6 was that she fully knew - around five years before filing suit - that on or about September 24, 2009, Tenant had stated unequivocally in a letter to Landlord that Tenant denied it had any obligation to make any such insurance payments, and that it would not make any such payments accrued or to be accrued in the future. *See* Bamar, LLC Depo. Exhibit 9 and testimony at pages 52-57. Nothing in the motion for reconsideration changes this in any way.

Landlord also testified that as of that date, five years prior, Tenant was clear that she "did not ever intend to pay" the insurance amounts at issue now. Bamar, LLC Depo. at 53, 54. The Landlord Bamar also testified that even though Bamar was a South Carolina company, and Tenant was a South Carolina resident, and the leased property in question is located in South Carolina, Landlord spoke to a Tennessee lawyer about what to do about the refusal to pay, and that the lawyer advised Landlord to sue or to "let it ride." *Id.* at 53. Landlord decided to "let it ride" five years ago when the claim was ripe. Therefore, the claim is time barred.

Under these circumstances, where the Landlord admits that 5 years before a lawsuit was brought, it was expressly informed by Tenant, unequivocally, that Tenant disputed and would not pay any insurance sums to which Plaintiff claimed it was entitled

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~~under the lease, past or future, the claim is barred by the statute of limitations. See Maher~~

v. *Tietex Corp.*, 331 S.C. 371, 500 S.E. 2d 204 (S.C. App. 1998).

In *Tietex*, the claimant was specifically informed that an annual bonus payment to which the claimant asserted he was entitled, would not be paid then or in the future. There, "Maher's testimony reveal[ed] he believed at the time of these conversations that he was not getting the bonus money to which he felt entitled." But Maher did not bring his claim within three years of first being notified that the bonuses would not be paid. Maher contended, among other things, that because he claimed the payments were to have been made annually, the failure to pay them constituted a "continuing wrong" such that each year, the time for the statute of limitations would be running again each year. Specifically, he contended that because the defendant there breached the contract every year from 1998 until his termination in 1994, his action was commenced timely. However, the South Carolina Court of Appeals specifically rejected this argument. The Court held that the breach of the contract was a single wrong - a breach of a single payment term - with "continuing effects." *Id.* at 383-84.

The same as in *Tietex* is the case here. The allegation - whether meritorious or not - is that the lease contract contained a provision requiring Tenant to reimburse Landlord annually for the cost of insurance, and that Tenant breached that provision by refusing to pay such amounts. It is undisputed that Landlord was informed that Tenant would not ever pay any such sums, five years before suit was brought. And the Landlord even consulted an attorney about the possibility of bringing a claim for such refusal, five years before suit was brought. Under these undisputed circumstances, the statute of limitations on such claim had long expired before suit was brought.

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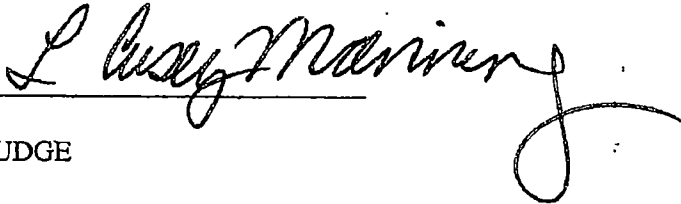
~~Landlord's contention that a non-waiver provision of the Lease precludes~~
application of the Statute of Limitation is meritless. Waiver is a matter of intentional
relinquishment of rights. The Statute of Limitations is not a "waiver," but is instead a
statutory preclusion against the bringing of stale claims. Nothing brought forth in the
motion to reconsider changes this outcome.

Because the undisputed evidence shows the above breaches, as well as the time
bar of the belated insurance claim, the Landlord may not recover on any claims asserted,
and summary judgment was therefore properly entered in favor of Tenant on all claims of
Landlord. Further, Tenant was and is entitled to judgment as a matter of law as to her
claims for breach of the lease by the Landlord, who admittedly dispossessed Tenant
during the paid up leasehold term, and nothing in the motion to reconsider changes the
Court's order so ruling. As previously ordered, the Court will schedule a damages hearing
to ascertain the loss Tenant suffered as a result of that breach of the lease, and the
appropriate recovery by Tenant on the counterclaims.

The motion for reconsideration is hereby DENIED.

IT IS SO ORDERED.

in Columbia, Richland County South Carolina, this 23 day of October, 2015.



JUDGE