Memorandum

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IA Part 4
Justice

MERRICK BLVD 9224, LLC,

Plaintiff(s)

-against-

92-24 MERRICK INC., DONALD WEINER BARBARA WEINER.

Defendant(s)

Index Number 17699 2010

Motion Date August 11, 2015

Motion Cal. Number 74

Motion Seq. No. 5

Hon. Marguerite A. Grays

Plaintiff Merrick Blvd 9224 LLC (plaintiff) moves this Court for an Order: (1) confirming the report of Judicial Hearing Officer, Roger N. Rosengarten (JHO Rosengarten), dated May 5, 2015 and (2) for a judgment against defendants 92-24 Merrick Inc., Donald Weiner, and Barbara Weiner (collectively referred to as defendants), jointly and severally, and defendants cross-move for an Order: (1) rejecting the JHO's report dated May 5, 2015; (2) denying judgment to plaintiff and (3) rejecting the holding that Barbara Weiner is liable as contained in the report of the JHO.

This is an action sounding in breach of contract and property damage arising out of a lease agreement between the parties. Plaintiff has alleged that defendant 92-24 Merrick Inc leased premises located at 92-24 Merrick Boulevard, in the County of Queens, that Donald Wiener and Barbara Wiener, the owners of 92-24 Merrick Inc, personally guaranteed the

lease, that defendants breached the contract by subletting the premises and failing to pay rent and caused significant damage to the premises when they vacated it prior to the end of the lease.

Plaintiff has moved to confirm the JHO's report and for judgment against defendants, finding them jointly and severally liable, while defendants have opposed and cross-moved to reject the report. Defendants have also challenged the JHO's finding that Barbara Weiner is liable in the sum of $241,643.93. The Court directed a hearing before JHO Rosengarten, who conducted such hearings on three (3) days, April 14, May 4 and 5, 2015. Following these hearings, the JHO found in favor of plaintiff, and found defendants jointly and severally liable, and that they owe plaintiff $202,176.00 in rent through June 2011, and $39,467.83 in real estate taxes, for a total of $241,643.83, with costs and disbursements. The JHO also dismissed defendants' counterclaims. JHO Rosengarten made his report on May 5, 2015.

CPLR §4403 provides, in relevant part, that "[u]pon the motion of any party or on his own initiative, the judge required to decide the issue may confirm or reject, in whole or in part, the ... report of a referee to report." "Where, a referee is appointed to hear and report, the referee's report and recommendation 'should be confirmed if the findings in the report are supported by the record'" (*Ferentini v Ferentini*, 72 AD3d 882, 883 [2010], quoting *Frater v Lavine*, 229 AD2d 564 [1996]; *see Shen v Shen*, 21 AD3d 1078, 1079 [2005]; *Stone v Stone*, 229 AD2d 388 [1996]). "It is well settled that the determination of a Referee appointed to hear and report is entitled to great weight, particularly where conflicting testimony and matters

of credibility are at issue, since the Referee, as the trier of fact, had the opportunity to see and hear the witnesses and to observe them on the stand" (*Frater v Lavine*, 229 AD2d at 564; *see Slater v Links at N. Hills*, 262 AD2d 299 [1999]).

The instant record contains, among other things, the JHO's report dated May 5, 2015, which was made on the record, as well as a copy of the lease agreement considered at the hearing. After review of the JHO's findings and the documentation in the record, the Court finds that defendants have failed to adequately demonstrate that the findings are unsupported in the record (*see Tihomirovs v Tihomirovs*, 123 AD3d 808, 809 [2014]; *Ferentini v Ferentini*, 72 AD3d at 883). Defendants have attempted to challenge the JHO's finding that Barbara Weiner is liable in the sum of $241,643.93, and have argued that she is, at most, liable for a maximum sum of $90,898.62. However, after a careful review of the record the Court finds that , defendants have failed to adequately demonstrate that they raised that issue at the hearing before the JHO, prior to the issuance of his decision, and, thus, they may not do so for the first time at this juncture (*see Shen v Shen*, 21 AD3d at 1079; *Hexcel Corp. v Hercules Inc.*, 291 AD2d 222, 223 [2002]; *see also Gamman v Silverman*, 98 AD3d 995, 996 [2012]).

Defendants have not otherwise demonstrated any error or impropriety in the JHO's conduct of the hearing or with regard to his findings. Their remaining contentions are without merit. Plaintiff, is thus entitled to the relief sought.

Accordingly, the JHO's report is confirmed and judgment is entered in favor of plaintiff. Defendants' cross motion is denied in its entirety.

Settle Order.

FILED

Dated: OCT 27 2015 NOV 12 2015

COUNTY CLERK
QUEENS COUNTY

J.S.C.

of the case law that I cited previously as far as creating a duty and potential liability on a landlord when they preserve that right.

And to the extent that counsel cited cases which state that the duty rises when there is a clear violation or a defect at the premises, there was explicit testimony from Mr. Krongelb which proves that precisely.

So interestingly he cited those cases because the expert's testimony, which again, was not refuted by any counter expert or any other, anyone who qualified as an expert, should speak for itself and it's unrefuted.

THE JUDICIAL HEARING OFFICER: Okay. Thank you.

First of all, I want to thank the attorneys for their courtesies and their fine presentment of the evidence and the witnesses and clients and for their courtesy and good behavior.

As to the premises in question, the cases cited by the defendant deal mainly with structural defects. The rear roof leak is not a structural defect.

And I find that the pipe failure of August 8th, 2008, is not, in my opinion, a structural defect.

In regard to the mold, the alleged mold condition cannot be found to be a latent structural defect as set forth in the case of Invesco, I N V E S C O versus Marsh, M A R S H, 92 Appellate Division 3d 414.

And I find that these conditions do not fall within the purview of the Administrative Code Section 28-301.1, which became effective on July 1st, 2008.

Under the terms of the lease of August 1st, 2008, the defendant corporation and the guarantors, the other Defendants, had the responsibility to maintain and repair the premises. And had leased the building in an as-is condition.

There has been no satisfactory proof of any violations that were cited on the building that relate to any structural defects.

It appears from Defendant's Exhibit F, the spread sheet in regard to the sales of the stores corporately owned by the defendants, by their West Hartford store closed, as testified to by the witness, the defendant witness. It appears that that closed on or about July 9th. And the Farm, which probably is Farmington, on or about February 9th -- on or about February of 2009, or it did not close, made no sales thereafter.

And the premises in question in this case, seems to have made no sales or had been closed as of May 2010.

Could the poor performance of the subject store been due to the nature and presentation of the merchandise offered, the condition of the building or by the severe downturn in the economy that we all experienced from 2008 to

2012.

I find that the defendant has failed to sustain their burden of proof that the plaintiffs are responsible for their losses.

Are landlords required to share our losses under circumstances like this?

While, ideally, that may seem equitable, under the law without an agreement to share such losses, that is not a requirement.

Accordingly, the counterclaim is dismissed.

I also find that as Mr. Neville has pointed out that the damages sustained by the break in the pipe that occurred on August 8th, 2008 were made whole by the defendant's insurer, who has made no claims against the landlords.

I find that the plaintiff has sustained its burden of proof that the defendant corporation and the lease guarantors failed to pay the real property taxes on the property in the amount of $39, 467. 83 and to pay rents in the amount of $202,176, as required by the lease that was signed on behalf of the defendant corporation and guaranteed by the individual defendants.

Accordingly, the plaintiff may enter judgment in the amount of $241,643.83, jointly and severally against all defendants, with costs and disbursements.