IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

CAFÉ PARISSA, INC.,	:	October Term, 2001
	:	
Plaintiff	:	No. 4272
v.	:	
	:	
1601 ASSOCIATES and 1601 SANSOM CORP.	:	Commerce Program
	:	
Defendants.	:	
	:	

ORDER

AND NOW, this 30th day of June 2004, upon consideration of the evidence presented at trial, the respective submissions of the parties, all responses thereto, all matters of record, and in accordance with the Opinion being filed contemporaneously with this Order, it hereby is **ORDERED** and **DECREED** as follows:

1. With respect to Count I of the Complaint (trespass), this court finds in favor of Defendants 1601 Associates and 1601 Sansom Corporation and against Plaintiff Café Parissa Inc.

2. With respect to Count II of the Complaint (breach of contract), this court finds in favor of Plaintiff Café Parissa Inc. and against Defendants 1601 Associates and 1601 Sansom Corporation in the amount of $151,281.00.

BY THE COURT:

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C. DARNELL JONES, J.

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1601 ASSOCIATES and 1601 SANSOM CORP.	:	Commerce Program
	:	
Defendants.	:	
	:	

MEMORANDUM OPINION

C. DARNELL JONES, J.

Plaintiff has brought claims against Defendant for trespass (Count I) and breach of contract (Count II). A three day hearing was conducted on November 17, 18 and 25, 2003. In accordance with the findings of fact and analysis set forth herein, this court finds as follows:

FINDINGS OF FACT

1. Plaintiff Café Parissa Inc. ("Parrissa") is a Pennsylvania corporation which owned and operated a restaurant and catering business in a premises which consisted of one-half of the first floor and basement of a building located at 1601 Sansom Street, Philadelphia, also known as 110 South 16th Street (the "Premises").

2. Plaintiff and the original landlord, Realty Tek Associates ("Realty Tek"), entered into a written lease in November 1992 for a five (5) year term through December 31, 1997, with two Renewal Options for a five (5) year terms (the "Lease"). (Pl. Exh. 1).

3. On April. 24, 1996, a lease amendment was executed which extended the lease

term and, by its specific terms, amended the Lease in part and ratified the other parts which were not amended (the "Amendment"). The Lease Amendment started on April 1, 1996 and was to continue for a five (5) year term to April 20, 2002. The Amendment also contained an option for Parissa to extend the lease from May 1, 2002 through April 30, 2007. (Pl. Exh. 2).

4. Upon occupying the Premises, Parissa made substantial improvements to the Premises and purchased furniture and other restaurant and kitchen equipment for use in the restaurant. (N.T. 11/17/03 at 32-46;169-182; N.T. 11/18/03 at 75-95.)

5. The defendants are 1601 Associates, a Pennsylvania limited partnership, and its general partner, 1601 Sansom Corporation (collectively, the "Landlord").

6. On or about October 29, 1999, the building in which the Premises was located was sold by Realty Tek to the Landlord, which assumed Parissa's Lease by written assignment of that date. The Landlord thereafter notified Parissa that all rents due under the Lease were to be paid to 1601 Associates c/o Turchi, Inc. (Pl. Exh. 3).

7. Paragraph 10 (a) of the Lease provides that the Landlord has the right to "…at his option make repairs, alterations and additions to the [Premises] or the building of which the [Premises] is a part. Except in the event of an emergency, [Landlord] shall give Tenant reasonable notice of its intention to enter the premises and shall give due consideration to the busy hours of [Tenant's] business, particularly during the lunch hours." (Pl. Exh. 1 at ¶ 10 (a)).

8. The Lease further describes the Landlord's responsibility with respect to "Partial Destruction of the Premises" as follows: "(b) if the damage to the [Premises] is only partial, [Parissa] shall have the option to terminate this Lease Agreement if the damage or destruction cause [Parissa] to be unable to operate its restaurant business for a period of fifteen (15) business

days from the date of casualty or damage….if [Parissa] elects to remain on the Premises. [Landlord] shall restore the damaged premises within reasonable promptness, reserving the right to enter upon the premises for that purpose. In the event that [Parissa] does not opt to terminate the Lease, a portion of the rent shall be abated; the amount of rent to be abated shall be determined by taking into account the portion of the [Premises] rendered untenantable and the duration of [Parissa's] repairs to the premises." (Id. at ¶ 12 (b)).

9. The Lease further provides that: "[e]xcept to the extent related to the renovation, modification or development of the building of which the [Premises] is a part or as hereinbefore provided, [Landlord] shall not be liable for any damage, compensation, or claim by reason of the necessity of repairing any portion of the building, the interruption in the use of the premises, any inconvenience or annoyance arising as a result of such repairs or interruption of the this Lease by reason of damage to or destruction of the Premises." (Id. at ¶ 12 (d)).

10. Beginning on November 9, 1999, the Landlord undertook a period of construction to the building where the restaurant was located. (N.T. 11/17/03 at 48). This construction commenced without any notice to Parissa from the Landlord that any construction was contemplated or contracted for at the Premises that day or in the future. (Id. at 53).

11. The construction caused noise, vibration, debris and dust to enter the restaurant, causing substantial damage to the interior of the Premises and forcing Parissa's owner, Hossein Alidjani, to close the restaurant. (Id. at 49-50).

12. On November 9, 1999, a meeting was held with Alidjani, Parissa's counsel, John J. Turchi Jr. (a representative of the Landlord) and the Landlord's counsel. At the meeting, it was disclosed that the Landlord was renovating the building as a residential apartment unit. (Id.

at 66-70; N.T. 11/25/03 at 13-18).

13. At the meeting, the Landlord represented to Parissa that the construction would be short term and that Alidjani would likely be able to reopen the restaurant within a couple of days. (Id.) In consideration thereof, Parissa incurred substantial time and expense cleaning and restoring order to the Premises, including the hiring of a cleaning service, in order to get the restaurant in a condition acceptable for serving food to customers. However, despite such representations, the construction continued causing further damage, dust and debris, rending these efforts futile. (Id.)

14. During this time, Parissa continued to pay its staff in the hopes that the restaurant would be able to reopen. (N.T. 11/17/03 at 127, 182-3).

15. The evidence further demonstrates that, during the course of the construction, gaping holes appeared in both the kitchen ceiling and in the restaurant and kitchen walls, a trash chute had been installed running through twelve floors of the building which passed immediately through the kitchen, ductwork for the HVAC system and hot water heater had been removed and the toilet and sewer system destroyed. Moreover dust and debris had permeated the entire restaurant, rendering it unfit for its intended use as a restaurant, forcing Parissa to close for business. (Id. at 50-65; 71-87; 92; N.T. 11/18/03 AT 101-3; Pl. Exhs. 6 and 7).

16. Alidjani later learned that the Landlord had hired a company to remove asbestos from the building which housed the restaurant, however Parissa was never notified by the Landlord about the condition of the asbestos, including whether the building was freed of asbestos. (N.T. 11/17/03 at 127). The removal of asbestos caused further dust and also water damage to the Premises. (Id. at 106-116). Parissa also incurred further expense in hiring a

laboratory to conduct tests to determine if the restaurant had been contaminated by asbestos from the building. (Id.).

17. In early December 1999, during one of his frequent visits to the Premises, Alidjani was not able to use his key in the front lock of the restaurant. At or about the same time, Alidjani also noticed that the retail area had been emptied of the furniture and restaurant equipment which had previously occupied the Premises. Because he could not get inside of the restaurant, Alidjani was also unable to gain access to the office inside the Premises, which contained the restaurant's records. The Landlord never provided Alidjani with any notice as to the removal of such items from the Premises. (Id. at 117-125; Pl. Exh. 5).

18. The restaurant never reopened, nor was the rent for November 1999 ever returned to Parissa. (Pl. Exh. 10, N.T. 11/17/03 at 96).

19. At no time did Parissa express a desire to vacate the premises, rather it was Parissa's consistent position that it wanted to reoccupy the Premises and re-open the restaurant. (N.T. 11/17/03 at 96-7, 216).

20. In 2001, Alidjani opened a new restaurant on the 1900 block of Sansom Street in Philadelphia, but was unable to re-establish catering operations due to space constraints.

21. At bar, Parissa has produced evidence that it incurred damages in the amount of $151,281.00,[1] including: 1) loss of possession and use of leasehold improvements and restaurant equipment; 2) expenditures made immediately prior to construction for perishable food and restaurant supplies; 3) expenses incurred with respect to maintaining the restaurant's staff in anticipation of reopening the restaurant; 4) inspection and cleaning incurred as a result of the

1 Defendant did not produce any evidence to refute the specific amounts claimed.

construction; 5) unreimbursed November rent; and 6) legal fees. (N.T. 11/17/04 at 36-9, 41-3, 45-6, 135-136, 145-191, Pl Exhs. 8, 9, 27-29). [2]

DISCUSSION

Plaintiff has brought claims against Defendant for trespass (Count I) and breach of contract (Count II). Each will be discussed in turn.

I. Trespass (Count I)

Count I of Plaintiff's Complaint is captioned "trespass," however upon close inspection of the language of the count, it appears that, in actuality, Plaintiff is asserting a negligence claim against Defendants here. Compl. ¶¶ 13-17. This is problematic because Pennsylvania's gist of the action doctrine bars tort claims that, as here: (1) arise solely from a contract between the parties; (2) where the duties allegedly breached were created and grounded in the contract itself; (3) where the liability stems from a contract; and (4) where the tort essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of the contract. Etoll, Inc. v. Elias/Savion Advertising, Inc., 2002 Pa. Super. 347, 811 A.2d 10, 19 (2002). Regardless of how the count was captioned by Plaintiff, the facts pled therein clearly demonstrate that the crux of Plaintiff's "trespass" claim is Defendants' alleged breach of the Lease. As such, Count I, as pled, is barred by the gist of the action doctrine.

Regardless of the forgoing, in its Proposed Findings of Fact and Conclusions of Law, plaintiff refers to Count I as "trespass/conversion." While, Pa.R.C.P. 1033 permits amendments to "conform to the evidence offered or admitted," Plaintiff has failed to produce sufficient evidence at trial to support such causes of action. Pennsylvania law defines conversion as "the

2 For a complete breakdown and calculation of the foregoing damages, see Pl. FFCL, ¶¶ 42-51.

deprivation of another's right of property in, or use or possession of, a chattel, without the owner's consent and without lawful justification." Brinich v. Jencka, 2000 Pa. Super. 209, 757 A.2d 388, 403 (2000). In reviewing a claim for conversion, a court must focus on a defendant's specific intent to exercise control over the chattel in question. McKeeman v. CoreStates Bank, N.A., 2000 Pa. Super. 117, 751 A.2d 655, 659, n. 3 (2000). The elements of trespass to chattel are essentially the same and require proof that defendant is "intentionally (a) dispossessing another of the chattel, or (b) using or intermeddling with a chattel in the possession of another." Restatement (Second) of Torts § 217 (1965).

At bar, Plaintiff has failed to demonstrate such specific intent by the Landlord, nor has it proven that the property in question was in the control of the Landlord, in fact, there was no testimony whatsoever about what actually happened to it, although it is clear that it was never returned to Plaintiff. Based on the evidence of record, this court finds that Plaintiff has failed to sustain its burden of proof with respect its claims for trespass/conversion.

Accordingly, this court finds in favor of Defendants 1601 Associates and 1601 Sansom Corporation and against Plaintiff Café Parissa Inc. with respect to Count I of the Complaint.

II. Breach of Contract

Count II of Plaintiff's Complaint relates to the Landlord's alleged breach of the Lease. To sustain a claim for breach of contract, a plaintiff must prove: (1) the existence of a contract, including its essential terms; (2) a breach of a duty imposed by the contract; and (3) resultant damages. CoreStates Bank, Nat'l Assn. v. Cutillo, 723 A.2d 1053 (Pa. Super. 1999). This court finds that the Lease and its Amendments constitute a valid and binding contract between the parties. The evidence also demonstrates beyond cavil that the Landlord breached the Lease and

that, as a result, Plaintiff suffered damages.

First, ¶ 10(a) of the Lease provides that the Landlord has the right to "…at his option make repairs, alterations and additions to the [Premises] or the building of which the [Premises] is a part" but that the Landlord must give Parissa notice of his intention to do so "except in the event of an emergency." (Pl. Exh. 1 at ¶ 10 (a)). The Lease further provides that, under such circumstances, the Landlord "…shall give due consideration to the busy hours of [Tenant's] business, particularly during the lunch hours." (Id.) It is undisputed that Parissa was never notified or advised that the construction was commencing and was never informed about the extent or timetable of the work or any safeguards contemplated by the Landlord to protect Parissa's ongoing restaurant business. (N.T. 11/17/03 at 53). This court finds no evidence of an "emergency" here, but rather the contrary. It is clear that substantial planning of the building renovations was necessary by the Landlord, given the nature and extent of the work being done. Despite this, the Landlord gave no notice whatsoever that it intended to perform the construction that caused the damage and eventual closing of the restaurant, even though it clearly was foreseeable that such extensive work would interfere with the operation of the food service establishment located directly below it.

Contrary to Defendants' assertions, the Landlord is not insulated from liability based on any specifics provisions of the Lease. The Lease specifically provides that: ***"[e]xcept to the extent related to the renovation, modification or development of the building of which the [Premises] is a part or*** as hereinbefore provided**,** [Landlord] shall not be liable for any damage, compensation, or claim by reason of the necessity of repairing any portion of the building, the interruption in the use of the premises, any inconvenience or annoyance arising as a result of

such repairs or interruption of the this Lease by reason of damage to or destruction of the Premises." (Id. at ¶ 12 (d)). The Landlord's conduct here falls squarely within the scope of the exception to ¶ 12 (d), namely events related to the "…renovation, modification or development of the building of which the [Premises] is a part…" (Id. at ¶ 12 (d)).

The Lease provides for damages in the event of "Partial Destruction of the Premises", which is exactly what occurred in this case. The Lease provides: "if [Parissa] elects to remain on the Premises. [Landlord] shall restore the damaged premises within reasonable promptness, reserving the right to enter upon the premises for that purpose. In the event that [Parissa] does not opt to terminate the Lease, a portion of the rent shall be abated; the amount of rent to be abated shall be determined by taking into account the portion of the [Premises] rendered untenantable and the duration of [Parissa's] repairs to the premises." (Id. at ¶ 12 (b)). While this provision also gives Parissa the option of terminating the Lease, it is clear that, Parissa never expressed a desire to vacate the premises. Rather, to the contrary, it was Parissa's consistent and unchanging position that it wanted to reoccupy the Premises and re-open the restaurant (N.T. 11/17/03 at 96-7, 216), a decision that this court finds to be reasonable and well within Plaintiff's rights under the Lease. Moreover, the evidence also demonstrates Landlord undertook no actions to affirmatively attempt to get Parissa to reoccupy the Premises, nor did it ever provide Parissa with notice that the construction was finished or that that building was free from asbestos.[3]

[3] In addition to the breach of specific provisions of the Lease, the evidence also demonstrates that Landlord's actions interfered with Plaintiff's right to beneficial enjoyment of the leased property, insofar as the Landlord's actions forcibly expelled Parissa from the Premises. "In every lease of real property, there will be implied a covenant of quiet enjoyment." 2401 Pennsylvania Avenue Corp. v. Federation of Jewish Agencies of Greater Philadelphia, 507 Pa. 166, 489 A.2d 733 (1985); Pollock v. Morelli, 245 Pa. Super. 388, 369 A.2d 458 (1976); The covenant is between the landlord and his tenant and it is breached when a tenant's possession is

Based on the foregoing, Plaintiff is entitled to damages. The purpose of damages in a breach of contract case is to return the parties to the position they would have been in but for the breach. Birth Center v. St. Paul Companies, Inc., 567 Pa. 386, 787 A.2d 376 (2001). It is well-settled that "mere uncertainty as to the amount of damages will not bar recovery where it is clear that damages were the certain result of the defendant's conduct." Pugh v. Holmes, 486 Pa. 272, 297, 405 A.2d 897, 909-910 (1979). In the instant case, it is obvious that Plaintiff's damages were the "certain result" of the Landlord's conduct. This court will not preclude recovery merely because the amount of the loss had to be estimated by the trial court based on the evidence produced by Plaintiff. Indeed, this is the traditional function of the fact finder. Penn Electric Supply Co., Inc. v. Billows Electric Supply Co., Inc., 364 Pa. Super. 544, 550, 528 A.2d 643, 646 (1987).

At bar, Parissa has produced evidence that it incurred damages, including: 1) loss of possession and use of leasehold improvements and restaurant equipment; 2) expenditures made immediately prior to construction for perishable food and restaurant supplies; 3) expenses incurred with respect to maintaining the restaurant's staff in anticipation of reopening the restaurant; 4) inspection and cleaning incurred as a result of the construction; 5) unreimbursed November rent; and 6) legal fees. ((N.T. 11/17/04 at 36-9, 41-3, 45-6, 135-136, 145-191, Pl Exhs. 8, 9, 27-29). The total amount claimed for the foregoing damages was $151,281.00. Defendant did not produce any evidence to dispute these amounts. Accordingly, judgment is

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impaired by acts of the lessor or those acting under him, as here. Id. ; No. 14 Coal Co. v. Pennsylvania Coal Co., 416 Pa. 218, 206 A.2d 57 (1965). In view of the decisions of the courts of this Commonwealth which recognize a tenant's right to the use of the leased property without disruption by the landlord, it is clear that a remedy exists in favor of the Plaintiff in the present case due to the Landlord's activity in undertaking significant renovations to the building which were detrimental to Plaintiff's business, without providing Plaintiff with any notice or opportunity to take precautions to protect the business.

entered in favor of Plaintiffs in the amount of $151,281.00.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact and analysis, the court finds:

1. With respect to Count I of the Complaint (trespass), this court finds in favor of Defendants 1601 Associates and 1601 Sansom Corporation and against Plaintiff Café Parissa Inc.

2. With respect to Count II of the Complaint (breach of contract), this court finds in favor of Plaintiff Café Parissa Inc. and against Defendants 1601 Associates and 1601 Sansom Corporation in the amount of $151,281.00.

This Court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT:

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C. DARNELL JONES, J.