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McMillan v. Marengo

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[*1]

McMillan v Marengo
2020 NY Slip Op 51456(U)
Decided on December 4, 2020
Supreme Court, Bronx County
Armstrong, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on December 4, 2020

Supreme Court, Bronx County

<p>Valeria McMillan and Roderick Francis, Plaintiffs,</p> <p>against</p> <p>Christopher Marengo, as Administrator, etc., Defendant.</p>

20462/2020E

Adrian N. Armstrong, J.

The following papers numbered ____ to ____ were read on these motions (**Seq. Nos. 1, 2**) noticed on ___ and duly submitted as *No.* on the Motion Calendar of _____.

Sequence Nos. 1, 2 Doc Nos.

Notice of Motion — Exhibits and Affidavits Annexed 6-39

Cross Motion — Exhibits and Affidavits Annexed

Answering Affidavit and Exhibits, Memorandum of Law

Reply Affidavit

Upon the foregoing papers, the motions listed above are decided in accordance with the annexed decision and order

Upon the foregoing papers, the motions indicated above are decided as follows

Under Motion Sequence No 1, the defendant moves by Order to Show Cause for summary judgment pursuant to CPLR 3212 dismissing the complaint. That motion was granted on default Under Motion Sequence No 2, the plaintiffs move by Order to Show Cause to vacate their default, and to restore Motion Sequence No. 1. Motion Sequence No. 2 is granted, the Decision and Order of September 30, 2020, is vacated and recalled, and Motion Sequence No. 1 is decided ab initio as follows.

This is an action for specific performance of a purchase option contained in a lease for real property. The plaintiffs and Jack Colbert, now deceased, entered into a lease dated October 26, 2012 for property located in Bronx County, to be used as a residence and home-based business. The lease contained a purchase option. The option clause provided, in part:

"This Option may be exercised at any time prior to the end of the term of the Lease. Upon expiration of the Option, the Landlord will be released from all obligations to sell the Premises to the Tenant. If the Tenant does not exercise the Option prior to its expiration, all rents and other charges paid under this lease will be retained by the Landlord, and neither party will have any further rights or claims against each other concerning the Option "

The plaintiffs allege that on September 23, 2019, Jack Colbert died, and that they exercised their option to purchase on September 30, 2019 Plaintiffs admit in papers submitted [*2] on this motion that since January 1, 2015, they have been holdover tenants in possession on a month to month basis

The determinative issue in this action is whether the tenant had the right to exercise the option to purchase during that time when the tenant was holding over as a month to month

tenant. The parties have asked the Court to take notice of Colorado law and other sources in determining this issue. There is no need to do so, as the issue may be determined under extant New York case law authority.

In the seminal and oft-cited case *Gulf Oil Corp. v. Buram Realty Co.* (11 NY2d 223, 182 N.E.2d 608, 228 N.Y.S.2d 225 [1962]), the lease contained an option to purchase, which provided that the option could be exercised "at any time during the term of this lease." The parties extended the original lease term by numerous extension agreements, all of which recited that the lease was extended "under the terms set forth herein." The Court of Appeals determined that the purchase option contained in the original lease was *not* in effect when the tenant sought to exercise it. Finding that the terms of the original lease was the "decisive factor," the Court reasoned as follows:

"The rules applicable to the construction of such agreements are well known. Where parties to a lease containing an option to purchase have agreed at the time they entered into a lease upon an option of renewal whereby the term could be extended by the tenant alone for an agreed additional period, the tenant may 'demand a conveyance at any time during that term' (*Masset v. Ruh*, 235 NY 462, 464; *Jones & Brindisi v. Breslaw*, 250 NY 147, 151). That is because 'once the option [of renewal] is exercised, the original lease, it is settled, is deemed one for the entire term' (*Matter of Harvey Holding Corp.* [Satter], 297 NY 113, 118) 'and the parties hold, not under any new contract by virtue of the renewal, but by virtue of the original lease' (*New York Business Bldgs. Corp. v. McCutcheon & Co.*, 229 App. Div. 681, 684, *affd.* 257 NY 554). When, however, the option to purchase was exercised during a term extended by a series of new extension agreements separate from the original amended lease and options to renew contained therein, 'the option is extended if the agreement refers to and continues the original lease, but the option is not extended if the agreement merely continues the tenancy, even though upon the terms fixed by the original lease' (163 A. L. R. 711, 712).

"Since here the option to purchase 'during the term of this lease' was not exercised during the term of the original lease as amended or during the term as extended by the exercise of an option to renew contained in the lease, the period for which the original lease has been extended is not considered as if it was a part of an entire term." (*Gulf Oil Corp. v. Buram Realty Co.*, 11 NY2d 223, 225-226, 182 N.E.2d 608, 609, 228 N.Y.S.2d 225, 226-227 [1962].)

The Court of Appeals specifically noted that the extension agreements did not reflect an intent to incorporate the purchase option as one of the terms of the extension. Moreover, the original lease specifically stated that the option to purchase could be exercised "during the term of this lease," as opposed to other

lease provisions which were effective during the term of the lease as well as any 'extension thereof.' "

Stated succinctly, the general rule is that "an option to purchase contained in a lease is, unless expressly reaffirmed in a subsequent lease or extension thereof, only valid during the term of the original lease." (*Galapo v. Feinberg*, 266 AD2d 150, 150-151, 699 N.Y.S.2d 344, 345 [1st Dept. 1999]; [see *Mulonet v. Exxonmobil Oil Corp.*, 81 AD3d 702](#), 704, 916 N.Y.S.2d 608, 610 [*3][2d Dept. 2011] [holdover provision contained in the 1973 lease did not allow the defendant to exercise the option to purchase the property after the expiration of the final renewal period enumerated in the lease].)

Here, the purported exercise of the option did not occur during the original lease term, or during the term of a renewal option contained in the original lease. Rather, the tenants are merely holding over as month-to-month tenants. "Generally, when a tenant remains in possession [of the leased premises] after the expiration of a lease, pursuant to common law, there is implied a continua[tion] of the tenancy on the same terms and subject to the same covenants as those contained in the original instrument" ([\(*Henderson v Gyrodyne Co. of Am., Inc.*, 123 AD3d 1091](#), 1093, 1 N.Y.S.3d 199 [2d Dept. 2014], quoting *City of New York v Pennsylvania R.R. Co.*, 37 NY2d 298, 300, 333 N.E.2d 361, 372 N.Y.S.2d 56 [1975]).

The fact that the lease continues generally on the same terms and conditions where there is a holding over does not mean that every condition of the lease is extended. Thus, for example, in [\(*Lo-Ho LLC v. Batista* \(62 AD3d 558](#), 560, 881 N.Y.S.2d 33, 36, 2009 NY App. Div. LEXIS 3805, *6 [1st Dept. 2009]), the First Department held that "a mere holdover tenancy could not operate in and of itself, to extend a personal guarantee in the absence of such provision in the guaranty."[\[FN1\]](#)

In the present case, the plaintiffs-tenants are undisputed holdover tenants. Assuming that they hold the premises on the same terms and conditions of the original lease, they nevertheless have no right to exercise an expired option to purchase. The lease specifically provides that the option must be "exercised at any time prior to the end of the term of the Lease." There was no provision that the option to purchase could be extended beyond the expiration of the original lease term. The fact that the lease provisions impliedly continue in the holdover tenancy does not provide any right to exercise the option to purchase, just as the renewal agreements in *Gulf Oil Corp.* did not give rise to any option to purchase, absent any further agreement of the parties.

As there is no right to exercise the option under the undisputed facts, the complaint must be dismissed.

Accordingly, it is hereby,

ORDERED that Motion Sequence No 2 is granted, and the Decision and Order of September 30, 2020 is vacated and recalled, and it is further

ORDERED that Motion Sequence No 1 is granted, and the defendant is granted summary judgment dismissing the complaint, and it is further

ORDERED that the complaint is dismissed.

This is the Decision and Order of the Court.

Dated: December 4, 2020

Adrian Armstrong, A.J.S.C.

Footnotes

Footnote 1: On the other hand, a special provision such as a guaranty would continue in a holdover tenancy when the lease so provides. (*See, e.g., Stephen LLC v Zazula*, [171 AD3d 488](#), 488, 95 N.Y.S.3d 819, 820, 2019 NY App. Div. LEXIS 2624, *1, 2019 NY Slip Op 02645, 1 [1st Dept. 2019] [broad language of the guaranty provided that the guaranty would remain in effect during subsequent holdover period as well as when the lease was later renewed].)

[Return to Decision List](#)