2021-07-01

Transus LLC v. Beach View Apt. Corp.

SUPREME COURT, APPELLATE TERM, FIRST DEPARTMENT
June 2021 Term
McShan, J.P., Brigantti, Hagler, JJ.

Transus LLC and Dragonsurfside Realty, LLC, Plaintiffs-Appellants, -against- Beach View Apartment Corp. and Robert L. Gordon, Defendants-Respondents.	NY County Clerk's No. 570139/20 Calendar No. 21-030

Plaintiffs, as limited by their brief, appeal from so much of a judgment of the Civil Court of the City of New York, New York County (Louis L. Nock, J.), entered December 27, 2019, after a nonjury trial, in favor of defendants dismissing the complaint.

Per Curiam.

Judgment (Louis L. Nock, J.), entered December 27, 2019, modified by reversing so much thereof as dismissed plaintiff Transus LLC's second cause of action and directing the Clerk to enter judgment in favor of said plaintiff on the second cause of action in the principal sum of $50; as modified, judgment affirmed, without costs.

A judgment rendered after a bench trial should not be disturbed unless it is obvious that the court's conclusions cannot be supported by any fair interpretation of the evidence, particularly where the credibility of witnesses is central to the case (*see Nightingale Rest. Corp. v Shak Food Corp*., 155 AD2d 297 [1989], *lv denied* 76 NY2d 702 [1990]). Except as indicated, the trial court's dismissal of the claims of plaintiffs, the corporate owners of several cooperative apartments in the building located at 129 Beach 118th Street, Far Rockaway, against the cooperative, defendant Beach View

Apartment Corp., and its attorney, defendant Robert L. Gordon, is supported by a fair interpretation of the evidence (*see Claridge Gardens v Menotti*, 160 AD2d 544 [1990]).

Plaintiffs' first cause of action alleges that the cooperative defendant failed to apply a maintenance credit on the account of one of plaintiffs' units (1A) to the account of other units which were in arrears, thereby resulting in the imposition of late fees. The trial court's dismissal of this cause of action is supported by a fair interpretation of the evidence, which showed that the maintenance credit for unit 1A totaled only $1,740.55, while the maintenance arrears for the other units exceeded $6,000. Therefore, even if the unit 1A credit was applied to the other units, plaintiffs would not have avoided late fees. Nor did plaintiffs establish the amount the late fees would have been reduced if the 1A credit was applied to the other units.

Plaintiffs' third cause of action seeking a rent abatement was properly dismissed. To the extent that plaintiffs rely upon the statutory warranty of habitability (*see* Real Property Law § 235-b), the claim is unavailing. The corporate plaintiffs, who initially purchased approximately 12 units in the building as "unsold shares," cannot avail themselves of the protection of the warranty because they never resided in any of the units (*see Halkedis v Two E. End Ave. Apt. Corp.*, 161 AD2d 281 [1990], *lv denied* 76 NY2d 711 [1990]; *see also Frisch v Bellmarc Mgt.*, 190 AD2d 383, 390 [1993]).

Nor are plaintiffs entitled to an abatement pursuant to the underlying proprietary lease. Paragraph 8 of the lease provides for an abatement of rent where damage resulting from "fire or other cause shall be so extensive as to render the unit partly or wholly

untenantable." Paragraph 38 provides that the lessor shall not be liable "except by reason of lessor's negligence, for any failure or insufficiency of heat, water supply, electric current, gas, telephone or elevator service or other service to be supplied by lessor" and that no abatement of rent shall be allowed for failure to make repairs or for interruption of services "unless due to lessor's negligence."

The trial court properly harmonized the conflicting lease provisions "so as not to leave any provision without force and effect" (*Isaacs v Westchester Wood Works*, 278 AD2d 184, 185 [2000]) in finding that plaintiffs were not entitled to an abatement for the months of November and December 2012, that is, the period right after Hurricane Sandy caused flooding in the building and disruptions in electricity, elevator and hot water service. As the Court noted, "the very language of Paragraph 8, referring to a unit in the singular tense, is itself an indication that the provision was not intended to apply to a building-wide shutdown on account of a natural disaster, such as Hurricane Sandy." Nor was the cooperative Board's determination to collect maintenance during this period a change in the proprietary lease, which requires the "approval of at least 66-2/3% of the lessees" (Paragraph 12).

Plaintiffs' fourth cause of action alleges that defendant Gordon, on behalf of the cooperative, overcharged them for legal work performed in connection with their units. The trial court's dismissal of this cause of action, based upon its finding that the fees charged by Gordon were reasonable, is supported by the evidence and is not disturbed (*see Kwangjin Song v Woods Oviatt Gilman LLP*, 55 AD3d 1278 [2008]). This evidence

includes the credited testimony of Gordon, the experienced attorney who performed the relevant services - including overseeing two closings, ordering lien searches, sending notices to cure and notices of default - and plaintiffs failed to present credible evidence showing that the time spent by Gordon was duplicative or that his fees were unreasonable.

We modify only to the extent of awarding plaintiff Transus the sum of $50 on its second cause of action for a wrongfully assessed sublet fee. Although $150 in sublet fees were refunded after this action was commenced, the trial testimony of the cooperative's agent established that the cooperative improperly assessed a $50 sublet fee for unit 1A that was not subsequently credited.

Plaintiffs' request for attorneys' fees is properly denied. Considering the true scope of the dispute litigated, followed by a comparison of what was achieved within that scope (*see Solow v Wellner*, 205 AD2d 339, 340 [1994], *aff'd* 86 NY2d 582 [1995]), including plaintiffs' five causes of action seeking damages for more than $25,000, that resulted in just a $50 judgment for a sublet fee (as well as a refund of $150 after the action was commenced), we find that plaintiffs cannot be accorded prevailing party status.

We have considered plaintiffs' remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

I concur I concur I concur

July 1, 2021