Filed 5/14/13 Music Box Bldg. Co. v. Music Box Theatre CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MUSIC BOX BUILDING CO., LLC, Plaintiff and Respondent, v. MUSIC BOX THEATRE, LLC, Defendant and Appellant.	B238057 (Los Angeles County Super. Ct. No. BC466597)

APPEAL from a judgment of the Superior Court of Los Angeles County. David L. Minning, Judge. Affirmed.

The Law Offices of Ronald Richards and Associates and Ronald N. Richards for Defendant and Appellant.

Mitchell Silberberg & Knupp, Thomas P. Lambert, Christopher B. Leonard, and Michael E. Chait for Plaintiff and Respondent.

Plaintiff Music Box Building Co., LLC, and defendant Music Box Theatre, LLC, were parties to a lease, with plaintiff as the landlord and defendant as the tenant. Upon discovering that defendant had breached certain terms of the lease, plaintiff exercised its right to terminate the lease. When defendant would not vacate the premises, plaintiff brought the instant unlawful detainer action. Plaintiff moved for summary judgment, and the trial court granted the motion. Defendant appeals, contending, inter alia: (1) a triable issue of material fact exists regarding when the 30-day period in which plaintiff could exercise its right to terminate the lease began to run; (2) plaintiff waived its right to terminate the lease; and (3) plaintiff acted in bad faith and outside the reasonable expectations of the parties.

We find no triable issue of material fact. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Lease*

On January 3, 2005, plaintiff's predecessor-in-interest entered into a 10-year lease (the lease) with defendant for certain real property improved by a theatre building on Hollywood Boulevard (the premises).[1] Section 12(a) of the lease provides, in relevant part: "Tenant [defendant] shall not voluntarily or by operation of law assign or encumber its interest in this Lease or the Premises, or sublease all or any part of the Premises (excepting the approximately 1,500 foot space currently occupied by the phone store), or allow any other entity to occupy or use all or any part of the Premises, nor transfer, enter into franchise, license or concession agreements, ***change ownership or voting control,*** mortgage, pledge or hypothecate all or any part of this Lease. Tenant's interest in the Premises or Tenant's business (collectively 'Transfer'), without first obtaining Landlord's [plaintiff's] prior written consent."

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[1] In June 2005, the premises and lease were transferred to plaintiff, a newly formed California limited liability company. In July 2005, plaintiff notified defendant of the assignment, and defendant thereafter paid rent to plaintiff and corresponded with plaintiff as the landlord under the lease.

Moreover: For purposes hereof, if tenant is a partnership or limited liability company, "a withdrawal or change of partners or members owning more than a forty-nine percent (49%) interest in the partnership or limited liability company . . . shall constitute a Transfer and shall be subject to these provisions."

In the event of a proposed "Transfer," section 12(a) requires defendant to notify plaintiff at least 60 days before the proposed transfer and provide detailed information about the proposed transfer and transferee: "Tenant shall notify Landlord in writing at least sixty (60) days prior to any intended Transfer which notice shall include the name of the proposed assignee or sublessee, information concerning the financial responsibility and the business reputation and experience of the proposed assignee or sublessee in operating a business of the type and quality permitted under this Lease, and the terms of the proposed Transfer."

Upon presentation of a request for a proposed "Transfer," along with the supporting information, section 12(a) grants plaintiff as follows: "Landlord shall, within thirty (30) days' receipt of such written notice and additional information requested by Landlord, elect one of the following: (i) consent to the proposed Transfer, or (ii) refuse such consent, which refusal shall be for any reasonable reason; or (iii) elect to terminate this Lease, or in the case of a partial sublease, terminate this Lease as to the portion of the Premises proposed to be sublet."

Finally, "[a]ny Transfer without Landlord's prior written consent shall be void and shall confer no rights upon any third parties, and shall constitute a material default entitling Landlord, among other remedies, to terminate the Lease and all obligations of Landlord hereunder."

B. *The Lenzo Agreement*

On June 1, 2008, defendant entered into a "Consulting/Operating Agreement" (COA) with Lenzo, LLC (Lenzo). Under the COA, Lenzo was granted the right to occupy and use 2,500 square feet within the premises for an initial term of five years for the purpose of operating a restaurant and bar.

In negotiations leading up to the execution of the COA, defendant and Lenzo referred to the document as a "lease." The COA was drafted using the lease between plaintiff and defendant as a template. The COA identifies defendant as "landlord," and Brian Lenzo understood defendant to be Lenzo's landlord from June 2008 through at least June 2011. Lenzo was required to pay "[i]nitial [b]ase [r]ent" of $8,000 per month, which Lenzo thereafter paid as monthly rent to defendant. Lenzo was required to pay defendant a "[s]ecurity [d]eposit" in the amount of $12,000. And, the COA granted defendant the right of quiet possession of the specified premises for the term of the COA.

From and after August 2008, and without plaintiff's knowledge, Lenzo operated and used a portion of the premises as a brewhouse under the name "Blue Palms Brew House." In fact, defendant never sought consent from plaintiff.

C. *July and August 2009 Correspondence*

On July 28, 2009, defendant informed plaintiff's accountant, Bill Eckenrod (Eckenrod) that it had a "prospective investor." In its e-mail to Eckenrod, defendant acknowledged that "if we submit a potential investor and they invest 49% or more," plaintiff would have the right to terminate the lease. In response, Eckenrod sent defendant a letter, drafted by plaintiff's attorney, David Gerstein (Gerstein). Gerstein's letter identified the steps that defendant was required to follow, and the information that would be needed, if defendant sought approval for a change in ownership or voting control.

On August 11, 2009, defendant's attorney clarified that defendant was not seeking approval for a change in ownership: "*At no time* has our client ever advised that it is seeking approval for transaction involving the transfer of a fifty percent (50%), ownership interest, or even a forty-nine percent (49%) ownership interest, to a prospective investor."

On August 13, 2009, Gerstein wrote to defendant's attorney and again expressly invoked and reserved plaintiff's rights under section 12(a) of the lease.

D. *October 2009 Purchase Agreement with Out of the Box Entertainment, LLC (OTB)*

In October 2009, OTB acquired a 48 percent membership interest in defendant from defendant's original members: Thaddeus Smith (Smith), Marco Roy (Roy), and James Burton Nelson (Nelson) (collectively the original owners).

E. *Fourth Amended and Restated Operating Agreement* (*4AROA*)

In March 2010, the members of defendant executed the 4AROA. Pursuant to the 4AROA, the members agreed to change the existing operating agreement as part of a share purchase agreement between OTB, on the one hand, and the original owners, on the other hand, whereby OTB would have 60 percent of the membership interest and the original owners would have 40 percent of the membership interest. The 4AROA further provides that "OTB [would] exclusively manage the company and [would] have the exclusive right to appoint managers." And, the membership and voting control provision was "changed in a way that OTB [had] 60% of the membership interest."

Defendant effected the transfer of majority ownership and control, including voting control, to OTB without notifying plaintiff.

F. *The Roy Action*

In July 2010, the original owners filed a lawsuit (the *Roy* action) against OTB and its three principals, Idan Shulman (Shulman), Tamir Cohen (Cohen), and Kobi Danan (Danan). The original owners accused the defendants of engaging in wrongful acts to seize control of defendant.

The original owners further alleged that Danan, who was identified in the October 2009 purchase agreement as one of the three owners of OTB, had been charged with the forcible rape of a female coworker at a club where he had previously been employed (and later pled guilty to aggravated assault), that Danan was associated with the Israeli Mafia, that Danan was using the backstage area as his "personal den of iniquity," and that Danan's presence at the premises jeopardized defendant's liquor license and could result in the closure of the theatre.

G. *Settlement and Sale of Remaining Interest to New Owners*

In August 2010, the original owners and Cohen entered into a purchase agreement whereby the original owners agreed to sell their 40 percent ownership interest in defendant to Cohen and/or a company in his control (the 2010 purchase agreement). The 2010 purchase agreement was contingent upon settlement of the *Roy* action.

On September 22, 2010, Nelson and Roy, two of the original owners, entered into settlement and release agreements with OTB, Shulman, Cohen, and Danan. Those agreements confirmed Nelson and Roy's transfer of their remaining membership interests in defendant.

H. *October 2010 Correspondence*

On October 14, 2010, defendant sent a letter dated October 11, 2010, to plaintiff. The letter stated in part: "We are attaching a brief overview of the group that will be submitting for majority ownership," and advised that it would also be compiling financials for plaintiff's review. The letter did not include any of the information required by section 12(a) of the lease, such as the identity of the transferee, the terms of the proposed transfer, and information concerning the financial responsibility, business reputation, and business experience of the proposed assignee.

On October 18, 2010, Nelson sent Eckenrod a five-page document titled "The Jacob Izaki Group."

On October 26, 2010, Eckenrod asked Nelson to clarify whether the change in ownership was pending or had been approved. In response, on October 29, 2010, Nelson advised Eckenrod that the transfer was still pending "and a contingency to it is your clients['] reasonable approval."

Later that day, Eckenrod, on behalf of plaintiff, sent a letter via certified mail to defendant requesting information regarding the proposed transfer and the proposed transferee(s). Eckenrod received no response to his October 29, 2010, letter.

I. *The November 2010 Operating Agreement*

On November 2, 2010, OTB and T Entertainment Inc. (TE), a company formed by Cohen, entered into a restated operating agreement for defendant. The new operating

agreement identified OTB and TE as the sole members, with OTB owning 60 percent and TE owning 40 percent. In other words, by November 2, 2010, the original owners (Smith, Nelson, and Roy) had been removed from ownership and control of defendant.

J. *Request for Approval of a Transfer of Majority Control*

On February 1, 2011, defendant sent an e-mail to plaintiff requesting plaintiff's consent to a change in the ownership and voting control.[2] The letter did not mention the November 2010 restated operating agreement or the fact that the original owners had been removed from control of defendant. Instead, the letter provided: "When we last spoke about the idea of working with new financial partners, we were taking the energy from this great information and were ready to take off like a rocket! However, since this building and business are so important to us, [Roy], [Nelson] and myself [Smith] decided to take a breath and wait until we were absolutely sure that these were the partners we wanted to grow with . . . I am now happy to report that the answer to that question is, yes. [¶] That being said, we are requesting at this time for our shares to be reversed. In other words, [Roy], [Nelson] and myself [Smith] will hold 40% and our partners will hold 60%."

K. *Plaintiff's Requests for Additional Information*

On February 21, 2011, and again on March 2, 2011, plaintiff requested additional information concerning the proposed transfer and transferee, pursuant to section 12(a) of the lease. On March 3, 2011, and March 21, 2011, plaintiff received a response indicating that OTB was the proposed transferee. But, the response did not provide any financial statements or other information about OTB's financial capabilities, its experience in managing similar business, or its business reputation. Nor did the response provide the terms of the proposed transfer.

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[2] As discussed below, the parties dispute the import of this letter. According to plaintiff, this was the first time defendant requested consent. According to defendant, this e-mail was a reminder of defendant's prior request for consent, namely in its October 14, 2010, letter.

After reviewing the information provided, on April 14, 2011, plaintiff requested that defendant provide the missing information, including the terms of the proposed transfer and information on the financial responsibility and reputation of OTB. On May 11, 2011, plaintiff received an e-mail from Smith, on behalf of defendant, indicating that he would send documents to plaintiff's accountant supporting the answers to plaintiff's questions. By May 13, 2011, plaintiff received a package of documents from defendant in response to plaintiff's April 14, 2011, letter.

L. *Plaintiff's Independent Investigation*

In addition to seeking information from defendant, between March and May 2011, plaintiff's attorneys conducted an investigation, and retained a private investigator to assist, in evaluating defendant's request for consent to transfer 60 percent of defendant to OTB. As a result of plaintiff's independent investigation, plaintiff learned about the *Roy* action, which had not been disclosed by defendant. It also learned from the court file of the *Roy* action of the 4AROA executed in March 2010 and obtained a copy of the October 2009 purchase agreement, identifying Danan as one of OTB's owners. Plaintiff further discovered Danan's criminal conviction and about the original owners' concerns about Danan's ties to the Israeli Mafia and alleged use of the backstage area of the theatre as his "personal den of iniquity."

Plaintiff also learned that Brian Lenzo or a business entity in which he was the principal was operating a business under the name "Blue Palms Brewhouse" in a portion of the premises. Plaintiff had no prior knowledge that Lenzo or any other third party was using a portion of the premises to operate a separate business. Plaintiff had never been asked to consent, and had not consented, to the use of any portion of the premises by Lenzo, as required by section 12(a) of the lease. Plaintiff did not learn about or see defendant's agreement with Lenzo until late September 2011, when Mr. Lenzo produced a copy of his COA with defendant in response to a subpoena served in this proceeding.

M. *The Termination Notice*

After evaluating all of the information provided by defendant, and the information obtained in the independent investigation, plaintiff decided to exercise its right to

terminate the lease. On June 7, 2011, and again on June 8, 2011, plaintiff served defendant with a "Notice of Landlord's Election to Terminate Lease and Thirty Day Notice to Quit" (the notice). The notice communicated plaintiff's election to terminate the lease on multiple grounds,[3] including: (1) the landlord's election of its termination right under section 12(a)(iii); (2) breach of section 12(a) by allowing Lenzo to use and occupy a portion of the premises to operate a separate business; (3) breach of section 12(a) by transferring de facto control of the premises and de facto majority control of defendant to OTB, Shulman, Cohen, and Danan, without plaintiff's knowledge or written consent; (4) breach of the covenant of good faith and fair dealing by deliberately misrepresenting material facts and omitting to state material facts after plaintiff requested additional information about the proposed transfer of a 60 percent interest in defendant; and (5) breach of paragraph 9 of the lease by making substantial alterations without plaintiff's prior written consent.

N. *The Unlawful Detainer Action*

Defendant did not vacate the premises as required by the notice. Accordingly, on August 1, 2011, plaintiff filed a verified unlawful detainer action against defendant. Plaintiff filed a second amended complaint on September 28, 2011, and defendant answered on October 5, 2011.

O. *Plaintiff's Motion for Summary Judgment; Defendant's Opposition*

On November 15, 2011, plaintiff moved for summary judgment. It argued that its June 7 and 8, 2010, notices of termination were timely under section 12(a). After all, according to plaintiff, the notices were delivered within 30 days of May 11, 2011, the date it received the documentation package from defendant. Alternatively, plaintiff contended that defendant was otherwise in breach of the lease for (1) transferring voting

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[3] In the trial court, defendant disputed plaintiff's offered reasons for terminating the lease, claiming instead that plaintiff was terminating the lease because of the possibility that the owner was seeking to sell the building. Defendant also argued that plaintiff waived its right to terminate the lease because it had been more than 30 days from when defendant requested approval (in October 2010).

control without consent, pursuant to section 12(a) of the lease; and/or (2) allowing Lenzo to occupy and use a portion of the premises without consent.

Defendant opposed plaintiff's motion. It argued that there was a triable issue of fact as to whether plaintiff waived its right to terminate the lease. It further asserted that there were disputed material questions as to when transfer of ownership and voting control actually occurred. Finally, defendant contended that further discovery was necessary.

Although defendant submitted declarations from three witnesses in support of its opposition, those declarations were not signed under penalty of perjury, as required by California law.

On November 28, 2011, plaintiff filed its reply brief and objections to defendant's evidence. That same day, without permission from the trial court, defendant filed a supplemental opposition brief, two new declarations, and "corrected" declarations from the three prior witnesses that were now signed under penalty of perjury.

P. *Trial Court Order*

Plaintiff's motion was heard on December 6, 2011. After entertaining oral argument, the trial court granted plaintiff's motion for summary judgment. In so ruling, the trial court rejected defendant's argument that plaintiff's exercise of its right to terminate the lease under section 12(a) had to be reasonable. It further rejected defendant's assertion that plaintiff had waived its right to terminate the lease.

Regarding the declarations that were not submitted under penalty of perjury, the trial court initially indicated in its tentative ruling that "no admissible affidavits [had] been presented to the Court." During oral argument, after defense counsel pointed out that corrected declarations had been submitted, the trial court responded: "[A]ssuming that the evidence is admitted, as I read the papers your client doesn't have the written consent of the plaintiff to bring in the other owner." Later, after the trial court indicated that it was adopting its tentative ruling as the final order, defendant asked the trial court to clarify whether it considered the evidence in the original declarations (not signed under

penalty of perjury) or the corrected ones. The trial court stated: "The ruling stands the way it is. That is the way the papers came in."

Q. *Motion for Reconsideration*

On December 8, 2011, defendant filed a motion for reconsideration, urging the trial court to consider the corrected declarations (executed under penalty of perjury). During oral argument, the trial court noted that the challenged declarations, whether signed under penalty of perjury or not, made no "difference" as the trial court read everything.

R. *Judgment and Appeal*

Judgment was entered in favor of plaintiff, and defendant's timely appeal ensued.

DISCUSSION

I. *Standard of review*

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision de novo." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

II. *The trial court properly granted plaintiff's motion for summary judgment*

Even considering all of the evidence offered by defendant in opposition to plaintiff's motion for summary judgment,[4] we conclude that the trial court properly granted plaintiff's motion for summary judgment. It is undisputed that there was a change in voting control in 2010 and that fact was hidden from plaintiff. It is also undisputed that a change of control occurred before defendant sought written consent. And, it is undisputed that defendant allowed Lenzo to occupy and use a portion of the premises for a brewhouse. Because each one of these acts separately amounts to a breach of the lease, plaintiff properly terminated the lease pursuant to section 12(a).

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[4] We do not reach the issue of whether the trial court should have considered declarations that were not submitted under penalty of perjury and/or whether it should have considered the "corrected" declarations later submitted.

A. Termination was timely

As set forth above, section 12(a) provides a 30-day period for plaintiff to exercise its right to approve a transfer, deny the transfer, or terminate the lease. And, section 12(a) unambiguously provides that the 30-day period runs from "receipt of such written notice and additional information requested by Landlord." In this case, it is undisputed that that period did not begin to run more than 30 days before June 7 and 8, 2011, when plaintiff served the notice on defendant.

In urging us to reverse, defendant argues that a triable issue of material fact exists as to when that 30-day window began to run. We cannot agree.

The entirety of defendant's argument is premised on the notion that several different letters or e-mails could be considered "request[s]" for a proposed transfer. However, defendant does not, and cannot, state that any of these purported "requests" provided the information required under section 12(a). For example, the October 14, 2010, letter did not identify the transferee, the terms of the proposed transfer, and information concerning the financial responsibility, business reputation, and business experience of the proposed assignee. The only information defendant did provide was about "The Jacob Izaki Group," which was not the transferee; rather, it is undisputed that the actual transferee was OTB, which had already acquired majority ownership before defendant's October letter was sent. Because defendant failed to provide any information in October 2010 that could have triggered the 30-period, the 30-day period could not have begun to run at that time.

Likewise, the February 1, 2011, e-mail did not trigger the 30-day period. As with the October 14, 2010, e-mail, this e-mail also did not provide any of the information required by section 12(a).

Similarly, the March 2011 e-mails could not have triggered the 30-day period. Those e-mails did not include any information on the financial responsibility, business reputation, or business experience of the proposed transferee. And, they did not provide the terms of the proposed transfer.

Finally, at some point between May 11 and 13, 2011, plaintiff received a package of documents in response to its April 14, 2011, letter. Accordingly, it was only at that point that the 30-day period began to run. It follows that the notice served on June 7 and 8, 2011, was timely.

B. Reasonableness

Defendant further argues that it is disputed whether plaintiff reasonably exercised its right to recapture the premises. As pointed out in plaintiff's respondent's brief, this argument is a red herring. Pursuant to *Carma Developers* (*Cal.*), *Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 364 (*Carma*), where a contract is explicit in allowing a recapture, a landlord may do so for any reason, regardless of reasonableness.

Defendant claims that plaintiff's delay (from October 2010 until June 2011) in terminating the lease was not within the parties' "reasonable expectations." (*Carma, supra*, 2 Cal.4th at p. 376.) But, defendant offers no record citations of evidence regarding what its expectations were. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115.)

Locke v. Warner Bros., Inc. (1997) 57 Cal.App.4th 354 (*Locke*) and *Gabana Gulf Distribution, Ltd. v. GAP International Sales, Inc.* (N.D.Cal. Jan. 9, 2008, No. C-06-02584 CRB) 2008 U.S. Dist. Lexis 1658, upon which defendant relies, are distinguishable. In those cases, the court applied the general principle that when a condition of a promisor's duty is subjective satisfaction with the promisee's performance, the promisor is nonetheless required to exercise his subjective judgment honestly and in good faith pursuant to the implied covenant of good faith and fair dealing. (*Locke, supra*, at pp. 363–364; *Gabana*, at pp. *21–*23.) Because the contract (the lease) at issue here, specifically section 12(a), does not turn on a party's subjective satisfaction, reasonableness is not an issue. (See, e.g., *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1121 ["if the express purpose of the contract is to grant unfettered discretion, and the contract is otherwise supported by adequate consideration,

then the conduct is, by definition, within the reasonable expectation of the parties and 'can never violate an implied covenant of good faith and fair dealing'"].)

Finally, defendant asserts that there is disputed extrinsic evidence regarding the parties' competing interpretations of section 12(a) and whether plaintiff acted reasonably. As pointed out by plaintiff, this issue was not raised below. As such, we do not consider it on appeal. (*In re Marriage of Broderick* (1989) 209 Cal.App.3d 489, 501 [permitting a party to adopt a new theory on appeal would be unfair to the trial court and manifestly unjust to the opposing litigant].)

C. Waiver

Defendant argues that there was a genuine issue of material fact regarding the issue of waiver. Specifically, it claims that plaintiff waived its right to terminate the lease by accepting rent. We are not convinced for several reasons. *First*, paragraph 25(a) of the lease expressly provides that acceptance of rent does not constitute a waiver. *Second*, paragraph 25(a) also provides that any waiver must be in writing and signed by the parties. It is undisputed that the parties did not sign any written waiver here. *Finally*, there is no evidence of waiver. To the extent defendant's contention is based upon its theory that plaintiff waived its right to terminate the lease by exceeding the 30 days in which it had the opportunity to do so, that argument fails for the reasons noted above.

In a similar vein, for the first time on appeal, defendant argues that plaintiff was estopped from evicting defendant. Because this argument was not raised in the trial court, defendant is precluded from asserting it on appeal. (*In re Marriage of Broderick*, *supra*, 209 Cal.App.3d at p. 501; see also *City of Oceanside v. McKenna* (1989) 215 Cal.App.3d 1420, 1432; *Saville v. Sierra College* (2005) 133 Cal.App.4th 857, 872; *Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19.)

DISPOSITION

The judgment of the trial court is affirmed. Plaintiff is entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.*
FERNS

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.