Filed 10/30/18 5500 S. Freeway, LLC. v. MGN Five Star Cinema CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

5500 S. FREEWAY, LLC., Plaintiff and Respondent, v. MGN FIVE STAR CINEMA, LLC., Defendant and Appellant.	B282638 (Los Angeles County Super. Ct. No. EC064738)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ralph C. Hofer, Judge. Affirmed.

Alexandra Krakovsky; Gipson Hoffman & Pancione and Kenneth I. Sidle for Defendant and Appellant.

Areg Allen Sarkissian for Plaintiff and Respondent.

On February 10, 2016, 5500 S. Freeway, LLC (5500 S. Freeway) filed an unlawful detainer complaint in the Los Angeles Superior Court for nonpayment of rent and return of possession against MGN Five Star Cinema, LLC (MGN) with regard to commercial property 5500 S. Freeway had leased to MGN. MGN filed an answer asserting a number of affirmative defenses to the allegations in the complaint and the case proceeded to trial on February 27, 2017. After a three-day trial, the court ruled in favor of 5500 S. Freeway and awarded it possession of the premises, past rent due, and additional payments and fees.[1]

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[1] It is unclear from the record whether the trial court issued a final written statement of decision. Prior to closing arguments on March 1, 2017, the court stated it would "hear brief closing argument and then the court will enter its decision."

After closing argument, the court orally stated its findings and decision on the record. The court then stated, "technically no written statement of decision would be required," because neither party demanded a written statement of decision under the California Rules of Court, and because the trial lasted less than eight hours. Nonetheless, the trial court indicated to 5500 S. Freeway's counsel that it "may be prudent to prepare" a statement of decision, and counsel stated, "I will do it." Notwithstanding this exchange between the trial court and 5500 S. Freeway's counsel, the trial court later stated, "[t]he court has entered its statement of decision."

California Rules of Court, rule 3.1590(n) provides "[w]hen a trial is completed within one day or in less than eight hours over more than one day, a request for statement of decision must be made before the matter is submitted for decision and the statement of decision may be made orally on the record in the presence of the parties." As no written statement of decision appears in the record before us, we treat the court's oral

MGN appeals from the judgment, alleging 5500 S. Freeway failed to prove at trial that it effectuated substitute service on MGN, and disputing both the amount of rent and related fees due, and the award of damages. As these contentions are without merit, we affirm.

BACKGROUND

In November 2011, MGN entered into a commercial lease agreement with 5500 S. Freeway to lease from it two movie theaters and a restaurant space in Glendale, California. In January 2016, MGN ceased paying rent on the theater space due to alleged "fraud and misconduct" by 5500 S. Freeway. In July 2015, the parties executed an amendment to the lease to cure the amounts in arrears. In pertinent part, the amendment provided that the base rent and common area maintenance[2] (CAM) charges for January 2016 would be $100,000.

In its unlawful detainer complaint, 5500 S. Freeway alleged MGN failed to submit the $100,000 payment and requested this payment in addition to possession, reasonable attorney fees, forfeiture of the lease agreement, and damages at

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statement of its findings and decision on the record as the final statement of decision. We therefore review this oral statement of decision as stated in open court on the record, and as documented in the court's minute orders and final judgment.

[2] Common area maintenance charges are expenses incurred to maintain "all areas and facilities outside the Premises and within the exterior boundary line of the Shopping Center," "including parking areas, loading and unloading areas, trash areas, roadways, walkways, driveways and landscaped areas."

the rate of $3,395 for each day MGN remained in possession of the property. 5500 S. Freeway also alleged in the complaint that it had served the three-day notice to pay rent or quit upon MGN on January 25, 2016 according to the notice requirements specified in the commercial lease agreement.

5500 S. Freeway filed a second unlawful detainer complaint on February 10, 2016 with respect to the restaurant premises, also for nonpayment of rent and return of possession. The court subsequently consolidated the two matters. MGN filed answers in both cases raising a number of affirmative defenses and alleging 5500 S. Freeway failed to account for expenses MGN incurred to improve the premises. MGN was granted leave to file a separate civil action, which it did on June 21, 2016. Shortly before trial, MGN notified the court that it had vacated the restaurant premises in August 2016; the matter thus proceeded to an unlawful detainer action for possession and rent of the theater premises only.

After a three-day trial, the court ruled in favor of 5500 S. Freeway. The court determined that the lease agreement was forfeited and awarded 5500 S. Freeway attorney fees and $2,118,516 in damages.

MGN timely appealed, alleging: (1) 5500 S. Freeway did not prove that it made substitute service of the three-day notice to pay rent or quit; (2) 5500 S. Freeway did not prove that the three-day notice contained a correct statement of the rent and CAM due; and (3) the award of damages in the judgment is incorrect. 5500 S. Freeway contends that valid service was proven at trial, and that the trial court's rulings with respect to rent due and damages were correct.

DISCUSSION

I. Substantial Evidence Supports the Trial Court's Finding That 5500 S. Freeway Effectuated Proper Service of Notice Upon MGN

"In an appeal from an unlawful detainer judgment, ' "[w]e review the trial court's findings of fact to determine whether they are supported by substantial evidence." ' " (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425.) "Under the substantial evidence standard of review, 'we must consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings]. [Citations.] [¶] It is not our task to weigh conflicts and disputes in the evidence; that is the province of the trier of fact. Our authority begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment. . . .' " (*ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1266.)

With respect to unlawful detainer actions involving commercial property, the statutory notice requirements provided in the Code of Civil Procedure[3] can be superseded by notice

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[3] The statute requires that a three-day notice to pay rent or quit be served by any of the following methods: "(1) [b]y delivering a copy to the tenant personally"; "(2) [i]f he or she is absent from the commercial rental property, by leaving a copy with some person of suitable age and discretion at the property, and sending a copy through the mail addressed to the tenant at the address where the property is situated"; and "(3) [i]f, at the

provisions contained in a commercial lease. In a commercial lease, therefore, lessor and lessee "may lawfully agree to notice procedures that differ from those provided in the statutory provisions governing unlawful detainer." (*Culver Center Partners East # 1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 750) If the notice requirements contained in a commercial lease are at variance with the statutory requirements, the provisions in the lease control. (*Ibid.*)

The commercial lease entered into by 5500 S. Freeway and MGN contains the following notice provisions: "All notices required or permitted by this Lease or applicable law shall be in writing and may be delivered in person (by hand or by courier) or may be sent by regular, certified or registered mail or U.S. Postal Service Express Mail, with postage prepaid, or by facsimile transmission, and shall be deemed sufficiently given if served in a manner specified in this Paragraph 23. The addresses noted adjacent to a Party's signature on this Lease shall be that Party's address for delivery or mailing of notices. Either Party may by written notice to the other specify a different address for notice, except that upon Lessee's taking possession of the Premises, the Premises shall constitute Lessee's address for notice. . . ." As defined in the lease, the "Premises" is the commercial property at

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time of attempted service, a person of suitable age or discretion is not found at the rental property through the exercise of reasonable diligence, then by affixing a copy in a conspicuous place on the property, and also sending a copy through the mail addressed to the tenant at the address where the property is situated. Service upon a subtenant may be made in the same manner." (Code Civ. Proc., § 1162, subd. (b).)

128, 130, and 132 N. Maryland Avenue in Glendale, California, which was the location of MGN's theater.

According to the terms of the lease, therefore, once the lessee takes possession of the leased property, all notices shall be delivered or mailed to the leased property's address. Here, Justin Rubel—the real estate broker for 5500 S. Freeway—testified that he delivered a copy of the three-day notice to pay rent or quit to MGN's theater in Glendale, and that notice was accepted by an employee of the theater named Harry. As MGN concedes, there is no question that MGN had taken possession of the theater property by the time notice was served since the action was triggered by the unlawful detainer complaint seeking to remove MGN from the premises. 5500 S. Freeway therefore complied with the notice provisions in the lease by delivering the notice to the leased property. Accordingly, substantial evidence supports the court's determination that 5500 S. Freeway effectuated proper service of the three-day notice to pay rent or quit upon MGN.

II. There is Substantial Evidence That the Three-day Notice Contained a Correct Statement of Rent and CAM Due

MGN contends that 5500 S. Freeway did not prove the amounts of rent and CAM due as stated on the three-day notice to pay rent or quit. MGN alleges: (1) 5500 S. Freeway did not lay a proper foundation for the evidence with respect to CAM charges 5500 S. Freeway had paid; (2) the admission of evidence of CAM payments contradicted the trial court's ruling on two of MGN's motions in limine; and (3) 5500 S. Freeway did not prove that the amount of rent and CAM due was allocable to the theater, rather

than to both the theater and restaurant premises. As the first two issues involve the trial court's evidentiary rulings, we review them for abuse of discretion. (See *Palm Property Investments, LLC v. Yadegar, supra,* 194 Cal.App.4th at p. 1426.) We review the third issue for substantial evidence.

A. *Foundation*

At trial, Maily Lee, the senior accountant for 5500 S. Freeway, testified as to the amount of rent and CAM charges due pursuant to the theater lease. Introduced into evidence were documents prepared by Lee documenting the unpaid amounts of rent and CAM (Exhibit Y-2), and the CAM expenses 5500 S. Freeway had paid in 2016 to maintain the common areas of the theater premises (Exhibit Y-1). MGN contends 5500 S. Freeway failed to meet its burden under Evidence Code sections 403, subdivision (a), and 702 to produce evidence that Lee had personal knowledge of the amount of rent and CAM due. Not so.

Evidence Code section 702 provides that "the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter." In determining foundational and other preliminary facts where personal knowledge is in dispute, Evidence Code section 403, subdivision (a) establishes that the proponent of the proffered evidence "has the burden of producing evidence as to the existence of the preliminary fact." Such proffered evidence is inadmissible unless "the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact" in four circumstances, one of which is when "[t]he preliminary fact is the personal knowledge of a witness

concerning the subject matter of his testimony." (Evid. Code, § 403, subd. (a)(2).)

Lee testified that she is the senior accountant not only for 5500 S. Freeway as a whole, but for its lease with MGN. Lee also testified that she personally prepared the statement of CAM charges 5500 S. Freeway had paid with respect to the theater property in 2016 (Exhibit Y-1), and also the unpaid rent, CAM charges, interest, and late fees for the theater property (Exhibit Y-2). The trial court therefore acted within its discretion in finding that Lee had personal knowledge of all finances related to the theater premises.

B. *Motions in Limine*

MGN filed a motion in limine requesting that evidence of unpaid rent and CAM be admitted only to prove 5500 S. Freeway's right to possession, not to establish damages due to setoff; and another motion in limine to exclude evidence offered to prove the amount of CAM damages due pursuant to the lease. The court preliminarily granted both motions. Later that day, however, the court revised its ruling. The court initially granted the motions upon the assumption that CAM charges would be subsumed within the monthly rent rather than charged separately, as is common in commercial leases. Upon reviewing the terms of the lease, however, the court learned that CAM charges were in fact charged separately. The court therefore revised it ruling as follows: "to the extent that the court made a ruling about offsets or credits, it doesn't apply to C.A.M."

MGN nonetheless maintains that the court's admission of CAM-related payments to establish damages was precluded by the trial court's grant of its motions in limine. A trial court's

ruling on a pretrial motion in limine, however, "is necessarily tentative because the court retains discretion to make a different ruling as the evidence unfolds." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1174.) The trial court here was in no way bound by its initial, preliminary grant of MGN's motion to exclude evidence of CAM damages. Indeed, after thoroughly reviewing the terms of the lease, the court made a subsequent ruling that evidence of CAM-related payments and expenses could be introduced by either party to establish offsets.

In any event, according to the terms of the commercial lease, the "rent payment" includes all monetary obligations—including CAM expenses—minus a security deposit. In order to bring an action for unlawful detainer, the estimated rent due on the three-day notice must be reasonably accurate; if it is not, notice is defective and the action cannot stand. (*WDT-Winchester v. Nilsson* (1994) 27 Cal.App.4th 516, 534.) Here, MGN challenged at trial this vital element of 5500 S. Freeway's unlawful detainer action: that the estimate of unpaid rent listed on the three-day notice to quit must be reasonably accurate. (Code Civ. Proc., §§ 1161, 1161.1, subd. (e) [amount of rent claimed in commercial unlawful detainer action reasonable if within 20 percent of amount determined to be due].) Were the court to exclude evidence of rent and CAM due, not only would 5500 S. Freeway be unable to prove the amounts due, it would be impossible for MGN to prevail in its effort to defeat the unlawful detainer action by proving the amount claimed to be due on the three-day notice was not a reasonable estimate. It would be irrational to conclude that the court intended to exclude evidence of rent and CAM charges due when such evidence is necessary to bring suit for unlawful detainer.

C. *Allocation of Rent and CAM to Theater Premises*

MGN alleges 5500 S. Freeway failed to prove that the entire $100,000 due pursuant to the lease amendment applied to the theater only, rather than both the theater and the restaurant premises.

MGN does not dispute that the original lease pertains only to the theater premises. The amendment, however, is entitled, "Agreement—Amendment to leases on property most commonly known as: 124-126 N. Maryland Avenue . . . and 128-130-132 N. Maryland Avenue . . . ." The 124-126 address pertains to the restaurant premises, and the 128-130-132 address pertains to the theater premises. It would therefore appear on the face of the amendment that the agreed upon rent and CAM payments due pertained to both properties. And, Lee testified on cross-examination that she did not personally know how much of the $100,000 referred to the theater only.

A closer examination of the record, however, supports the trial court's determination that the $100,000 was entirely attributable to the theater premises. First, Exhibit Z, prepared by Lee, is an accounting of rent, CAM, late fees, and interest due from January 2016 through February 1, 2017, for units 128, 130, and 132 only. The document indicates that the rent due for January 1, 2016 was $100,000. The address of the restaurant premises, which would be units 124-126, does not appear on this document. According to Exhibit Z, therefore, the $100,000 in rent due on January 1, 2016 was for the theater premises only.

In addition, an examination of Exhibit Y-2 and the amendment reveals that the amounts MGN agreed to pay pursuant to the amendment are far less than the amounts in arrears for the theater premises only. Exhibit Y-2 lists rent,

CAM, late fees, and interest charged to MGN from October 2014 through January 2017 for the theater premises only. Exhibit Y-2 also lists all payments MGN made during this time period. As of December 2015, MGN owed 5500 S. Freeway $804,661.95. The amendment provides that MGN pay 5500 S. Freeway a total of $400,000 by the end of 2015, which would be applied to 2015 base rent and CAM charges. Thereafter, MGN would pay an additional $15,000 per month through February of 2017 to cure the amounts in arrears for 2015. The record therefore reflects that 5500 S. Freeway and MGN had agreed that MGN would only pay $580,000 to cure its $804,661.95 debt. As this debt was attributable to the theater premises only and far exceeds the amount agreed upon to cure the debt, substantial evidence supports the trial court's determination that the provision in the amendment requiring MGN to pay $100,000 in rent and CAM for January 2016 can reasonably be attributed to the theater premises only.

III. The Trial Court's Judgment for Damages Was Not Improper

Finally, MGN claims the trial court's award of damages contradicts its rulings on two of its motions in limine, and that the court erroneously precluded it from presenting equitable defenses. According to MGN, it was improperly precluded from presenting evidence of equitable set-off with respect to rent, CAM charges, and a forfeiture of $9,600,000 it paid for tenant improvements.

First, MGN misconstrues the effect of the court's rulings on the motions in limine. As discussed above, the trial court did not preclude either party from introducing evidence of CAM expenses

due or already paid. The court based its award of damages on the lease, the amendment, and 5500 S. Freeway's accounting of past rent, CAM, interest, and late fees due. These documents were properly introduced into evidence at trial and not disallowed by any of the trial court's prior rulings on the motions in limine.

MGN, however, never presented any evidence of CAM expenses it incurred. The trial court had made it quite clear that MGN "would have a right to challenge C.A.M. charges or present evidence about C.A.M. charges and other evidence about the rent" and told MGN's counsel that she could "provide an accounting on C.A.M." MGN not only failed to provide any evidence of CAM charges it incurred to offset the award of damages, it failed to introduce any other evidence at trial, or make any allegations on appeal, to demonstrate that the amount in the judgment of damages was incorrect.

What the trial court did exclude is any evidence of matters collateral to the narrow issue of whether 5500 S. Freeway was entitled to possession of the theater premises. MGN wanted to introduce evidence that it was entitled to an offset of upwards of $9 million it voluntarily spent on tenant improvements. According to MGN, it paid $9,672.253 to "refurbish the Premises and install modern trade fixtures for a competitive cinema" due to 5500 S. Freeway's alleged fraudulent conduct in the lease negotiations and breach of its contractual obligation to pay a tenant improvement allowance. The court ruled that tenant improvements were not going to be litigated in the unlawful detainer action because it did not directly relate to rent.

"Except in the context of residential leases where a tenant may have the right to 'repair and deduct' or to withhold rent

where the premises are uninhabitable,[4] a tenant generally does not have the right to raise the landlord's breach of a lease covenant as a defense in an unlawful detainer action based on nonpayment of rent, nor to exercise 'offset rights' 'against rent currently due under the lease.' " (10 Miller and Starr, Cal. Real Estate (4th ed. 2017) § 34:227, fns. omitted.) Because the right to possession is the issue before the court in an unlawful detainer action,[5] a tenant " 'is not permitted to file a cross-complaint or counterclaim and, "a defense normally permitted because it 'arises out of the subject matter' of the original suit is generally excluded . . . if such defense is extrinsic to the narrow issue of possession. . . ." . . . [Citation.]' [Citation.]" (*Underwood v. Corsino*, *supra*, 133 Cal.App.4th at p. 135.) Matters collateral to possession of commercial property and rent due—"particularly those seeking damages for breaches of lease provisions"—are excluded from unlawful detainer actions. (*Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal.App.3d 1032, 1070.) Accordingly, only those defenses which "directly relate to the

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[4] Our Supreme Court held in *Green v. Superior Court* (1974) 10 Cal.3d 616 that a warranty of habitability is implied in residential leases and that breach of this warranty can be raised by a residential tenant in an unlawful detainer action. *Schulman v. Vera* (1980) 108 Cal.App.3d 552 and subsequent cases have held that this implied warranty is not implied in a commercial lease; therefore, a commercial lessee cannot raise a breach of this covenant as a defense to an unlawful detainer action.

[5] When the lessor is successful in the unlawful detainer action, the court must also determine the amount of rent and other sums due. (Code of Civ. Proc., §§ 1161.1, subd. (a), 1174, subd. (b); *Underwood v. Corsino* (2005) 133 Cal.App.4th 132, 136.)

issue of possession and which, if established, would result in the tenant's retention of the premises" are permitted in an unlawful detainer action. (*Green v. Superior Court*, *supra*, 10 Cal.3d at p. 633.)

MGN contends the trial court erroneously precluded MGN from presenting "equitable defenses of set off and mutually dependant covenants." As explained above, these defenses are unavailable to a commercial lessee in an unlawful detainer action by law; as such, the trial court committed no error in ruling that these issues must be litigated in MGN's separate civil suit. Furthermore, MGN has not alleged that the terms of the lease allowed it to unilaterally take on tenant improvements without the landlord's permission, or even that the lease would allow it to use the money spent on such improvements as credit to offset the rent. MGN also has not provided any evidence, authority, or argument establishing it would be entitled to retain possession of the theater premises if it was able to prevail in its fraud complaints. We therefore find no error in the court's ruling that MGN could not introduce evidence of money spent on tenant improvements.

MGN also contends it was entitled either to a jury trial on damages and equitable defenses, or to the exclusion of 5500 S. Freeway's claim for damages. MGN, however, had already waived a jury trial, and never complied with the statutory requirement to lodge a request for a jury trial within the necessary time frame pursuant to Code of Civil Procedure section 631, subdivision (f)(4). Furthermore, while the court may limit the unlawful detainer action to possession only and determine damages at a separate proceeding, MGN has not alleged or provided any evidence that it made such a request.

(*Northrop Corp. v. Chaparral Energy, Inc.* (1985) 168 Cal.App.3d 725, 729-730.)

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

CURREY, J.*

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