

Remsen Properties, Inc., Respondent, v. Solomon Nayman, Appellant, et al., Defendant

[NO NUMBER IN ORIGINAL]

Court of Appeals of New York

58 N.Y.2d 1083; 449 N.E.2d 424; 462 N.Y.S.2d 644; 1983 N.Y. LEXIS 3002

March 30, 1983, Decided

PRIOR HISTORY: [**1] Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered September 27, 1982, which modified, on the law, and, as modified, affirmed an order of the Supreme Court at Special Term (Thomas R. Jones, J.), entered in Kings County, (1) granting plaintiff's motion for summary judgment on its second cause of action but denying said motion as to its first cause of action, (2) dismissing defendant's counterclaim, (3) denying defendants' cross motion for summary judgment, (4) declaring that plaintiff may assign its interest in the lease to a co-operative corporation without defendant landlord's consent and take steps to convert the leasehold to co-operative ownership, and (5) denying defendant's request for a declaration that "additional net rents" under the lease includes moneys paid to the assignee co-operative corporation should the court find that the lease was assigned without the landlord's consent. The modification consisted of granting summary judgment to plaintiff on its first cause of action and declaring that plaintiff had no obligation under the lease to pay any additional net rent for moneys received by it from tenants at 100 [**2] Remsen Street for the calendar year 1980 and further declaring that plaintiff had no liability to defendant Nayman with respect to any moneys it may receive from the assignment of its long-term leasehold interest to a co-operative corporation. In this declaratory judgment action, plaintiff sought a declaration with respect to its leasehold rights in an apartment building consisting of 80 rent-stabilized apartments. Plaintiff was the tenant under a long-term lease running from 1959 to 2043, and had applied to convert the building from individual leaseholds to co-operative ownership by assigning its main lease to a co-operative housing corporation. Defendant Nayman, the landlord, refused to consent to the conversion and threatened to terminate the lease if plaintiff did so. Defendant Nayman also sought additional rent allegedly due for the year 1980, a renewal year for the lease, which provided in paragraph 38 that the tenant was required to pay "a sum equal to 15% of the gross income in excess of \$ 175,000.00 per annum received by the Tenant in the operation of and from the sub-tenants in the Demised Premises during each and every calendar year of each renewal term". Defendant [**3] sought the additional rent for the calendar year 1980 in spite of the fact that the renewal term of the lease did not begin until December 15, 1980. The Appellate Division concluded that Special Term correctly held that under the lease agreement plaintiff may assign its interest in the lease to a co-operative corporation without the landlord's consent and take other legal steps required to convert its leasehold interest to a co-operative ownership, without the landlord's consent and without incurring a default or termination of the lease agreement; that Special Term erred in denying summary judgment to plaintiff on the issue of additional rent and in failing to declare in favor of plaintiff on defendant's counterclaim to hold plaintiff responsible for income received by way of the purchase price for the assignment and for value of the sponsor retained stock as additional net rent under paragraph 38 of the lease; that neither the sum received by the plaintiff for the assignment of its leasehold interest nor the moneys received by the assignee from its future proprietary leases may be construed as gross income for the purpose of paragraph 38, and that the issue of additional rent due [**4] for the calendar year 1980 involved contract interpretation, was resolvable without a trial, and must be resolved in plaintiff's favor, since plaintiff would only be obligated to pay as additional rent 15% of its gross income if such income exceeded \$ 175,000 between December 15, 1980 and December 31, 1980 (which it did not) inasmuch as the renewal clause should not be construed to apply to all income received in a calendar year, where only part of the calendar year falls within the renewal term.

Remsen Apts. v Nayman, 89 AD2d 1014.

DISPOSITION: Affirmed.

HEADNOTES

Landlord and Tenant -- Lease -- Conversion of Leased Premises to Co-operative

In an action to declare the rights of the parties with respect to a long-term lease of an apartment building containing rent-stabilized apartments, where the lessee sought to convert the building from individual leaseholds to co-operative ownership and defendant landlord sought to block the conversion and to obtain additional moneys allegedly due under terms of the lease, an order of the Appellate Division, which modified an order granting summary judgment to plaintiff on its second cause of action but denying it on its first cause of action and [**5] denying defendant's motion for summary judgment, by granting plaintiff summary judgment on its first cause of action, is affirmed for the reasons stated in the memorandum at the Appellate Division, which concluded that plaintiff tenant was entitled to convert to a co-operative without defendant landlord's consent; that plaintiff had no liability under an additional rent clause of the lease to defendant with respect to any moneys received from the conversion, and that the issue of additional rent allegedly due for the calendar year 1980 under the terms of the lease renewal involved contract interpretation, was resolvable without a trial, and must be decided in favor of plaintiff, since the initial term of the lease ended December 14, 1980 and plaintiff would only be obligated to pay additional rent if its income exceeded \$ 175,000 for the period between December 15, 1980 (the renewal date) and December 31, 1980, inasmuch as the percentage clause should not be construed to apply to all income received in a calendar year where only part of the calendar year falls within the renewal term.

COUNSEL: *Samuel Kirschenbaum* for appellant.

Charlotte M. Fischman for respondent.

JUDGES: Concur: [**6] Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Fuchsberg, Meyer and Simons.

OPINION

[*1086] **OPINION OF THE COURT**

On review of submissions pursuant to rule 500.2 (b) of the Rules of the Court of Appeals (22 *NYCRR* 500.2 [g]), order affirmed, with costs, for the reasons stated in the memorandum at the *Appellate Division* (89 *AD2d* 1015).