State of New York
County of Ontario
Canandaigua City Court

Index Number: **CV-000429-11/CA**

Christine G Henehan; John J Gilbert
Plaintiff(s)
-against-
Dallywater's Enterprises, LLC; Kevin Harwood; Janice Harwood
Defendant(s)

DECISION

Present: Hon. Stephen D. Aronson

Appearances: Plaintiff: Scott & Gilbert, LLP; John J. Gilbert, Esq., of counsel

Defendant: Gerald R Forcier, Esq.

In this civil action the plaintiffs, Christine G. Henehan and John J. Gilbert ("plaintiffs" or "landlords"), commenced anaction in Canandaigua City Court against the defendants, Dallywater's Enterprises, LLC, Kevin Harwood and Janice Harwood ("defendants" or "tenants"). The complaint seeks a judgment against Dallywater's Enterprises, LLC for $11,656.85 together with attorney fees, costs and disbursements. The complaint seeks a judgment against Kevin Harwood and Janice Harwood for $7,500. The defendants served an answer and counterclaim seeking: judgment dismissing plaintiffs' complaint; a judgment for $1,800 against plaintiffs; and costs, disbursements and attorney fees. A bench trial was held on April 30, 2012.

In the fall of 2010 the defendants were looking to move their British Tea Room-type restaurant business from Naples to Canandaigua. They began negotiating with the plaintiffs about space on South Main Street in Canandaigua.

On January 24, 2011, the parties executed a written lease. The lease (plaintiffs' exhibit 1, paragraph 9) provides that the landlords would make certain specified improvements (new wood

or laminate flooring, replace carpeting on walls with drywall, take down division wall, install stub wall) "prior to the inception of the lease." The lease also provides (plaintiffs' exhibit 1, paragraph 9) that the tenants were to perform "all other improvements to premises as on existing architectural plans." The credible evidence shows that the landlords started to work on the improvements, but a stop-work order was issued by the City Code Enforcement Officer, Stephen Wade. Mr. Wade issued a stop-work order because no building permit was obtained. Subsequently, Mr. Wade insisted that the property be improved by the installation of an Ansul hood (cooktop with full venting system); and the credible evidence shows that neither of the parties desired to have an Ansul hood installed in the premises. The credible evidence shows that as a result, the tenants became frustrated and rescinded the lease. Also, the credible evidence shows that the tenants were unable to obtain bank financing from Canandaigua National Bank.

As urged by the landlords, the lease did not contain any provisions making the tenants' performance to pay rent conditioned upon obtaining a building permit. Under these circumstances, in a written lease where the tenants' obligation to pay rent is not specifically conditioned upon obtaining a public official's approval, the court may not imply a condition that the parties chose not to insert in their lease. *See, e.g., Raner v. Goldberg*, 244 NY 438(1927). In *Raner* the parties entered into a lease with the understanding that the premises would be used for a dance hall. The landlord made improvements, but a license to conduct a dance hall on the premises was denied. The Court of Appeals held that the tenant could not recover his deposit and first month's rent where the parties did not choose to insert a condition in the lease that the license must be granted. *Id.* The *Raner* holding has been confirmed consistently. *See, e.g., Herr v. Herr*, 5 AD3d 550 (2d Dept 2004); *P.K. Dev. v. Elvem Dev. Corp.*, 226 AD2d 200 (1st Dept

1996). Similarly, in this case the credible evidence shows that there was no provision in the lease allowing the tenants to rescind or to recover their deposit if they didn't obtain municipal approvals. The court may not now imply a condition in the lease that the parties chose not to insert in the lease. Therefore, the tenants' obligation to pay rent was not contingent on their obtaining a building permit or obtaining municipal approvals.

However, the tenants correctly contend that they are protected by Real Property Law §223-a enacted in 1962:

> In the absence of an express provision to the contrary, there shall be implied in every lease of real property a condition that the lessor will deliver possession at the beginning of the term. In the event of breach of such implied condition the lessee shall have the right to rescind the lease and to cover the consideration paid. Such right shall not be deemed inconsistent with any right of action he may have to recover damages.

This statute gives a tenant the right to rescind a lease where the landlord hasn't completed improvements and can't give possession at the beginning of the term. This lease contained a condition precedent, i.e., the landlord agreed to make improvements "prior to the inception of the lease." The common dictionary definition of "inception" is "beginning; start; commencement" (Random House Dictionary 2012). The lease also states that the term of the lease starts February 15, 2011 (plaintiffs' exhibit 1, paragraph 2). The lease provides that the landlords will "have access to the premises until February 15, 2011 in which to perform Landlord's agreed upon work" (plaintiffs' exhibit 1, paragraph 9). The credible evidence showed that on February 15, 2011, the landlords had not completed the improvements specified in the lease. Accordingly, under Real Property Law §223-a, the landlords did not deliver possession at the beginning of the term, the tenants had the right to rescind the lease and to recover the consideration paid. Therefore, the tenants are entitled to recover the $1,800 they paid as consideration when the lease

was signed. The tenants seek attorney fees; however, the lease does not provide for recovery of attorney fees. Real Property Law §234 authorizes a tenant to recovery attorney fees despite the absence of authorizing language in a lease but only in residential leases. Since this is a commercial lease, Real Property Law § 234 does not apply. Therefore, in the absence of an express provision in the lease, the tenants have no recourse for attorney fees.

The lease provides (plaintiffs' exhibit 1, paragraph 9) that the landlords would install new flooring (wood or laminate) throughout the premises. The landlords purchased new hardwood flooring materials on February 9, 2011, after the tenants signed the lease (January 24, 2011). The tenants and landlords discussed the hardwood flooring (they went to Lowes to look at flooring), with the landlords making the final choice of which flooring to purchase. The new flooring cost the landlords the sum of $5,222.72. The landlords seek to recover the cost of the hardwood flooring on the ground that the tenants breached the lease. However, the tenants were within their rights to rescind the lease under Real Property Law §223-a. A court cannot imply a condition in the lease that does not exist, i.e., the parties did not include a provision in the lease making the tenants responsible for the flooring or materials for improvements in case of rescission before possession. Contrary to the allegations in the landlords' complaint (paragraph 12), the lease does not require the tenants to pay for construction materials to alter the premises. Moreover, the lease states (plaintiffs' exhibit 1, paragraph 25): "This agreement constitutes the entire agreement of the parties and supercedes any prior agreements or negotiations." So, similarly, the landlords are precluded from recovering any other out-of-pocket expenses incurred in connection with improvements based on a cause of action for breach of contract.

Accordingly, the plaintiffs' complaint is dismissed. The defendants are granted judgment for $1,800, any interest provided at law, costs and disbursements. Defendants shall submit the proposed judgment and bill of costs on notice.

ENTERED: Canandaigua, New York
DATED: May 10, 2012

Hon. Stephen D. Aronson
City Court Judge

"An appeal from this judgment must be taken no later than the earliest of the following dates: (I) thirty days after receipt in court of a copy of the judgment by the appealing party, (ii) thirty days after personal delivery of a copy of the judgment by another party to the action to the appealing party (or by the appealing party to another party), or (iii) thirty-five days after the mailing of a copy of the judgment to the appealing party by the clerk of the court or by another party to the action."

Exhibits will be held for 30 days at which time they will be destroyed, if not picked up.