STATE OF MAINE

BUSINESS AND CONSUMER COURT
CIVIL ACTION
DOCKET NO. AP-15-05

449 MAIN STREET, LLC, Plaintiff v. 3CROW LLC, Defendant.	)))))))))	**ORDER ON APPEAL OF DISTRICT COURT JUDGMENT**

This matter is before the Court on Defendant's appeal of the determination made by the District Court and Plaintiff's Motion to Dismiss Appeal.

I. Background

The District Court laid out the facts in its Order dated October 14, 2015. On May 15, 2015, Plaintiff 449 Maine Street, LLC, notified Defendant 3Crow LLC that it was in default of their rental agreement and that certain lease terms were accelerated. Plaintiff extended the cure period to June 1, 2015. The District Court found that Defendant failed to cure defaults within that time and that on June 15, 2015, Plaintiff terminated the tenancy as a result of the uncured breach.

The lease agreement signed by the parties on December 11, 2012 stated that Mr. Rockwell, owner of 449 Main Street, LLC, "will become" at 25% owner of 3Crow LLC upon execution of the lease. An amendment to the lease signed by the parties in February 2013 stated that the parties agreed that Mr. Rockwell was a 25% owner of 3Crow. On April 1, 2014, 3Crow's operating manager signed a document named "Action Taken by Unanimous Written Consent" agreeing that

Rockwell had a 25% interest in 3Crow. In February 2015, Defendant's certified public accountant prepared a 2014 Schedule K-1 for Rockwell to show that Rockwell held "18.835616 percentage of stock ownership for the tax year." Rockwell understood this to mean that he did not hold a 25% interest in 3Crow.

Plaintiff alleged that Defendant breached the terms of the lease because Defendant did not pay the propane/natural gas bill as required by the lease. Parties agreed, for the purposes of this litigation, that the lease agreement held Defendants responsible for 50% of the propane or natural gas bill. Defendant's 50% share for December 2012 through March 2015 was $11,175.98.

At that time, Hixson and Barker, who together with Rockwell own 3Crow, concluded that the restaurant used only 13% of the fuel delivered to the building and believed that 3Crow should only be responsible for 13% of the bill. In April 2015, Defendant sent a check for $2,906 to Plaintiff, representing 13% of the total bill, with the memo "13% of propane inv." Plaintiff objected to the check and did not deposit the check for fear that the language was limiting. After communicating with Plaintiff, Defendant sent a new check for $8,270.98 along with the original check with the memo line stating "13% of propane inv."[1] Together, the two checks represent the full 50% of the propane bill.

Defendant has made some but not all payments on the accelerated schedule that is triggered where Defendant has breached the lease agreement and failed to cure the breach within the cure period.

[1] The District Court did not mention that the original check was presented a second time to Plaintiff along with a check for the remainder. Both parties agree that the original check was sent to Plaintiff and returned to Defendant a second time.

The District Court found Defendant breached the lease agreement by not timely granting Rockwell his 25% interest in 3Crow and failing to pay its 50% share of the propane/natural gas bill. The District Court further found that Defendant failed to cure these defaults. The District Court granted Plaintiff a writ of possession, ordered payment of the Accelerated Fixed Minimum Rent, and ordered that Defendant pay Plaintiff's legal fees in the amount $7,000.12.

Defendant, 3Crow LLC appeals the decision of the District Court on three grounds. Defendant claims that the District Court erroneously ruled that 3Crow violated a term of the lease agreement by failing to make Mr. Rockwell a 25% owner of 3Crow in a timely manner. Defendant also claims that the District Court erroneously found that Defendant was in financial default of the lease agreement. Finally, Defendant argues that the amount awarded to Plaintiff is inappropriate.

II. Discussion

a. Plaintiff's Motion to Dismiss

Plaintiff moves the Court to dismiss Defendant's appeal arguing that Defendant has failed to comply with 14 M.R.S. 6017(2)(A). Plaintiff contends that in order to maintain a defense and appeal the judgment of the District Court, Defendant must pay the disputed rent amount to be held in escrow by the Court. Defendant has sent checks of some, but not all, of the disputed judgment amount to the court in the form of checks made out to Plaintiff. Plaintiff contends that there is no way to know whether these checks are backed by sufficient funds because neither the Court nor Plaintiff is in the position to deposit them.

The Court denies Plaintiff's request for dismissal. The role of this Court is to review the ruling of the District Court. Section 6071(2)(A) requires that a

defendant pay disputed rental amounts to the court by the time of hearing. Defendant had not paid the entirety of the disputed rental amounts to the District Court at the time of hearing. The District Court chose not to rule on this basis, but instead to reach the merits of the forcible entry and detainer action. Therefore, this Court reviews the findings of the District Court.

b. Defendant's Appeal

Defendant has filed an appeal for review of the District Court's issuance of a Writ of Possession. Defendant has not filed a jury demand nor an affidavit laying out the issues of material fact to be determined at trial. As such, Defendant's appeal is on issues of law only pursuant to M.R. Civ. P. 80D(f)(1).

The findings of the District Court are not disturbed unless clearly erroneous. "A trial court's factual determinations are 'clearly erroneous' only if there is no credible evidence on the record to support them, or if the court bases its findings of fact on a clear misapprehension of the meaning of the evidence." *White v. Zela*, 1997 ME 8, ¶ 3, 687 A.2d 645. The Court defers to the District Court's determination of weight given to disputed evidence. *Id*.

Defendant has raised three issues on appeal: whether Mr. Rockwell's ownership status was compliant with the terms of the lease agreement, whether Defendant was in financial default pursuant to the lease agreement, and whether the judgment awarded is reasonable.

i. Rockwell's Interest in 3Crow

The Court finds that the District Court's factual findings as to when Mr. Rockwell became a member with a 25% interest in 3Crow LLC were clearly erroneous. "After formation of a limited liability company, a person is admitted as a member of the limited liability company…With the consent of all the

members". 31 M.R.S § 1551 (2015). In the current case, all parties consented to the admittance of Mr. Rockwell as a member of 3Crow at the time the lease agreement was signed. The lease agreement states: "The Parties agree that 449 Main Street LLC or its assignee will become a 25% owner of Three Crow LLC upon the execution of this lease." Upon execution of the lease agreement, Rockwell became a 25% owner of 3Crow LLC. No other action was necessary to create Rockwell's membership interest pursuant to statute.

The District Court held that the K-1 and email communication between Barker and Rockwell establish that Rockwell was not in fact an owner. This Court holds that the findings of the District Court concerning when Mr. Rockwell became a member of 3Crow with a 25% interest were clearly erroneous. The Court finds that as a matter of law Defendants did not breach the lease agreement by failing to make Mr. Rockwell a member of 3Crow.

ii. Financial Default

Defendant asks the Court to find that the ruling by the District Court concerning whether Defendant was in financial default was clearly erroneous. The District Court ruled that Defendant did not pay the full 50% of the propane costs because the amount was paid by two separate checks, the smaller of which had the memo "13% of propane inv." The District Court found that Plaintiff was under no obligation to deposit the check with the notation "13% of propane inv.", because acceptance of the check could foreclose Plaintiff's claim to the remaining 87%. The District Court has essentially found that the notation "13% of propane inv." amounted to accord and satisfaction, and would allow Defendant to defend against further efforts by Plaintiff to collect on the claim.

As a matter of law, the memo "13% of propane inv." on the check does not meet the requirements of accord and satisfaction. In order for a party to have an enforceable defense of accord and satisfaction, the notation must have "provided the payee with sufficient notice of the payor's intent" to establish accord and satisfaction. *Stultz Electric Works v. Marine Hydraulic Engineering Co.*, 484 A.2d 1008, 1010 (Me. 1984). There is no language on the 13% check that states that the payment is "full and final payment" or "in satisfaction of all claims". Plaintiff was given no notice of any intent on Defendant's behalf that the check was meant to be a "full and final payment" of the claim. The District Court erred in finding that the notation on the check met the requirement of an enforceable affirmative defense of accord and satisfaction. Because the notation of "13% of propane inv." does not meet the requirements of accord and satisfaction, the Court finds that the District Court erred in determining that Defendant breached the lease terms by not curing the financial default caused by failing to pay the agreed to 50% of the propane bill.

iii. Accelerated Payments

Because the Court reverses the District Court's finding of default, the Court finds that the accelerated payment schedule of the lease agreement was not triggered.

III. Conclusion

The entry will be:

Plaintiff's Motion to Dismiss Defendant's Appeal is DENIED.

The Court reverses the determination of the District Court and finds that Defendant is in compliance with the lease terms. The Court remands for entry of judgment in favor of Defendant[2] and for entry of order releasing the escrowed payments to Plaintiff up to the amount due under the lease agreement.

Pursuant to M.R. Civ. P. 79(a), the Clerk is hereby directed to incorporate this Order by reference in the docket.

DATE: 2/9/16

_____/s_____
Michaela Murphy
Justice Superior Court

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