Supreme Court, Appellate Division, First Department, New York.
U.O.T.S. INC., Plaintiff–Appellant,
v.
DeBARON ASSOCIATES LLC, Defendant–Respondent.

Nov. 15, 2011.

Jacqueline M.H. Bukowski, New York, for appellant.

Belkin Burden Wenig & Goldman LLP, New York (Joseph Burden of counsel), for respondent.

ANDRIAS, J.P., FRIEDMAN, DeGRASSE, FREEDMAN, MANZANET–DANIELS, JJ.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered October 6, 2010, which denied plaintiff's motion seeking an order directing defendant's payment of reasonable use and occupancy at market level from November 2009 until resolution of this action, and a declaratory judgment that the 99–year lease between the parties be vacated as an unauthorized and unconscionable burden on plaintiff, and granted defendant's cross motion to the extent of dismissing the complaint pursuant to CPLR 3211(a)(5) and (a)(7), declaring the lease between the parties to be in full force and effect, and vacating the temporary restraining order precluding defendant ground-floor tenant from subletting the premises, unanimously affirmed, without costs.

Plaintiff owner, a not-for-profit corporation, entered into a 99–year lease with defendant real estate company in 1989. Pursuant to the terms of the lease, defendant paid $30,000 at the time the lease was executed and was required to pay non-escalating rent in the amount of $175 per month for the full term of the lease in exchange for use and possession of one-third of the ground-floor commercial space (approximately 400 square feet). At the time the lease was executed, plaintiff owed approximately $30,000 in accrued real estate taxes and was seeking to avoid foreclosure. In addition, in 1989, the area where the building is located had a reputation for crime and drug use and property values in the neighborhood were low.

Plaintiff argues that the lease was never authorized by a requisite two-thirds vote of its board of directors (*see* Not–For–Profit Corporation Law § 509), and was unconscionable due to the alleged onerous terms, as well as in violation of the rule against perpetuities (*see* EPTL 9–1.1). The lease was entered into by the president of plaintiff's board, and correspondence from one of the president's attorneys indicates that plaintiff had legal representation at the time the lease was executed. Additionally, the record shows that plaintiff retained the initial $30,000 payment, its building was not foreclosed against, plaintiff collected rent from defendant for three years and, thereafter, it knowingly allowed defendant to deposit rent in an escrow account set up in plaintiff's name until the commencement of the instant action in 2009. Plaintiff's board acknowledged its awareness of the lease terms in 1992 and, during the next 17 years, raised only various complaints regarding non-compliance with certain lease provisions, although taking no identifiable action and never arguing that the monthly rent provision, the lengthy lease term, or any other provisions were unauthorized or unconscionable. Thus, the evidence supports the conclusion that plaintiff's board ratified the lease, or, at the very least, that it is barred from contesting the lease provisions based on the doctrine of laches (*see e.g. Congregation Yetev Lev*

D'Satmar v. 26 Adar N.B. Corp., 219 A.D.2d 186, 190, 641 N.Y.S.2d 680 [1996], *lv. denied* 88 N.Y.2d 808, 647 N.Y.S.2d 713, 670 N.E.2d 1345 [1996]).

Plaintiff's argument that the lease violates the rule against perpetuities because there was no measuring life in being designated at the time of the lease's execution and thus, the lease should cease after 21 years, is misplaced. The rule against perpetuities prevents the "vesting" of an estate in another (i.e., alienation) which does not occur within the measuring period. Here, the lease was already "vested" in defendant at its inception, and no provision of the lease attempted to further alienate the land in the future, beyond the initial, finite 99 years. Thus, no provision of the lease suspends the power of alienation longer than the measuring period (*see* EPTL 9–1.1; *see generally Symphony Space, Inc. v. Pergola Props., Inc.,* 88 N.Y.2d 466, 646 N.Y.S.2d 641, 669 N.E.2d 799 [1996]; *Payne v. Palisades Interstate Park Commn.,* 204 A.D.2d 787, 611 N.Y.S.2d 699 [1994]).

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