STATE OF VERMONT

SUPERIOR COURT
Lamoille Unit

CIVIL DIVISION
Docket No. 194-8-11 Lecv

LLOYD JONES, NEIL JONES, and RUSSELL JONES

Plaintiffs,

v.

H.A. MANOSH INC.,

Defendant.

FILED
MAY 31 2013
VERMONT SUPERIOR COURT
LAMOILLE UNIT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the court on January 17, 2013. Attorney Matthew Daly represented the plaintiffs, Lloyd Jones, Neal Jones and Russell Jones (collectively, "Plaintiffs"). Attorney Pamela Moreau represented the defendant, Howard A. Manosh Inc. Following trial both parties have submitted proposed findings of fact and conclusions of law, the last of which was received on February 26, 2013. Based on the evidence the court makes the following conclusions of fact and law:

FINDINGS OF FACT

1. Plaintiffs are the owners of a parcel of land located in Hyde Park, Vermont and rent to Defendant a lot of about a quarter acre in size, which has been rented to the Defendant since about 1965.

2. The property is used as the site for a communications tower and ancillary equipment. Originally, the property was leased by Floyd and Frances Jones to H. A. Manosh, Inc. on a verbal, handshake basis in exchange for H. A. Manosh, Inc. repairing their water pump. The Manosh company was and still is engaged in well drilling, plumbing, construction and real estate. It has a number of trucks on the road and radio communications are an important aspect of its business enterprise. The particular site at issue is effective for radio communications: Howard Manosh testified at trial that radio signal from the site can be reached as far away as Montréal.

3. In January 1975 Floyd and Frances Jones entered into a written lease agreement with H.A. Manosh, Inc. which memorialized and formalized the prior oral agreement. Relevant portions of the lease agreement include the following:

> This lease shall run for the duration of a period of five years from January 1, 1975 and may be continued for additional five year periods as long as the tower is in use by the lessee and as long as the rent herein after provided for is paid.
>
> It is further agreed by both parties that this lease agreement may be terminated upon written notice by either party upon six months notice to the other party and property will be returned to its former state by the lessee.

The agreed-upon lease amount was $300 per year. The lessee was obligated to pay taxes related to the buildings and equipment. A right-of-way to the site was also granted.

4. Floyd and Frances Jones have passed away. Prior to their deaths they conveyed the relevant property to Lloyd Jones who has since added Neil Jones and Russell Jones as owners.

5. The radio tower on the site is approximately 100 feet tall and is triangular in shape being about 18 inches on each side. It is supported by guy wires. Based on the description, the court would conclude it to not be an elaborate tower.

6. The Manosh company still uses the tower and has sublet space on the tower, deriving substantial income – approximately $26,000 per year – from leasing out tower space to other telecommunications users.

7. In the mid-1990s, Howard Manosh, initiated the process of obtaining state and local permits to relocate the tower on other property he owned. There was substantial local opposition and the matter was litigated in the environmental court and the Vermont Supreme Court. *In re Beckstrom*, 176 Vt. 622 (2004).

8. During the permitting proceedings, a neighbor opposing the new Manosh tower solicited from Lloyd Jones a letter concerning his future intentions for the Manosh tenancy. The letter was drafted by the neighbor, but signed by Jones and read:

> I, Lloyd Jones, can confirm that I have leased part of my property to H.A. Manosh for use as a tower site for more than 20 years.
>
> In March 1997, I told Mr. Manosh that the tower could stay where it is, for as long as needed, at the current rental payment.
>
> In the summer of 1997, Sheriff Gardner Manosh approached me with concerns about the tower. Again, I told him it could stay where it is for long as needed.

> In June 1998, I said the same thing to Ken Harvey, chairman of the Hyde Park Select Board.

9. Jones testified at trial and the court finds as credible that when Jones signed the letter quoted above he did so because he did not wish people to think he was trying to push Manosh off the property, something which had been attributed to him. He did not intend the letter to be used for evidentiary purposes in the tower litigation and there is no evidence it was, or was used to Manosh's detriment, although it subsequently was presented to various boards considering the Manosh application, which was ultimately denied. Jones testified, and the court finds his testimony credible, that he did not intend the letter he wrote to act as a lease modification.

10. Manosh's plan to build a tower at a different site was ultimately disapproved or withdrawn although the details of any such disapproval were not placed in the record. In any event, Howard Manosh did not pursue alternative tower construction further.

In its recitation of facts in *In re Beckstrom*, the Vermont Supreme Court reflected that Manosh had made an application to move his tower because:

> A review of the record evidence reveals that the court's findings are amply supported by the testimony of several witnesses that Manosh's sole intent at the time of the April 1997 application was to move the Jones tower to the new site because the owner of the Jones property planned to use his land for other purposes.

The *Beckstrom* decision was issued in 2004. It is not clear to this court that the letter in evidence as Exhibit 3 had any effect on that litigation whatsoever.

11. In late 2003, Manosh planned to make improvements to the equipment building and other infrastructure related to the tower. Although Manosh characterizes those improvements as being extensive, the court finds the improvements to be modest: there were upgrades to the right-of-way, guy wires were replaced and a new "building" was placed on site to house the electronics associated with the tower - it was a "Sea-Land" shipping container. This court infers that the choice of enclosure was made because Mr. Manosh was unsure of how long his tenancy would last and such an enclosure is highly portable.

12. In November 2003, Lloyd Jones and Howard Manosh spoke by phone. During the discussion Manosh advised that he thought a new lease would be a good idea and that he should pay $2,500 per year as rent. By letter sent the following day, November 18, Manosh reminded Jones of his past statements that Manosh could stay for as long as needed. Manosh sent Jones a new lease with that language in place of the six month termination language. The letter closed "if you are in agreement, please endorse the lease copies in the permission letters and return one

signed copy of each to this office." Jones never responded to the letter nor did he sign and return the lease.

13. In the letter, Manosh advised Jones that he planned on making the improvements to the property discussed above.

14. In 2007, not having seen any lease payments from Manosh since their 2003 discussion, Lloyd Jones called about the status of the payments. Manosh sent him a check for $10,000. Jones had forgotten about Manosh's desire to have the termination provision changed and when he realized that Manosh expected the increased lease payment to be part of the quid pro quo for the indefinite termination provision proposed he did not cash the check. He did not return the check, nor did he notify Manosh he was rejecting the proposal. He received one further check for $2,500 which he also did not cash and which he sent back.

15. In about 2011, Jones mentioned to Manosh that he would need to terminate the lease. On April 27, 2011, Jones's sons, Neil and Russell had come into ownership of the property and on their behalf, their attorney sent a notice of lease termination to H.A. Manosh, Inc., giving six months notice with a termination date of October 31, 2011.

DISCUSSION

Defendant resists the termination of tenancy with a number of arguments:

a. The lease was modified by Jones telling Manosh that it could "stay as long as needed."

b. Promissory Estoppel prevents Jones from terminating the lease as Manosh relied on the statements that it could "stay as long as needed."

c. Plaintiffs are equitably estopped from terminating the tenancy because Plaintiffs allowed Manosh to improve the site without making objection.

d. Jones's statements concerning his intent that Manosh could stay as long as needed acted as a waiver of his right to terminate the tenancy.

e. Plaintiffs are barred by the doctrine of laches for equitable reasons.

f. Plaintiffs are not entitled to equitable relief in the form of a writ of possession.

g. The lease, by its terms, does not expire until 12/31/14, thus the notice to quit is ineffective.

A. Was the lease modified?

The court does not conclude that the lease was modified. Lloyd Jones testified as to the circumstances under which he signed the letter in evidence as Exhibit 3. The letter itself reflects three instances in which Mr. Jones told others, including Howard Manosh, that the tower could stay where it was, for as long as needed, at the current rental payment. The letter is addressed to "Whom it may

concern". That salutation suggests that the letter itself was not intended to be more than an informational document for someone other than Manosh – as Jones explained it was for those involved in or interested in the litigation between Manosh and neighbors over Manosh's application for a new cell tower.

Even the statement admittedly made to Manosh, that he could stay as long as needed, is insufficiently definite for this court to conclude that it was intended to act to essentially eviscerate the term provisions of the lease agreement and turn it into a perpetual lease. The statute of frauds requires a writing to effect such a change to a written document for just that reason; to prevent casual statements from being later recast as yielding or creating substantial rights. *Amsden v. Atwood*, 68 Vt. 332, 334 (1895); *see* 9A V.S.A. § 2-201. Simply put, the facts do not support a then current intent on the part of Jones to actually change the provisions of the lease agreement with Manosh and make the lease perpetual as Manosh argues.

A modification of a contract must be supported by the same level of intent as for the creation of a contract. In order to find a contract, the court must find there to have been a meeting of the minds. *Starr Farm Beach Campowners Ass'n v. Boylan*, 174 Vt. 503, 505 (2002) (mem.) ("An enforceable contract must demonstrate a meeting of the minds of the parties: an offer by one of them and an acceptance of such offer by the other."). The statements in Exhibit 3, under the circumstances made to the extent they were put in evidence, simply do not support that there was a meeting of the minds between Manosh and Jones. Manosh has failed in sustaining his burden of proof on that issue. The court credits Jones's testimony that he did not intend to change the lease by Exhibit 3.

Similarly, the court cannot find that those statements acted as a waiver. "A waiver is the intentional relinquishment or abandonment of a known right and may be evidenced by express words as well as by conduct." *Chimney Hill Owners' Ass'n v. Antignani*, 136 Vt. 446, 453 (1978). A waiver "involves both knowledge and intent." *Liberty Mutual Ins. Co. v. Cleveland*, 127 Vt. 99, 103 (1968) (quoting *Beatty v. Emp'rs' Liab. Assurance Corp.*, 106 Vt. 25, 31 (1933)); *see Hixson v. Plump*, 167 Vt. 202, 206 (1997).

Here, the facts do not support an intent by Lloyd Jones to actually waive his right to terminate the lease. The words used were of a casual sort and in fact, when presented with an actual document to sign to put those words in writing, Jones balked.

B. Equitable arguments.

Manosh argues that Plaintiffs are estopped from terminating the tenancy because he relied on Exhibit 3 and the statements made therein to discontinue his efforts to obtain permitting and to improve the property. As noted in the findings of fact, this court does not conclude Manosh made the improvements under the impression that he had an agreement with Jones to make the lease perpetual.

The party asserting estoppel has the burden of establishing four elements: (1) the party to be estopped must know the facts; (2) the party to be estopped must intend that its conduct shall be acted upon, or the conduct must be such that the party asserting estoppel has a right to believe it is intended to be acted upon; (3) the party asserting estoppel must be ignorant of the true facts; and (4) the party asserting estoppel must detrimentally rely on the conduct of the party to be estopped. *Gravel and Shea v. White Current Corp.*, 170 Vt. 628, 629 (2000).

Manosh asserts that based on Jones's letter and statements that he could use the property as long as he needed to, he did not pursue siting his tower elsewhere. There were many, many currents running through the circumstances of his zoning petition for a new tower as are evidenced by the recitation of facts in the *Beckstrom* case. This court is wholly unpersuaded that any failure to further pursue re-siting the communications tower was based on Manosh's satisfaction with Jones's statements to him. If that were the case, why did the litigation continue through the Vermont Supreme Court decision, which was rendered in 2004? The letter was written in 1998. Nor can the court conclude that Manosh would have otherwise obtained a permit, but gave it up on the strength of the Jones statements. Manosh has not satisfied criteria #4. Further, as stated above, Manosh was aware that until he had a modified lease, he could not rely on the letter or oral statements as lease modifications.

Manosh Inc. is, among other things, in the commercial real estate business. It understood the purpose of leases and the legal effect of the lack of a lease. To that end, Manosh sought to have the lease re-executed in 2003 to include language which would allow the lease to remain in effect for as long as needed. Had Manosh believed the letter of July 22, 1998 modified the lease, there would have been no need to enter into a new lease agreement.

The court infers from the testimony of the parties and other evidence that Lloyd Jones was somewhat mercurial and not always communicative. Mr. Manosh was quite reasonable in wanting to pin Jones down with a new lease agreement. But the letter of November 18, 2003 was insufficient to do so, or to create an estoppel, given the last sentence, "if you are in agreement, please endorse the lease copies and the permission letters and return one signed copy of each to this office." That Manosh did not send any rental payments for three more years also suggests that he was aware that Jones had not signed the lease and might not. The improvements made were minor, especially in the scope of the income the tower was generating. In order for an estoppel to be applicable, reliance must be substantial and typically something greater than expenditure of money. *See Ragosta v. Wilder*, 156 Vt. 390, 396 (1991) (stating that under promissory estoppel, the reliance required must be "of a definite and substantial character") (internal quotations omitted); *Maurice Callahan & Sons, Inc. v. Cooley*, 126 Vt. 9, 11 (1966) (illustrating that merely expending money in reliance does not automatically make estoppel appropriate).

C. Laches.

Defendant argues that Plaintiffs are barred by the doctrine of laches because, after Manosh sent the revised lease in 2003, Jones did not speak up and in consequence, Manosh acted to his detriment by making improvements to the tower.

"Laches is the failure to assert a right for an unreasonable and unexplained period of time when the delay has been prejudicial to the adverse party, rendering it inequitable to enforce the right." *Chittenden v. Waterbury Ctr. Cmty. Church, Inc.*, 168 Vt. 478, 494 (1998) (quotation omitted). Delay alone is insufficient to invoke laches - the delay must be unexcused and prejudicial. *Id.*

As stated above, the court does not find that Manosh changed his position or otherwise incurred any substantial detriment because of the failure of Jones to disaffirm Manosh's proposed lease. Defendant's proof fails.

The court simply cannot find that the equities of the situation are such that H.A. Manosh Inc. was misled to its detriment or that it would be inequitable to allow termination of a tenancy. The lease commenced when Manosh asked Floyd and Frances Jones to lease the site for his own company's communication needs. Initially, even before the first lease, the parties agreed the tower could go up and the lease paid was repair of the Jones's water pump. From that humble beginning, the Manosh Company has sublet space on the tower and is deriving more than $25,000 per year from its efforts. The court does not find that the equities tip in Manosh's favor based on the evidence that the guy wires were replaced for a relatively small amount of money or other regular maintenance was performed or improvements were made which facilitated the sub-leasing of tower space. The court notes that in leasing to its subtenants, H.A. Manosh Inc. attached relevant portions of the F. Jones lease and included language that those leases were "bound by and limited to the conditions of the lease granted to the Lessor by Lloyd Jones."

D. Term of the Lease.

The term provision of the written lease reads:

> This lease shall run for the duration of a period of five years from January 1, 1975 and may be continued for additional five year periods as long as the tower is in use by the lessee and as long as the rent herein after provided for is paid.
>
> It is further agreed by both parties that this lease agreement may be terminated upon written notice by either party upon six months notice to the other party and property will be returned to its former state by the lessee.

Howard Manosh testified that he understood the six month termination provision to apply to termination at the end of the five year cycle. While Mr.

Manosh's understanding of the lease would be a reasonable way to structure a lease agreement with a 5 year renewal clause, that is not how the lease reads. The lease agreement is unambiguous. Even if it were ambiguous, it would be construed against Manosh, its drafter.

ORDER

The notice to quit was properly given. The lease agreement is terminated.

Plaintiff sued for damages – rent remaining unpaid. The rent amount was never modified and thus rental damages are due for the years of 2004 – 2013, $400, the amount both parties agree was the rental rate under the F. Jones lease. It is not clear that demand was properly made for that rental amount, thus the court will not award interest.

Judgment in the amount of $4,000 plus Plaintiff is entitled to a writ of possession.

Dated at Hyde Park, Vermont, this 31 day of May, 2013.

Hon. Robert Bent
Superior Court Judge