SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

MINUTE ORDER

DATE: 01/30/2023 TIME: 01:39:00 PM DEPT: C11

JUDICIAL OFFICER PRESIDING: John C. Gastelum
CLERK: J. Roa
REPORTER/ERM: None
BAILIFF/COURT ATTENDANT:

CASE NO: **30-2019-01091292-CU-BC-CJC** CASE INIT.DATE: 08/19/2019
CASE TITLE: **Washington 111, LTD. vs. Kelsey**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Breach of Contract/Warranty

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EVENT ID/DOCUMENT ID: 73940710

EVENT TYPE: Under Submission Ruling

APPEARANCES

There are no appearances by any party.

The Court, having taken the above-entitled matter under submission on 01/24/2023, now makes the following ruling as attached hereto and incorporated herein by reference.

A Status Conference is scheduled for 05/23/2023 at 08:45 AM in Department C11.

Court orders Clerk to give notice.

14. Washington 111, Ltd. v. Kelsey

Motion for New Trial

The matter previously taken under submission, the Court now Rules as follows:

The court grants the motion for a new trial on the grounds there was insufficient evidence that the parties made a mistake of fact.

"The authority of a trial court in this state to grant a new trial is established and circumscribed by statute. [Citation.] Section 657 sets out seven grounds for such a motion: (1) 'Irregularity in the proceedings'; (2) 'Misconduct of the jury'; (3) 'Accident or surprise'; (4) 'Newly discovered evidence'; (5) 'Excessive or inadequate damages'; (6) 'Insufficiency of the evidence' [or the verdict is against law]; and (7) 'Error in law.' [¶] . . . Section 657 . . . provides: 'When a new trial is granted, on all or part of the issues, the court shall specify the ground or grounds upon which it is granted and the court's reason or reasons for granting the new trial upon each ground stated.'" (*Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 633-634.)

Per section 657 subdivision (6), the trial court may grant a new trial if there is insufficient evidence to "justify the verdict." If, "after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the . . . jury clearly should have reached a different verdict . . . ." (*Ibid.*) Indeed, this court has a "duty" to grant a new trial if, in its opinion, the weight of the evidence is " 'contrary to the finding of the jury.' " (*Barrese v. Murray* (2011) 198 Cal.App.4th 494, 503.)

Here, the court orders a new trial on the ground there was insufficient evidence to show a mutual mistake of fact.

As Plaintiff argues, misunderstandings as to possible future events do not qualify as factual mistakes unless there is evidence that the non-occurrence of the future event was an assumption of the contract. (*Paramount Petroleum Corp. v. Superior Court* (2014) 227 Cal.App.4th 226, 245–246; *Mosher v. Mayacamas Corp.* (1989) 215 Cal.App.3d 1, 5; see Civ. Code, § 1577.)

Here the undisputed evidence offered at trial shows the parties were mistaken as to a possible future event, not a fact that existed before or at the time they entered into the lease agreement. At trial, Kelsey stated he was surprised to learn -- ***months after*** the parties executed the lease agreement—for the first time about the City's new ADA requirement. (Fraser Decl. ¶ 7, exh. 5, p. 245.) Along these lines, Kelsey testified "initially it wasn't entirely clear in terms of what the city wanted," but he eventually understood that the City was now requiring that certain ADA improvements be made to the common areas before tenant improvements could proceed. (Fraser Decl. ¶ 7, exh. 5, pp. 247–248.) Kelsey sent an email to the Washington Park leasing agent inquiring about the new requirement: "They are requiring ADA accessibility upgrades in the parking lot. More info to come." (Fraser Decl. ¶ 7, exh. 5, p. 246.) In October 2018, approximately ***six months after*** the parties executed the lease agreement for Suites 4 and 5, Kelsey sent another email to the leasing agent, again indicating his surprise regarding the new requirement: " 'We have been in plan check since June. They completed the site inspection today and will be requiring [Washington 111] to make some ADA accessibility upgrades in the parking lot. The new guy at the city is a real gem, he is some kind of an ADA savant and he is insisting on the stuff on all new projects.' " (Fraser Decl. ¶ 7, exh. 5, p. 278, emphasis added.) And the city manager of Washington 111, Jack Tarr, confirmed the City was implementing a "newly created" policy that it had never

implemented before. (Fraser Decl. ¶ 7, exh. 5, p. 304.) In sum, this evidence reveals that **after the parties executed the lease**, the City implemented a new permit requirement. Given all the circumstances, any failure to anticipate this new requirement was not a mistake of fact.

Similarly, no evidence was offered at trial to show that the non-occurrence of the City's new requirement was a basic assumption of the lease. (*Mosher, supra,* 215 Cal.App.3d at p. 6.) Kelsey offered no evidence to show any oral agreement concerning the non-occurrence of the City's new requirement. Nothing in the contract itself indicates the parties assumed that the City would not impose this kind of requirement. To the contrary, the lease (section 17.02) specifically mentions the possibility that Kelsey would have to comply with present or future requirements imposed by city, county, municipal, state, federal and/or "other applicable governmental authorities." (Fraser Decl. ¶ 3, exh. 1, p. 31.) Also., section 26.05 specifically contemplates that one or both parties could be temporarily prevented from performance due to, among other things, "restrictive governmental laws or regulations." (Fraser Decl. ¶ 3, exh. 1, p. 36.) These provisions show the parties did contemplate the possibility of government requirements causing unforeseen delays or an inability to perform. But this is not evidence that the parties had assumed such requirements would not occur.

Kelsey testified he expected to receive permits from the City before he commenced work on his tenant improvements. (Fraser Decl. ¶ 7, exh. 5, p. 230.) And he was not surprised when the City did not initially accept his plans. He was aware that all Washington Park tenants experienced "ADA compliance issues." (Fraser Decl. ¶ 7, exh. 5, pp. 236–237.) He conceded it took "two or three rounds" for him to get constructions plans approved by the City for Suite 10. (Fraser Decl. ¶ 7, exh. 5, p. 237.)

The evidence offered at trial shows the parties ***knew*** the City could condition the issuance of permits for certain improvements, even if they were unaware the City might specifically condition issuance of permits based on the lessor first making ADA improvements to the common areas. Even assuming Kelsey harbored some "unrevealed subjective view" that the City would not condition issuance of tenant permits on ADA improvements to common areas, that does constitute a mistake of fact under California law.

There is no evidence the parties were mistaken as to an identifiable and essential element of the lease ***at the time they executed it***. In fact, when defendants/Cross-Complainant sought leave of this Court to amend their Answer to assert the affirmative defense of mutual mistake and to amend their Cross-Complaint to assert mutual mistake as a basis for rescission and cancellation in the Cross-Complaint, they noted their pleadings already alleged they did not learn of the City of La Quinta's refusal to issue a permit for tenant improvements unless and until Plaintiff/Cross-Defendant satisfied the City with respect to their own ADA-upgrade work to common area until **long after executing the lease at issue** (see Cross-Complaint, ¶ 19).

For these reasons, the Court will grant Washington 111's motion for a new trial.

1-30-23

John C. Gastelum