2017 IL App (1st) 161852-U
No. 1-16-1852
Order filed May 9, 2017
Modified Upon Denial of Petition for Rehearing July 18, 2017

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

NORTH COMMUNITY BANK, successor by merger to ARCHER BANK, Plaintiff-Counter-Defendant-Appellee, v. DRAGON FLY PROPERTIES, INC., an Illinois Corporation, Defendant-Counter-Plaintiff-Appellant.	)	Appeal from the Circuit Court of Cook County. No. 13 CH 28461 The Honorable Neil Cohen, Judge, presiding.

PRESIDING JUSTICE HYMAN delivered the judgment of the court.
Justices Pierce and Mason concurred in the judgment.

ORDER

¶ 1 *Holding*: The trial court correctly found landlord was not entitled to retroactive rental increases under the doctrine of equitable estoppel and tenant was entitled to rescind an option to extend lease based on unilateral mistake.

¶ 2 North Community Bank, now known as Byline Bank, leased two bank branches from Dragon Fly Properties, Inc. The Bank and Dragon Fly executed an amendment for each lease,

under which the base rent was increased to 125% of the then-current base rent. Dragon Fly then sent a letter stating that negotiations regarding the base rental increase were ongoing, and while the negotiations continued, Dragon Fly would accept the rental amount stated in the original leases; however, Dragon Fly had a right to the 125% increase if negotiations were unsuccessful. The Bank continued to pay the original base rent for 152 months. During that time, Dragon Fly never sent a notice of default, nor did the parties communicate on the status of negotiations. Ultimately, the parties negotiated a 10-year option term extension without mention of defaulted rent or a demand for unpaid rent. Immediately after the new term began, Dragon Fly sent a demand to the Bank for unpaid rent. The Bank brought a claim seeking an order declaring Dragon Fly was not entitled to retroactive base rental increases and a rescission of the option term.

¶ 3 The trial court (i) barred Dragon Fly's retroactive base rental increases under the doctrine of equitable estoppel, and (ii) granted rescission of the option term on the ground of unilateral mistake due to Dragon Fly's failure to disclose its intent to claim the retroactive rental increases once the new lease term began. Notably, Dragon Fly acknowledged that the increase would have been a material aspect for both parties in negotiating the new option term. Dragon Fly moved for a stay of that part of the judgment granting rescission of the option term pending appeal. Both the trial court and the appellate court denied the motion. We affirm the judgment of the trial court on the basis of equitable estoppel and unilateral mistake.

¶ 4 BACKGROUND

¶ 5 The facts are largely undisputed. In 1999, Dragon Fly's predecessor and the Bank's predecessor entered into two lease agreements—one in Summit, Illinois and the other in Bridgeview, Illinois. The leases ran for 15 years and expired on July 31, 2013. Under the 1999

leases, the Bank's base rent began at about $8,000 per month for the Summit building and $9,000 per month for the Bridgeview building. Except for the rental prices, the Summit and Bridgeview leases were identical. In November 2000, in conjunction with a lease assignment, both leases were amended so as to increase the base rent to 125% of the old rental rate (the "base rental increase"). Nevertheless, by letter to the Bank in December 2000, Scott Whitman, an attorney and the Vice President of Dragon Fly Properties, stated that the parties were negotiating the possible waiver of the base rental increase, and while doing so, Dragon Fly agreed to rent payments under the original leases. The letter further stated that this did not prejudice Dragon Fly's right to later enforce the rent increase provisions in the event negotiations failed.

¶ 6 From December 2000 until July 31, 2013 (the end of the original lease term), the Bank paid to Dragon Fly, and Dragon Fly accepted, 152 monthly rent payments, under the terms of the original lease, rather than the amendment. Throughout this period, Dragon Fly did not send any notices of default to the Bank, or give any other indication that there was outstanding rent under either lease.

¶ 7 As stated in the December 2000 letter and Whitman's corroborating testimony, base rental increases were conditioned on unsuccessful negotiations between Dragon Fly and the Bank. Between the December 2000 letter and July 31, 2013, Whitman did not communicate with the Bank regarding the status of negotiations and he never sent a notice of default.

¶ 8 In July 2007, Whitman sent Matt Tilton, a former president of a predecessor of the Bank, an email with tenant estoppel certificates for each lease. Dragon Fly was refinancing a loan and the lender, LaSalle Bank, required estoppel certificates for each property. Tilton signed the forms, which noted that the original leases had been amended but stated the monthly rent

payments were about $8,000 and $9,000 respectively, the rent under the original lease, and not under the amendment.

¶ 9 Whitman never sent anything in writing to LaSalle Bank explaining that the estoppel certificates reflected the amount Dragon Fly was currently collecting from the Bank, and that more was owed under the amendment. Whitman claimed, however, that he submitted various documents to LaSalle Bank indicating that more was owed on the properties, and that he spoke with someone at LaSalle Bank about the amount of rent owed under the amendment.

¶ 10 After the estoppel certificates were completed, Dragon Fly executed a promissory note and received funds from LaSalle Bank. The promissory note was secured by the mortgages on both properties.

¶ 11 In 2007, Tilton understood that the rent payments were current and made under the terms of the original leases. He never received notice of default relating to either lease, and he was not aware at any time of the amendment increasing the monthly rent under the leases.

¶ 12 In 2012, Dragon Fly and Tilton, on the Bank's behalf, began negotiating the terms of an option to extend the lease terms. The negotiations continued into 2013. The option would extend the leases for an additional 10 years. Throughout the negotiations Whitman never mentioned that money was owed though he knew he was going to send the Bank a letter informing them of their obligation to pay the base rental increase.

¶ 13 During the negotiations on the option, Tilton told Whitman that the Bank was looking at alternatives regarding the two properties, including closing or moving the branches, and that he was shopping for other locations. The parties agreed to the option on January 11, 2013, and the Bank stopped looking into moving the Summit and Bridgeview branches.

¶ 14 Tilton and Whitman both testified that from the time the option was executed until August 1, 2013, Dragon Fly never notified or communicated with the Bank about the contents of the December 2000 letter or its claims for the base rental increase.

¶ 15 On August 1, 2013, the day after the original lease term ended and the 10-year option went into effect, Dragon Fly sent a demand to the Bank for the base rental increase from December 2000 until the end of the lease term for both leases (the “August 2013 letter"). The demand totaled $667,708.50.

¶ 16 According to Tilton, until the August 2013 letter, he had no idea that Dragon Fly would claim the base rental increase. Moreover, Tilton was never made aware of the amendment from 2000 nor did he review the master lease file before negotiating the option. The matter of payment of the base rental increase would have had a material effect on the Bank’s decision-making in extending the option.

¶ 17 Both parties stipulated that the Bank inadvertently overpaid monthly rent under the option for the Summit lease in the amount of $244,387 from August 2013 through March 2015, while negotiations were pending. Whitman was aware of the overpayment but did not advise the Bank of the mistake. Due to the magnitude of the overpayments, he believed they were the Bank’s way of settling their debt for the failure to pay the increased rent under the terms of the amendment.

¶ 18 The Bank filed a complaint seeking a declaratory judgment that Dragon Fly was not entitled to retroactively enforce the base rental increase and a rescission of the option and termination of the lease based on unilateral mistake. Dragon Fly counterclaimed for breach of contract, asking the trial court to enforce the leases, as amended. The Bank filed affirmative defenses alleging the counterclaim is barred by (i) the statute of limitations, (ii) laches, (iii)

waiver, (iv) unilateral or mutual mistake, and (v) equitable estoppel. Dragon Fly filed a motion for summary judgment on the complaint and its counterclaim, which the trial court granted in part and denied in part, leaving as the sole remaining issues the Bank's defense of equitable estoppel and, in the alternative, the Bank's request to rescind the contract for unilateral mistake.

¶ 19 After a bench trial, the trial court entered judgment for the Bank on all claims. First, the trial court held that the doctrine of equitable estoppel barred Dragon Fly from retroactively enforcing the base rental increase. The court found that the December 2000 letter stated that the rental increase would not go into effect until after negotiations with Argo had ended and Whitman testified that negotiations were ongoing. The court concluded that this was a "strategic decision" by Whitman, who knew he was going to enforce the rental increase but waited until after the option was signed and went into effect before doing so. As for the estoppel certificates, the court did not believe Whitman's testimony that he informed LaSalle Bank that the Bank was obligated to pay more monthly rent on the properties under the amendments. In assessing Whitman's credibility, the trial court stated, "I only have his testimony that he told LaSalle Bank [that the estoppel certificates were inaccurate]; that actually the rental increase was more and that the bank owed more *** I don't believe him. I believe he lied to me. I believe he lied to me on that material fact in order to get a personal benefit *** so I find that to not be credible."

¶ 20 The court also found that Dragon Fly's hidden intent to retroactively enforce the base rental increase once the Bank signed the option warranted rescission of the option based on unilateral mistake. The trial court stated that it would be unconscionable to require the Bank to adhere to a contract that it signed without knowing that Dragon Fly intended to enforce the amendment. The court acknowledged that the Bank pled counts I and II in the alternative, but

allowed the Bank to amend its complaint to strike the alternative count to conform to the evidence at trial.

¶ 21 Lastly, the trial court ordered Dragon Fly to repay $244,387 that the Bank overpaid on the Summit lease between August 2013 through March 2015 within 30 days or be subject to accruing interest.

¶ 22 Dragon Fly moved to stay enforcement of the judgment order as it relates to the rescission ruling, pending appeal. After a hearing, the trial court denied the motion on the grounds that it could not force the Bank to comply with a lease the court found unenforceable. Dragon Fly appealed to this court, which also denied the motion to stay.

¶ 23 ANALYSIS

¶ 24 Dragon Fly contends the trial court erred in (i) applying equitable estoppel to its claim for retroactive rent and (ii) granting recession of the option.

¶ 25 Equitable Estoppel

¶ 26 A claim of equitable estoppel exists where a person's statements or conduct induce a second person to rely, to his or her disadvantage, on the statements or conduct. *Guarantee Trust Life Insurance Co. v. Platinum Supplemental Insurance, Inc.*, 2016 IL App. (1st) 161612, ¶ 40. A finding that the doctrine of equitable estoppel applies as a defense must be based on clear and convincing evidence and will not be overturned absent an abuse of discretion by the trial court. *In re Marriage of Duerr*, 250 Ill. App. 3d 232, 237 (1993). Further, to the extent the trial court relied on the credibility of witness testimony to determine whether the December 2000 letter modified the lease, we defer to findings of the trial court unless they are against the manifest weight of the evidence. *Stewart v. Thrasher*, 242 Ill. App. 3d 10, 17 (1993).

¶ 27 To establish equitable estoppel, the claimant must show: (i) the other party misrepresented or concealed material facts; (ii) the other party knew at the time that the representations were untrue; (iii) the claimant did not know that the representations were untrue when they were made and when they were acted on; (iv) the other party intended or reasonably expected the representations to be acted on by the claimant or by the public generally; (v) the claimant reasonably relied on the representations in good faith to his or her detriment; and (vi) the claimant has been prejudiced by reliance on the representations. *Parks v. Kownacki*, 193 Ill. 2d 164, 180 (2000).

¶ 28 "Without the misrepresentation or concealment of a material fact, equitable estoppel does not apply." *Parks*, 193 Ill. 2d at 180. Although fraud is an essential element of equitable estoppel, "the representation need not be fraudulent in the strict legal sense or done with an intent to mislead or deceive." *Geddes v. Mill Creek Country Club, Inc.*, 196 Ill. 2d 302, 314 (2001). Rather, estoppel applies when, in light of all relevant circumstances, "conscience and the duty of honest dealing" preclude someone from repudiating the consequences of his or her wrongful representations or conduct. *Ceres Illinois, Inc. v. Illinois Scrap Processing, Inc.*, 114 Ill. 2d 133, 148 (1986).

¶ 29 The testimony shows that Dragon Fly concealed material facts. Whitman testified that he knew he while negotiating the option amendment that he was going to send a demand for the base rental increase going back to 2000, yet failed to mention it. Instead, the day after the end of the previous lease term, he notified the Bank of the retroactive base rate it owed. Further, the Bank used estoppel certificates in 2007 in refinancing both properties, which stated expressly that the rent was up to date and there were no defaults. In fact, at all times before August 1, 2013, the Bank provided, and Dragon Fly accepted, rental payments.

¶ 30 The Bank was unaware that any retroactive base increase was due and acted on Dragon Fly's silence by entering into the option. Further, Dragon Fly's silence regarding their intent to collect the base rental increase was designed to ensure the Bank would agree to execute the option. Considering that the $667,708.50 was material to the negotiations, Dragon Fly's silence was a strategic move to ensure future payments. Although Whitman testified that he would have sought the retroactive base rental increase whether or not the Bank agreed to the option, the trial court found this testimony not credible, the August 2013 letter having been sent the first day the new 10-year term went into effect.

¶ 31 Dragon Fly's strongest argument lies with the requirement that the Bank must have reasonably relied on the omission to their detriment. Dragon Fly submits three arguments to this point, none of which establish an unreasonable reliance given the facts. First, Dragon Fly cites to the plain terms of the lease. Although Tilton testified that he was unaware of the amendment and did not review the master lease file before negotiations, that alone is not enough to show that he should have known that a huge retroactive payment would become due the day after the option began. The Bank provided, and Dragon Fly accepted, payments under the original lease. That amounts to 152 payments over 13 years. Not only did past payments provide context for Tilton's failure to read the master lease file, but the December 2000 letter itself expressly stated that the landlord's agreed to accept payments under the original lease until negotiations ended. The record suggests negotiations never ended, or, at least, that Dragon Fly never notified the Bank that they were over.

¶ 32 Second, Dragon Fly argues it could not have waived or amended its right to rent under the amendment without signing an unambiguous amendment, citing Article XXXI of the lease:

> "No provision of this Lease shall be deemed waived or amended except by a written instrument unambiguously setting forth the matter waived or amended and signed by the party against which enforcement of such waiver or amendment is sought. Waiver of any matter shall not be deemed a waiver of the same or any other matter on any future occasion."

¶ 33 This argument fails for three reasons: (i) to obtain a loan from LaSalle Bank, Dragon Fly relied on the estoppel certificates, which stated that the Bank's rent was the amount listed in the original lease, thus waiving their right to collect the rent under the amendment; (ii) the argument ignores the December 2000 letter, signed by Whitman, expressly stating that Dragon Fly agreed to accept future rent payments "excluding the subject rent increases;" and (iii) the right to accept rent under the amendment did not need to be expressly waived for the doctrine of equitable estoppel to apply. The entire circumstances of the transaction are relevant, and taking a strict stance on waiver would ignore the context of the Bank's strategic misrepresentation. *Ceres Illinois, Inc.* 114 Ill. 2d at 148.

¶ 34 Dragon Fly also argues that the Bank ignored its remedies by failing to request an estoppel certificate, and therefore their reliance on the statements was unreasonable. We agree with the Bank that this argument is a red herring. Illinois law has held that the availability of an equitable defense, as opposed to equitable relief, is not precluded by the adequacy of legal remedies, because substitute remedies of money are not adequate to provide any relief. *Brownmark v. Livingston*, 100 Ill. App. 474, 477-78 (1902) . Second, where a court of law may not provide an adequate or complete remedy, a court of equity may do so. *Siemans v. Thompson*, 11 Ill. App. 3d 856, 859 (1973). In any event, because this issue was not raised at trial, it is

waived on review. *Amalgamated Bank of Chicago v. Kalmus & Associates, Inc.*, 318 Ill. App. 3d 648, 658 (2000).

¶ 35 Finally, the record is replete with evidence showing that the Bank relied on this omission to their detriment. Tilton testified that he told Whitman he was pursuing alternatives while negotiations on the option were pending, and by the time Tilton received the August 2013 demand, he was unable to pursue them. Given that the Bank was undergoing financial strain and had considered closing both branches (i) being trapped in a new 10-year term, (ii) being required to pay $667,708.50 with no notice, and (iii) having no ability to negotiate that amount before entering into the option, was a detriment to the Bank.

¶ 36 The Bank meets all the criteria to establish equitable estoppel and the trial court properly applied it to Dragon Fly's claim for the retroactive base rent increase. Because equitable estoppel is a valid defense, we do not need to determine whether the December 2000 letter modified the terms of the lease.

¶ 37 Rescission of Option Amendment

¶ 38 Next, Dragon Fly argues that the Bank is not entitled to rescission of the option and that the trial court erred in granting that relief based on a finding of unilateral mistake.

¶ 39 A party seeking rescission must show by clear and convincing evidence that: (i) the mistake was material; (ii) the mistake is so significant as to make enforcement unconscionable; (iii) the mistake occurred despite the exercise of due care by the party seeking rescission and (iv) rescission will place the other party in the status quo. *Siegel v. Levy Organization Development Co. Inc.*, 153 Ill. 2d 534, 545 (1992). Rescission is an equitable remedy largely left to the discretion of the trial court. *Newton v. Aitken*, 260 Ill. App. 3d 717, 719 (1994). A reviewing court will not disturb that decision unless it clearly resulted from an abuse of discretion. *Id.*

¶ 40 This court has held "[i]f there is apparently a valid contract in writing, but by reason of a mistake of fact by one of the parties, not due to his negligence, the contract is different with respect to the subject matter or terms from what was intended, equity will give to that party a remedy by cancellation where the parties can be placed in status quo." *Steinmeyer v. Schroeppel*, 226 Ill. 9, 13 (1907). Rescission is justified because, due to the mistake, there was no mutual agreement on the terms. *Id.*

¶ 41 Here, there was no "meeting of the minds." The Bank believed it was negotiating another 10-year term, without any hint that a demand for $667,708.50 would be forthcoming. The record demonstrates the Bank was experiencing financial strain, and both parties admitted that $667,708.50 was "material." Based on this admission alone, we find the contract should be rescinded due to unilateral mistake.

¶ 42 Although Dragon Fly argues that the Bank failed to exercise due diligence to support its claim for unilateral mistake, that is a question of fact determined by the trial court. *Cavalry Portfolio Services v. Rocha*, 2012 IL App (1st) 111690, ¶ 10. We will not overturn that decision unless it is against the manifest weight of evidence. *People v. Coleman*, 183 Ill. 2d 366, 384-85 (1998). Tilton stated he was aware of the estoppel certificates, he reviewed the lease, and was aware of the amount of the rent that the Bank had been paying for many years without any notice of default. And, the lack of communication from the December 2000 Letter until the August 2013 demand demonstrates that there was no reason for Tilton to pore through the entire master lease file before negotiating with Dragon Fly over the option. Tilton's communications with Whitman about the Bank's financial difficulties and that he was considering closing the branch entirely, should have alerted Dragon Fly that a demand for $667,708.50 would be material to the Bank's decision to pursue the option.

¶ 43 We cannot ignore Whitman's testimony that he would have pursued back rent with or without the execution of the option. But, the trial court noted grave concerns with Whitman's truthfulness and we defer to the trial court's evaluation of Whitman's credibility. See *Stewart*, 242 Ill. App. 3d at 17 (1993) ("the reviewing court will not substitute its judgment for that of the trier of fact, whose function it is to determine the credibility of the witnesses' testimony and the inferences to be drawn therefrom."). The Bank is entitled to rescission of the lease under the doctrine of unilateral mistake.

¶ 44 Affirmed.