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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: I.A. PART 13**

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MARSHALL LELCHUK and JOAN LELCHUK,

INDEX NO. 2173/2009

Plaintiffs,

- against -

DECISION AFTER TRIAL

**IPE ASSET MANAGEMENT, LLC and
EZRATTY, EZRATTY & LEVINE, LLP¹,**

Defendants.
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P R E S E N T :

**HON. JOEL K. ASARCH,
Justice of the Supreme Court.**

By Order of this Court (Galasso, J.), dated February 3, 2012, this matter was restored to the trial calendar and assigned to the undersigned for such non-jury trial.

The trial was held on April 17, 2012. The Court heard from the plaintiffs, Marshall Lelchuk and Joan Lelchuk, and the defendant, IPE Asset Management, LLC (hereinafter referred to as defendant) by David DeRosa, a principal.

After hearing the testimony and reviewing the evidence, the Court finds as follows: the plaintiffs were the owners of real property located at 32 Amherst Road in Great Neck, New York. To prevent a foreclosure against the property in 2001, the plaintiffs transferred title to the real property to TJB Equities, Inc., which thereafter in 2005 transferred title to the premises to defendant IPE Asset Management, LLC, but plaintiffs remained in possession. In 2006 in the Nassau County District Court, the defendant commenced summary proceedings seeking possession from the

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By Stipulation dated March 25, 2011, the within action was discontinued against defendant EZRATTY, EZRATTY & LEVINE, LLP.

plaintiffs. As a result, on December 1, 2006, a stipulation of settlement was entered into by the parties. By its terms, the plaintiffs agreed to vacate the premises by June 30, 2007 (which date could be extended by the plaintiffs by paying use and occupancy in the agreed upon monthly amount of \$3,000). The petitioner in the landlord tenant proceeding (defendant IPE Asset Management LLC) agreed "to escrow \$25,000 with respondents' counsel on or before June 1, 200[7]. Upon surrender of keys, or presentment of a proposed lease to new housing by respondents, respondents' counsel may release any funds needed to secure said lease to the proper third party with balance paid to respondents at key surrender."

Pursuant to such stipulation, the plaintiffs agreed to allow access to the premises by a licensed real estate broker retained by defendant. "Upon any breach in petitioner funding escrow, respondent may move to restore to calendar and vacate judgment by 5 day facsimile notice to petitioner's counsel".

The plaintiffs thereafter leased premises in Douglaston, New York by lease dated August 8, 2007. The term of the lease was to commence on September 1, 2007. When they inquired from their attorneys about the escrow, the plaintiffs learned that the defendant had failed to fund the escrow. This action ensued.

The proof establishes that defendant IPE Asset Management, LLC breached the agreement to fund the escrow account. The proof also shows that the plaintiffs failed to pay use and occupancy under the stipulation for July and August 2007.

Plaintiffs testified that since there was no "key money" in escrow, plaintiff Joan Lelchuk had to borrow against her teacher's retirement pension in mid-August 2007 to pay for the move to Douglaston. According to plaintiff Marshall Lelchuk, the new landlord wanted six months worth

of payments for rent and security at the commencement of the new lease. Plaintiff further testified that the Great Neck premises were surrendered at the end of August 2007 when the keys and copy of the new lease were given to plaintiffs' (former) attorneys. Plaintiff Joan Lelchuk testified that she was unable to retire from the New York City school system until the funds which she had borrowed against her pension were repaid. This delayed her planned retirement in the summer of 2007.

Defendant contends that the real estate broker which defendant had retained (IPE Realty – a related company) was denied access to the premises and therefore could not show it to potential tenants/buyers. Plaintiffs denied this. However, as this defense to the complaint was never raised in the defendant's answer nor did the real estate broker (or any agent) testify as to the alleged actions of the plaintiffs with respect to the showing of the premises, the Court need not consider this argument.

Plaintiffs allege in their complaint two causes of action – breach of contract and detrimental reliance. In their answer, the defendant raised two affirmative defenses – lack of personal jurisdiction due to improper service [now waived pursuant to CPLR 3211(e)] and non-broker related violations of the stipulation by the plaintiffs, excusing the payment of the escrow.

It is not the function of the Court to rewrite the parties' agreement under the guise of contract interpretation. *See, e.g., Shand Morahan & Co. Inc. v. Rice*, 160 A.D.2d 1078 (3rd Dept. 1990). While this Court has certain concerns about "key money" agreements, neither party has objected to the agreement into which they entered – only the consequences thereof. It appears that in order to permit the plaintiffs to obtain other housing and to move to their new home, the parties agreed to escrow \$25,000 from defendant. Funds needed to obtain the premises (up to \$25,000) would be paid from escrow to the new landlord and the balance, if any, would be payable to the plaintiffs after they

had vacated the premises. Thus, the defendant obligated itself to pay \$25,000.00 in connection with obtaining possession of the Great Neck property.

Similarly, there was an obligation on the part of the plaintiffs to pay use and occupancy while they remained in the Great Neck property. The defendant has failed to prove with respect to their Second Affirmative Defense that there was any destruction to the interior of the premises by the plaintiffs or that the municipality issued violations for improper maintenance of the exterior the premises. However, accepting the testimony of the plaintiffs that they vacated the premises on August 30, 2007 by delivering the keys to their (former) attorneys, the Court finds that the plaintiffs owe use and occupancy pursuant to the stipulation of settlement in the sum of \$6,000.00 (\$3,000 a month for July and August 2007).

The Court rejects the defendant's argument that the only remedy available to plaintiffs was to move to vacate the stipulation of settlement in the District Court. The stipulation states that the plaintiff(s) may (but not shall) proceed in District Court to vacate the stipulation. The gravamen of such action would primarily deal with the warrant of eviction issued by the District Court – not the issue of damages. As the right to possess the real property was the underlying basis for the eviction proceeding and as this Court is a court of original general jurisdiction (and unlimited monetary jurisdiction), this Court has jurisdiction to determine the action.

Similarly the Court rejects the argument of plaintiffs raised at trial that they are entitled to attorneys' fees and consequential damages (for lost time in court, interest paid on pension borrowing, etc.) As for attorneys' fees, there is no agreement presented by the parties as to the recovery of attorneys' fees nor any statutory authority known to the Court. See *Matter of AG Ship Maintenance Corp. v. Lezak*, 69 NY2d 1, 5 (1986). Similarly, the plaintiffs have not sought any damages except

the \$25,000 – and based on this record, even if they had, they would not be entitled to such purported consequential damages.

Thus, the plaintiffs are awarded the sum sought in their complaint (to wit: **\$25,000.00**), less unpaid use and occupancy as raised in the Second Affirmative defense of the defendant (**\$6,000.00**).

After due deliberation, the plaintiffs are awarded the sum of **\$19,000.00** from the defendant, IPE Asset Management, LLC, together with interest at the statutory rate from August 30, 2007 (the date the plaintiffs vacated the premises) (see CPLR 5001(a)), costs and disbursements.

Settle judgment.

Counsel for the parties shall arrange to pick up their marked exhibits from the Clerk of the Part.

This constitutes the Decision of the Court.

Dated: Mineola, New York
June 27, 2012

ENTER:



JOEL K. ASARCH, J.S.C.

Copies mailed to:

Jonathan E. Kroll & Associates, PLLC
Attorneys for plaintiffs

Matthew K. Tannenbaum, Esq.
Attorney for defendant IPE

ENTERED
JUL 03 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE