

NEW YORK SUPREME COURT

Wood v. Walbridge

19 Barb. 136 (N.Y. Sup. Ct. 1854) · Decided December 4, 1854

SUMMARY

The court held that a lease was surrendered by operation of law when the lessors retook possession, rebuilt the destroyed tavern, and leased the premises to another tenant, conduct inconsistent with continuation of the original lease. The court also upheld admission of the plaintiff's chancery bill and related testimony as evidence of declarations and conduct bearing on surrender, and denied the motion for a new trial.

OPINION

STRONG, J.

By the Court, T. R. Strong, J. The lease from Hubbell, Burns and Perrin, to the plaintiff, under which the latter claims title to the premises in question, was executed the 8th day of November, 1848; and the term was to commence the first day of April, 1844, and continue eight years: The premises consisted of a building known as the "Mansion House," in the city of Rochester, with bairns and sheds, which had been used for the purpose of a tavern.

On the 29th of February, 1844, the said house was destroyed by fire; and the plaintiff, who had before taken possession of the premises, thereupon abandoned the same; and, early in March, - requested the lessors to cancel the lease, insisting that it was verbally agreed between him and the lessors, before the lease was drawn, that in case of a destruction of the house by fire, the lease was thereby to be terminated.

The lessors refused to cancel the lease, and the premises were unoccupied by any of the parties to it during the first quarter, each disclaiming that he had any thing to do with the premises. In July, 1844, the lessors entered into possession of the prem*138ises; and by deed dated the 31st of that month, Burns and Perrin conveyed to Huhbell their interest therein.

In August following, Huhbell commenced the erection of a new tavern house on the premises, much more valuable than the former one, which was completed in July, 1845, and the defendant, soon thereafter, went into possession under a lease from Huhbell, for three years, at nearly double the annual rent which was to have been paid by the plaintiff. ' Perrin testifies that the plaintiff made no claim to the premises while the new building was in progress of erection; and this action was not commenced until the 28th of November, 1846.

Upon these facts, I am of opinion that the lease to the plaintiff must be regarded as having been surrendered, by operation of law, long before the commencement of this action. The taking possession of the premises by the lessors, the erection of the new building by one of them, and the lease thereof to the defendant, must be taken to have been with the plaintiff's assent.

They are inconsistent with the continuance in force of the lease to the plaintiff; it would be highly inequitable to allow the plaintiff to assert a title under that lease; and these facts in law constitute a valid surrender of the lease. (2 R. S. 134, § 6. *Bailey v. Delaplaine*, 1 Sand. S. C. R. 5, and cases cited. *Whitney v. Meyers*, 1 Duer, 266. *Schieffelin v. Carpenter*, 15 Wend.

400. *Smith v. Niver*, 2 Barb. S. C. R. 180.) Upon the trial the defendant gave in evidence, under an objection by the plaintiff, and an exception to the decision allowing the evidence, a bill of complaint in a suit in chancery in favor of the plaintiff against his lessors, which suit was brought to have the defendants therein enjoined from further proceedings in a suit against him for the first quarter's rent, and to procure the lease to be reformed by inserting the alleged agreement above mentioned in respect to the termination of the lease, in case the house should be destroyed by fire during the term; and upon the lease being so reformed, to have the same delivered up and canceled.

This bill was subscribed and sworn to by the plaintiff; and I think it was properly received in evidence, as proof of important declarations of the plaintiff, bearing upon the question of a surrender of the lease; as the destruction of the house by fire; his offer to surrender the lease, and his efforts to have the same canceled; the taking possession of the premises by the lessors at the commencement of the second quarter; the erection of the new building, and some other acts of a similar character.

[Monroe General Term, December 4, 1854. Johnson, Welles and T. B. Strong, Justices.] The testimony of Daniels, to declarations of the plaintiff in April, 1844, in substance, that he had nothing to do with the premises, was evidence of a like nature; and so also was the testimony of Burns and Perrin to conversations with the plaintiff, in which he expressed a desire to have the lease canceled, and stated he had nothing to do with the premises.

I do not perceive that Burns and Perrin were incompetent witnesses in favor of the defendant, from interest in the event of the action. They were not parties to the lease to the defendant, nor under any obligation whatever to him. They had sold out their rights in the premises before that lease was executed. Whatever interest they had was in favor of the plaintiff, and they were called to testify against it.

No ground for objection, by the plaintiff, to this existed. It follows, from the foregoing views, that the motion for a new trial must be denied.

