

STATE OF VERMONT
RUTLAND COUNTY

CONFORMED COPY
RUTLAND SUPERIOR COURT

JUL 18 2008

JOHN A. RUSSELL CORPORATION,)
Appellant)

v.)

KENNETH DECANDIO, Appellee)

Rutland Superior Court
Docket No. 91-2-08 Rdcv

on appeal from
Docket No. 690-7-07 Rdsc

SMALL CLAIMS APPEAL
Decision

This matter is before this Court on appeal from the Small Claims Findings and Order of January 14, 2008. Appellant John A. Russell Corporation (JRC), a commercial landlord, appeals the decision of the Small Claims Court in favor of tenant Kenneth DeCandio. The Small Claims Court Judge ruled that JRC's failure to invoke a rent increase for well over a year after it was contractually entitled to do so in October 2005 amounted to a waiver of the contractual right to the rent increase until the next contractually specified date for a rent increase in October 2007.

On an appeal from the Small Claims Court, the Superior Court's review is based on the record below and limited to questions of law. See 12 V.S.A. § 5538; V.R.S.C.P. 10. For the reasons set forth below, this Court affirms the decision of the Small Claims Court.

In late January 2007, DeCandio purchased an ice cream store from Eddy Enterprises (Eddy), and took assignment from Eddy of a commercial lease with JRC for the space where the ice cream store was located. DeCandio knew from the written lease terms that JRC would have the right to a CPI-based increase in rent in October 2007, but assumed that until then, the rental amount was the same monthly rent Eddy was paying. The lease authorized periodic CPI-based rent increases at specified times. The last time before the sale was in October of 2005. There was some minor confusion initially because Eddy had told DeCandio he paid monthly rent of \$1,851.99, but JRC clarified on Feb. 8, 2007, that the rent Eddy paid was \$1,854.70 a month. Though this was \$3 more than the figure DeCandio had used in his decision to purchase the business, DeCandio accepted the higher figure.

Later that month, however, DeCandio received a letter from JRC informing him that in October of 2005, JRC had failed to raise the rent based on the CPI when it had the right to do so under the lease, and that DeCandio would have to pay \$1,966.57 rather than \$1,854.70 until the next scheduled increase in October 2007. This was a substantial

unexpected increase, and DeCandio balked at paying the higher amount. He then filed this small claims action, essentially asking for a declaratory judgment that he was not required to pay the higher amount. JRC counterclaimed for the difference (about \$112 per month) for the months from February until October 2007. The Small Claims Court ruled for DeCandio and granted him costs, holding that JRC had waived its right to raise the rent until October 2007.

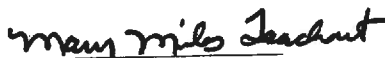
A waiver is the intentional relinquishment or abandonment of a known right, and can be express or implied. *Anderson v. Cooperative Ins. Cos.*, 2006 VT 1, ¶ 10, 179 Vt. 288, 291. Implied waiver is the type of waiver involved here since it is undisputed that JRC did not expressly waive its right to an increase under the lease in October 2005. Implied waiver “blurs the line between the doctrines of waiver and estoppel.” *Id.* at ¶ 11. It is an equitable doctrine that serves to enforce the reasonable expectations of one party based on another party’s course of conduct. *Id.* To prove implied waiver, the party invoking the doctrine must show that the other party’s conduct was unequivocal, that he relied on that conduct to his detriment, and that his reliance was reasonable. *Id.*

That is exactly what occurred in this case. For approximately fifteen months, from October 2005 through January 2007, JRC accepted a set amount of rent from Eddy for the space in question. JRC never notified Eddy of a CPI rent increase, and accepted rental payments without seeking an increase. DeCandio relied on the rental amount that JRC accepted from Eddy in making his plan to purchase the ice cream business and take on the lease. The Small Claims Court determined that it was reasonable for him to expect that this would be the monthly rent until the next rental increase scheduled under the written lease, which would take place in October 2007. DeCandio was not required, in the face of JCR’s acceptance of regular rent in a specified amount for 15 months, to independently investigate to ascertain whether the landlord had forgotten to raise the rent the last time it was entitled to do so.

The record supports the conclusion that as of January of 2007, there was an implied waiver by JRC of its right under the lease to a CPI rent increase for any month prior to October of 2007. While the opinion in the Small Claims Court decision did not distinguish between express and implied waiver, and in this case there was no express waiver, the record and the findings of the trial judge support the outcome based on the law of implied waiver. An appellate court may affirm lower court’s decision on any legal basis supported by record, even if it was not precisely the theory relied on by lower court.

For the foregoing reasons, the judgment of January 14, 2008 is *affirmed*.

Dated at Rutland, Vermont, 17th day of July, 2008.


Mary Miles Teachout
Presiding Judge