

**REHEARING APPENDIX
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**HEARING ON MOTION
FOR SUMMARY JUDGMENTS–
TRANSCRIPT EXCERPTS
(FEBRUARY 2, 2018)**

CIVIL DISTRICT COURT FOR THE PARISH
OF ORLEANS STATE OF LOUISIANA

308 DECATUR-NEW ORLEANS, LLC

v.

THE ROUGE HOUSE, LLC

Case Number: 2013-09718

Division G

Before: Hon. Robin M. GIARRUSSO, Presiding Judge.

[February 2, 2018, Transcript p.2]

THE CLERK: Number 26, *308 Decatur New Orleans, LLC vs. The Rouge House, LLC*, Case No. 2013-09718.

MS. LOWE: Good morning, Your Honor. Amanda Lowe on behalf of 308 Decatur New Orleans, LLC.

MS. RILEY: Good morning, Your Honor.

THE COURT: Good morning. Tell me your name, please, for the record?

MS. RILEY: Tracy Riley.

THE COURT: Thank you.

Go ahead.

MS. LOWE: Your Honor, 308 Decatur filed two motions for summary judgment in this case. The first was filed with regard to our petition for declaratory judgment seeking rent owed under the lease, and other damages. The second was filed to dismissed all the claims made by the Rouge house in reconvention, in the reconventional demand.

The only mentioned that the Rouge House formally opposed was the motion to dismiss the claims made in the reconventional demands, but we understand essentially those arguments serve as an opposition to the other motions. But, to simplify things, I'm going to address the motion to dismiss, the claims of the reconventional demand, and briefly address the other issue.

THE COURT: That's fine.

MS. LOWE: Your Honor, we think it's abundantly clear when you look at the opposition that was submitted by the Rouge House that the Rouge House has failed to present the Court with any competent summary judgment evidence that would support it's claims in the reconventional demands and defeat 308's motion for summary judgment. In fact, most of the material facts admitted in its opposition actually supports the motion for summary judgment of 308 Decatur.

In all the claims made by the Rouge House in its reconventional demand are for negligent misrepresentation, intentional misrepresentation, detrimental reliance, and claims under the Unfair Trade Practices Act.

All of those claims require the Rouge House to prove that 308 Decatur did in fact make a misrepresentation to the Rouge House that induced Rouge House to enter into the lease. And you will see from the reconventional demand and the opposition that all of Rouge House claims hinge on two alleged misrepresentations.

The first being that my client, 308 Decatur, misrepresented to the Rouge House, or told the Rouge House that the Rouge House would be able to use the alcohol permit owned by Jason Mohny, the owner of the premises.

The second being that 308 Decatur made certain factual misrepresentations with regard to the condition of the property. Specifically, that we failed to disclose certain Vieux Carre Commission ordinance violations and other City of New Orleans Code violations that were existing against the premises.

As to the liquor license, Your Honor, Ms. Riley—the Rouge House admits in its opposition to our summary judgment that Ms. Riley, Ms. Tracy Riley, the principle of the Rouge House was made aware on several occasions before the lease was signed that we would not allow her to use the Liquor license belonging to Mr. Mohny. This was made clear in e-mails, in text messages, all of which have been introduced, attached—

THE COURT: I've seen them—

MS. LOWE:—she also admitted that she knew she was never told that she could use it. She further admitted that she was told by us that we would cooperate with her and put her in touch with 308

Decatur's counsel, David Halpern, who would cooperate and assist her to obtain a City's liquor license, which he did in this instance.

Judge, the only evidence that the Rouge House points to support an alleged misrepresentation with regards to the Liquor license is the terms of the lease itself. At that point, Judge, you can decide this issue as a matter of law on summary judgment because, as both the Rouge House and 308 Decatur had noted in our briefs, contract interpretations is a matter of law.

The provision that she cites to you is Paragraph 27, which provides that "the Bar shall"—"the Bar shall cooperate with Tenant to transfer and assign to Tenant (or caused to be issued to Tenant) the liquor license to sell beer, wine and liquor at the leased premises for consumption on the lease premises. Bar shall not be required to incur any costs or expenses or liability to cause the Liquor License to be issued to Tenant; and Tenant shall reimburse Bar for all expenses incurred by Bar in connection with same."

Your Honor, the paragraph clearly provides a destructive, or that we would cooperate with her to cause a liquor license to be issued to her.

Again, this violates—the Rouge House admits that she knew she couldn't use the Liquor License before the lease was signed. She admits that our local counsel did cooperate with her to have a temporary event permit issued to her. She later obtained a City Liquor License.

So, even if the Court were to find that this provision ambiguous, the next step is to look to

the intent of the parties with regards to what was meant by that provision. The intent is specifically clear. She—The Rouge House even admits that they knew they couldn't use the License.

Your Honor, we just believe that this issue can be clearly decided as a matter of law. There was no alleged misrepresentation made by 308 Decatur with regard to the Liquor License.

As to the code violations against the premise, the Rouge House has claims not that we made an affirmative misrepresentation to her that there were none, but instead that we had some type of affirmative duty to let her know that these code violations existed.

Your Honor, this is not supported by any evidence. It's not supported the clear and ambiguous language of this lease, and it's certainly not by the law.

The Rouge House admits that there were two "as is" provisions in this lease. The Rouge House admits that even before she—before the lease was signed, she was let—she was made known when she requested certain things be repaired or remedied that this was an as is deal. Let us know if you want to go forward, because we are not doing anything. She agreed and said, yes, I'd like to move forward.

Your Honor, she's claiming that the "as is" provision should be invalidated because of fraud and that argument essentially boils down to an argument that we had some affirmative duty to disclose these code violations to her.

Your Honor addressed this exact issue on summary judgment in *Jeffers Versus Tharpe*—I mean, the exact issue. And Your Honor granted summary judgment to the sellers—

THE COURT: And was affirmed—

MS. LOWE:—and was affirmed by the Fourth Circuit. The summary judgment was granted for sellers because Your Honor found that “as is, where is” provision that is clearly laid out in the sale document that is brought to the attention of the buyer and that is explained to the buyer serves as the waiver of the warranty of defects. That is abundantly—that is clear that has happen here.

The “as is” provision in this lease provides Tenant, in bold in all caps, “TENANT IS Accepting the property in “as is” CONDITION WITH ALL FAULTS.” No Representations or warranties have been made or are made and the responsibility has been or is assumed by landlord or Bar or by any member, manager, officer, director, person, firm, agent or representative acting or purporting to act on behalf of Landlord, or Bar as to the condition or repair of the property or the value, expense of operation, or income potential thereof or as to any other fact or condition which has or might affect the Property or the condition, the repair, value, expense of operation or income potential of the Property or any portion thereof.” I’ll save you from going through the whole thing.

The other “as is” provisions even provides that this property is sold “as is, where is” without any warranties whatsoever as to fitness or condition, whether expressed or implied, and Tenant

expressly waives the warranty of fitness and the guarantee against hidden or latent defects (defects in the property sold) which render it useless or render its use inconvenient or imperfect that Tenant would not have purchased it had it known of the vice or defect.”

Your Honor, in this case, it’s clear that “as is” clearly provided in the lease. It’s clear from the e-mails and text messages that she was also told this is an “as is” deal. It’s clear that—Your Honor found that the third element that’s explained is satisfied if you can prove that the buyer actually knew the “as is” provision existed.

Your Honor, we are also not dealing with the case where the Rouge House was unsophisticated, unrepresented party here. It had an attorney that reviewed this lease. If anybody had an obligation to explain the import of this “as is” provision, it was her attorney.

Your Honor, I believe your decision in Jeffers and you granting that summary judgment supports very clearly that we had no affirmative duty—

THE COURT: Talk to me about the rent issue, the rents?

MS. LOWE:—the rent issue, Okay.

Your Honor, again, the Rouge House has submitted no evidence that contradicts those material facts. Ms. Riley, the principle of the Rouge House, admitted in her deposition that she did sign this lease. She did agreed to \$25,000.00 a month in rent. She paid the additional first and last month with a \$50,000.00 deposit. She was in premise

from July, August, September, and October and didn't pay rent. We actually gave her three or four months to pay the rent and it wasn't until October that we finally were like, okay, we have to go forward with the eviction proceeding.

Your Honor, we think it's very clear in the lease that we are also—we're entitled—she was required to pay rent. She was required to pay the utility bills, and water bills, which were never paid.

The lease also provides that we're entitled to attorney's fees and cost for having to bring an action to collect on that rent that was owed.

And, Your Honor, again, just—and back to the “as is” condition of the property. The other cases that were cited by the Rouge House to support its position that the fraud and invalidated “as is” provisions also don't support the Rouge House's position. The Newton case—unfortunately, the Rouge House cited to the dissenting opinion, and the opinion in that case actually supports our position because that case found that a seller is under no duty to disclose defects that a reasonable prudent buyer could have discovered and should have discovered—

THE COURT: Let me hear what Ms. Riley has to say.

MS. RILEY: Good morning, Your Honor.

I am coming before you as pro se. I'm not an attorney—

THE COURT: I know—

MS. RILEY:—I won't be—very layman—hum—so, as I understand—

THE COURT:—you know, that's your choice, but you've got very able counsel up against you, so, you know, do what you want—

MS. RILEY:—I understand—

THE COURT:—we've been through this before I think—

MS. RILEY:—okay. right.

As I understand this particular procedure today, it's a summary judgment procedure. The purposes of that is to—a—for you to decide whether or not we get to have a—a actual trial which we have scheduled for May 8th, and that I'm suppose to show that there are issues with the material facts. That is my understanding of what this particular—so we are not—we are not having a hearing, and you know talking about the merits of the case and all of that—hum—so as it—

THE COURT: We are talking about whether or not you're going to be able to prove your case or not based on what's in front of me. So, tell why I shouldn't dismiss a reconventional demand and I shouldn't grant the summary judgment on the rents?

MS. RILEY: Well, in terms of—in terms of the evidence that was mentioned—brought before you and is before you, the plaintiffs failed to mention some of this key evidence, and I'll like to bring that to your attention.

It's Exhibit B. The plaintiff's memo doesn't address the notice of violation and the fact that when we had this—this negotiation phase, or this determining of the terms of this lease phase that, that was a discussion phase, and that the fact that the plaintiffs were in violation of City of New Orleans ordinances was not officially brought to my attention at the time, nor did they bring to my attention that they were barred from being able to operate.

The first day that I met the plaintiff's representative in front of witnesses, I described to them what my intentions were to be for that building. So, they knew I was relying on this property to operate a particular business in a particular way. At no time did they interrupt me and say, Major Riley, we understand how you want to use the building, please know that this building currently has a cease and desist order on it. This building has a cease and desist order on it. You can not operate your business because we are in a formal process with the City of New Orleans, City Attorneys, and we have to go before hearings, and if we lose those hearings, than this building will be taken and sold to someone else by City of New Orleans.

Now, they mentioned that I had an obligation to do some—some research. They mentioned that I had an attorney representative. Your Honor, I have and have submitted the evidence already that I not only spoke with the City of New Orleans, but I also documented in e-mail communication—that's in the records—I clearly explained how I would be—how I intended to use this property to

the city of New Orleans, to the plaintiffs, to the Safety and Permit's Office, as well as the Vieux Carre—

THE COURT: Vieux Carre commission—

MS. RILEY:—portion of safety and permits.

And—and at no point during that, that phase of between my doing the research on the property to the day we actually signed that lease on June 24th was I notified by any of those entities that this building would not be available to me to use it as I intended. That—and that is what I am saying in terms of I relied on the plaintiffs to disclose to me any faults and defects with—not just the physical location but also with the government agencies.

There is no way that I could—I could have known beyond what I attempted to find out for myself that they were sitting on a cease and desist order. I—I didn't know that and I had relied on them to tell me that. It's just as anyone would rely on an automobile dealership to let them know if a car is a lemon, or if it's been flooded. That has a huge impact on your decision on whether or not you're going to invest your hard earned money.

In this case, this was my life savings with my husband and I. This was our retirement after serving twenty-four (24) years for me and twenty-eight (28) years for him in the military. This is ours—our dream business. This isn't a location that we just haphazardly just decided to throw our life savings away for. If this had been disclosed to me, then I would have—I would have made a decision based on the information that

was reasonable and fair not to go into this endeavor.

Now, they are referring to text messages. I also relied very heavily on using the permit that, that business had pictures of in the premises next to the door to verify that they had all their permits in place. I asked them to used those permits until I got my own. Yes, in the text messages where we are negotiating and working out the terms of what would be then the contract, the representative, Ms. Dominique Dennoun, did say to me that the owners did not want to allow me to use their permits. I understood that. I have those text messages.

But we continued to try to work out a deal so that my needs could be met; their needs could be met; and again, that in my view is what that negotiation phase was for. And I wrote a letter—an e-mail to the plaintiffs on June 23rd when they asked me to prove my financial capability of handling a \$25,000.00 a month lease to purchase agreement. On June 23rd, within the hour, I responded today them. I don't have that kind of money, but I do have a plan which I had already presented to them, my business plan. I told them that based on the revenue that we would be making from the business. the business that I relied on them—or on that building to be able to provide me with the ability to operate that I was confident that I could take the money earned from operating and be able to pay that loan back. So, they knew beforehand that I relied on that—on that property. The next response that I

got from them was an e-mail, eight (8) days later, with the lease.

So, in my mind, when they asked me about can I handle the \$25,000.00 a months by having money stored in a bank account, my answer was no, but—but I could do it by relying on the building. Their next response was sending me the lease. It was in that lease I saw their response to my request, and that was to—that—that the plaintiff would transfer and cause to be transferred their Liquor Permit.

Now, in my interpret—that wasn't confusing to be. That's the same in my view as use their Liquor Permit until I got my own.

THE COURT: Okay. Ms. Lowe, I'm a little concerned about the cease and desist order.

MS. LOWE: Your Honor, the cease and desist order—all of the violations referred to were all code violations and they were all Vieux Carre Commission. One was there was red tint place on the windows of this building that the VCC wanted down; another one was there was cement around the side of the property that was busted up.

There were several code violations which was exactly why we were signing this "as is, where is" because we had no intention of remedying any of them.

The only—I'm not sure the cease and desist order she's talking about. We had a nuisance petition filed against the former business that was there. We paid a \$1,500.00 fine to get out of the

nuisance petition and have out alcohol license cleared. It's—

THE COURT: Yeah. I'm going to go ahead and grant the summary judgments—

MS. LOWE:—thank you—

THE COURT:—do you want to prepare the judgments for me—

MS. LOWE:—yes—

THE COURT: I don't really have any choice but to do it—

MS. LOWE:—I agree, Your Honor—

THE COURT:—so—

MS. RILEY: I don't understand?

THE COURT: Well, I'm dismissing your case based on the summary judgments, because I don't think you have enough evidence when you enter into something “as is” you take it as it is. I don't see any reasons not to grant them, so—

MS. LOWE: Okay. We'll prepare—We have a judgment actually today with regard to the—

MS. RILEY: If I may—

THE COURT: Don't interrupt. Let her finish and I'll let you talk—

MS. RILEY:—Your Honor—

MS. LOWE:—the dismissal of the claims in the reconventional demand. We also have an order with regards to our summary judgment on the rent also, but as we said we're entitled to attorney's

fees End cost. I'm not sure if we should submit it at another date—

THE COURT: Well, you can you say attorney's fees and cost, if you don't agree, you can amend later for the amount because I'm assuming we're going to have a hearing on that.

MS. LOWE: Okay. I'm going to hold off on that one, but I do have one for the reconventional demand. I several copies.

MS. RILEY: May I now?

THE COURT: Yes, of course.

MS. RITEY: When you refer to "as is, when is" they're specifically talking about physical defects with the building. I did not take issue with painting the building or repairing the sidewalk or any of those issues. I took issue with the fact that they sold the building to me and withheld the fact that I could not be able to use the building for the purposes that they knew I was purchasing it and—

THE COURT: I understand that, but you had—

MS. RITEY: . . .

[. . .]

**HEARING ON MOTION TO
CONTINUE THE EVICTION—
TRANSCRIPT EXCERPTS
(NOVEMBER 8, 2013)**

CIVIL DISTRICT COURT FOR THE PARISH
OF ORLEANS STATE OF LOUISIANA

308 DECATUR-NEW ORLEANS, LLC

v.

THE ROUGE HOUSE, LLC

Case Number: 2013-06136

Division G

Before: Hon. Robin M. GIARRUSSO, Presiding Judge.

[November 8, 2013, Transcript p.2]

THE CLERK: Number 24, 308 *Decatur-New Orleans*
vs. The Rouge House, LLC., Case No. 2013-09718.

MS. GAUTREAUX: Good morning, Your Honor. Jill
Gautreaux on behalf of 308 Decatur.

MR. WARNER: Channing Warner here on behalf of
the Rouge House, Your Honor.

THE COURT: All right.

MS. GAUTRENUX: Your Honor, this is a rule to evict—

THE COURT: Okay.

MS. GAUTRENUX:—we have personal service on The Rouge House, LLC through its agent for service of process on October 22nd, we're ready to proceed.

THE COURT: You're ready. Let's go ahead.

MS. GAUTREAUX: I'm pretty sure he has something to say about it—

THE COURT: Oh, okay—

MR. WARNER: Yes, Your Honor—

MS. GAUTREAUX:—that's Why I paused—

MR. WARNER: Channing Warner here on behalf of the defendant, The Rouge House. I was just hired on this matter official to represent them on yesterday evening. I filed my motion to enroll and a—with the Court.

What happen in this matter, Your Honor, with no fault to opposing counsel and myself. Both parties contracted to do parties—do business in New Orleans, but not being in New Orleans, and there were some things that were relied upon in that contract. It's just a little confusion. I've had the opportunity to speak to apposing counsel, and I don't think we are far apart from working things out and getting things back on track.

It's just—my client is on activity duty in the military right now. She's in a transitioning phase to fully be retired from the military. She should actually be finished within the next month, Your Honor.

MS. GAUTREAUX: Your Honor—

THE COURT: He seems to be asking me for a continuance. I didn't hear those words, but—

MR. WARNER: Yes, Your Honor—

MS. GAUTREAUX:—he is asking you for a continuance, Your Honor.

And I'm sure this probably not the first time that you've heard this in the contexts of an eviction case. But there's not a lot of credibility that is going on between our two parties. It's been our experience that this particular principle of this LLC would say and do anything in order to get what she needs. It's not with just us. It's with the city. It's with the neighborhood.

She was served personally on October 22nd. So, she was in town as of two weeks ago.

According to the Sailors and Servicemen's Act, if she is in fact seeking a continuance on the grounds of the fact that she's on activity duty, she suppose to provide a letter stating the facts quoting the manner in which the current military duty requirement material effects the service, members ability to appear and stating a date when the service member will be available to appear, and also a letter from the service member's commanding officer stating that the service member's current military duty prevents her appearances, and that military leave is not authorized for the service member at the time of the letter.

Also there's no prohibition against an eviction of an activity duty service member, because this is not a residential property. It's a commercial property. In addition, this is an LLC and there is another manager of the LLC who is local. She is not the only manager of the LLC.

THE COURT: Let me ask one other question, though—

MS. GAUTRENUX: Okay—

THE COURT:—because, you know, when I first ran for office, which was a lot longer time ago than I care to admit, every lawyer that I've ever talked to about campaigning said to me, Judge, please don't forget what it's like to be a lawyer.

Now, it's not his fault that he just got retained last night, but how do I make somebody go to trial, who just got retained last night, and what harm—I'm not going to wait a month, or two months, or whatever, but What harm does it do to your client to wait two more weeks to let him get up to speed to a certain point?

MS. GAUTREAUX: The problem with two more weeks is the fact that I start a jury trial on the 18th—

THE COURT: Okay—

MS. GAUTREAUX:—and that's a week long juror trial.

THE COURT: And you'll work on Friday also?

MS. GAUTREAUX: Yes.

THE COURT: Okay.

MS. GAUTREAUX: It's a week long jury trial.

THE COURT: Right. I understand. We don't do jury trials on Friday in Orleans Parish, so I'm—generally, I should say—

MS. GAUTREAUX: She has a rule day in the morning and we would go into the afternoon. It's Judge Julien?

THE COURT: Oh, then, you can be here in the morning for an eviction hearing.

MR. WARNER: And, Your Honor, I think the contract actually workouts to her client's benefit. My client has sunk \$150,000 into his property—

THE COURT: I don't want to hear about the merits—

MR. WARNER:—okay. No problem.

But, she does want to move forward—

THE COURT:—but she's—she's absolutely correct in what she's saying About the military thing—

MR. WARNER:—yes, Your Honor—

THE COURT:—the only reason I'm continuing this until November 22nd, and I'm going to set it for ten o'clock (10:00), and if I'm in the middle of some other rules, we'll stop, because it's going to take testimony so you're not late for your trial for Judge Julien, because I don't want you to get you in any trouble. If y'all can't work it out by then, but I intend on hearing it on November 22nd. It's not just fair to him when he just got hired.

MR. WARNER: Thank you, Your Honor.

THE COURT: I mean, you know, it maybe 10:05 but I'll do it my best to do it quickly.

MS. GAUTREAUX: No problem. I appreciate that. And so are you waiving service?

MR. WARNER: Yes. I'll waive service as well.

MS. GAUTREAUX: All right. I appreciate it.

THE COURT: Okay.

(End of Proceedings)