

SCANNED ON 10/6/2006  
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **WILLIAM CAHN**

PART 99

Index Number : 604313/2005

JRK FRANKLIN LLC

vs

163 EAST 87TH STREET

Sequence Number : 001

DISMISS ACTION

*C*

INDEX NO. \_\_\_\_\_

MOTION DATE 3/13/06

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE \_\_\_\_\_ FOR THE FOLLOWING REASON(S):

**MOTION IS DECIDED IN ACCORDANCE™  
WITH ACCOMPANYING MEMORANDUM  
DECISION IN MOTION SEQUENCE .....**

**FILED**  
OCT 06 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 10/3/06

*William Cahn*

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 49

-----X  
JRK FRANKLIN, LLC,

Plaintiff,

-against-

Index No. 604313/05

164 EAST 87<sup>TH</sup> STREET LLC,

Defendant.  
-----X

**Herman Cahn, J.:**

Defendant 164 East 87<sup>th</sup> Street LLC (landlord) moves to dismiss the within action in its entirety pursuant to the terms of a commercial lease, as amended, CPLR 3211 (a) (1). Plaintiff JRK Franklin, LLC, (tenant) cross-moves for partial summary judgment on the first cause of action for a judicial declaration that it bears no contractual obligation to pay additional rent consisting of certain real estate taxes, CPLR 3211 (c).

**The Facts:**

Pursuant to a commercial lease dated October 27, 1992, landlord's predecessor leased certain premises, known as the Franklin Hotel, and the land beneath it, located at 164 East 87<sup>th</sup> Street in Manhattan (the hotel premises) to tenant's predecessor, for a 25-year term. The lease obligates the lessee (plaintiff-tenant) to pay basic minimum monthly rent and additional rent consisting of, among other things, a portion of certain real estate taxes.

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At the time the lease was negotiated and executed, the hotel premises were part of a single zoning and tax lot designated as block 1515, lot 46, (old lot 46). Old lot 46 also included a parking garage, known as the Allen Garage, abutting the hotel premises and located at 152-160 East 87<sup>th</sup> Street. The lease obligates the lessee to pay 1/8th of the real estate taxes assessed on the entire lot, as long as the hotel premises remained part of old lot 46 (see Lease, ¶ 4 [b]).

On October 18, 1996, the parties' predecessors amended the lease to facilitate the future separate sale or transfer of the hotel premises and the garage. Pursuant to the amendment, landlord was accorded the unilateral right to apply for the subdivision of old lot 46 into two independent tax lots (see Lease Amendment, ¶ 6). With regard to the payment of taxes after the subdivision, the lease, as amended, provides that "[u]pon the legal creation of such tax lot [for the hotel premises] and the assessment of Taxes thereon, Tenant shall pay and discharge 100% of the Taxes on the Premises in accordance with the Lease (as amended by this Amendment) without regard to" the 1/8th allocation of taxes originally attributed to the hotel premises (Lease Amendment, ¶ 4 [e] [i]; see Lease, ¶ 4 [b]).

On October 30, 2002, the hotel premises and the garage were separately sold and transferred to different owners. The hotel premises were purchased by defendant-landlord, here.

Subsequently, on March 19, 2003, landlord filed a work approval application with

the New York City Department of Buildings (Buildings Department) to effect a zoning and tax lot subdivision of old lot 46 into two separate lots, one consisting of the hotel premises and the other, of the garage. The Buildings Department tentatively approved the subdivision on August 21, 2003.

By letter dated February 11, 2005, the Manhattan Borough President's Office assigned a new address to the hotel premises and designated its location as block 1515, lot 45 (new lot 45). The garage remained designated as block 1515, lot 46, (new lot 46). The letter was filed with the Buildings Department which, in turn, notified the City Department of Finance (Finance Department) of the creation of the two separate lots. On September 18, 2005, the Finance Department Surveying Bureau finalized the revision of the New York City Tax Map to include the two new tax lots.

Subsequently, on October 20, 2005, the Finance Department issued a real estate tax bill to landlord demanding payment of \$151,589.52 in real estate taxes on the hotel premises, as a newly created separate tax lot, for the second half of the 2005-06 tax year. On November 21, 2005, the Finance Department issued a revised tax bill, reducing the amount of the tax demanded to \$148,284.42. Had the subdivision not occurred, and pursuant to the terms of the original lease, tenant would have been responsible for payment of \$77,366, (1/8th of \$618,000, the total real estate taxes due on old lot 46 for the 2005-06 tax year).

The Finance Department also issued a separate real estate tax bill for the garage

(new lot 46) for the same time period. The hotel premises' taxes are equal to slightly less than half of the total tax originally assessed against old lot 46.

Upon receipt of the hotel premises tax bill, landlord advised tenant for the first time that old lot 46 had been subdivided and that real estate taxes had been imposed on new lot 45 by the Finance Department. Landlord also submitted the tax bill to tenant and demanded payment of additional rent equal to 100% of the amount billed, offset by the amount held in a tax escrow account by landlord.

Tenant paid the \$94,088.60 demanded, together with an amount sufficient to cover the increased tax escrow account amount, "under protest," reserving its right to contest its contractual obligation to pay on a variety of grounds. These grounds included landlord's claimed breach of its express and implied obligations to act in good faith and deal fairly under the lease, as amended, and tenant's lack of contractual obligation to pay the additional rent. Tenant contended that it had no such obligation on grounds that the Finance Department had not newly assessed new lot 45 and had no statutory authorization to do so inasmuch as old lot 46 had not been subdivided prior to June 1.

**The Within Action:**

Tenant commenced this action for return of the \$94,088.60 which it paid to landlord under protest and the \$15,512.62 deducted on December 1, 2005, from the tax escrow account. In the first cause of action, tenant seeks a judgment declaring that it is not obligated by terms of the lease, as amended, to pay additional rent consisting of real

estate taxes assessed against the hotel premises for the second half of the 2005-06 tax year on the ground that the Finance Department had not newly assessed the taxes due on new lot 45 at the time it issued the tax bill. In the second cause of action, tenant asserts a claim for breach of landlord's express and implied obligations of good faith and fair dealing under the lease, as amended, by failing to allegedly timely notify tenant of the proposed subdivision, thereby allegedly denying tenant the opportunity to provide landlord and the Finance Department financial information that would have supported a "correct" apportionment of the assessed valuation and real estate taxes as between the two newly created lots. On this claim, tenant seeks to recover an amount in excess of \$125,000, consisting of compensatory damages for the allegedly improper apportionment of taxes and damages arising from the effects of that apportionment in succeeding tax years.

**The Motion:**

Landlord now seeks dismissal of the first cause of action for a declaratory judgment on the ground that the lease, as amended, expressly obligates tenant to pay 100% of the real estate taxes assessed against the hotel premises as a separate tax lot for the second half of the 2005-06 tax year.

In opposition, tenant contends that the motion must be denied because the lease terms upon which it is premised are subject to conflicting interpretations.

On a motion addressed to the sufficiency of the pleadings, the court must accept

every factual allegation as true, and liberally construe the allegations in the light most favorable to the pleading party (Guggenheimer v Ginzburg, 43 NY2d 268 [1977]; see CPLR 3211 [a] [7]). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory" (Leon v Martinez, 84 NY2d 83, 87-88 [1994]). Further, a dismissal pursuant to CPLR 3211 (a) (1) "is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (id. at 88; Goshen v Mutual Life Ins. Co. of New York, 98 NY2d 314 [2002]).

The 1996 amendment to the lease to facilitate the future creation of separate tax lots for the hotel premises and garage provides:

Landlord may elect to cause the [Hotel] Premises to be assessed as a single tax lot (which tax lot would comprise the [Hotel] Premises and no other real property). Tenant shall reasonably cooperate with the Landlord in connection therewith, except that Tenant shall not be obligated to incur any obligation or liability or expend any sums in respect thereof. Upon the legal creation of such tax lot and the assessment of Taxes thereon, Tenant shall pay and discharge 100% of the Taxes on the Premises in accordance with this Lease without regard to the [1/8th] allocation set forth in the first two sentences of paragraph (b) of this Section.

(Lease Amendment, ¶ 6 [a] [emphasis added]; see Lease, ¶¶ 4 [b], 4 [c]).

Thus, the lease, as amended, in clear and unambiguous terms, obligates tenant to pay 100% of the real estate taxes levied against the hotel premises upon the occurrence of two conditions. One, the legal creation of a separate tax lot for the hotel premises, and two, the assessment of taxes on the newly created tax lot.

The parties agree that the lease, as amended, accords landlord the unilateral right to apply to subdivide old lot 46, and that the lot was subdivided and a new lot consisting solely of the hotel premises was legally created. Therefore, the first condition precedent to tenant's payment obligation has been satisfied.

The parties dispute, instead, whether the second condition precedent – the assessment of taxes – had occurred prior to the time that the Finance Department issued the hotel premises tax bill for the second half of the 2005-06 tax year.

Essentially, the parties dispute the meaning of the term, "assessment of Taxes," as used in paragraph 4 (c) of the lease, as amended. "Whether or not a writing is ambiguous is a question of law to be resolved by the courts" (W.W.W. Associates, Inc. v Giancontieri, 77 NY2d 157, 162 [1990]). The court notes that neither side has submitted an affidavit from any of the drafters of the lease or lease amendment regarding the intended meaning of the term.

Landlord contends that the term merely requires that a tax bill for new lot 45 be issued by the Finance Department. Tenant contends that the term requires the performance by the Finance Department of a tax assessment, or, assessed valuation, as defined by the New York City Charter, (see New York City Charter § 1506 [defining "assessment" as "a determination by the assessors of (a) the taxable status of real property as of the taxable status date; and (b) the valuation of real property, including the valuation of exempt real property, and where such property is partially exempt, the valuation of

both the taxable and exempt portions"]; see Real Property Tax Law § 102 [2]).

**Decision:**

There is no dispute that the tax bill for the second half of the 2005-06 tax year was not based on an assessed valuation of the hotel premises as a separate tax lot as that term is defined in the City Charter, supra. Rather, the tax bill was based on an apportionment of the total tax assessed against old lot 46.

The well-established law of contract interpretation provides that:

In interpreting a contract, the intent of the parties governs. A contract should be construed so as to give full meaning and effect to all of its provisions. Words and phrases are given their plain meaning. Rather than rewrite an unambiguous agreement, a court should enforce the plain meaning of that agreement. Where the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law and the case is ripe for summary judgment. On the other hand, if it is necessary to refer to extrinsic facts, which may be in conflict, to determine the intent of the parties, there is a question of fact, and summary judgment should be denied.

(American Express Bank Ltd. v Uniroyal, Inc., 164 AD2d 275, 277 [1<sup>st</sup> Dept 1990], lv denied 77 NY2d 807 [1991] [internal citations omitted][(emphasis added)]; South Rd. Assocs. v IBM Corp., 4 NY3d 272 [2005]). The principle that a contract should be enforced according to its clear and complete terms "is particularly important 'in the context of real property transactions, where commercial certainty is a paramount concern, and where . . . the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length'" (South Rd. Assocs. v IBM Corp., 4 NY3d at 277,

quoting Vermont Teddy Bear Co. v 538 Madison Realty Co., 1 NY3d 470, 475 [2004]).

Interpreting the lease, as amended, as a whole, as we must (see New York Overnight Partners, L.P. v Gordon, 217 AD2d 20 [1<sup>st</sup> Dept 1995], affd 88 NY2d 716 [1996] [interpreting the term "land" based on its use throughout the contract]), it is evident that the plain and unambiguous meaning of the disputed term, "assessment of Taxes," refers to taxes levied by the Finance Department against the hotel premises and not to an assessed value issued by the Finance Department, as defined by the Charter. Neither the Charter nor the Administrative Code of the City of New York (Administrative Code) or any other statute, rule, or regulation governing the assessment of taxes is expressly incorporated into the lease, as amended. Indeed, the lease, as amended, contains no reference to any of the statutes, rules, or regulations cited by tenant. Further, nothing in the lease, as amended, may be construed as requiring that the disputed term be defined by its statutory definition, or that the Finance Department perform certain specific statutory procedures, before tenant will become obligated to pay the tax assessed against the hotel premises it had leased. "Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing" (W.W.W. Associates, Inc. v Giancontieri, 77 NY2d at 162).

Moreover, the interpretation of the word, "assessment," as "levy" is supported by the contracting parties' use of the words, "assessed" and "assessment," in paragraph 4 (a) of the lease, which remained unchanged by the 1996 lease amendment, in a list of clearly

synonymous and interchangeable words. The paragraph provides, in relevant part, that:

Tenant shall, during the term of his [sic] lease, pay and discharge punctually . . . all taxes, special and general assessments . . . and other governmental impositions and charges of every kind and nature whatsoever, extraordinary as well as ordinary (collectively, 'Taxes') . . . which shall or may during the term of the lease be charged, levied, laid, assessed, imposed, become due and payable . . . with respect to the premises.

(Lease, ¶ 4 [a] [i] [emphasis added].) The paragraph similarly obligates tenant to pay "all other charges levied, assessed, imposed, or otherwise payable in respect of the Premises . . . [for services] furnished to the Premises or occupants thereof during the term of this lease" (id., ¶ 4 [a] [ii] [emphasis added]).

Tenant next contends that it can bear no legal obligation to pay the subject taxes on the ground that the Finance Department lacked the statutory authority to apportion the 2005-06 tax assessment applicable to old lot 46 because the lot was subdivided after June 1, (citing Charter § 1513). Whether the Finance Department acted appropriately in apportioning the tax due during that period is not relevant to tenant's obligation to pay real estate taxes in accordance with the terms of the lease, as amended.

The separate real estate tax bills for new lots 45 and 46 issued on October 20, 2005, by the Finance Department conclusively demonstrate that the Department had assessed taxes for the second half of the 2005-06 tax year against the hotel premises, as a separate tax lot.

For the foregoing reasons, that branch of landlord's motion to dismiss the first

cause of action for a declaratory judgment is granted to the extent that the court declares that tenant is bound by the lease, as amended, to pay 100% of the real estate taxes assessed, or, levied, against the hotel premises (new lot 45) for the second half of the 2005-06 tax year. Tenant's cross motion for partial summary judgment on the first cause of action is denied to the same extent.

Landlord next seeks dismissal of the second cause of action for breach of contract, contending that the undisputed documentary evidence conclusively demonstrates that it did not breach any of its express or implied obligations under the lease, as amended.

In opposition, tenant contends that the undisputed evidence demonstrates that landlord breached the lease, as amended, by acting in bad faith in failing to notify tenant of the proposed subdivision, to request that tenant provide it with financial information to be submitted to the Finance Department in connection with the subdivision application process, and to provide accurate financial information about the garage's operations to the Finance Department to facilitate an accurate apportionment of taxes between new lot 45 and new lot 46.

The lease, as amended, does not impose on landlord any obligation to notify tenant of landlord's contractually permissible election to apply for subdivision of old lot 46. Nor does it afford tenant an opportunity to provide the Finance Department with financial information relating to the apportionment of taxes for the proposed subdivided lots. Instead, the lease, as amended, merely provides that "[l]andlord may elect to cause the

Premises to be assessed as a single tax lot . . . Tenant shall reasonably cooperate with Landlord in connection therewith" (Lease Amendment, ¶ 6 [a]). Whatever obligation to cooperate there is, is placed on tenant.

Further, the subdivision application form and related documents required by the Finance Department and submitted by landlord did not require any such notice to tenant, tenant's participation in the process, or the submission of any financial information, either by landlord or tenant. The form required landlord to provide its names and addresses and that of its authorized representatives, a description of the property, a description in words of the proposed subdivision, and a diagram of the proposed subdivision, together with a deed from the former owner of old lot 46 conveying the hotel premises portion of the lot to landlord, a completed application to the Buildings Department to subdivide old lot 46 into two new lots, and a proposed revised section of the City Tax map reflecting the proposed subdivision.

Given that the submission of financial information was not required during the subdivision application process, tenant's contention that landlord intentionally failed to file accurate real property income and expense (RPIE) forms with the Finance Department in violation of statute<sup>1</sup> is not relevant to the issue presented here.

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<sup>1</sup>Section 11-208.1 of the Administrative Code of the City of New York provides that "[w]here real property is income-producing property, the owner shall be required to submit annually to the [Finance Department] not later than the first day of September a statement of all income derived from and all expenses attributable to the operation of such property." Owners of income-producing properties with tax assessments over \$40,000 are required by statute to file annual real property income and expense (RPIE) forms with the Finance Department (see 19

In any event, the court notes that landlord has produced copies of completed RPIE forms for old lot 46 for the 2005-06 tax year. The RPIE forms require a landowner, rather than a tenant, to report the income realized and expense incurred, as the owner of the real property (see RPIE instructions, Part II, § J). Tenant does not dispute landlord's contention that landlord provided this information accurately.

For these reasons, that branch of landlord's motion to dismiss the branch of the second cause of action for breach of an express duty imposed by the lease, as amended, is granted.

Next, the parties dispute whether the implied duty of good faith and fair dealing present in the lease, as amended, imposed upon landlord duties to advise tenant of the proposed subdivision and to provide an opportunity for submission of financial information regarding the separate financial operations of the hotel premises and the abutting garage.

A covenant of good faith and fair dealing in the course of performance is implied in every contract (see Wood v Lucy, Lady Duff-Gordon, 222 NY 88 [1917]). Under the implied covenant, contracting parties are precluded from taking any action "which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (Kirke La Shelle Co. v Paul Armstrong Co., 263 NY 79, 87 [1933]).

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RCNY § 33-01 [b] [2] [i]). In the RPIE form, the Finance Department requires hotel owners to provide specific information, including number of rooms, occupancy rates, and rates for the different types of rooms.

However, the covenant is not without limits, and "[n]o obligation can be implied . . . which would be inconsistent with other terms of the contractual relationship" (Dalton v Educational Testing Serv., 87 NY2d 384, 396 [1995], quoting Murphy v American Home Prods. Corp., 58 NY2d 293, 304 [1983]). Therefore, "a party who asserts the existence of an implied-in-fact covenant bears a heavy burden, for it is not the function of the courts to remake the contract agreed to by the parties, but rather to enforce it as it exists. Thus, a party making such a claim must prove not merely that it would have been better or more sensible to include such a covenant, but rather that the particular unexpressed promise sought to be enforced is in fact implicit in the agreement viewed as a whole" (Rowe v Great Atl. & Pac. Tea Co., 46 NY2d 62, 69 [1978]). Tenant has failed to sustain its burden of proof.

The provision upon which tenant relies to create the implied duties does no more than authorize landlord to unilaterally apply for the subdivision and obligate tenant to reasonably cooperate with the application process (see Lease Amendment, ¶ 6 [a]). The provision does not impose upon landlord any duty to affirmatively act, or refrain from acting. In addition, the affirmative obligation to cooperate imposed on the tenant cannot be stretched to incorporate a duty on behalf of landlord to notify tenant that it intended to begin the subdivision application process or to accord tenant the opportunity to submit financial information. Last, an obligation to pay 100% of the taxes levied on the demised premises cannot be held to deprive tenant of the benefit of its bargain.

On these grounds, and contrary to tenant's strenuous contention, implied duties to notify tenant and to permit tenant to submit financial information cannot be inferred from the terms of the lease, as amended.

Therefore, that branch of landlord's motion to dismiss the branch of the second cause of action for breach of the implied covenants of good faith and fair dealing imposed by the lease, as amended, is granted.

Accordingly, it is

ORDERED that the branch of defendant 164 East 87<sup>th</sup> Street LLC's motion to dismiss the first cause of action is granted to the extent that the court declares that the terms of the lease, as amended, obligate plaintiff JRK Franklin, LLC, to pay 100% of the real estate taxes for the second half of the 2005-06 tax year assessed, or, levied, by the Finance Department, and that both conditions precedent to the payment obligation have occurred; and it is further

ORDERED that the branch of the motion to dismiss the second cause of action for breach of the lease, as amended, is granted and that claim is dismissed; and it is further

ORDERED that plaintiff JRK Franklin, LLC's, cross motion for partial summary judgment on the first cause of action is denied in accordance with the declaration above.

This constitutes the decision and order of the court.

Dated: October 3, 2006

ENTER: \_\_\_\_\_



J.S.C.

**FILED**  
OCT 06 2006

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