SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CC Ram **Justice** **PART** 53

Index Number : 651403/2012
TOYS R US-DELAWARE, INC.
vs.
44-45 BROADWAY REALTY CO., LLC
SEQUENCE NUMBER : 002
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____
Answering Affidavits — Exhibits _____ **No(s).** _____
Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with
accompanying memorandum decision and order.

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

Dated: 1/2/13

CHARLES E. RAMOS, J.S.C.

1. **CHECK ONE:** ..... ☑ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☑ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION
----------X
TOYS "R" US-DELAWARE, INC.,

Plaintiff,

Index No. 651403/2012

-against-

44-45 BROADWAY REALTY CO., LLC,

Defendant.
----------X

Charles E. Ramos, J.S.C.:

This action, which seeks, among other things, to recover 12 years of the plaintiff-tenant's share of real estate taxes paid to the defendant-landlord is hereby dismissed.

The plaintiff contends that the provision in the lease that requires the tenant to pay taxes levied against its own trade signs by the City of New York excuses it from having to pay its agreed to proportionate share of the real estate taxes for the entire building.

Discussion

In the first instance, there is no dispute that both the parties are highly sophisticated, are experienced in commercial real estate and were well represented in the negotiations and execution of the lease to the premises.

It is also undisputed that the plaintiff has paid its proportionate share of real estate taxes pursuant to the standard real estate tax escalation clause contained in the lease for the past 12 years without objection.

The language of the lease is unambiguous. The lease contains a standard real estate tax escalation clause under which

plaintiff is required to pay its proportionate share of any increase in real estate taxes imposed on the building above those imposed during the "Base Year." Pursuant to this clause, the plaintiff has paid its real estate tax escalation obligation.

The signage tax clause that plaintiff relies on provides: "If Taxes are assessed against signs on the Building, or if there shall be a separate assessment with respect to signs on the Building, Tenant shall be required to pay the Taxes levied with respect to Tenant's signs, but not Taxes levied with respect to any other signs on the Building."

It is also undisputed that the plaintiff has not been required to pay the signage taxes for any other tenants. Those other tenants were separately billed for those taxes.

The plaintiff contends that the signage tax clause modifies its obligation to pay its share of real estate taxes imposed on the Building because income derived from signs affixed to the Building by all tenants is used by the City of New York to determine the taxes assessed against the entire Building. Thus plaintiff argues that the landlord is wrongfully charging it for taxes assessed against the signs of the other tenants.

The plaintiff is conflating income derived from signs with taxes charged by the City. It argues that the lease, by implication, provides for a tax adjustment to be made by the defendant by somehow determining how and to what extent the City of New York computes the total real estate tax on the building based in part on rental income for the signs of the other tenants

in the building. However, the plaintiff cannot credibly argue that it is being required to pay "Taxes levied with respect to any other signs on the Building," that is, its neighbor's signage tax.

As the defendant points out, the contractual obligation to pay a defined portion of real estate taxes imposed on the building has nothing to do with taxes imposed against signs or the income derived from those signs (or for that matter, the source of any income).

When this Court inquired of the plaintiff's counsel if there was any evidence other than the language of the lease to form a basis upon which this Court can conclude that plaintiff's contention was correct, the answer was "No." At that point, this Court suspended further argument on this case and has rendered its decision based on the written materials submitted on this motion.

It is this Court's opinion that the plaintiff's complaint approaches frivolity. The lease is clear and any reasonable application of the tax provisions of the lease does not implicate any adjustment as the plaintiff seeks. If these parties had intended such a result, they would have drafted the lease appropriately.

This Court need not address the other agreements put forward by the defense.

Counsel and their clients are admonished to consider that the citizens of this State pay a considerable sum to finance the

operations of the Unified Court System. The record reveals that this action was commenced in the midst of lease renewal negotiations. Litigation, with its expense and uncertainty, has been used from time to time, as part of a negotiating strategy in circumstances similar to this case. If such a strategy was being utilized here, it would represent an abuse of the judicial process and to the taxpayers of this State, to add insult to injury.

This State's finances are in a deplorable condition. Its resources are being stretched thin to the point where the needs of its citizens are imperiled. If counsel and their clients in this case are litigating in bad faith, they are depriving others far less well off of a proportionate share of the services the public relies on...health care, education, fire protection, police protection...the list goes on and on.

The Bar is hereby reminded that this Court and the Unified Court System as a whole, rely on counsel to act as gate-keepers to prevent meritless claims from frittering away this State's ability to meet its more pressing needs.

As for this dispute, even if the calculation sought by the plaintiff was possible to make, the lease is clear and unambiguous. There is nothing in the documents submitted that remotely suggest that the parties intended the result sought by the plaintiff.

Accordingly, this complaint is dismissed with prejudice.

Dated: January 2,2013. _____ J.S.C.

CHARLES E. RAMOS