

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

Charles Edward Ramos

53

PRESENT.

PART _____

Index Number : 603653/2004

ONE FORDHAM PLAZA

vs

HOUSING AUTHORITY

Sequence Number : 001

SUMMARY JUDGMENT

C

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

Is decided in accordance with accompanying memorandum decision and order.

FILED
NOV 13 2006
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/11/06

CHARLES E. RAMOS

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION
-----X
ONE FORDHAM PLAZA, LLC,

Index No. 602950/04

Plaintiff,

-against-

NEW YORK CITY HOUSING AUTHORITY,

Defendant.
-----X

Charles Edward Ramos, J.S.C.:

In motion sequence 001, defendant New York City Housing Authority (the "NYCHA") moves pursuant to CPLR 3212 for summary judgment on the grounds that, as a matter of law, the complaint fails to state a cause of action. In motion sequence number 002, plaintiff, One Fordham Plaza, LLC ("Fordham"), also moves pursuant to CPLR 3212 for summary judgment as it alleges that, as a matter of law, NYCHA is obligated to pay its share of all levied and paid Contingent Tax Rent prior to, and during, NYCHA's tenancy.

Background

Plaintiff Fordham, is suing to recover damages for NYCHA's alleged breach of the parties' Lease at One Fordham Plaza, Bronx, New York. Fordham seeks to recover from NYCHA its alleged proportionate share of payments in lieu of taxes ("Contingent Tax Rent") i.e. taxes, assessments and other governmental charges assessed or levied against the building.

Fordham's predecessor, Fordham Renaissance Associates ("FRA"), was a tenant of the Commercial Redevelopment Corporation ("FCRC") in a commercial space in the building known as One

Fordham Plaza, Bronx, New York. FCRC leased the building to FRA pursuant to a Master Lease dated September 30, 1984 ("Master Lease"). Fordham then leased the third and fifth floors to NYCHA pursuant to a written Lease Agreement ("the Lease") dated October 7, 1999. The matter in dispute concerns the "Contingent Tax Rent" allegedly payable by NYCHA, as Fordham's tenant under the Lease, to Fordham.

Article VI of the Lease, Section 6.1¹ states that impositions are:

[A]ny tax(es), assessment(s) and all other governmental charges assessed, levied, or imposed against the Building or any part or element of the Building, including the (Demised Premises [...] Impositions include any amounts payable in lieu of taxes ("PILOT Payments") that Landlord is required to pay pursuant to chapters 5.4 (relating to Minimum Tax Rent, as such term is defined in the Master Lease) or 5.5 (relating to Contingent Tax Rent, as such term is defined in the Master Lease) of the Master Lease.

The Master Lease contains a schedule for the accrual of Contingent Tax Rent, known as Payments in Lieu of Taxes ("PILOT Payments") which Fordham was obligated to pay during the first 20 years of its lease term. Section 5.5.1 of the Master Lease provides that:

Tenant shall be obligated to pay Contingent Tax Rent to the

¹ The remainder of Section 6.1 provides a series of defined terms which the Lease uses to calculate a final payment formula in Section 6.2(A). The formula provides as follows:

If Impositions for any Lease Year subsequent to the Base Impositions shall exceed the Base Impositions Amount, Tenant shall pay the Impositions Contribution to landlord for such Lease Year upon the terms and conditions hereinafter set forth [...] Tenant shall make payments to landlord on account of Impositions Contributions for the then current Lease Year [...]

extent of the balance of Available Cash in accordance with subsection 4.4.3(b) with respect to the part of the Occupancy Term that expires at the end of the twentieth Lease year but not thereafter.

Under the Master Lease, Fordham's payments became due when it had "Available Cash," i.e. a certain amount of cash flow became accessible.² Fordham argues that this provision is merely a condition precedent to the payment while NYCHA asserts that it is a means for Fordham to defer payments until cash becomes available.

Fordham began to pay Contingent Taxes Rent in 2001. The Housing Lease term commenced November 18, 1999. In 2002, Fordham billed NYCHA for its proportionate share of the Contingent Tax Rent that accrued in 2001 which NYCHA paid. In 2003, Fordham billed NYCHA for its proportionate share of the 2002 Contingent Tax Rent, as well as for the 1996 and 1997 Contingent Tax Rent together with accrued interest. NYCHA objected in a letter dated April 9, 2004, asserting that it was "disputing payment of the pro rata share of 1996 and 1997 Contingent Tax Rent since it is for tax years prior to the Authority's tenancy."

In 2004, Fordham billed NYCHA for its proportionate share of 2003 Contingent Tax Rent as well as for the balance of the Contingent Tax Rent for 1997, 1998, 1999 and 2000, together with interest that had accrued on the deferred payments. NYCHA

² Section 4.5.4 of the Master Lease provides that "Available Cash" is required to be audited annually so that FCRC, the landlord under the Master Lease, could reliably determine if Fordham had Available Cash and therefore incurred an obligation to pay the Contingent Tax Rent.

remitted its proportionate share of the Contingent Tax Rent for 2003 and for 2000, with accrued interest; yet, objected once more to the Contingent Tax Rent and interest which accrued prior to its tenancy.

On October 28, 2004, plaintiff commenced this action against NYCHA. Plaintiff alleges that under the Lease, it is entitled to recoup from NYCHA \$592,337.70 representing its proportionate share of the Contingent Tax Rent, 14.03% and interest that accrued prior to the commencement of NYCHA's Lease beginning in 2000.³ Defendant asserts that it fully paid its pro rata share of the Contingent Tax Rent for the years 2000-2004 that have come due during the period of tenancy.

Defendant argues that Fordham owed this Contingent Tax Rent for years prior to the commencement of NYCHA's lease but had deferred payment until after NYCHA took occupancy. NYCHA further asserts that the complaint should be dismissed on the following grounds: (1) plaintiff failed to serve NYCHA with a notice of default as required by the Lease and is therefore barred from suing to recover damages for such alleged default; (2) plaintiff failed to file a notice of claim pursuant to Public Housing Law ("PHL") §157 which is a condition precedent to commencing an action against NYCHA as well as failed to plead compliance with

³ Plaintiff alleges that NYCHA is liable for (i) \$210,883.67 representing Fordham's Contingent Tax Rent alleged obligations from 1996-2003 under the Master Lease, plus interest at the CPLR rate from June 1, 2003 to the date of judgment, and (ii) \$330,972.46 representing 14.03% of Fordham's invoices paid to the City of New York plus interest at the CPLR rate from May 15, 2004 to the date of judgment.

PHL §157; and (3) under the parties' Lease, plaintiff is not entitled to seek reimbursement from NYCHA for Contingent Tax Rent which accrued in the years prior to the date on which NYCHA's lease term commenced and prior to the date on which it took occupancy of the leased premises.

Plaintiff argues that NYCHA's obligation to contribute to the payment of Contingent Taxes is dependent upon the year when the tax is levied by the City of New York and paid by Fordham. Further, Fordham asserts that the Lease did not explicitly require a written notice of default separate from the written notice commencing this action. Fordham claims that, in any case, a separate written default notice was given on March 24, 2006. Plaintiff argues that NYCHA has not cured its default in response to the notice and thus it has proceeded with this action accordingly.

Discussion

In order to grant summary judgment, the court must determine whether a material and triable issue of fact exists. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957). If movant establishes his or her prima facie case, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a material issue of fact that requires a trial. *Winegrad v New York Medical Univ. Med. Cen.*, 64 NY2d 851 (1985). When deciding a motion for summary judgment, the court must view the evidence in a light most favorable to the party opposing the motion and must give that party the benefit of

every inference which can be drawn from the evidence. *Assaf v Ropog Cab Corp.*, 153 AD2d 520 (1st Dep't, 1989).

Service of Notice of Default

NYCHA argues that Fordham never served a notice of default as required by Paragraph 16.1(a) of the Lease prior to commencing this action thereby failing to provide NYCHA with an opportunity to cure the alleged breach. Fordham counters that the requirements of a written notice have been met by service of the Summons and Complaint as well as a letter dated March 24, 2006.

Prior to commencing an action, Fordham was obligated by Article 16.1(A) to serve a notice of default. Section 16.1(A) of the Lease states that a default exists when:

[a] failure to make any payment of Rent to landlord on the date on which any such payment is to be made, which failure continues for more than fifteen Business days after written notice by Landlord to tenant [constitutes] such failure.

The issue is whether Section 16.1's fifteen days requires a written notice following an opportunity for NYCHA to cure its alleged breach or, as Fordham argues, requires a written notice of a failure. This Court is compelled to conclude that the fifteen day time period following the notice constitutes NYCHA's opportunity to cure its alleged failure to pay the Contingent Tax Rent. As Fordham believes that the fifteen days does not, it asserts that Section 16.2 of the Lease stating that the landlord "may [...] proceed as [he] shall deem advisable to enforce the provisions of this Lease at law or in equity" allows for direct commencement of an action. That is, that the complaint itself provides NYCHA with a notice of a failure to pay the Contingent

Tax Rent.

Section 16.2 states that the landlord may proceed only in the event "tenant fails to cure the default or to diligently commence or to cure such default." NYCHA cannot cure its alleged breach without having been placed on notice. Particularly in the present situation, NYCHA could not have been aware of the requested Contingent Tax Rent without an appropriate notice of default since the taxes accrued from years preceding NYCHA's tenancy.⁴

The Summons and Complaint does not satisfy the notice of default requirement under the Lease. Plaintiff provides no support for the proposition that there is no material difference between a summons and complaint and a notice of default. Nor does this Court find any legal authority equating a complaint and a notice of default. Therefore, neither the initial action nor a notice of default following the commencement of an action allows NYCHA an opportunity to cure its alleged breach as is required by the Lease. Therefore, the action is dismissed for failure to provide notice and an opportunity to cure.

This Court also rejects Fordham's argument that a March 24, 2006 letter satisfies its notice obligation to plaintiff. There is no factual evidence that a notice was sent on March 24, 2006. In fact, a letter dated February 23, 2006, memorializing a discussion between the parties on February 22, 2006, shows that

⁴ Fordham failed to respond to NYCHA's refusal to pay the Contingent Tax Rent from 1996-2000. Instead, it filed this action, years later.

Fordham admitted to not having issued a default notice. NYCHA established that Fordham failed to send a notice of default thus failing to fulfill a condition precedent to commencing this action. This action is thus premature and is dismissed on that basis.

Public Housing Law §157

Fordham did not file a proper notice of claim pursuant to PHL §157(1).⁵ Fordham argues that PHL §157(1)'s requirement of filing a notice of claim is not a condition precedent to breach of contract actions. Instead, this requirement is limited to tort actions. NYCHA's lead off case *Leon v New York City Hous. Auth.*, Id, and its following case law is persuasive: PHL §157(1) is not limited to tort cases.⁶ *Leon v New York City Employees'*

⁵ This Court joins plaintiff's frustration in that NYCHA cites a string of cases which do not relate specifically to PHL §157(1): *Reaves v City of New York*, 177 AD2d 437 (1st Dep't, 1991) which addresses PHL 157(2) not PHL 157(1); *Moore v New York City Hous. Auth.*, 35 AD2d 553 (2nd Dep't, 1970) which addresses the notice of claim pursuant to section 50-e of the General Municipal Law; *Walter E Poppe Gen Cont. Inc. v Town of Ramapo*, 280 AD2d 667 (2nd Dep't) which discusses the notice of claim based upon Section 65(3) of the Town law; and finally *Popular Constr. V New York City Sch. Constr. Auth.*, 268 AD2d 467 (2nd Dep't) whereby the notice of claim was found in Section 1744 of the public Authorities Law.

For its part, Fordham also fails to properly cite pertinent case law. Fordham cites *Hoydal v City of New York*, 154 AD2d 345 (2nd Dep't, 1989) to support its contention that the presentation of demand of payment alleged in paragraph 11 and 13 of the complaint is sufficient to satisfy PHL 157(1)'s requirement due to the fact that this is a contract case and not a tort case. The Second Department does not even mention PHL 157(1) in the decision rendered in *Hoydal*.

⁶ See *Kovachevich v New York City Hous. Auth.*, 295 AD2d 255, (1st Dep't, 2002) (Dismissal of the complaint to recover for NYCHA's allegedly wrongful failure to award three construction

Retirement Sys., 658 NYS 2d (1st Dep't, 1997) , app' den 90 NY2d 812 (1997) (Employee's failure to comply with PHL §157(1) required dismissal of his cause of action against NYCHA for breach of contract). Regardless of whether NYCHA was served with a notice under the Lease or notice of claim, its argument is the same: it does not owe money.

The Lease

The parties dispute whether the terms of the lease impose on NYCHA a payment of the Contingent Tax Rent limited to the sum accrued during its Lease term, or as Fordham argues, the Contingent Tax Rent which extends to all monies "levied, assessed, or imposed" on Fordham, prior to NYCHA's Lease Term.

Fordham seeks to collect from NYCHA its proportionate share of Contingent Tax Rent which Fordham paid to New York City for the years 2002 and 2003 which included taxes from 1996, 1997, and 1999, prior to NYCHA's Lease term. Fordham contends that Section 6.1(A) of the Lease defines "Imposition" or Contingent Tax Rent as: "any tax(es), assessment(s) and all governmental charges assessed, levied or imposed against the Building" and does not, in its definition, confine NYCHA's obligation to years falling during its Lease Terms. Fordham fails to examine other sections of the Lease which work in conjunction with Section 6.1(A).

NYCHA's obligation to pay Contingent tax Rent is set forth

contracts to plaintiff was warranted in view of plaintiff's noncompliance with PHL §157(1)); *New York City Hous. Auth. v Roberts*, 2002 NY Slip Op 50144U (2002) (Tenant was precluded from asserting a breach of warrant of habitability due to his failure to comply with PHL §157(1)'s notice of claim requirement).

in article VI of the Lease. While section 6.1 provides some guidance as to NYCHA's accrual period; that is the period for which Contingent Tax Rent is allocated to NYCHA, several sections highlight that the Lease grants importance to occupancy periods and tenants' proportionate payments of the Contingent Tax Rent. Section 6.2(a) provides that:

If impositions for any Lease Year subsequent to the Base Impositions Year [the calendar year ending in December 31, 1999] shall exceed the Base Imposition Amount [of \$327,000.00], tenant shall pay the Impositions Contribution to Landlord for such Lease Year⁷ upon the terms and conditions hereinafter set forth. (1) Tenant shall make payment to landlord on account of the Impositions Contributions for the then current Lease Year.

As a tenant, NYCHA must agree in clear and explicit language in the Lease to make any payments, Contingent Tax Rent payments included, which accrued prior to its tenancy.

In cases of contract interpretation, it is well settled that when parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms. This principle is particularly important in the context of real property transactions, where commercial certainty is a paramount concern, and where the instrument has been negotiated between sophisticated, counseled business people negotiating at arm's length. It is also important to read the document as a whole to ensure that excessive emphasis is not placed upon particular words or phrases. *South Rd. Assocs., LLC v IBM*, 4 NY3d 272, 277 (2005).

The terms "such Lease year" emphasize that the parties intended to determine Imposition obligations through Lease Years, or periods of occupancy, and not through general non-paid time accrued over several periods of tenancy.

⁷Section 5.3 defines "Lease year" as " a calendar year or portion of a calendar year occurring within the Term of the Lease."

Additionally, Section 6.2(B) is clear in that Contingent Tax Rent is prorated according to the tenant's lease term and thus, NYCHA is not obligated to pay for periods during which it was not a tenant.

The Master Lease between Fordham and FCRC imposing upon Fordham "an obligation to pay Contingent Tax Rent to the extent of the balance of Available Cash in accordance with subsection 4.4.3(b) [of the Master Lease,]" was neither incorporated nor referred to in the Lease between Fordham and NYCHA.⁸ Therefore, should NYCHA have been liable for the accrued Contingent Tax Rent prior to occupying the premises, it should have agreed to such payments, whether the Tax resulted from a voluntary deferment of Fordham's imposition obligations or its cash availability. For the aforementioned reasons, the Lease taken in its entirety obligates NYCHA to pay its proportionate share of the Contingent Tax Rent determined on the basis of its period of tenancy only. Thus, this action is also dismissed on the merits.

Accordingly, it is

ORDERED that defendant's motion for summary judgement is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff's motion for summary judgement is

⁸ Section 5.5.1 of the Master Lease alone which contains the schedule of the Contingent Tax Rent accruing in the first twenty years of the lease which is incorporated in the Lease is insufficient to show that NYCHA is liable for Contingent Tax Rent for years prior to its tenancy.

denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: October 11, 2006



J.S.C.

CHARLES E. RAMOS

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.

FILED
NOV 13 2006
NEW YORK
COUNTY CLERK'S OFFICE