Eighty Eight Bleecker Co., LLC v 88 Bleecker Street Owners, Inc.
2004 NY Slip Op 30200(U)
October 4, 2004
Supreme Court, New York County
Docket Number: 0604350/2002
Judge: Debra A. James
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SCANNED ON 10/14/2004

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

PRESENT: DEBRA A. JAMES, Justice — PART 59

EIGHTY EIGHT BLEECKER CO., LLC.,
Plaintiff,

- v -

88 BLEECKER STREET OWNERS, INC.,
Defendant.

Index No.: 604350/02
Motion Date: 07/21/04
Motion Seq. No.: 01
Motion Cal. No.: 35

The following papers, numbered 1 to 6 were read on this motion for partial summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1, 2
Answering Affidavits - Exhibits	3, 4
Replying Afffidavits - Exhibits	5, 6

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Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers,

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

In this breach of lease action concerning commercial premises, plaintiff moves for partial summary judgment.

Plaintiff-tenant leases commercial premises in a residential cooperative building owned by defendant corporation pursuant to a lease dated January 11, 1982. Plaintiff's complaint raises three causes of action. The first cause of action seeks reimbursement of monthly rents plaintiff allegedly paid defendant in excess of the amount provided for in the lease for the six years prior to the commencement of this action on December 2, 2002. The second cause of action seeks reimbursement of tax escalations charged by

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

defendant which plaintiff asserts are in excess of the amount provided for in the lease. The third cause of action seeks an accounting of real estate tax refunds defendant allegedly received since the commencement of the lease. Plaintiff now moves for summary judgment on the first two causes of action. Defendant cross-moves for summary judgment dismissing the second cause of action.

With respect to the first cause of action for rent overcharge, plaintiff states that the lease provides for a annual rent of $43,000, or $3,583.33 per month. Plaintiff argues that it had been billed, and had been erroneously paying a monthly rent of $3,808.53, or $45,702 annually. Defendant in its answer admits that it billed the plaintiff for the higher amount and that the plaintiff paid the higher amount. Plaintiff in the affidavit it submits in support of this motion argues that it paid the excess rent in error and sought reimbursement from the defendant prior to initiating suit. Plaintiff states that no response to the request for reimbursement was received.

Defendant fails to submit any evidence raising a triable issue of fact as to plaintiff's allegations on the first cause of action. Defendant agrees with plaintiff as to the amount of rent set forth in the lease and that the plaintiff billed, and defendant paid, an amount in excess of that provided for in the lease. Although defendant in its memorandum of law in opposition

to the motion alleges that there was "an informal agreement" to pay a higher rent than provided for in the lease, defendant presents no documentation or affidavit in support of that assertion. Consequently, because of defendant's failure to raise any triable issue of fact as to defendant's entitlement to reimbursement for the rental overpayments, the court shall grant plaintiff's motion for summary judgment on the first cause of action.

The second cause of action concerns additional rent as defined in paragraph 41 of the lease. The paragraph provides in pertinent part

> 41. Tax Escalation. Tenant shall pay as additional rent a sum equal to ten per cent of any increase in the amount of real estate taxes over and above those payable for the fiscal year 1981/1982 which may be imposed upon the property of which the Demised Premises form a part, in each and every year during the period of this Lease, commencing from the fiscal year beginning July 1, 1982. Such amount shall be paid within thirty days after demand therefore by Landlord, and shall be collectible as rent. Tax bills shall be sufficient evidence of the amount of such taxes and shall be used for the calculation of the amounts to be paid by Tenant. If Landlord shall receive any tax refund in respect of any tax year following the fiscal year 1981/1982, Landlord may deduct from such tax refund any reasonable expenses incurred in obtaining such tax refund, and Landlord shall then pay to Tenant a sum equal to ten per cent of the remaining balance of such tax refund. If the last year of the term of this Lease ends on any day other than the last day of a tax year, any payment due to Landlord by reason of any increase in taxes shall be prorated, and Tenant shall pay any amount due to the Landlord within thirty days after being billed therefor.

Plaintiff argues that under these terms of the lease it is entitled to have the amount of any J51 tax exemptions, school tax relief exemption (STAR) abatements, and cooperative/condominium abatements included in the amount of real estate taxes as defined in paragraph 41, thereby reducing the tax escalation payments owed by it. Defendant argues that these abatements and exemptions were properly excluded in calculating the plaintiff's rent escalation based upon the express terms of the lease and because they do not belong to defendant but pass through to the individual shareholders.

The court holds that plaintiffs are entitled to judgment on their second cause of action under the First Department's holding in Ran First Associates v 363 East 76th Street Corp., 297 AD2d 506 (1st Dept 2002). In that case as in the present action, a commercial tenant sought recovery of rent overcharges based upon a rent tax escalation clause which stated in pertinent part "In the event that the amount of real estate taxes ... assessed against the Land and the Building owned by Landlord ... attributable to any fiscal tax year ... during the term of this Lease after the base year [fiscal year July 1, 1989 to June 30, 1990] ... shall be greater than the amount of real estate taxes on the real property attributable to the base year, then Tenant shall pay to Landlord, as Additional Rent, 5.5% of the increase in real estate taxes on the entire real property for such tax

year over the amount of such actual real estate taxes attributable to the base year." Id. at 507. The Court's holding, which is dispositive here stated

> The tax escalation clause clearly and unambiguously requires the tenant to pay 5.5% of the amount by which the real estate taxes on the entire property exceeds the real estate taxes in the base year. The escalation clause defines "real estate taxes" as "taxes, assessments, duties, charges, fees or payments levied, assessed or imposed upon the real property by state or local governments."
>
> Significantly, this definition does not include the amount of tax exemptions or abatements. Moreover, calculation of additional rent under the tax escalation provision, as written, does not depend on whether or not a specific tenant is entitled to benefit from a particular exemption or abatement, as landlord suggests it should. A court may not rewrite the terms of a contract in order to reflect the real intention of the parties where to do so would contradict the clearly expressed language of the contract (see Rodolitz v Neptune Paper Prods., 22 NY2d 383, 386 [1968]).
>
> We reject landlord's argument that because the residential tenants of the co-op are statutorily deemed the owner of their unit for purposes of the tax exemptions/abatements, the tax relief provided by these exemptions/abatements falls outside the definition of taxes assessed against the land "owned by the landlord" and should not be considered in determining tenant's additional rent. The statutory provisions at issue serve an entirely different purpose and cannot override the express provisions of the parties' lease.
>
> Park Sq. Garage v New York Univ., (27 AD2d 460, 461 [1967]), cited by both parties, does not support landlord's position. In Park Square, this Court held that a landlord's exclusion of a tax exemption in determining a commercial tenant's additional rent was proper where the lease clearly provided that the commercial tenant was required to pay the increase in real estate taxes on "the leased premises," and the exemptions, which extended to only the noncommercial portions of the property, did not apply to the leased premises. Here, in contrast, the tax escalation clause of the parties' lease was not limited to increased real estate taxes on the leased premises,

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> but rather covered increased taxes on the entire property.
> To the extent the Second Department's memorandum decision in Whitman Owner Corp. v 75 Henry St. Garage (56 AD2d 867 [1977], lv denied 42 NY2d 810 [1977]) is to the contrary, we decline to follow it. We also note that the decision does not include a description of the exact terms of the parties' lease.
> Enforcing the lease escalation clause as written is consistent with well-settled law that such clauses are "meant to provide relief for the landlord where 'assessed' tax required actual payment." (Fairfax Co. v Whelan Drug Co., 105 AD2d at 648; see also 1100 Ave. of Ams. Assoc. v Bryant Imports, 234 AD2d 101, 101-102; S.B.S. Assoc. v Weissman-Heller, Inc., 190 AD2d at 529.) Landlord's attempt to distinguish these cases on the ground that it would not be receiving any windfall in this case because the tax relief was passed through to qualifying shareholders is unavailing. Although the IAS court correctly stated that the net benefit of the subject abatements to the landlord is "zero," the same cannot be said for the collection of additional rent by landlord based on taxes that have not been paid by it. To permit landlord to collect additional rent based on taxes forgiven by the taxing authorities, and therefore not payable by either the landlord or the shareholders, would allow the landlord to reap a windfall not envisioned by, and contradictory to, the parties' agreement (see S.B.S. Assoc. v Weissman-Heller, Inc., 190 AD2d, at 529-530). Nor is tenant obtaining a windfall by our holding, as landlord suggests, since tenant does not receive the benefits of those exemptions/abatements for which it does not qualify, and its additional rent is based on the actual taxes paid by landlord.
> Id. at 508 -509.

Defendant's attempt to distinguish Ran from the facts in the current action fails. Paragraph 41 of the lease specifically refers to "real estate taxes . . . which may be imposed upon the property of which the Demised Premises form a part." This language, which is similar to that present in the lease considered in Ran, bases the rent escalation on the increase in

taxes on the entire building. Furthermore, the Whitman and Park Square Garage cases upon which plaintiff relies have been held by the First Department to be inapplicable to an escalation clause of the type in the lease considered here.

Therefore the court shall grant judgment to the plaintiff on its second cause of action and deny defendants' cross-motion for summary judgment. However, because the parties disagree as to the extent and amount of the overcharges paid by plaintiff under the rent escalation clause, the issue of damages on the second cause of action shall be referred to a special referee.

Accordingly, it is

ORDERED and ADJUDGED that plaintiff's motion for summary judgment on its first cause of action is GRANTED; and it is further

ORDERED and ADJUDGED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants on the first cause of action in complaint in the sum of $15,088.40, together with interest thereupon of $ ______________ at the statutory rate as prayed for from the date of December 2, 2002, until the date of entry of judgment, as calculated by the Clerk, for a total of $ ___________ ; and it is further

ORDERED and ADJUDGED that plaintiff's motion for summary judgment on its second cause of action is GRANTED and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the issue of the amount of damages due plaintiff on the second cause of action based upon the amount of the rent overcharge under Paragraph 41 of the lease as sued for herein is referred to a Special Referee to hear and report with recommendations in accordance with this decision and order, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that within 60 days from the date of this order the petitioner shall cause a copy of this order with notice of entry to be served on the Clerk of the Judicial Support Office (Room 311, 60 Centre Street) to arrange a date for the reference of the aforesaid issue to a Special Referee; and it is further

ORDERED and ADJUDGED that defendant's cross-motion for summary judgment is DENIED.

This is the decision and order of the court.

Dated: October 4, 2004 ENTER:

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DEBRA A. JAMES *J.S.C.*
J.S.C.