

**Matter of Eighty-Eight Bleecker Company, LLC v 88
Bleecker Street Owners, Inc.**

2004 NY Slip Op 30228(U)

August 2, 2004

Supreme Court, New York County

Docket Number: 0105711/2004

Judge: Walter Tolub

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SCANNED ON 8/5/2004
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB
Justice

PART 15

In the Matter of the Arbitration between
EIGHTY-EIGHT BLEECKER COMPANY

INDEX NO. 105711/2004

Petitioner,

MOTION DATE 4/30/2004

- v -

MOTION SEQ. NO. 001

88 BLEECKER STREET OWNERS, INC.,

Respondent.

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 ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, this motion is decided in accordance with the accompanying memorandum decision.

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

FILED
AUG 05 2004
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/2/04

WALTER B. TOLUB, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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IN THE MATTER OF THE ARBITRATION BETWEEN

EIGHTY-EIGHT BLEECKER COMPANY, LLC,

Petitioner,

Index No. 105711/04
Mtn Seq. 001

-against-

88 BLEECKER STREET OWNERS, INC.,

Respondent.

-----x

WALTER B. TOLUB, J.:

By this motion, petitioner, Eighty-Eight Bleecker Company, LLC, moves pursuant to CPLR 7503 for a permanent stay of the arbitration commenced by respondent, 88 Bleecker Street Owners, Inc. concerning the renewal of the 1982 lease between the parties. Petitioner contends that respondent's arbitration demand is invalid because the demand exceeds the scope of the narrow arbitration clause contained within the subject lease. Petitioner further seeks a declaration that the only arbitrable issue in this matter is the respondent's cost of maintaining the premises lease to the petitioners during the period of January 1, 2000 and ending on December 31, 2000.

Facts

Respondent 88 Bleecker Street Owners, Inc. (Bleecker Owners) is the owner of commercial and residential property located at 88 Bleecker Street in Manhattan. In 1981, as the Sponsor of the property, Eighty-Eight Bleecker Company, LLC (Bleecker LLC)

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NEW YORK
COUNTY CLERK'S OFFICE

commenced the conversion of over 100 residential apartments into a cooperative. The Offering Plan for the cooperative called for the leasing of the commercial space in the Building consisting of eight stores, the garage, laundry room and northwest corner storeroom to Bleecker, LLC. Pursuant to the Master Lease between the parties, dated January 11, 1982, these premises were leased to Bleecker, LLC at an annual rate of \$43,000 plus modest tax escalations.

The initial rental period of the Master Lease ran from January 11, 1982 to December 31, 2001, and provided that the tenant could renew the lease for two successive fifteen year periods. Paragraph 44 of the lease, which sets forth the renewal terms, reads as follows:

44. Option to Renew

(a) The term of this Lease may be extended, at the option of the Tenant, for two successive periods of fifteen years, each such period of fifteen years beign herein sometimes referred to as the extended term, as follows:

First extended term - January 1, 2002 to December 31, 2016.

Second Extended term - January 1, 2017 to December 31, 2031.

Such option to extend shall be excersised by Tenant, if at all, by Tenant giving written notice to Landlord not more than twenty-four nor less than twelve months prior to the expiration of the then existing term.

(b) Each extended term of this Lease shall be upon the same terms, covenants and conditions and with the same annual rent payable, as provided herein for the initial term; provided that if, at the time of the exercise of either or both of said options, the Landlord's annual cost of maintaining those portions of the Building comprising the Demised Premises

should be greater than the annual rent reserved hereunder, then the annual rent payable for such option period shall be increased to such annual cost. For the purposes of this paragraph, in determining the cost to the Landlord of maintaining the Demised Premises, generally accepted cost accounting procedures shall be applied, except that depreciation shall not be considered an expense. Any dispute concerning the Landlord's cost of maintaining the Demised Space shall be resolved in arbitration before the American Arbitration Association in the City of New York.

©) Payment of all additional rent required to be made by Tenant as provided in this Lease for the initial term shall continue to be made during each of such extended terms. Tenant shall not be permitted to extend this Lease beyond the second extended term. Any termination of this Lease during the initial term or during any extended term shall terminate all rights of extension hereunder.

Pursuant to the terms of the lease, on January 3, 2000, Bleecker, LLC exercised its option to extend the Master Lease from January 1, 2002 to December 31, 1996. At some point after the renewal, Bleecker Owners informed Bleecker, LLC that its annual cost of maintaining the premises was \$188,310, and pursuant to the terms of the lease, the rent would be increased accordingly. Bleecker, LLC disagreed¹ with this calculation, and following failed negotiation attempts², in 2004, Bleecker Owners commenced an

¹ This court is unclear as to whether Bleecker, LLC has paid, to date, any rent for the renewal term.

² The parties represented to this court at argument that negotiations had failed, which in turn resulted in the commencement of the arbitration proceedings.

arbitration proceeding.

Bleecker Owners commenced the arbitration proceeding at issue by filing a demand on March 24, 2004 with the American Arbitration Association. The demand characterizes the nature of the dispute as seeking a determination "as to the annual cost of maintaining the leasehold premises at 88 Bleecker Street, New York, New York, for the purposes of calculating the annual rent due to claimant under the subject lease for the period January 1, 2002 to date" (Order to Show Cause, Ex. C). The claim or relief sought, is "an award of the annual difference between the fixed rent and the cost fo maintaining the leasehold premises at the time Respondent's option was exercised calculated for the period January 1, 2002 to the date of award (plus interest and legal fees) (Id.).

Bleecker, LLC, then commenced the instant proceeding, claiming that the sole arbitrable issue under paragraph 44(b) of the Master Lease is the landlord's (Bleecker Owners) cost of maintaining the premises for the first extension of the lease, and further alleging that the time frame for calculation of the annual rent for the first extended term was from January 1, 2000 to December 31, 2000.

Discussion

On a motion to stay arbitration, there are only three threshold questions that are to be resolved by this court: "whether there is a valid agreement to arbitrate; if so, whether there was compliance with the agreement; and whether the claim would be time

barred if asserted in state court" (*Matter of the Arbitration between New York Central Mutual Fire Insurance Co. v Valois*, 6 AD3d 1183, 776 NYS2d 425 [4th Dept 2004]; *Matter of the Arbitration between John W. Cowper Company, Inc. v. Hires-Turner Glass Company*, 72 AD2d 934 [4th Dept 1979], *aff'd*, 51 NY2d 937 [1980]; *Matter of the Arbitration between Smith Barney, Harris Upham & Co., Inc. v Luckie*, 85 NY2d 193, 201-202 [1995]).

The party seeking to stay the arbitration bears the burden of establishing sufficient facts to justify staying the arbitration (*AIU Insurance Co. v Cabreja*, 301 AD2d 448, 449 [1st Dept 2003]), and if it is determined that the particular claim asserted does not fall within the ambit of the arbitration agreement, a court may order that arbitration be stayed in entirety (*Matter of New York City Transit Auth. v Amalgamated Transit Union of America, AFL-CIO, Local 1056*; 284 AD2d 466 [2nd Dept. 2001]; *Matter of New York City Transit Auth. v Transport Workers Union of America, Local 100 AFL-CIO*, 177 AD2d 695, 696 [2nd Dept. 1991]). Alternatively, as "arbitration clauses, as contractual agreements, must be enforced according to their terms, even if the result is bifurcated litigation" (*Primavera Laboratories, Inc. v Avon Products, Inc.*, 297 AD2d 505, 506 [1st Dept. 2002]), a court may opt to merely stay arbitration on issues deemed nonarbitrable, while directing that arbitration continue on the remainder of the disputed issues.

The inquiry into whether a disputed issue falls into an

arbitrable or non-arbitrable category is not done by substantive analysis of the provision. Rather, the court inquires as to whether a reasonable relationship exists between the subject matter of the dispute, and the general subject matter of the agreement (*Matter of New York City Transit Auth. v Amalgamated Transit Union of America, AFL-CIO, Local 1056*; 284 AD2d 466, 468 [2nd Dept. 2001]). In the instant application, the dispute between the parties arises from the arbitration clause contained within paragraph 44(b) of the Master Lease. Under that provision, "any dispute concerning the Landlord's cost of maintaining the Demised Space shall be resolved in arbitration before the City of New York" (Verified Petition, Ex. 1). Petitioner contends that this arbitration clause is one that is limited solely to the landlord's cost of maintaining the premises. Under this argument, respondent's request for an award of back rent, interest and legal fees associated with commencement of the arbitration, far exceeds the scope of the arbitration clause, thus necessitating granting of a stay. Respondent's position, is that the language of the lease arbitration clause, which was drafted by petitioner as Sponsor of the cooperative, is ambiguous, and as such, cannot be construed against respondent as a narrow clause with only one possible interpretation. Respondent further argues, that as the instant dispute is a rent dispute, petitioner currently owing over 26 months in past due rent, an arbitrator may resolve interpretation

of the provision, award the back rent with interest (per the dictates of paragraph 19 of the Master Lease), and legal fees.

Under New York law, a legal agreement containing a broad arbitration clause allows an arbitrator to decide all matters relating to the interpretation of that agreement. (*In re Arbitration between Dimson v. Elghanayan*, 19 NY2d 316, 324 [1967]; *Arbitration between John W. Cowper Company, Inc. v. Hires-Turner Glass Company*, 72 AD2d 934 [4th Dept 1979], *aff'd*, 51 NY2d 937 [1980]). When however, an arbitration clause is limited in scope, claims made outside the scope of the arbitration clause are deemed not arbitrable (*Matter of New York City Transit Auth. v Transport Workers Union of America, Local 100 AFL-CIO*, 177 AD2d 695, 696 [2nd Dept. 1991]).

In the instant application, the scope of the subject matter involved in the arbitration clause, the cost of the maintenance of the subject premises, is undisputably narrow, as it only deals with that one particular subject. The inclusion of the words "any dispute" arguably broadens the scope of the clause, but only to the extent that it indicates that the parties contemplated that there might exist more than one type of dispute as to how to calculate the costs of maintaining the premises. As the clause is neither invalid nor ambiguous, it is this court's opinion that all of the possible issues that arise concerning how respondent determined the cost of maintaining the subject premises are arbitrable.

