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

PRESENT: Cahn Justice

PART 49m

Bates Advertising

- v -

498 Seventh LLC

INDEX NO. 605632/99

MOTION DATE 3/26/04

MOTION SEQ. NO. 007

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

FILED
MAY 26 2004

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

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 5/24/04

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

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

BATES ADVERTISING USA, INC.,

Plaintiff,

- against -

498 SEVENTH, LLC,

Defendant.

Index No. 605632/99

**Herman Cahn, J.**

Defendant moves (seq. no. 007) to set aside the decision and order rendered after trial, CPLR 4404.

Plaintiff, a commercial tenant, asserted causes of action against defendant landlord for a substantial rent abatement due to breach of lease, and for related claims. The matter was tried before the undersigned, without a jury, resulting in a decision and order, dated February 25, 2004, granting plaintiff judgment for rent abatement credits aggregating $4,434,484.64; and for the sum of $94,956.03 with interest from May 15, 1999.[1]

The facts and procedural background are fully set forth in the Decision, which will not be repeated here. Seminal findings pertinent to this motion include the following:

(I) Landlord failed to provide a fully code coinpliant fire alarm system, as required under the lease, until May 2000 -- 14 months after Tenant moved into the premises (Decision at 13);

(ii) Landlord's said failure "presented a grave safety issue[,]"[2] rendering Landlord liable for a full

[1] The Decision also granted plaintiff judgment for reasonable attorneys' fees, in an amount to be determined. The Decision was amended by order, dated May 1S, 2004, to allow for further rent abatement credits calculated as interest on the principal amount of $4,434,484.64.

[2] Over 700 of Tenant's personnel were sited at the leased premises (Decision at 7).

day's rent abatement from March 23, 1999 through May 9, 2000 – 412 days – under Paragraph 54 ©) of the lease ***(id.,*** at 13-14); (iii) Landlord failed to provide an upgraded private passenger elevator for Tenant's exclusive use, and failed lo install a lobby card access system, as required under the lease *(id.,* at 14);and (iv) Landlord levied electricity charges which wcrc not based on actual usage, as required under the lease (*id.*, at 15).

Landlord's counsel posits that any delay in installation of the lire alarm system was Tenant's fault. The weight of credible evidence shows otherwise (Decision at 6-11). As detailed in tlic Dccision, Landlord was fully aware of the dcficiencies **in** tlic building's existing system, but took no meaningful remedial action until after Tenant moved into the premises (*id.*, at 9-13). The Decision found, inter alia:

> Tlicrc was no code compliant Class E system in place until May 9, 2000, when tlie New York City Fire Department finally granted its certification (Ex. 43). As far back as 1997, Landlord's engineering consultants, Edwards & Zuck, P.C., recommended that the pre-existing system rcquircd expansion and upgrades (Tr. at 385). In November 1998, that firm issued a request for proposal from tire alarm vendors "to modify, upgradc, expand or rcplace the existing Edwards 5800 lire alarm systcni." (Exs. 10, 75.) Moreover, Rosenstein[3] admitted that as of March 1999, the pre-existing system, to the extent it was operative, was not even functional in Tenant's spacc (Tr. at 343-44). Instead of taking sufficient action to rectify the problem, Duncan[4] determined to pay $32,000 to an alarm vendor so that Tcnant could have "some protection" (*id.*, at 322 [emphasis added]).
>
> Citron[5] testified that water flow tamper switches, fire emergency door releases, and air conditioning shut down controls in Tenant's space were not connected as late as the spring of 1999 (Tr. at 412). Hc confirmed that there were insufficient points, and that tlic entire systcni needed to be replaced (*id.*, at 408-09). Rosenstein admitted that "the air conditioning units did not have

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3 Referring to Mark Rosenstein, Landlord's construction manager

4 Rcferring to Peter Duncan, Landlord's manager

5 Referring to Jay Citron, a rcprescntativc of Landlord's fire alarm vendors.

> functioning smoke detectors in the Bales space" as late as May 1999 and that the "door releases in tlie Bates . . . floors had not been connected to the fire command station . . . as of June '99." *(Id.*,at 330.)
>
> Tenant made repeated requests that Landlord conduct fire drills after it had moved into tlic building. Landlord acceded by instructing its fire alarm vendor to lest the existing fire alarm system. Upon testing, the fire alarm control panel malfunctioned amidst smoke (Tr. at 70-73, 130-31, 369; Exs. 31, 47, 48). Repairs to the system were unsuccessful (Tr. at 333, 338, 374-75). One repair vendor concluded that the system was "dead and inoperable" (Ex. 36). Another noted that there were no connections to "water flows and tampers in the Bates space, the fourth floor pre-action alarm and trouble points," **and** that the air conditioner "unit fan shut down on each floor." (Ex. 66.) Yet another tcstificd that smoke detectors in Tenant's space were not connected (Tr. at 252-53). After numerous unsuccessful attempts to patch up the inoperable pre-existing systcni, code compliance was finally achieved in May 2000 (Tr. at 209-14; Exs. 34, 36, 42, 43, 66, 68).

(Decision at 10-11.)

The lease unequivocally vested Landlord with the responsibility lo install a Class "E" Gre alarm and communications system in compliance with New York City fire **and** safely regulations (Lease Exhibit "C" at 5). The evidence undermines Landlord's assertion that "[n]othing in the Lease rcquircd Landlord to provide a 'fully functional' system as of the dale that tlic Tenant moved in . . . ." (Sadowsky Aff. ¶ 4.) The pre-existing system was not merely half functional – it was virtually useless. Landlord bore the responsibility of installing sufficient "tie-in-points" to connect local alarm stations within the premises to the building's central system (Decision at 6, 9). Tenant did not prevent Landlord from fulfilling its fire safety obligations under tlic lcasc.

Landlord submits nothing on this motion sufficient to disturb the foregoing findings, and similar findings, supporting the court's conclusions as to Landlord's breach of the fire safety provisions of the lease. Counsel points to certain portions of the trial record during

which the court entertained the possibility that Tenant bore tlic obligation to install the fire alarm tie-in points (Sadowsky Aff. ¶ 9; Tr. at 58-61)." This ignores subsequent portions of the record in which the court discarded that possibility on the basis of persuasive evidence *to* thc contrary, including Note 3 of the Fire Alarm Notes in the architectural plans which Landlord approved prior to filing with the New York City Department of Buildings, which stales:

> REPROGRAMMING OF THE FIRE COMMAND STATION AND FINAL CONNECTIONS AT THE FIRE COMMAND STATION OR DATA GATHERING PANELS ARE TO BE MADE BY THE BUILDING'S FIRE ALARM MAINTENANCE CONTRACTOR. INCLUDE PRICE FOR SAME IN BID PRICE.

(Tr. at 153-61; Exs. 6, 7; Decision at 9.)[7] As noted in the Decision, this is in accord with the overwhelming weight of evidence showing that Landlord had undertaken tlic responsibility of ensuring that proper tie-in connections would be made, at Tenant's cost (Decision at 9-12).

Landlord asserts that Tenant, in a prior submission to thc Appellate Division, withdrew its claims relating to the failure to provide upgraded elevator service and key card lobby access. As observed in the Decision, however, Tenant's appellate brief clearly manifested Tenant's position that the elevator and card access breaches were of equal importance to the fire alarm breach (Decision at 14-15 n. 11; see *also, id.,* at 12, 14 [Landlord stipulated lo its failure to provide elevator service until April 15, 1999, **and** to provide card access until January 2000]).

Landlord's assertion that Tenant is not entitled to a refund for electricity overcharges is belied by the plain evidence that no electrical submeter was installed by Landlord until July 1999 – four months after Tenant moved in (Decision at 16). The lease provides that

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6 References to "Tr." are to the trial transcript.

7 References lo "Ex." are to trial exhibits admitted in evidence.

"Tenant's consumption of electrical energy at the demised premises will be measured by submeters to be installed by Landlord at Landlord's expense and Tenant shall not be charged for electricity until at least one submeter is installed and operational." (Ex. 1 ¶ 12 [B].)

Landlord's counsel argues that Tenant is not entitled to a judgment for electricity overcharges because the complaint only seeks a declaratory judgment with regard to this issue. This is without merit. The complaint expressly seeks a "refund" of all such overcharges (Complaint at 12, 14; *id.*, ¶ 56).

Tenant submitted evidence of electricity charges from July 16, 1999 through October 15, 1999, based on specified submeters showing kilowatt usage (Exs. 94, 105, 105A; Tr at 295, 307). Landlord did not meet such evidence with rebuttal evidence of similar detail; nor did it submit any records of submetered charges for any period prior to July 16, 1999 to rebut Tenant's claim that no submeters existed during that period and, thus, no charges should have been levied under Paragraph 12 (B) of the lease.

In sum, no grounds exist to disturb the findings of fact and conclusions of law contained in the post-trial decision and order, dated February 25, 2004 (CPLR 4404; *see, Thoreson v Penthouse Intl., Ltd.*, 80 NY2d 490, 495 [1992], *rearg denied* 81 NY2d 835 [1993]).

Accordingly, it is

ORDERED that the motion is denied.



Dated: May **24,** 2004

ENTER:

J. S. C.