

**239 East 79th Owners Corp. v Lamb 79 & 2 Corp.**

2006 NY Slip Op 30052(U)

April 7, 2006

Supreme Court, New York County

Docket Number: 0600215/0215

Judge: Marilyn Shafer

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

PRESENT: SHAFFER  
Justice

PART 36

239 EAST 79<sup>TH</sup> OWNERS CORP. INDEX NO.

600215/03

- v -

LAMB 79+2 CORP.

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 02

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 pursuant to attached Deem

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

Dated: 4/7/06  
~~Nov. 10, 2005~~

HON. MARILYN SHAFER, JSC  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

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

\_\_\_\_\_ )  
 239 EAST 79<sup>th</sup> OWNERS CORP., )  
 )  
 )  
 Plaintiff, )  
 )  
 -against- )  
 )  
 LAMB 79 & 2 CORP., )  
 )  
 )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

Index No. 600215/2003

**MARILYN SHAFER, J.:**

Defendant Lamb 79 & 2 Corp. (Lamb) moves, and plaintiff 239 East 79<sup>th</sup> Owners Corp. (Owners), cross-moves, pursuant to CPLR 2221 (e), for leave to renew their prior motions for summary judgment.

Plaintiff is a residential cooperative corporation that net leases its commercial space to defendant. At the heart of the dispute between the parties herein is paragraph 2 (b) of the amended lease which, states in pertinent part:

"(b) For the balance of the lease term, as extended pursuant to paragraph 1 above, commencing on the first day of August 9, 1991, the annual base rent due and payable to Owner shall equal the greater of (i) one-half (1/2) of the rent and/or other moneys actually paid to Tenant by all present, substitute or future subtenants of the demised premises, including all escalations and adjustments and other compensation actually paid but excluding reimbursements to Tenant for water meter charges and similar reimbursements in accordance with the leases entered into between Tenant and said subtenants and (ii) thirty three thousand, six hundred dollars (\$33,600)."

It is plaintiff's position that under the terms of this paragraph, defendant's annual rent to plaintiff includes one-half of the real estate tax escalation payments made to defendant by its subtenants. Defendant has not included these amounts with its rent payments. Plaintiff's complaint contains three causes of action. The first cause of action, based on breach of contract, seeks to recover \$119,448.17, which represents one-half of the real estate tax escalation payments paid by the subtenants to the defendant since April 1996. The second cause of action, based on a theory of account stated, seeks to recover \$39,523.25, which represents one-half of the real estate tax escalation payments paid by the subtenants to defendant for the 1996/1997 tax year and the 1997/1998 tax year. The third cause of action seeks a declaratory judgment finding that plaintiff's interpretation of paragraph 2 (b) is correct.

Defendant's position is that paragraph 2 (b) specifically excludes from the calculation of rent any amounts paid by the subtenant to defendant which are reimbursements for amounts paid by defendant.

Paragraph 40 of the lease states, in pertinent part;

"40. The Tenant shall pay as additional rent hereunder a proportion of all real property taxes in excess of the real property taxes for the tax year 1982/1983 (as the same may be reduced in proceedings to reduce the assessed valuation) that may be levied on the tax unit of which the demised premises form a part. The proportion of real estate taxes herein provided for, payable by the Tenant as aforesaid shall be 8.14%. Such additional rental shall be paid to the Landlord in each year in equal installments on or before the twentieth day of the respective months in which real property taxes may be paid during the term without interest or penalties to the City of New York. For all purposes under this Lease, and in any suit of any kind between the parties hereto, any receipt showing the payment by the Landlord of any such tax, signed by a public official authorized to give such receipts and the Tenant's failure to pay the same as herein provided shall be conclusive evidence against the Tenant that the amount of such payment was due and payable and that such tax was a valid and existing lien on the premises at the time of such payment; in the event the Tenant has paid a proportion of the

increased taxes as in this paragraph provided and thereafter Landlord obtains a refund, the Landlord shall pay a portion of said refund to Tenant in the same proportion as original tax was paid less the cost of obtaining such reduction including legal fees. Tenant's obligation hereunder is subject to the presentation by Landlord of any and all bills for real property taxes in every tax year to the Tenant. If Landlord fails to present same to Tenant, Tenant shall be relieved of any and all of its obligations hereunder."

Defendant claimed that the real estate tax escalations paid by the subtenants are reimbursements to defendant for the real estate taxes defendant is obligated to pay plaintiff pursuant to paragraph 40 of the lease. As such, they should be excluded from the calculation of the rent.

By order dated December 10, 2003, the court denied both parties' motions for summary judgment with respect to the first and third causes of action, because there was a question of fact as to whether the real estate escalation payments were intended to be reimbursements to defendant. The fact that the yearly real estate escalation payments received by defendant exceeded the yearly real estate taxes defendant paid to plaintiff would tend to indicate that these payments were not intended as a reimbursement. On the other hand, the fact that from 1991 through 1996, plaintiff never asked for, and defendant never paid, one-half of the real estate escalation payment, would tend to show that the parties did not intend to include this amount in defendant's rent obligation.

Based on recently discovered documents, it now appears that both parties were in error concerning their prior course of conduct concerning the real estate escalation payments. It appears that for tax year 1991/1992, the first year the subject contract clause was in effect, plaintiff initially billed defendant for one-half of the entire real estate tax escalation payments made to defendant by its subtenants.

However, defendant objected to this in letters to plaintiff, claiming that it only had to pay one-half of the real estate escalation taxes it collected from its subtenants that exceeded the amount of real estate tax escalation defendant was required to pay under section 40 of the lease. Plaintiff apparently agreed with this, because in tax year 1992/1993 and 1993/1994, plaintiff billed defendant accordingly. Since this course of conduct is consistent with the plain language of the lease, the court finds this to be the intent of the parties.

Plaintiff, in opposition to the instant motion and in support of its instant cross motion, based on the fact that plaintiff billed defendant in the 1991/1992 tax year for one half of the entire real estate escalation taxes paid to defendant, asks the court to find that plaintiff is entitled to this amount. However, plaintiff does not even attempt to explain why the court should ignore the fact that defendant objected to this and that plaintiff thereafter only billed for one-half of the excess.

Accordingly, plaintiff should be allowed to recover, in the first cause of action one-half of all real estate tax escalation payments received by defendant that exceed the amount of real estate tax escalation payments paid by defendant pursuant to paragraph 40 of the lease. However, as explained in the court's original decision of December 10, 2003, the statute of limitations bars the recovery in the first cause of action for any amount that accrued prior to January 22, 1997.

That part of the court's prior decision which denied both the motion and cross motion for summary judgment with respect to plaintiff's second cause of action and defendant's counterclaim remains unchanged. Nothing presented in the instant motions is relevant to the bases on which this branch of the motions were denied.

The court now turns to the parties' claims to recover attorneys.

While entitlement to attorney fees under a lease clause is a matter of contractual right, a court's authority to withhold fees in a particular case is not so closely confined and may turn upon equitable factors or other considerations fact-specific to the litigation. Rose v Montt Assets, Inc., 187 Misc 2d 497 (App Term 1<sup>st</sup> Dept 2000). In general, only a prevailing party is entitled to recover an attorney's fee. Village of Hempstead v Taliercio, 8 AD3d 476 (2<sup>nd</sup> Dept 2004). With respect to the first and third causes of action neither party can be considered the prevailing part, since the court did not adopt either party's initial position. Plaintiff brought this action claiming that defendant's annual rent should include one-half of all the real estate tax escalation payments made to defendant by its subtenants. Defendant, in opposing this action, initially claimed that none of this should be included in the rent. The court has now concluded that the rent should include one-half of all real estate tax escalation payments received by defendant that exceed the amount of real estate tax escalation payments paid by defendant pursuant to paragraph 40 of the lease.

Accordingly, the court is not awarding any legal fees.

The parties shall settle an order providing;

1- that pursuant to paragraph 2 (b) of the lease, defendant's annual rent should include one-half of the real estate tax escalations paid to defendant by its subtenants, but only based on the amounts of said payments that exceed the amount of real estate tax escalations paid by defendant pursuant to paragraph 40 of the lease; and

\*7]

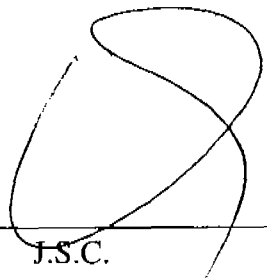
2 - that plaintiff is granted judgment in the first cause against defendant in an amount to be calculated in accordance with the formula described in the immediately preceding paragraph, but only to the extent that such amount became due on or after January 22, 1997; and

3 - that action shall continue as to the second cause of action and the counterclaim.

Settle Order

Dated:

4/7/06



J.S.C.

HON. MARILYN SHAFER, JSC