

44 Court St., LLC v Edwin Gould Servs. for Children & Families
2006 NY Slip Op 30615(U)
December 18, 2006
Sup Ct, NY County
Docket Number: 600584/2005
Judge: Karla Moskowitz
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

FBEM

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44 COURT STREET, LLC,

Plaintiff,

INDEX NO. 600584/2005 E

-against-

MOTION DATE _____

EDWIN GOULD SERVICES FOR CHILDREN
AND FAMILIES f/k/a EDWIN GOULD SERVICES
FOR CHILDREN, INC.,

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

Defendant.

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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 the accompanying
Decision and Order.

Dated: December 18, 2006

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[Signature]
KARLA MOSKOWITZ 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: IAS PART 3

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44 COURT STREET, LLC,

Plaintiff,

Index No. 600584/2005

-against-

EDWIN GOULD SERVICES FOR CHILDREN
AND FAMILIES f/k/a EDWIN GOULD SERVICES
FOR CHILDREN, INC.,

DECISION and ORDER

Defendant.
-----X

KARLA MOSKOWITZ, J:

In an action to recover damages for breach of a commercial lease, plaintiff, 44 Court Street, LLC (“44 Court”), moves for summary judgment to recover rent in the amount of \$582,799.29 and attorney’s fees. Defendant, Edwin Gould Services for Children and Families f/k/a Edwin Gould Services for Children, Inc. (“Edwin Gould” or “the agency”), cross moves for summary judgment dismissing the complaint.

In 1992, Edwin Gould, a nonprofit agency that provides a wide variety of services and programs to children and families in crisis, entered into a 10 year commercial lease with plaintiff’s predecessor, Joseph P. Day Realty Corporation (“Joseph Day”), for Suite 505 in a building located at 44 Court Street in Brooklyn, New York (“the building”). Paragraph 2 of the lease states that the tenant shall use the premises “for general and executive offices for a child care agency and for no other purpose.” (6/8/06 Oliver Aff., Ex. A). Paragraph 66 of the lease that grants Edwin Gould a limited right to terminate the lease prior to its expiration, states

It is mutually understood and agreed the obligation of the
Tenant to pay rent hereunder is dependent upon Tenant’s
continued funding by the government and the agencies
thercof for the purpose of which this lease is executed,
and should the Tenant’s foster care population and level

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of funding be significantly reduced by the government or its agencies and should such reductions in funds prevent the tenant from paying the financial obligation under this lease, this lease shall cease and be terminated and Tenant's obligation to pay rent hereunder shall end provided that the Tenant forgoes all security including interest and provided further Tenant provides landlord with the details of the reduced funding and that the reduction prevents Tenant from paying future financial obligations under this lease With (sic) at least one hundred and twenty (120) days written notice of the termination date sent certified mail, return receipt requested.

(6/8/06 Oliver Aff., Ex. A).

In 1996, Edwin Gould experienced financial difficulties and the parties modified the lease to provide for reduced rent. (6/8/06 Oliver Aff., Ex. B). In 1998, Edwin Gould moved additional program operations to Brooklyn, and the parties again modified the lease to expand Edwin Gould's leasehold to include the entire fifth floor in the building and to extend the term of the lease to July 31, 2012. (6/8/06 Oliver Aff., Ex. C).

Edwin Gould states that, in 2002, it suffered a \$1.6 million budget deficit because the government decreased funding for its preventive services and foster care programs. (6/8/06 Oliver Aff., Ex. G). Funding deficits continued in 2003 and the agency once again ended the year with a negative fund balance. (6/8/06 Oliver Aff., Ex. H).

On May 5, 2003, the agency met with Joseph Day to explain its financial situation and to explore alternatives to its continued obligations under the lease. The agency memorialized that meeting in a May 7, 2003 letter that summarized its financial condition and suggested various ways it might reduce its rent obligations. (7/26/06 Shah Aff., Ex. 8). The agency sent a follow-up letter on July 14, 2003 requesting another meeting to discuss its funding problem. (7/26/06

Shah Aff., Ex. 9).

In December 2003, Joseph Day contacted the agency and suggested that Edwin Gould would save a significant amount of money if it consolidated its 44 Court Street offices with its East 11th Street offices into a building located at 186 Remsen Street in Brooklyn. Accordingly, the agency began negotiating with Joseph Day regarding the Remsen Street property while it continued to look for other options to reduce its rent obligations.

In the spring of 2004, Edwin Gould located fully furnished office space in a building located at 40 Rector Street in Manhattan that would accommodate all the programs located at 44 Court Street and East 11th Street and that would provide the agency with a substantial cash grant because the building is located near the World Trade Center site. Edwin Gould considered its options and chose the Rector Street office because, according to Sanjay Shah, the agency's former Associate Executive Director for Finance, 40 Rector Street offered the best opportunity for the agency to survive despite its operating deficits. (7/26/06 Shah Aff., ¶¶ 35-36).

On July 2, 2004 Edwin Gould served Joseph Day with a Notice of Termination under Article 66 of the lease along with a summary of its financial condition and copies of the agency's 2002 and 2003 financial statements. The Notice of Termination states:

We regret to inform you that as a direct result of a 44% reduction of our foster care population from 1999 and level of funding by the Administration for Children Services, Tenant is no longer able to meet its financial obligations under the leaseSuch significant reduction in funding and foster care population prevents Tenant from paying future financial obligations under the lease

(7/26/06 Shah Aff., Ex. 14).

Joseph Day reviewed the financial information that Edwin Gould provided and determined that: 1) Edwin Gould would be paying more rent at Rector Street than it was currently paying for 44 Court and 2) that cash received from all government programs decreased by 1.7% while the agency's program service revenue actually increased by 3.7%. Based on this analysis, in letters dated July 8, 2004 and July 12, 2004, Joseph Day rejected the agency's notice of termination. (6/8/06 Oliver Aff., Ex. I)

On November 11, 2004 Edwin Gould vacated its premises at 44 Court Street. In February 2005, plaintiff commenced this action alleging breach of the lease and demanding back rent and attorneys' fees.

Plaintiff's Argument

In support of the motion for summary judgment, plaintiff argues that Paragraph 66 of the lease is clear and unambiguous regarding the only factors that would permit Edwin Gould to terminate the lease prior to its expiration: 1) that the agency's foster care population significantly decreased; 2) that its level of funding from the government or its agencies significantly decreased; and 3) that the reduced funding prevented Edwin Gould from paying future rent under the lease. Plaintiff contends that the agency's tax returns and financial documents demonstrate that Edwin Gould's level of funding from all of its government sponsored programs actually increased each year from 2001 through 2004 and, therefore, the agency is unable to demonstrate that its level of funding "significantly decreased" – a condition precedent to its exercise of the early termination right under Paragraph 66 of the lease.

Defendant's Argument

In support of the cross motion for summary judgment, Edwin Gould states that the lease

was originally executed for the purpose of housing the administrative offices for the agency's foster care program and that, between 1999 and 2005, the government and its agencies reduced Edwin Gould's foster care population by 39% and reduced revenues to the agency's foster care program by 34%. Edwin Gould contends that this reduction constitutes a "significant decrease" in funding. The agency argues that the parties intended that the only revenues that the landlord would consider under Paragraph 66 were revenues from the foster care program, and that the reductions in funding for that program, combined with the increase in operating expenses, prevented Edwin Gould from meeting its financial obligations under the lease thus triggering its early termination rights under Paragraph 66.

DISCUSSION

The well established law of contract interpretation provides that:

In interpreting a contract, the intent of the parties governs. A contract should be construed so as to give meaning and effect to all its provisions. Words and phrases are given their plain meaning Where the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law and the case is ripe for summary judgment. *On the other hand, if it is necessary to refer to extrinsic facts, which may be in conflict, to determine the intent of the parties, there is a question of fact, and summary judgment should be denied.*

(American Express Bank Ltd. v Uniroyal, Inc., 164 A.D.2d 275, 277 [1st Dept 1990], lv denied 77 N.Y.2d 807 [1991] [internal citations omitted] [emphasis added]); South Rd. Assocs. v IBM Corp., 4 N.Y.3d 272 [2005]).

In *Pouch Terminal Inc. v Haag-Lloyd (America) Inc.*, 172 A.D.2d 735 (2d Dept 1991), defendant sought to terminate a commercial lease on the ground that plaintiff had not

“converted” or “renovated” the space by a date certain, as specified in the lease. Plaintiff rejected defendant’s attempt to terminate the lease and commenced an action for a declaration that it had, in fact, converted the space as contemplated by the parties and that defendant had no right to terminate. In that case, the court held that whether the parties intended the space to be ready by a date certain, so as to cut off defendant’s termination right, “cannot be determined as a matter of law by their use of the otherwise unexplained terms ‘renovate’ and ‘converted.’” (*Id.* at 737; *see also Hellene-Harrison, Corp. v Money Line Network, Inc.*, 29 A.D.3d 456 [1st Dept. 2006] [questions of fact as to liability for the alleged breach of the parties’ commercial office lease are presented by the conflicting affidavits]).

In *Federated Associates v Howard Johnson Company, Inc.*, 144 A.D.2d 531 (2d Dept 1988), the appellate court affirmed the lower court’s denial of summary judgment regarding the tenant’s right to terminate a commercial lease, stating:

The lease which is the subject of this action is ambiguous in several respects and subject to different interpretations. Where the intent of the parties depends upon a choice between reasonable inferences to be drawn from extrinsic evidence, interpretation of the contract must be determined by the trier of fact. In the instant matter . . . the supporting and opposing papers do not unequivocally clarify the parties’ intent as to the tenant’s right to terminate the lease. in such a situation, summary judgment is inappropriate.

(*Id.* at 532 [internal citations omitted]).

In this case, the intent of the parties cannot be discerned from the four corners of the lease, and the supporting and opposing papers do not unequivocally clarify the parties’ intent as to the tenant’s right to terminate the lease. Paragraph 66 states, in pertinent part, “It is mutually understood and agreed that the obligation of the Tenant to pay rent hereunder is dependant upon

Tenant's continued funding by the government and the agencies thereof for the purpose of which this lease is executed" The parties, here, have submitted conflicting affidavits regarding the purpose of the lease and what revenues the landlord would consider to determine whether Edwin Gould's "level of funding had been significantly reduced."

Plaintiff claims that, pursuant to Paragraph 2 of the lease, the agency rented the space for use as "general and executive offices for a child care agency." Plaintiff contends that the language clearly states the space in the building would be used for general offices, not just foster care. Thus, according to plaintiff, the parties intended that the landlord would consider all funding Edwin Gould received from the government or its agencies for all programs and services that the agency provides to determine whether "funding has been significantly reduced" for the purpose of early termination.

Edwin Gould, on the other hand, contends that, reading Paragraph 66 in its entirety, the parties intended the agency to use Suite 505 as the administrative offices for its foster care program only. Gould further asserts that the landlord would consider only revenue from the foster care program when determining whether "funding had been significantly reduced" for the purpose of early termination and that the landlord would consider expenses and other factors related to the foster care program to determine whether the agency could not meet its financial obligation under the lease.


The court finds that the language of Paragraph 66 is ambiguous. The phrase "the purpose of which this lease is executed" is not explained in the document, and, as the conflicting affidavits from the parties confirm, the phrase is subject to different interpretations. Without clarity regarding the purpose of the lease, the court cannot determine whether the parties intended

the landlord to consider all program revenue or just foster care program revenue to determine whether the agency had suffered “significant reductions” in funding. Because triable issues of fact exist as to the parties intentions, both the motion and cross-motion are denied. (*Mallard Constr. Corp. v County Fed. Sat. & Loan, Assn.*, 32 N.Y.2d 285 [1973]).

This decision constitutes the order and decision of the court.

The parties are directed to participate in a conference call on January 9, 2007 at 11:00 a.m. with the court to pick a trial date.

Dated: December 18, 2006



J.S.C.

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