MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 14

68-49 WOODHAVEN BOULEVARD HOLDING CORP.,

Plaintiff,

- against -

EXXON MOBIL CORPORATION F/N/A MOBIL OIL CORPORATION,

Defendant.

INDEX NO. 1353/05

BY: ELLIOT, J.

DATED: April 6, 2007

EXXON MOBIL OIL CORPORATION,

Third-Party Plaintiff,

- against -

AC WOODHAVEN INC., A.C. WOODHAVEN REALTY CORP., and ADELMO CIOFFI,

Third-Party Defendants.

Defendant Exxon Mobil Corporation has moved for summary judgment dismissing the complaint against it and for summary judgment on its first counterclaim asserted against plaintiff 68-49 Woodhaven Boulevard Holding Corp. The plaintiff and the third-party defendants have cross moved for, inter alia, summary judgment on the second cause of action asserted in the complaint and summary judgment dismissing the third-party complaint respectively.

Adelmo Cioffi owns real property located at 68-27 Woodhaven Boulevard, Rego Park, New York , where he operates

a gas station, car wash, and convenience store. There was a Mobil gas station located on adjacent premises known as 68-29 Woodhaven Boulevard, Rego Park, New York ("68-29 Woodhaven"). Pursuant to a lease dated July 2, 1990, The Mobil Corp. rented 68-29 Woodhaven for a term of ten years. Paragraph 3 of the lease required Mobil to pay as additional rent "all real estate taxes." Paragraph 13 of the lease required Mobil to return the property with the building then on the premises. Paragraph 32 of Mobil's lease required the tenant to test the property for environmental contamination at the end of the term, and, if such existed, to perform remedial work. Paragraph 32 further provided: "*** if in the performance of the environmental clean up the Lessee interferes with the Lessor's use of the premises, then and in that event the Lessee agrees to pay to the Lessor on a monthly basis on the first day of each month that the Lessee is in possession for the limited purpose outlined above, a sum equivalent to the use and occupancy of the premises." In 2000 Mobil Corp. closed the gas station, and the landlord put the real property up for sale. In December, 2000, Cioffi executed a Mobil supply agreement pursuant to which he changed his supplier for his gas station at 68-27 Woodhaven from Sunoco to Mobil, allegedly receiving as consideration a lump sum payment from Mobil amounting to $800,000. On January 3, 2001, Cioffi purchased 68-29 Woodhaven Boulevard, allegedly relying on representations made by Mobil's representatives that the clean up would only last sixty to ninety days. Cioffi alleges that Exxon Mobil, the

successor to Mobil, is still engaged in remediation efforts, but has failed to pay use and occupancy and has also failed to pay real estate taxes since January 2005, as allegedly required by the lease. Cioffi alleges that as part of the remediation effort, (1) Mobil demolished the existing building on 68-29 Woodhaven Boulevard and has not yet rebuilt it, and (2) Mobil has installed monitoring wells across the center of the premises and around the perimeter and has not yet removed them. Although Cioffi alleges that the premises have not been remediated and the New York State Department of Conservation has not issued a "No Action" letter, he admits that in 2003 he entered into lease negotiations with KFC Corp., which made a written offer to rent the premises for $225,000 per year, triple net with periodic rent increases, for a term of twenty years.

Defendant Exxon Mobil alleges the following: Between November 1, 2000 and June 30, 2001, Exxon Mobil removed underground storage tanks, contaminated soil, and fluids from the site. On or about June 5, 2001, pursuant to an agreement with Exxon Mobil, the plaintiff, for the benefit of the defendant, demolished the building on the subject site to permit the excavation of soil. According to Melissa W. Tacchino, a lead project manager for Exxon Mobil responsible for the remediation effort at the subject site, " *** upon completion of the intrusive excavation and removal of petroleum impacted soils on June 26, 2001, Exxon Mobil's environmental actions *** are typical of work done on properties

with established ongoing businesses and that such activities have been nonintrusive and did not and/or would not interfere *** or prevent Plaintiff from utilizing the site for a commercial purpose." According to Andrew W. Jones, a Territory Manager for Exxon Mobil's Global Environmental Remediation Group, by June 30, 2001, Exxon Mobil had restored the site to a commercially usable condition. Jones allegedly told Cioffi "that any further work by Exxon Mobil would be nonintrusive in nature and, if warranted, would likely occur only on a quarterly basis for soil and groundwater monitoring purposes."

Defendant/third-party plaintiff Exxon Mobil also alleges that on or about December 20, 2000 it entered into a franchise agreement with third party defendants Adelmo Cioffi, AC Woodhaven, Inc., and A.C. Woodhaven Realty Corp. pursuant to which the third party defendants agreed to operate a Mobil station and to construct and operate an "On the Run" convenience store. Exxon Mobil alleges that the third party defendants breached the agreement to build and operate the convenience store and have wrongfully retained an $800,000 advance payment made by the former for the construction of the convenience store.

That branch of defendant Exxon Mobil's motion which is for summary judgment dismissing the first cause of action asserted against it is denied. Summary judgment is not warranted where there is an issue of fact which must be tried. (See, Alvarez v Prospect Hospital,68 NY2d 320.) In the case at bar, the

conflicting evidence in the record has created issues of fact pertaining to whether defendant Exxon Mobil became a holdover tenant, and, if so, for how long. The plaintiff alleges that the defendant did more than intermittently make remediation efforts on the subject site and did not actually vacate the property. (Compare, Charlebois v Carisbrook Industries, Inc., 23 AD3d 821.) The plaintiff also alleges that it accepted rent from the defendant in the form of payment of real estate taxes after the expiration of the lease, thereby creating a holdover tenancy. (See, Real Property Law §232-c; Jaroslow v Lehigh Valley R. Co., 23 NY2d 991.) On the other hand, the defendant alleges that it mistakenly made those payments. Under all of the circumstances of this case, there is an issue of fact concerning whether the parties intended to preserve the landlord-tenant relationship after the expiration of the lease. (See, Niagara Frontier Transp. Authority v Euro-United Corp., 303 AD2d 920; Walker v Espinal, 4 Misc3d 136[A].)

That branch of defendant Exxon Mobil's motion which is for summary judgment dismissing the second cause of action asserted against it is denied. That branch of the plaintiff's cross motion which is for summary judgment on its second cause of action is denied. Pursuant to paragraph 32 of the lease the defendant essentially promised to pay the plaintiff on a monthly basis "a sum equivalent to the use and occupancy of the premises" if the environmental clean up interfered with the plaintiff's use of the premises. A landlord is entitled to recover for the reasonable

value of the use and occupation (see, Beacway Operating Corp. v Concert Arts Soc., Inc., 123 Misc2d 452), which is based on the premises' fair market value. (See, N.Y. Prac, Landlord and Tenant Practice in New York, § 10:109.) An award for use and occupancy should reflect the fair market rental value of the premises. (See, Petallides v Petallides, 269 AD2d 511; 150-18-28 Union Turnpike Associates v Board of Managers of Village Mall at Hillcrest Condominium, 12 Misc3d 135[A] [AT 2 &11], 511; United Hay, LLC v Grabrovak, 2002 WL 919658 [AT 1][n.o.r.]; Parker 24 Commercial Associates v Sakow,14 Misc3d 1231[A]; New York City Economic Development Corp. v Harborside Mini Storage, Inc., 13 Misc3d 1218[A]; Fairfield Presidential Associates v Salis, 7 Misc3d 1028[A].) In the case at bar, summary judgment for either side is precluded by an issue of fact concerning when, if ever, the defendant's remediation of the site ceased to substantially interfere with the plaintiff's use of the premises. Summary judgment is also precluded by an issue of fact pertaining to the fair market rental value of the premises.

That branch of defendant Exxon Mobil's motion which is for summary judgment dismissing the third cause of action asserted against it is denied. That branch of the plaintiff's cross motion which is for summary judgment on the issue of liability arising under the third cause of action is denied. In an appropriate case, a landlord may recover incidental and consequential damages from a holdover tenant. (See, 437 Madison Ave. Associates v A.T. Kearney,

Inc., 127 Misc2d 37 [AT 1]; Palumbo v Donalds, 194 Misc2d 675.) In the case at bar, summary judgment is precluded by issues of fact pertaining to what damages, if any, the plaintiff suffered by the alleged wrongful holding over by the defendant. Moreover, there is also an issue of fact concerning whether the plaintiff failed to mitigate its damages, a duty which applies to the landlord-tenant relationship. (See, 437 Madison Ave. Associates v A.T. Kearney, Inc., 120 Misc2d 944.)

That branch of defendant Exxon Mobil's motion which is for summary judgment dismissing the fourth cause of action asserted against it is denied. That branch of the plaintiff's cross motion which is for summary judgment on the issue of liability arising under the fourth cause of action is denied. The plaintiff alleges that the defendant breached paragraph 13 of the lease by failing to return the property with a building of equal or greater value than existed when the tenant began its occupancy. The conflicting evidence in the record has created an issue of fact concerning whether defendant Exxon Mobil breached its contractual obligation under paragraph 13 of the lease.

That branch of defendant Exxon Mobil's motion which is for summary judgment dismissing the fifth cause of action asserted against it is denied. That branch of the plaintiff's cross motion which is for summary judgment on the issue of liability arising under the fifth cause of action is denied. The conflicting evidence in the record has created an issue of fact concerning

whether defendant Exxon Mobil breached its contractual obligation to remediate the premises.

That branch of defendant Exxon Mobil's motion which is for summary judgment dismissing the sixth cause of action asserted against it is denied. That branch of the plaintiff's cross motion which is for summary judgment on the issue of liability arising under the sixth cause of action is denied. Paragraph 37 of the lease provides for the recovery of attorney's fees incurred by "the prevailing party." While there is a contractual basis for the award of attorney's fees in this case (see, A.G. Ship Maintenance Corp. v Lezak, 69 NY2d 1), the determination of issues pertaining to attorney's fees is premature before the resolution of all of the causes of action asserted by the plaintiff.

That branch of defendant Exxon Mobil's motion which is for summary judgment on its first counterclaim asserted against the plaintiff is denied. That branch of the plaintiff's cross motion which is for summary judgment dismissing the first counterclaim is denied. The defendant alleges that it mistakenly paid real estate taxes after the expiration of the lease, and it seeks to recover the sum paid on a theory of unjust enrichment. (See, Mente v Wenzel, 178 AD2d 705.) There is an issue of fact concerning whether the defendant mistakenly paid those taxes, and, moreover, if the defendant is a holdover tenant, another issue of fact, then "pursuant to common law, there is implied a continuance of the tenancy on the same terms and subject to the same covenants as

those contained in the original instrument." (City of New York v Pennsylvania R. Co., 37 NY2d 298, 300; see, Logan v. Johnson, 34 AD3d 758.)

That branch of the cross motion by the third party defendants which is for summary judgment dismissing the third party complaint is denied. The third party defendants allege that Exxon Mobil did not make the $800,000 payment for the construction of the convenience store, but rather as an inducement for Cioffi to enter into a supply agreement to purchase gasoline from Exxon Mobil rather than Sunoco. The conflicting evidence in the record concerning the purpose of the $800,000 payment has created an issue of fact which precludes summary judgment.

Short form order signed herewith.

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J.S.C.