Spa Meridan 1, Inc. v 143 E. 34th St. Corp.
2007 NY Slip Op 31310(U)
May 15, 2007
Supreme Court, New York County
Docket Number: 0112242/2004
Judge: Judith J. Gische
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SCANNED ON 5/23/2007

[* 1]

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

PRESENT: JUDITH J. GISCHE
Justice

PART 10

Spa Meridian Inc.

- v -

143 East 34 Street Corp.

INDEX NO. 112242/04

MOTION DATE

MOTION SEQ. NO. ~~002~~ 06

MOTION CAL. NO.

The following papers, numbered 1 to ______ were read on this motion to/for + Corrected Decision order x re: Amended Complaint

	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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED
MAY 23 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 5/15/07

HON. JUDITH J. GISCHE, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☒ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

Spa Meridan 1, Inc.

Plaintiff

-against-

143 East 34th Street Corp., Skyline Development Group, Inc. and Emanuel Kambanis,

Defendants.

Corrected
DECISION/ORDER
Index No.: 112242/04
Seq. No.: 002

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

Papers	Numbered
Pltff's OSC [§3025] w/EMM affid, exhs	1
Def's Opp w/SH affid, exhs	2
Reply w/SSHA affirm	3

FILED
MAY 23 2007
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers the court's decision is as follows:

GISCHE, J.

Plaintiff is a the tenant of a commercial condominium unit located on the ground floor of the building located at 143 East 34th Street in New York County (hereinafter "the store" and "the building"). Defendants are, collectively, the owner and landlord of the building. This action is for injunctive relief, tolling a Notice to Cure that defendants had served on the plaintiff ("Yellowstone" injunction"). The Yellowstone claim has been resolved by the parties, but the issue of whether plaintiff owes additional rent, including real estate taxes ($4,772.99), legal fees, and the fees charged by an expeditor was set

down for a hearing before and report by a special referee. The hearing is already underway before Referee Liebman. He stayed the hearing, however, so that plaintiff could bring this motion for leave to serve an amended complaint asserting a new (9th) cause of action against defendant for reformation of the lease on the basis that there has been a "mutual mistake." It is within this context that plaintiff's motion to amend presently before the court is considered and decided.

Background

There has always been a dispute between the parties about whether plaintiff is in default under the terms of its lease, including the provisions attendant to the payment of rent. Once the hearing started, defendants began presenting evidence about the additional rent it claims is owed, using the base tax year of 2002-2003. Plaintiff now contends that defendant's use of the 2002-2003 base tax year is incorrect and unfair because it is not what the parties intended when they entered into the lease. Therefore, defendant seeks reformation of the lease to provide that it is not required to pay real estate in the manner the lease expressly provides for. The provision in controversy provides as follows (hereinafter "¶ 43.__") and both sides agree this provision is in the lease between them:

> "43. REAL ESTATE TAX ESCALATION:
>
> Tenant shall pay to Landlord, as additional rent a portion of the Real Estate Taxes due on the Ground Floor Commercial Unit as calculated in accordance with this Article.
>
> A. [* * *]
>
> 1. The term "Base Tax Year" as hereinafter set forth for the determination of real estate tax escalation shall mean the real estate tax year 2002/2003.

They also agree that throughout paragraph 43, reference is made consistently to, and the base tax year is defined as, "2002/2003." According to this provision, "[t]enant's first payment of tax escalation shall be due and payable commencing July 1, 2003" (¶ 43.A.4) The lease also contains the following formula for calculating the real estate taxes payable by the plaintiff:

> "6. The phrase 'Real Estate Taxes payable during the Base Tax Year' shall mean that amount obtained by multiplying the valuations actually used by the City of New York, of the Commercial Condominium Unit (whether same be actual or transitional assessment), for purposes of billing Real Estate Taxes during the Base Tax Year by the Base Tax Year rate for each $100.00 for such valuation, exclusive of any 421 (a) abatements, credits or exemptions."

The building where the store is located was still under construction at the time the lease was executed and was not completed until November 2002. Plaintiff argues that the parties did not contemplate that plaintiff would have to pay taxes until the building and store were completed and taxes reassessed. Thus, it is plaintiff's claim, that there was a mutual mistake because the lease requires it to pay real estate taxes calculated upon the assessed value of the building prior to its completion and reassessment.

To support this argument, plaintiff offers the sworn affidavit of its president, Mr. Moon, and a memorandum by Mr. Hochberg, an attorney who was involved in the lease negotiations. Mr. Hochberg's statement is not only unsworn, it does not support plaintiff's claim that there is an any "mistake" in the lease. He merely opines that "if the real estate taxes for the Unit were calculated without 421 (a) benefits, then the real estate taxes would be too high for the tenant to pay." Thus, plaintiff argues that since

there was no 421 (a) benefit available in 2002-2003, the language in ¶ 43.A.4, *supra*, would be rendered meaningless. Mr. Ahne, plaintiff's current attorney, affirms that the parties intended for the tenant (his client) to pay 100% of the increase in real estate taxes over the post construction assessment.

Discussion

Leave to amend a pleading shall be freely at any time by leave of court upon such terms as may be just, including the granting of costs and continuances. CPLR § 3025 (b). Moreover, leave should be granted when the denial of the motion would create a greater prejudice than granting it. Murray v. City of New York, 43 NY2d 400 (1977); Adams Drug Co. v. Knobel, 129 AD2d 401 (1st Dept 1987). However, an order allowing the amendment should not be granted without considering the validity of the claim sought to be asserted. Thus, "the sufficiency or meritoriousness of a proposed pleading or matter" should be resolved at the outset "to obviate the possibility of needless time consuming litigation." Sharapata v. Town of Islip, 82 AD2d 350, 362 *aff'd* 56 NY2d 332 (1982).

Although plaintiff contends there has been a "mutual mistake," defendants contend that is not the case, and the lease provides exactly what they expected, what was agreed by the parties, and what both side intended. A "mutual mistake" is by definition a matter of mutual concern to the parties. Brauer v. Central Trust Co., 77 AD2d 239 (4th Dept 1980). The mistake must exist at the time of the agreement, and not be a future development or unknown injury or consequence. Marchello v. Lenox Hill Hospital, 107 AD2d 566 *aff'd* 65 NY 833 (1985).

The lease provisions plaintiff contends contain the mistake are clear and

unambiguous. Plaintiff makes no claim to the contrary, such that any material language or terrn was omitted. Thus, the lease, being subject to the ordinary rules of construction, like any other agreement, is read to mean what it plainly states. George Backer Management Corp. v. Acme, 46 NY2d 211 (1978). Plaintiff's claim, that having to pay real estate taxes for the period before November 2002, when the unit was completed, is "wrong" and not what they expected, is therefore, not a mutual mistake and leave to serve an amended complaint for reformation based upon a mutual mistake is denied.

Assuming that plaintiff really means *it* made a mistake, this is a unilateral mistake. Chimart Assocs v. Paul, 66 NY2d 570 (1980) Where a party alleges a unilateral mistake, the aggrieved party would have to show that the mistake was fraudulently induced, and the subsequent writing does not express the intended agreement. Greater New York Mutual Insurance Company v. United States Underwriters Insurance Company, 36 AD3d 441 (1st Dept 2007). Reformation does not lie merely to relieve a party from a hard or oppressive burden. Greater New York Mutual Insurance Company v. United States Underwriters Insurance Company, 36 AD3d at 148 (*citing* Backer Mgt Corp v. Acme Quilting Co., 46 NY2d 211 [1978]).

The court will not allow plaintiff to serve the amended complaint to assert the proposed new claim for reformation of contract. There are no facts offered in support that would provide a foundation for that cause of action and there is no claim of fraudulent inducement by the defendants. The defendants do not claim there is a mistake and the lease is unambiguous on its face. Although the real estate taxes to be paid by plaintiff are "exclusive of" 421 (a) tax abatements, the exact language in the

agreement is "exclusive of ***any*** 421 (a) abatements, credits or exemptions." (*emphasis added)*. Therefore, payment of real estate taxes does not mandate the precondition of there being a 421 (a) tax abatement, as plaintiff suggests.

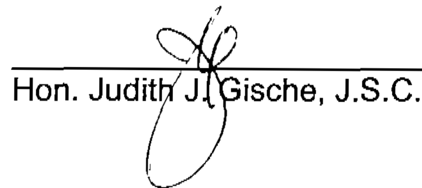
For these reasons, the motion to amend is denied, and the hearing is to resume before Referee Liebman. Defendants shall serve a copy of this decision upon Referee Liebman who will notify both sides of when the hearing will resume.

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
May 15, 2007

So Ordered:



Hon. Judith J. Gische, J.S.C.

FILED
MAY 2007
NEW YORK
COUNTY CLERK'S OFFICE