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

PRESENT: RAKOWER PART 5

Index Number : 600254/2007

WAVERLY CORP.

vs

CITY OF NEW YORK

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 ...	1, 2
Answering Affidavits — Exhibits	3, 4
Replying Affidavits	5

FILED

JUN 20 2007

COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: June 11, 2007

EILEEN A. RAKOWER 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: PART 5

----------X

WAVERLY CORP.,

Plaintiff,

Index No.
600254/07

- against -

DECISION
and ORDER

THE CITY OF NEW YORK, DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES, THE FORMER DEPARTMENT OF GENERAL SERVICES and THE ADMINISTRATION FOR CHILDREN'S SERVICES,

Mot. Seq. 001

Defendants.

----------X

HON. EILEEN A. RAKOWER

Plaintiff brings this action for declaratory relief in anticipation of defendants' contractual breach. Plaintiff and defendants entered into a landlord tenant relationship with the execution of a lease agreement in 1995 ("the lease"). Waverly Corp. ("Waverly") is the owner and lessor of premises known as 143 Waverly Avenue in the County of Kings and State of New York. Defendants (collectively "City") are the lessee of the premises referred to in the lease as 143 Waverly Avenue (Block 1889, Lot 1). City, by letter dated December 14, 2006, notified Waverly that it intended to stop making certain payments effective January 1, 2007 relating to taxes on the demised premises. Waverly contends this is an anticipatory breach of the lease agreement, and seeks "summary judgment on the causes of action in the complaint for a permanent injunction, directing defendants to fulfill its obligations under the Lease to pay directly to the DOF [Department of Finance] Additional Rent and for a declaration as to the parties' rights and obligations under the lease as it relates to City's obligation to pay Additional Rent allocable to the Lot." Additionally, it moves to dismiss defendant's counterclaims. City opposes the motion.

City, since 1995 with the inception of the lease, has paid what both parties refer to as Additional Rent, which includes real estate taxes. Such payments representing real estate taxes were made directly to the Department of Finance (DOF). City, in December 2006, alerted Waverly that it no longer intended to make direct payments to DOF. "You are required to make all real estate tax payments to the authorities

directly, and apply for reimbursement to this Agency for its share of taxes. You will be reimbursed within thirty (30) days after the receipt of such request in accordance with the provisions of Article 8 of the lease."

Additionally, City notified Waverly that it contests the calculation of the tax payments it was responsible for, stating "The City of New York has made real estate tax payments for the lot area that is not included as part of "Demised Premises" as described in the preamble of the Lease No. 7311 for 143 Waverly Avenue, Brooklyn, NY 11205. Therefore, the City will take steps to recover these payments from you." City, by way of counterclaims pleaded in its answer to Waverly's summons and complaint, seeks reimbursement of $56,164.13 City already paid directly to DOF during the lease term, which it states represented taxes attributable to a vacant lot adjoining the leased property.

"To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Di Menna & Sons v. City of New York*, 301 N.Y. 118 [1950]). This drastic remedy should not be granted where there is any doubt as to the existence of such issues and "issue finding rather than issue determination is the key to the procedure."(*Sillman v. Twentieth Century Fox Film Corp.* 3 N.Y.2d 395 [1957], *quoting Esteve v. Abad,* 271 App. Div. 725 [1st Dept. 1947]).])In addition, "[t]he party opposing the [summary judgment] motion must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests." (*Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966 [1988]) Bald, conclusory allegations, even if believable, are not enough. (*Id.*; *Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249 (1st Dept. 1989).

It is the Court's responsibility on a motion for summary judgment in a contract dispute, if possible, to determine the intent of the parties from the four corners of the document (*Diversified Group Inc. v. Sahn*, 259 A.D. 2d 47 [1st Dept. 1999]). However, when the contract is ambiguous and the intent of the parties becomes a relevant inquiry, a question of fact is presented which cannot be resolved on a motion for summary judgment. (*Ruttenberg v. Davidge Data Systems Corp.* 215 A.D.2d 191 [1st Dept. 1995]). Under such circumstances, the parole evidence rule is not violated by the introduction of extrinsic evidence, not to change the terms of the contract but only to explain the meaning of a particular provision. (*Shepherd v. Seril,* 118 A.D. 2d 422 [1st Dept. 1986]).

Plaintiff, in support of its motion, provides the lease, the authorization to approve the lease by the City Law Department, the certification by the Mayor's Office of Contracts/Public Hearings Unit, the summons and complaint and answer, and a letter dated December 14, 2006 from the Director of the Lease Enforcement Unit for City to the landlord of the leased premises. The lease itself is subject to public hearing and Mayoral approval pursuant to 1602(3)(a) of the New York City Charter.

The lease between the parties requires at Article 8 that

> Tenant shall pay within thirty (30) days after receipt of a bill therefor, all real estate taxes, assessments, water rates and sewer rents and vault taxes (if any)(as well as interest and penalties resulting from Tenant's delay in the payment thereof) levied against said premises or that may be liens thereon.
>
> The term "real estate taxes" as used herein, shall mean taxes on or with respect to the Building and the land upon which it is located assessed, levied, or imposed by any governmental authority having jurisdiction.

The lease itself describes the demised premised as

> The entire building comprising approximately 22, 074 rentable square feet of interior space and approximately 7,806 square feet of the roof play area located at 143 Waverly Avenue (Block 1889, Lot 1) in the Borough of Brooklyn.

Finally, Article 2 of the lease directs

> Rent shall be payable at Landlord's address hereinbefore set forth or at such other address as may be designated by Landlord from time to time, by notice in the manner provided in Article 21 hereof.

Waverly asserts that the language of the lease unambiguously requires City to make payment of real estate taxes directly to DOF. However, a plain reading of the previously quoted Article 8 does not state to whom the lessee should make that payment. It is undisputed that throughout the course of this lease City paid real estate taxes directly to DOF. Additionally, Plaintiff submits a copy of DOF's property assessment roll which demonstrates that the billing name and address for the subject property is City. Notwithstanding the above, the term used by both Waverly and City to describe these payments, "Additional Rent," (a term not used in the lease) lends itself to a different interpretation, in that it would suggest that the money should be paid to Plaintiff along with regular rent pursuant to the above quoted provision contained in Article 2 of the lease.

Waverly argues that the language of Article 8 which assigns responsibility for interest and penalties to City is further evidence of City's obligation to make direct payments to DOF. Waverly states that this provision would be a nullity if it was the intention of the parties for Waverly to make payments to DOF and seek reimbursement from City. This is unconvincing. While the billing address for the tax bills directs those bills to the lessee and it has been the practice of the lessee to make those payments directly, any interest or late payments would have accrued to the property itself and that property would be subject to tax liens as a result. The plain language of Article 8 acknowledges that the ultimate responsibility for payment runs with the taxed property and thus the landowner. This provision of the lease preserves for Waverly the right to recoup such penalties from City in order to extinguish any such liens.

Waverly also moves to dismiss City's counterclaims as they regard property taxes allocated to a vacant lot next to the leased property. City claims that it was, and is, only required to pay property taxes for the portion of the property that the building is located on (rather than the entire lot). It appears that neither the lease nor the tax bill subdivide Lot 1, separately designating the land that the building is on and the vacant lot that adjoins the building. To the extent that the lease clearly requires the payment of taxes, if any, imposed on Block 1889, Lot 1, and Block 1889, Lot 1 includes the land which City now attempts to exclude, such apportionment of the tax responsibility modifies the language of the lease.

Article 26 of the lease states

> This lease sets forth the entire Agreement between the parties, superseding all prior agreements and understandings, written or oral, and may not be altered or modified except by a writing signed by both parties.

City argues that Waverly's motion is premature in that all discovery remains outstanding. To the extent that the lease may have been modified, such additional writing might explain the conduct of the parties in the face of the above cited lease provisions. Regarding the taxes on the vacant lot, again, should such modification exist, or should there exist evidence in the form of photographs, maps, schematics or any other documentation that would demonstrate that this land was not contemplated in the taxing authority's designation Block 1889, Lot 1, then discovery will bring it to light.

CPLR § 3212(f) states, in pertinent part:

> Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had . . ..

Here,"[s]ince the plaintiff's motion was made before discovery began, summary judgment is premature at this juncture." (*Great South Bay Family Medical Practice, LLP v.Raynor*, 35 A.D.3d 808 [2nd Dept. 2006]). Accordingly, Waverly's motion for summary judgment declaring the rights and obligations of the parties must be denied.

Wherefore it is hereby

ORDERED that Plaintiffs' motion for summary judgment seeking a declaration of the rights and obligations of the parties and dismissing City's counterclaims is

denied as premature.

All other relief requested is denied.

This constitutes the decision and order of the Court.

Dated: June 14, 2007

Eileen A. Rakower, J.S.C.