

Duane St. Assoc. v June Shine Nail Corp.

2007 NY Slip Op 32229(U)

July 9, 2007

Supreme Court, New York County

Docket Number: 0116955/2006

Judge: Emily Jane Goodman

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

EMILY JANE GOODMAN

PRESENT: _____

PART 17

Index Number : 116955/2006

DUANE STREET ASSOCIATES

VS.

JUNE SHIN NAIL CORP.

SEQUENCE NUMBER : 002

REFER TO ANOTHER JUDGE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

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 *is decided per attached*

FILED

JUL 18 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/9/07

[Signature]

J.S.C.
EMILY JANE GOODMAN

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X

Duane Street Associates,
Plaintiff,

Index No. 116955/06

-against-

June Shine Nail Corp
Defendant.

-----X

Emily Jane Goodman, J.S.C.:

Plaintiff seeks to remove a breach of contract action filed in Civil Court to this Court and to amend its complaint, based on its contention that the damages originally sought were less than what is owed, which exceed the jurisdiction of the Civil Court. The Court previously denied the motion with leave to renew upon a client affidavit and memorandum of law supporting Plaintiff's argument that it did not assign to Independence Plaza, LLC., rights to real estate tax escalation charges (Charges) under Section 5.2 of the Purchase Agreement (Purchase Agreement), dated June 25, 2002, between Plaintiff, as seller and Independence Plaza Associates, LLC, as purchaser.¹ The Charges are, accordingly to the complaint, for the 2002/2003 tax year, and "for other years" which were retroactively assessed by the Department of Finance subsequent to the sale, for a period of time prior to the sale. The Charges are apparently labeled by the City Collector as "Housing-Shelter Rent."

¹The Purchase Agreement also includes Julian L. Cohn, Herbert N. Cohn and Harold N. Cohn as sellers, in addition to the corporate entity.

In its Memorandum of Law, Plaintiff cites paragraph 60 of the lease between the parties, dated November 22, 1993, for the term December 1, 1993 to November 30, 2003, which provides that “[f]or the period commencing December 1, 1993 and ending November 30, 2003, Tenant shall, as additional rent, pay to the Landlord 3.3% of any increase in real estate taxed over the base year 1993/1994 for the commercial space whether such increase is caused by an increase in assessed valuation, an increase in tax rate or any other method of increase.” The lease was extended by Agreement of Lease Extension And Modification, dated December __, 2001 for an additional 10 years and providing that “[e]xcept as expressly amended by this Agreement, the terms and provisions of the Lease, including but not limited to the real estate base year set forth in Lease Article 57(a), shall continue in full force and effect as first written.”

Plaintiff argues that the amounts designated as “Housing-Shelter Rent” are the equivalent of real estate taxes, citing, 9 NYCRR §1740.1. Further, Plaintiff claims that Defendant’s alleged prior payments, without objection, is evidence that Defendant agreed to pay the Charges, despite the designation of “Housing-Shelter Rent.”

Plaintiff further argues that under Section 5.2 of the Purchase Agreement, it retained the right to collect the Charges from its former tenants as “Additional Rents.” That section provides in relevant part:

5.2 If any past due rentals or additional rents are owing by Tenants on the Closing Date, Sellers are entitled hereunder to all of said past due rentals or additional rental. Purchaser agrees that the first moneys received by Purchaser from the respective Tenants owing such past due rentals, net of the cost of collection, shall be applied in the following order of priority; (a) first to the month in which the Closing occurred, (b) then to the month in which collected; and (c) then to the periods prior to the month in which such rental is collected and then to the months preceding such month, but except for “Additional Rents” under Commercial Leases, in no event for any period of time greater than six months prior to the Closing Date.

Because this provision excepts “Additional Rents” under Commercial Leases, Plaintiff maintains that it retained the right to collect the Charges.² In opposition, Defendant argues that the Charges are not “past due rentals or additional rents are owing by Tenants on the Closing Date” because the closing took place on June 25, 2003 and the Charges were assessed retroactively, subsequent to the sale of the property (Plaintiff admits that this will be an issue for the Court). Defendant also argues that the Assignment of Leases and Security Deposits, dated June 25, 2003 (Assignment), does not contain the same language exempting certain interests, as did the earlier Purchase Agreement. In response, Plaintiff cites paragraph 1 of the Assignment, contending that it assigned all interests “except as set forth in the Contract.” However, the Assignment provides in relevant part:

1. Assignor does hereby grant, convey, transfer, set over and assign to Assignee, its successors and assigns, the Leases and all of the right, title and interest of Assignor as the landlord under said Leases, including, without limitation, the security deposits (the “Security Deposits”) held thereunder without any representation or warranties except as set forth in the Contract.

Accordingly, this provision can be interpreted as providing that the interests assigned are not subject to any representations or warranties, except as to those representations and warranties which are set forth in the Contract. However, as no prejudice will result from amendment of the complaint, and as Plaintiff need not prove its case in order to obtain removal, Plaintiff’s motion is granted.

It is hereby

ORDERED that Plaintiff’s motion to amend its complaint in the form of the Proposed Amended Verified Complaint attached as Exhibit H to the moving papers is granted; and

²Independence Plaza Associates has not been named a party in this litigation.

Plaintiff shall serve such complaint within 20 days of receipt of a copy of this Decision and Order; and it is further

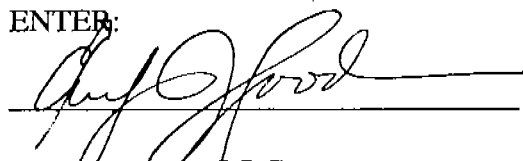
ORDERED that pursuant to CPLR 325 (b), the action in Civil Court, New York County entitled Duane Street Associates v June Shin Nail Corp., 032715-CV-2005 is removed to this Court, upon service of a copy of this Decision and Order, with Notice of Entry upon the Clerk of the Civil Court, who is directed to transfer the file to this Court, upon payment of any appropriate fees; and it is further

ORDERED that the parties contact the Court by telephone (646-386-3235) on September 5, 2007 at 11AM to discuss potential settlement.

This Constitutes the Decision and Order of the Court.

Dated: July 9, 2007

ENTER:



J.S.C.
EMILY JANE GOODMAN

FILED
JUL 18 2007
NEW YORK
COUNTY CLERK'S OFFICE