

**Manhattan Church of Christ, Inc. v 40 E. 80
Apt. Corp.**

2007 NY Slip Op 32554(U)

August 14, 2007

Supreme Court, New York County

Docket Number: 0603664/2006

Judge: Herman Cahn

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

PRESENT: HERMAN CAHN

PART 49

Index Number : 603664/2006
MANHATTAN CHURCH OF CHRIST
40 EAST 80 APARTMENT CORP.
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 5/14/07
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

_____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

| PAPERS NUMBERED |
|-----------------|
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| |
| |

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that _____

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

.MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE

Dated: 8/14/07 Herman Cahn
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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 49

-----X
MANHATTAN CHURCH OF CHRIST, INC.,

Plaintiff,

-against-

Index No.
603664/05

40 EAST 80 APARTMENT CORPORATION

Defendant.
-----X

UNFILED JUDGMENT
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Herman Cahn, J.:

This action is basically a landlord-tenant dispute over the interpretation of a rent escalation clause in a long-term ground lease. The interpretation involves the determination of whether, under the parties' lease, the floor area ratio (FAR) value, to be used in the rent escalation determination, is based only on the area that the leased building, i.e. the cooperative building, occupies or whether it is based on the entire area of the zoning lot. Plaintiff lessor urges that the FAR Value is to be determined based on the entire zoning lot, which has never been divided, and not just the portion of the zoning lot comprising the cooperative building. Therefore, according to the plaintiff, the square foot area of the plaintiff lessor's building would be included in the rent escalation calculation, since the tenant obtained the air rights of that building. Defendant lessee argues that the rent escalation provision provides that the base rent was to be 6% of the fair market value of "the land constituting the demised premises, considered as vacant, unimproved and unaffected by this lease," which demised premises is 54,260 square feet, not 78,955 square feet. The parties agree that the issue is one of contract interpretation, and thus an issue of law.

Plaintiff moves for summary judgment, declaring that the FAR value allowable to the cooperative parcel leased by defendant is 78,955 square feet and that, accordingly, the annual base rent owed by defendant to plaintiff commencing April 1, 2002 under the lease between the parties is \$947,460, and dismissing the counterclaim as moot.

Defendant cross-moves for summary judgment dismissing the complaint; awarding it judgment on its counterclaim, declaring that the FAR value for the parcel is 54,260 square feet, and that the annual base rent commencing April 1, 2002 is \$569,730.

BACKGROUND

Plaintiff Manhattan Church of Christ, Inc. (the Church) owns a parcel of land at 40-48 East 80th Street, New York, New York, Block 1491, Lot 48, which constitutes a single zoning lot (Plaintiff's Statement of Uncontroverted Facts, ¶ 1). The zoning lot has a total area of 9,716.71 square feet (*id.*). In 1968, the Church owned a five-story building on a portion (4,291 square feet) (the Church Property) of the zoning lot with a floor area of 18,214.3 square feet (*id.*, ¶ 2).

On May 9, 1969, the Church, as lessor, entered into a ground lease (the Lease), with regard to the remaining portion of the zoning lot having an approximate area of 5,426 square feet (the Coop Premises) with Richard Sherrill Associates, Inc., defendant 40 East 80 Apartment Corp.'s predecessor (*id.*, ¶ 3). The Coop Premises was thereafter improved with a 25-story apartment building with a floor area of 88,767.9 square feet (the Apartment Building), which the defendant Coop now owns.

The leased property, referred to in Section 1.1 of the Lease as the "demised premise," as set forth in Schedule A to the Lease, is defined by a metes and bounds description that includes three contiguous parcels (described as Parcels A, B, and C), which collectively total 5,426 square

feet (Lease, at Not of Mot, Corrected Exh A1 at 1-2, Sch A). The Church Property, which is not the subject of the Lease, together with the three parcels (Parcels A, B, and C), comprised a single zoning lot at the time the Lease was signed.

The Coop's rent obligations are fixed in Section 2.1 of the Lease, which provides for a fixed "basic" rent for the first 32 years and nine months of the 99 year lease term, after which the "basic" rent is calculated in accordance with Article XXI of the Lease (id. at 2). In Article XXI, at Section 21.1, the Lease provides that on April 1, 2002, the basic rent payable was to be adjusted to an amount equal to "6% of the fair market value (to be determined as provided in Section 21.2 [sic]) of the land constituting the demised premises, considered as vacant, unimproved and unaffected by this lease" (id. at 53) at the time of such adjustment, as determined pursuant to procedures specified in the Lease. Section 21.3 sets forth the procedures to determine the new basic rent.

When the parties were unable to agree on a new basic rent, each party appointed an appraiser to determine the fair market value pursuant to the Lease procedures set forth in Section 21.3, (Plaintiff's Statement of Uncontroverted Facts, ¶ 18). The appraisers were able to agree on the value of each square foot of developable floor area, but were unable to resolve the issue of how many square feet of floor area attributable to the demised premises were to be assumed under Section 21.1 of the Lease for purposes of determining fair market value.

On May 9, 2002, the appraisers issued a letter report (Haims Aff, Exh A). In this letter report, the appraisers stated that pursuant to Section 21.3 of the Lease, Robert Von Ancken of Landauer Realty Group, Inc. had been appointed by the plaintiff lessor, and that Jerome Haims had been appointed by the defendant lessee to determine the fair market value (id. at 1). The

report further stated that they had agreed that the fair market value depended upon “whether the floor area attributable to the demised premises under the Lease, and in accordance with applicable zoning rules, is 78,955 square feet (the ‘Higher FA Value’) or 54,260 square feet (the ‘Lower FA Value’)” (id.). They also agreed that the fair market value of the land constituting the demised premises, considered as vacant, unimproved and unaffected by the Lease was either \$15,791,000 if it is based on the Higher FA Value or \$9,495,500 if the value is based on the Lower FA Value (id. at 1-2).

On February 12, 2003, the parties entered into an agreement (the Stipulation) (Not of Mot, Exh F). In Recital D of the Stipulation, the parties stated that neither the appraisers nor the parties had agreed as to whether the FA Value of the demised premises under the Lease was 54,260 square feet or 78,955 square feet (id. at 1). The parties agreed to increase the annual basic rent from \$60,000 to \$569,730 without prejudice; agreed to a formula for paying the increased rent retroactively to April 1, 2002; and agreed to work in good faith to resolve their dispute (id. at 2-3). They further agreed that if a lawsuit was commenced by either party to adjudicate the dispute:

the sole issue to be determined in any such Action, for the period in question, shall be the issue of whether the FA Value of the land constituting the demised premises as defined in the Lease is (i) 54,260 square feet, in which event the basic annual rent shall be \$569,730 per annum, or (ii) 78,955 square feet, in which event the basic annual rent shall be \$947,460 per annum.

Id., ¶ 4.

Plaintiff contends that the value given to the demised premises under Section 21.1 should include all of the development rights for the entire zoning lot, minus the rights taken up by the

plaintiff's building (the Church Building). It asserts that the purpose of Section 21.1 was to prevent the lessor from reaping the value of the improvements made by the lessee, and to prevent the lessee from reducing the value of the premises because they are encumbered by a ground lease. Thus, plaintiff maintains, the floor area ratio must be computed in accordance with Zoning Resolution § 92-041 and based on a ten FAR, as ten times the development rights of the full zoning lot, less the floor area of the Church Building. It asserts that under Zoning Resolution § 92-041, the maximum size of the hypothetical building which could be built is determined by the unused development rights of the entire zoning lot. It contends that the total development rights of the zoning lot are 97,170 square feet, of which 18,215 square feet are used by the Church Building, leaving a balance of 78,955 square feet available for development. It urges that neither § 92-041 nor any other law provides for the computation of unused development rights based on only a portion of a zoning lot. It further contends that the plans, the permit, the Coop Offering Plan, and the Church Building demonstrate that a building with a FAR of 78,955 could be built on the Coop Premises considered as vacant, unimproved and unaffected by the Lease. It points to Section 9.3 of the Lease (Not of Mot, Corrected Exh A1, Rider to page 17 of Lease), which refers to the parties' agreement regarding the use of air rights applicable to the demised premises and the Church Property, as proof that all development rights of the zoning lot not used by the Church Building provides the FAR to be used under Section 21.1.

The defendant Coop computes that floor area, based on a ten FAR, as ten times the area of the portion of the zoning lot comprising the Coop Premises. It contends that under the rent recalculation provision in Section 21.1, the reset rent should reflect the value of the land constituting the demised premises only, and that no assumption should be made that the

purchaser of such land would be able to use air rights pertaining to the portion of the zoning lot retained by plaintiff. It urges that this provision forbids consideration of either the building that was actually constructed on the demised premises, or the provisions of the Lease, such as the air rights provision in Section 9.3, to the extent that such provisions would affect the valuation of the demised premises. Defendant further contends that the parties knew how to provide for unused development rights, and did so when it came to construction of the Apartment Building by expressly addressing it in Section 9.3. But, those rights were not included when addressing the calculation for the reset rent as provided in Section 21.1. Defendant asserts that to interpret the Lease the way plaintiff urges would be to rewrite the parties' agreement. It maintains that the fair market value in Section 21.1 is based on how large a building a hypothetical purchaser of only the demised premises would be allowed to erect, not how large a building the Church could build on the demised premises if it retained both the demised premises and the Church Property. Such a hypothetical purchaser could not use the air rights over the Church Building absent a conveyance of such rights by the plaintiff. Accordingly, defendant seeks a judgment declaring that the FAR value is 54,260 square feet for the demised premises.

DISCUSSION

Plaintiff's motion for summary judgment is denied, and defendant's cross motion for summary judgment is granted to the extent that it is declared that the FAR value pursuant to Lease Section 21.1 for the demised premises is 54,260 square feet. Therefore, the fair market value of the demised premises is \$9,495,500, and the annual rent owed by defendant to plaintiff commencing April 1, 2002 is \$569,730.

As the parties both agree, the issue presented involves interpretation of an unambiguous

contract, which is a question of law appropriate for determination on a motion for summary judgment (see Vermont Teddy Bear Co. v 538 Madison Realty Co., 1 NY3d 470 [2004]; W.W.W. Assocs. v Giancontieri, 77 NY2d 157, 162 [1990]; Maysek & Moran, Inc. v S.G. Warburg & Co., 284 AD2d 203, 204 [1st Dept 2001] [construction of unambiguous contract is question of law for court]; see also Ruth v S.Z.B. Corp., 2 Misc 2d 631, 636 [NY County], affd without opinion 2 AD2d 970 [1st Dept 1956]). “When the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the document” (ABS Partnership v AirTran Airways, Inc., 1 AD3d 24, 29 [1st Dept 2003] [citations omitted]), and the writing should be enforced according to its terms (Vermont Teddy Bear Co., 1 NY3d at 475). The contract will be read as a whole, and words and phrases will be given their plain meaning (see Matter of Riconda, 90 NY2d 733, 738 [1997]).

Here, Section 21.1 of the Lease clearly provides:

The basic rent which Lessee agrees to pay and Lessor agrees to accept during each 20 year period . . . commencing 32 years and 9 months following the Commencement Date shall be an amount per annum equal to 6% of the fair market value (to be determined as provided in Section 21.2) of the land constituting the demised premises, considered as vacant, unimproved and unaffected by this lease . . .

Not of Mot, Corrected Exh A 1, at 53 (emphasis added). The express purpose of this provision was to provide for a renewal rent based upon the value of the land only which would not be subject to the acts of either party (see 185 Lexington Holding Corp. v Holman, 19 Misc 2d 521, 522 [Sup Ct, NY County 1959], affd 10 AD2d 569 [1st Dept], affd 8 NY2d 965 [1960]). The parties expressed a clear intention that existing structures, encumbrances, and the Lease itself not be taken into account in setting the fair market value. If the Coop building, or the granting of air

rights with respect to the development of the land, was to be considered in determining the rental value, either increasing or decreasing it, that would or should have been stated (see id.).

The plain and natural meaning of the terms “unaffected by this lease” requires that the Lease “in its entirety must be eliminated from consideration” (Ruth, 2 Misc 2d at 634). It would be contrary to the language employed to hold that the grant of the air rights over plaintiff’s Church Building, springing from Section 9.3 of the Lease itself, may be treated by the appraisers as an element of value (id. at 636). The drafters of this rent reset provision could not have intended that the appraisers “might give heed to the very lease which so declared” otherwise (id. at 636-37). Therefore, to consider, as plaintiff’s propose, that the value of the demised premises under Section 21.1 includes the air rights over the Church Building, which rights were specifically granted to defendant lessee by Section 9.3 of the Lease, would be to ignore the directive in Section 21.1 that the value be “unaffected by this lease.”

While it is undisputed that defendant’s predecessor, the original lessee under the Lease, in constructing the Apartment Building, used most of the unused development rights specifically made available to it under Section 9.3 of the Lease, Section 21.1 forbids consideration of the fact that the Apartment Building was built in determining the value of the demised premises. Moreover, as demonstrated by Section 9.3, it is clear that the parties to the Lease were aware of the unused development rights when the Lease was drafted, and did not fail to consider them altogether. They simply did not include them when they addressed the calculation of the value for the reset rent in Section 21.1. This court will not read the value of the air rights into the calculation of value under Section 21.1 under these circumstances.

Pursuant to the express terms of the Lease, the parties did not intend the land to be

appraised at its highest and best use to establish the rental reset rate under Section 21.1 (see New York Overnight Partners, L.P. v Gordon, 88 NY2d 716, 722 [1996]). Rather, the Lease plainly stated that the land be considered theoretically as a vacant and unimproved parcel, and not, as plaintiff contends, as a parcel of property permitting usage of a building containing 78,955 square feet of floor space, based on the consideration of air rights over the plaintiff's building granted to the lessee under the Lease. The fact that it may be possible to develop the land with a greater FAR under the zoning resolutions is not determinative of the value of the land under Section 21.1. The fact that this may strike plaintiff as a poor bargain, over 38 years after execution of the Lease, fails to provide a basis for "recasting the agreement under the guise of judicial interpretation" (id.).

The language here is very similar to that used in Ruth v S.Z.B. Corp. (2 Misc 2d at 634). In that case, the parties entered into a long term lease with renewal periods. The renewal provision set forth the basis for calculating the renewal rent as 6% of "the full and fair value of the land demised which the same would sell for as one parcel considered as vacant and unimproved, in fee simple, by private contract, free of lease and unencumbered" (id. (internal citation omitted)). The lease contained provisions restricting the use of the buildings on the land. While the court recognized that ordinarily a legally imposed restriction on the use of land is a factor properly considered when fixing the value of the property, it determined that the terms "free of lease" meant that those restrictions should not be considered (id. at 636 (internal citation omitted)). It found that giving that phrase its plain and natural meaning, "the lease in its entirety must be eliminated from consideration, whether its provisions spell good or ill fortune for one party or the other" (id.). To consider the restriction on use would delete the phrase "free of

lease” from the formula (id.). Thus, the court held that the land was to be valued in accordance with the formula set forth in the renewal rent provision, without including as an element of value the use restrictions flowing from the lease (id. at 637; see also 185 Lexington Holding Corp. 19 Misc 2d at 522-23 [clause providing that renewal rent to be calculated as 6% of the value of the land only, without improvements, at the time of the appraisal, requires valuation of the land vacant and unimproved, without consideration of encumbrances like the existing lease]; Archdiocese of New York v Amedeo Hotels Ltd. Partnership, 295 AD2d 161, 161 [1st Dept 2002] [language that land was to be regarded as “vacant, unimproved and unencumbered by this lease” means appraiser must disregard use restrictions upon the leased property, and any existing improvements]; Olympia & York 2 Broadway Co. v Produce Exchange Realty Trust, 93 AD2d 465, 469 [1st Dept 1983] [language that value based on value of land as vacant and unimproved, manifests parties’ intention that existing structures, encumbrances, and lease not be taken into account in fixing value]).

Similarly, the lease renewal provision in 201-203 Lexington Ave. Corp. v 205/215 Lexington Ltd. Partnership (224 AD2d 183 [1st Dept], lv denied 88 NY2d 813 [1996]) provided for a renewal rent of “6% of the fair market value . . . of the Demised Premises considered as vacant and unimproved, unencumbered by this lease” (201-203 Lexington Ave. Corp., 224 AD2d at 184 (internal citation omitted)). The court found that this language contemplated disregard of the value of any improvements, restrictions and encumbrances, and required current zoning restrictions be considered in valuation process (id.; cf. Plaza Hotel Assocs. v Wellington Assocs., 55 Misc 2d 483 [Sup Ct, NY County], affd without opinion 28 AD2d 1209 [1st Dept 1967], affd 22 NY2d 846 [1968] [where lease renewal clause did *not* exclude consideration of lease

encumbrance, restrictions in lease as to use of property as hotel were not to be disregarded]).

Plaintiff's argument that because either party could have used the entire zoning lot's development rights, with those rights going to the first party to exercise them, and because plaintiff irrevocably surrendered all development rights of the zoning lot not already used for the Church Building, to value the demised premises without consideration of their actual development rights would be to ignore reality, is rejected. As defendant aptly points out, whatever rights defendant has to use and possess the demised premises, including the air rights over the Church Building, exist solely by virtue of the Lease and are limited by the Lease. Once the Lease terminates, the plaintiff may use the air rights without restriction. Again, Section 21.1 forbids consideration of the rights afforded by the Lease. The fact that the zoning resolutions might permit plaintiff as the owner of the entire zoning lot to build a building with a greater floor area on the cooperative parcel because it did not use all the air rights over its Church Building does not increase the floor area ratio value for the demised premises under Section 21.1. This Lease provision is in contrast with the provision in the Plaza Hotel Assocs. v Wellington Assocs. (55 Misc 2d at 483) case, relied upon by plaintiff. In the Plaza Hotel case, the lease renewal provision did not contain the language "unaffected by this lease," and, therefore, the court considered the lease restriction regarding the use of the property, particularly because it caused the property not to be put to its highest and best use (id. at 485-87). If the parties had intended to base this rent reset provision on the fair market value of the demised premises and the fair market value of the air rights for the entire zoning lot, they could have written that into Section 21.1. They did not.

The court has considered the plaintiff's remaining arguments and finds them without

merit.

Therefore, the court holds that the FAR value for the demised premises pursuant to Section 21.1 of the Lease is 54,260 square feet, and the annual rental owed by defendant to plaintiff commencing April 1, 2002 is \$569,730.00.

Accordingly, it is

ORDERED that the motion for summary judgment is denied, and the cross motion for summary judgment is granted; and it is further

ORDERED, ADJUDGED and DECLARED that the floor area ratio value for the cooperative parcel leased by defendant at 40-48 East 80th Street, New York, New York, pursuant to the parties' lease Section 21.1, is **not** 78,955 square feet; and the annual rental owed by defendant to plaintiff commencing April 1, 2002, is **not** \$947,460.00; and it is further

ORDERED, ADJUDGED and DECLARED that the floor area ratio value for the cooperative parcel leased by defendant at 40-48 East 80th Street, New York, New York, pursuant to the parties' lease Section 21.1, is 54,260 square feet, and the annual rental owed by defendant to plaintiff, commencing April 1, 2002, is \$569,730.00.

Dated: August 14, 2007

ENTER:



J.S.C.

UNFILED JUDGMENT
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