

**Bank of New York v Kaplan**

2007 NY Slip Op 32594(U)

August 14, 2007

Supreme Court, New York County

Docket Number: 0117270/2006

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE  
Justice

PART 10

Index Number : 117270/2006

BANK OF NEW YORK

vs

KAPLAN, MARY E.

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

s 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

**FILED**

AUG 21 2007

COUNTY CLERK'S OFFICE  
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

AUG 14 2007

Dated: \_\_\_\_\_

HON. JUDITH J. GISCHE J.S.C.  
NON-FINAL DISPOSITION

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

RECEIVED

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

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

-----X  
The Bank of New York as Trustee under  
the Last Will and Testament of  
Catherine Hamersley Carpenter,

Plaintiff

**DECISION/ORDER**  
Index No.: 117270/06  
Seq. No.: 001

-against-

Mary E. Kaplan,

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

Defendant.  
-----X

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

Papers	Numbered
Pltff n/m (§3212) w/RW affid, exhs .....	1
Def opp w/MK affid, exhs .....	2
Pltff reply w/RW affid, exhs .....	3

**FILED**

Upon the foregoing papers the court's decision is as follows: **AUG 21 2007**

**GISCHE, J.**

**COUNTY CLERK'S OFFICE  
NEW YORK**

This is an action by plaintiff for a declaratory judgment that it properly terminated the  
defendant's lease (1<sup>st</sup> cause of action) and that use and occupancy is due and owing for the  
period commencing May 2004 through November 2006 (2<sup>nd</sup> cause of action).

Plaintiff now moves for summary judgment. Since issue has been joined, but the note  
of issue has not been filed, the time limitations of CPLR § 3212 have not been triggered and  
this motion will be decided on the merits. CPLR § 3212; Brill v. City of New York, 2 N.Y.3d 648

(2004).

As the proponent of this motion for summary judgment, plaintiff must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). When issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. See Hindes v. Weisz, 303 A.D.2d 459 (2d Dept. 2003).

The court's decision and order is as follows:

**Arguments presented and Claims made**

Plaintiff is the net lessor of real property located in Manhattan ("landlord" and "premises") and defendant is the net lessee ("tenant") as per the 21 year ground lease that commenced May 1, 1983 and ended April 30, 2004 (the "lease"). Although plaintiff seeks a declaration that it has properly terminated the tenant's occupancy of the premises, this action emanates from the parties' larger dispute over whether the tenant properly exercised her option to renew the lease that expired April 30, 2004.

It is undisputed that the tenant notified the landlord by letter dated March 31, 2004 that wanted to renew her lease for another 21 year term. The landlord contends, however, that tenant did not comply with other conditions attendant to the proper renewal of the lease.

Alternatively, the landlord contends that the tenant owes rent in the amount it has set unilaterally as the "renewal rent," because the tenant improperly renewed the lease.

Article 19 applies to how the lease can be renewed and the new rent for the renewal lease calculated. In relevant part, it provides as follows:

"Tenant may by notice in writing by Tenant, delivered to the Landlords at least one (1) month before the end of this Lease Term, request a new lease of the Premises, and Landlord will prepare such Lease at Tenant's cost and expense for an additional term of twenty-one (21) years to begin on the day after the end of this Lease Term and continue for twenty-one (21) years thereafter at an annual rent as shall be agreed upon by the Landlords and Tenant, but not less than the annual rent paid under this lease. In the event that Landlords and Tenant fail to agree on the annual rent for such further Lease Term of Twenty-one (21) years, then the annual rent for such renewal term will be determined as follows: at least one month before the end of this Lease Term, Tenant shall nominate in writing to the Landlords, one (1) fit and impartial person and Landlords shall nominate in writing to Tenant, one (1) other fit and impartial person to ascertain such rent for such further twenty-one (21) year Lease Period. The persons nominated by Landlords and Tenant shall each appraise and value the lot of land hereby leased to Tenant at such lot's full and fair worth or price at private sale, considering the same as an unencumbered lot. The Annual rent for the Premises for such further twenty-one (21) years shall be five (5%) percent of their valuation, but in no event less than the rent provided in this lease. If the two fit and impartial persons shall differ in the amount of their valuations of the premises, they shall choose third fit and impartial person to be arbitrator with them. If they cannot agree on the choice of the third person, then each of them shall nominate two (2) fit and impartial persons and from the names of the four (4) persons so nominated, one (1) name shall be drawn by ballot. The party whose name has been so drawn shall be such third person. The decision under oath and in writing of any two (2) such persons will be the valuation which will be final and conclusive upon Landlords and Tenant."

It is agreed by both sides that the tenant's March 31, 2004 notice to the landlord was timely because she sent it one month before the end of the lease. While landlord contends that the tenant made no effort to see whether they could reach a mutually agreeable rent for the new lease, the bypassing of this step is of no moment because the parties are far apart as to what the rent for the net lease should be. It is undisputed that in her March 31<sup>st</sup> letter, the tenant named the appraiser she intended to have appraise the property, and she asked the landlord to provide her the name of its appraiser.

Rather than nominate its appraiser, by letter dated August 13, 2004 the landlords appraisal had already been done. The property's value, according to this letter, was \$4,400,000 as of June 2004. This forms the basis for landlord's claim that the annual rent for the ground lease is now (or should be set at) \$220,000 per annum. The landlord did not provide a copy of the appraiser's report, however, only the cover letter from the appraiser indicating the figures and that the report was an enclosure. Nonetheless, in his sworn affidavit Mr. Weydig, landlord's Vice President, contends that "Plaintiff provided Kaplan with a copy of its appraisal" with its August 2004 letter.

According to the ground lease that expired, the rent was \$14,250 per annum, payable in two equal installments in May and November of each year. Tenant paid \$7,125 on May 27, 2004 and another \$7,125 on November 5, 2004 which the landlord accepted, without prejudice.

The tenant wrote back that she was "taken aback by the valuation that [the landlord's] appraiser ha[d] come up with . . ." and she proposed an "exchange" of appraisal reports in mid-

November. Thereafter, she made another payment to the landlord (on December 23, 2004) in the amount of \$54,500, but without any explanation of how she had arrived at that particular figure. In her letter she wrote: "[a]dded to the \$14,250 already delivered, the total [paid] to date is \$68,750."

By March 2, 2005, tenant still had not provided the landlord with her appraiser's valuation, but the landlord sent a copy of its report to the tenant. Along with the report, however, the landlord notified her that because she had not provided them with a copy of her appraiser's report (or told them the figure), and more than 11 months had elapsed since she had exercised the renewal option, the landlord would offer her a renewal lease at the yearly rent of \$220,000, coinciding with its own valuation of the property. The landlord enclosed the proposed renewal lease, with a demand that the tenant sign and return it. The landlord also rejected and returned the \$54,500 check she had sent in December 2004.

By letter dated March 16, 2005, the tenant provided the landlord with her appraiser's report (a copy has not been provided by either side to the court). Based upon the appraiser's valuation of \$1,375,000, the annual rent for the ground lease is \$68,750. This coincides with the payments the tenant had already made, two of which were accepted, without prejudice, and the returned check (\$14,250 + \$54,500). Moreover, the appraisal was by a different appraiser than she had originally nominated. These actions, and its allegation that the tenant did not pay any "rent" form the basis for the landlord's bad faith claim against the tenant.

In November 2005, the landlord served a 3 day Notice to Cure and In January 2006, it commenced a non-payment proceeding based upon its claim that the rent for the "renewal lease" was \$220,000 per year. The petition was dismissed by Judge Brown who granted the

tenant's motion for summary judgment. Judge Brown decided that the landlord had pled inconsistent theories for recovery of the premises. On the one hand, the landlord alleged the tenant had not properly renewed the lease. On the other hand, that the tenant owed unpaid "rent" under the "renewed" lease of \$220,000 per annum. Order, Brown J., 7/13/06.

Landlord now contends in this action for declaratory judgment that the tenant improperly exercised her renewal option, therefore it was within its rights to unilaterally set the rent using its appraisal because the tenant did not provide her own appraisal. It also contends that because the tenant refused to sign the renewal lease, this is the basis for the termination of her occupancy. Alternatively, the landlord contends that the failure to pay rent of \$220,000 per annum is a "default" under the renewal lease that was never properly renewed, and therefore also a basis to terminate the "lease."

In opposition, the tenant states that she fully complied with the requirements of Article 19, which was to exercise her renewal option, nominate an appraiser, and have the property appraised. She denies that she acted in bad faith and states that she has been paying rent all along - first at the "old" rate and then at the higher rate set forth in her appraisal, pending the resolution of the parties' disagreement over what the renewal term rent will be.

### **Discussion**

When parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms and the court must not rewrite their contract. WWW Assoc., Inc. v. Giancontieri, 77 N.Y.2d 157 (1990). Article 19 sets out concise requirements on how the lease can be renewed and the rent for the new term set. The tenant complied with these requirements by: 1) exercising her right to renew, 2) nominating the appraiser she

intended to use, and 3) providing a copy of the appraisal.

The fact that the landlord nominated its appraiser and notified the tenant of what his appraisal was before the tenant provided her appraisal figures does not mean the tenant failed to properly renew her lease. Nor is it important that the parties decided to exchange their appraisal reports in mid-November 2005, but it never happened. The exchange of appraisals was not a condition in their lease, or of the lease renewal, but something the parties agreed to informally during the course of their settlement discussions. As per the lease, each side has been required to nominate an appraiser, the tenant first, the landlord second. The appraisers would then appraise the property.

Since the lease does not provide any guidelines or deadline by which the appraisal has to be disclosed, landlord's argument that the tenant's failure to do so timely is entirely subjective. The landlord itself did not nominate its own appraiser until August 2004, some five months after the tenant asked for this information. The landlord also did not provide a copy of its own appraisal report until May 2, 2005 – one year after the lease had expired. The tenant provided her report only two weeks after that.

Landlord's argument, that because the tenant did not provide an appraisal, it had the right to unilaterally set the rent for the renewal fails, as does its further claim that by refusing to sign the renewal lease, the tenant's occupancy may now be terminated. The solution the landlord chose is not an express remedy contained in the parties' agreement, but fashioned by the landlord out of whole cloth. The landlord had (and may still have) other remedies available to it, including completion of the appraisal process so the true renewal rent can be determined.

The landlord is not entitled to summary judgment on either of its causes of action

because it has failed to prove that defendant unreasonably or inexcusably delayed in providing her appraisal. EMF General Contracting Corp. v. Bisbee, 6 A.D.3d 45 (1<sup>st</sup> dept 2004) *Lv to App Den* 3 N.Y.3d 607 (2004); Eastern Shopping Centers, Inc. v. Trenholm Motels, Inc., 33 A.D.2d 930 (3<sup>rd</sup> dept 1970). In any event, defendant has raised issues of fact, including whether the defendant's own delay in providing its appraisal, or commencement of the holdover proceedings while settlement negotiations were still pending, unduly protracted the process under Article 19. EMF General Contracting Corp. v. Bisbee, *supra*.

Landlord has also failed to prove that the tenant has acted in "bad faith" by improperly renewing the lease and then not paying rent. A showing of bad faith requires a disingenuous or dishonest failure to carry out a contract justifying the imposition of punitive damages. Aero Garage Corp. v. Hirschfeld, 185 A.D.2d 775 (1<sup>st</sup> Dept 1992). The tenant's interim payments of rent, albeit in an amount the landlord disagrees with, easily defeats this argument.

**Conclusion**

For these reasons, plaintiff's motion for summary judgment is denied. This case is already scheduled for a status conference on **September 20, 2007 at 9:30 a.m.** At that time the court will determine whether this case is ready for trial.


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  
August 14, 2007

So Ordered:

**FILED**  
AUG 21 2007  
COUNTY CLERK'S OFFICE  
NEW YORK

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