Advance Mag. Publ. Inc. v Four Times Sq. Assoc. LLC
2007 NY Slip Op 33029(U)
September 24, 2007
Supreme Court, New York County
Docket Number: 0600396/2007
Judge: Walter Tolub

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

PRESENT: _____ PART 15
Justice

Index Number : 600396/2007
ADVANCE MAGAZINE PUBLISHERS
VS
FOUR TIMES SQUARE ASSOCIATES
Sequence Number : 001
SUMMARY JUDGMENT

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 IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
SEP 26 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 9/24/07

WALTER B. TOLUB 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 15

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ADVANCE MAGAZINE PUBLISHERS INC. d/b/a
THE CONDE NAST PUBLICATIONS,

Index No. 600396/07

Plaintiff,

- against -

FOUR TIMES SQUARE ASSOCIATES LLC,

Defendants.

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WALTER B. TOLUB, J.:

Defendant Four Times Square Associates LLC moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff Advance Magazine Publishers Inc. d/b/a The Conde Nast Publications (Tenant) cross-moves, pursuant to CPLR 3124, for an order lifting the stay of discovery.

Background

Defendant is the owner and landlord of an office building located at 4 Times Square, New York, New York (Building). Plaintiff is a tenant at the Building pursuant to an Indenture of Lease, dated as of August 21, 1996 (Lease), between plaintiff, as tenant, and defendant, as landlord.

The Lease provides that, in addition to the rent fixed by the Lease, plaintiff is to pay a proportional share of certain of defendant's expenses (Lease, § 4.01). If these expenses for any calendar year after 2002 are greater than $8.40 per rentable square foot, plaintiff is required to pay an "Escalation Expense Payment" in addition to the "Fixed Expense Payment" (Affidavit of Ira Marx, sworn to April 11, 2007, ¶ 28). Within 270 days following the end of any given

"expense year," defendant is to provide plaintiff with an "Expense Statement" prepared by an independent certified accountant, and certified as correct by an officer of defendant's managing agent (Lease, § 4.01 [b] [5]).

As set forth in the complaint, in March 2004, defendant provided plaintiff with an Expense Statement for calendar year 2002, asserting that the expenses were less than $8.40 per rentable square foot, and therefore, the base year cost would be $8.40 per rentable square foot. In May 2004, defendant sent an "Estimated Operating Expense Calculation" for 2003, indicating an increase of $.20 per rentable square foot over the $8.40 base amount. Plaintiff paid the increase.

In November 2005, defendant sent plaintiff a final Expense Statement for 2003, indicating that the actual increase for 2003 was in an amount $1.10 above the base amount of $8.40, not $.20, as the May 2004 estimate had predicted. Plaintiff paid the difference, but, considering this discrepancy, it asserted its right under section 4.01 (B) (7) of the Lease to audit the 2003 Expense Statement. Subject to conditions specified therein, section 4.01 (B) (7) permits plaintiff to:

> "examine, copy, make abstracts and audit Landlord's books and records with respect to any Expense Statement . . . ."

Plaintiff contends that defendant failed to comply with this provision in that it refused to supply certain information crucial to plaintiff's audit, including an expense variances analysis relating to substantial increases for insurance, cleaning, security, and maintenance charges that defendant's independent auditor prepared. The parties were unable to resolve their dispute over entitlement to documentation, and this action ensued.

The complaint contains only one cause of action for breach of contract based upon defendant's alleged failure to comply with its obligations under section 4.7 to provide

information to enable plaintiff to audit defendant's expenses. Plaintiff seeks a declaration that it is entitled to audit defendant's Expense Statement for 2003, and it is entitled to receive from defendant documents and information necessary to do so. It also seeks related transaction costs, interest, and fees, and reasonable attorney's fees incurred in this action.

Specifically, the items that plaintiff is seeking are set forth in the Affidavit of James Vella, sworn to June 22, 2007 (Vella Aff.), at 14-15. These include the following: (1) the underlying insurance policies for 2002 and 2003, including any schedules of covered properties and limits and deductibles for those properties, and information about the methodology that defendant used to allocate the premium for the blanket policy among those properties and any back-up information for the methodology and allocation, and (2) any analysis of expense variances performed by defendant's auditor comparing the expenses for 2002 to the expenses for 2003 in the categories of insurance, cleaning, salary and wages, security, and repairs and maintenance.

Plaintiff states that, after the review of the analysis of expense variances, it will require additional back-up information, which may include explanations from defendant's personnel about information included in the analysis. Plaintiff states further that if the analysis of expense variances is unavailable, it will require documents and explanations pertaining to large increases in expenses in these categories, so that it can undertake its own analysis of the expenses. Moreover, if the explanations are not possible to obtain, it will require access to the payroll register for cleaning staff of every pay period during 2002 and 2003, the hourly records for the cleaning staff, any records of new or added employees, and any information on the allocation of "floater" cleaning personnel.

Defendant contends that it has complied with section 4.01 (B) (7) in that plaintiff has been given access to its books and records regarding the 2003 Expense Statement that is at issue, and plaintiff's auditor has spent more than eight months examining defendant's books and records. Defendant also contends that plaintiff has waived its right to certain of the documentation sought because, by letter dated December 4, 2006, from its own accountant, Paul Scherer & Company, LLP (Scherer), to it, it sought only an analysis of expense variances between 2002 and 2003 for the following increases: (1) insurance ($415,000); (2) cleaning ($454,000); (3) security ($131,000); (4) engineering ($129,000); and (5) repairs and maintenance ($155,000).

Defendant now argues that it is entitled to summary judgment dismissing the complaint to the extent that it is predicated on the issue of expense variance analyses. In addition to arguing that defendant has failed to eliminate all factual issues, plaintiff contends that the court could search the record and grant it summary judgment as to its right to examine defendant's books and records.

Determination

For the reasons set forth below, plaintiff is entitled to receive the documentation requested that constitutes defendant's books and records, but it is not entitled to the expense variances analysis or other materials prepared by defendant's independent auditor.

Discussion

Plaintiff seeks any analysis of expense variances performed by defendant's auditor – H.J. Behrman & Company, L.P. (Behrman) – comparing the expenses for 2002 to the expenses for 2003 in the categories of insurance, cleaning, salary and wages, security, and repairs and

maintenance. The Lease does not entitle plaintiff to examine documentation of defendant's independent auditor that is not part of defendant's own books and records, and, therefore, plaintiff cannot compel defendant to provide it with copies of any analysis that Behrman, or any other independent auditor, may have prepared of expense variances between 2002 and 2003. That is because section 4.01 (B) (7) of the Lease provides plaintiff with the right to "audit Landlord's books and records with respect to any Expense Statement," and an expense variance analysis prepared by defendant's independent auditor does not fall within this category. Audit documentation is the property of the auditor (*see* defendant's Exhibit X, at 339A.10). "Book and records" refer to transactional documentation maintained by the entity conducting the transactions, not the auditing entity (*see* defendant's Exhibit O, Kohler's Dictionary for Accountants, defining "book of account," "book of original entry," and "record"). Moreover, as its title implies, an independent auditor has an obligation to remain independent from its client (*Fidelity & Deposit Co. of Md. v Arthur Andersen & Co.*, 131 AD2d 308 [1st Dept 1987]), such circumstance thereby militating against a finding that Behrman's work product constitutes defendant's books and records. Thus, plaintiff's citation to decisions such as *Cohoes Realty Assoc. v Lexington Ins. Co.* (292 AD2d 51 [1st Dept 2002] [defendant cannot hide behind its agent to avoid producing documents relevant to plaintiff's claim]) is unpersuasive.

Plaintiff also contends that defendant's assertions as to its obligations is inconsistent with Generally Accepted Auditing Standards (GAAS). For example, according to plaintiff, GAAS requires an auditor to perform an analysis of variances when it encounters an excessive divergence, such as occurring between 2002 and 2003 (Vella Aff., ¶ 45). Moreover, under GAAS, an auditor is required to ask questions of and seek clarifications from client personnel

and management as one of the necessary evidence-gathering procedures in which an auditor engages (*id.*, ¶ 26). These assertions are unconvincing. Plaintiff fails to demonstrate that the Lease is governed by GAAS, or that, thereunder, it is entitled to any required variances analysis. Furthermore, even if GAAS were applicable, the asserted obligation of the dialogue between the auditor and the client is inconsequential here, because plaintiff is not Behrman's client.

Plaintiff also argues that defendant's interpretation – that it is not entitled to explanations or the auditor's work product – is contrary to the parties' practice. For example, plaintiff contends that Edward Riccio, the controller of Royal Realty Corp., defendant's managing agent for the Building, routinely provided written and verbal explanations to Scherer during its review of the expenses and provided certain of its auditor's work papers (Vella Aff., ¶¶ 14, 15, 21, 22, 25).

When interpreting language in a commercial lease, where, as here, the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms, and extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face (*Madison Ave. Leasehold, LLC v Madison Bentley Assoc. LLC*, 8 NY3d 59 [2006], *rearg denied* 8 NY3d 867 [2007]; *see also Futurist 1952, Inc. v Westbeth Corp. Hous. Dev. Fund Co., Inc.*, 37 AD3d 347 [1st Dept 2007]). This principle is particularly important in the real property context, where commercial certainty is a paramount concern, and where sophisticated, counseled business persons negotiated the contract at arm's length (*Madison Ave. Leasehold, LLC v Madison Bentley Assoc. LLC*, 8 NY3d 59, *supra*). Indeed, lease interpretation is subject to the same rules of construction as are applicable to other agreements (*Matter of Wallace v 600 Partners Co.*, 205 AD2d 202 [1st Dept

1994], *affd* 86 NY2d 543 [1995]). Hence, extrinsic evidence, consisting of the parties' practice, will not be considered.

Plaintiff is entitled to summary judgment, however, insofar as it seeks defendant's books and records, as set forth in paragraphs 51 and 53 of the Vella Aff. (e.g., insurance policies, payroll register for cleaning staff, records of new or added employees, information on the allocation of "floater" cleaning personnel). When appropriate, the court is entitled to search the record, and grant summary judgment to the nonmoving party regarding a cause of action that is the subject of the motion before it (CPLR 3212 [b]; *Scott v Beth Israel Med. Ctr., Inc.*, 41 AD3d 222 [1st Dept 2007]). There are no remaining material factual issues, and plaintiff should not be impeded in its contractual right to conduct its own audit to protect itself from what may constitute expense overcharges (*see P.A. Bldg. Co. v City of New York*, 217 AD2d 417 [1st Dept], *lv denied* 86 NY2d 708 [1995]).

As for copies of the insurance policies, defendant represents that it is willing to provide them (as requested by plaintiff), rather than providing merely summary information, and it states that it has done so for the 2004 audit. Defendant's only explanation for not having done so for the 2003 audit is because "Conde Nast's auditors, having been given the extensive summary information on insurance specified above, no longer sought the insurance policies themselves for 2003" (Reply Affidavit of Ira Marx, sworn to July 18, 2007, ¶ 30). This is a capricious basis upon which to refuse to provide plaintiff with an item that is, undisputably, within its contractual right to obtain.

Furthermore, contrary to defendant's contention, plaintiff has not waived its right to obtain this documentation. Waiver is the voluntary abandonment or relinquishment of a known

right (*Excel Graphics Tech. v CFG/AGSCB 75 Ninth Ave.*, 1 AD3d 65 [1st Dept 2003], *lv dismissed* 2 NY3d 794 [2004]). The record amply demonstrates plaintiff's continuing efforts to obtain documents, thereby negating a showing of affirmative conduct or a failure to act so as to evince an intent not to claim a purported advantage (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006]).

Contrary to defendant's assertion, the December 4, 2006 letter from Scherer to it (Exhibit R to Vella Aff.) does not demonstrate waiver, because defendant did not comply with plaintiff's request therein for the expense variances analysis, and the items presently sought represent substitute documentation. Hence, that plaintiff was, at one time, seeking some documents, but not others, does not amount to a "'clear manifestation of intent' to relinquish a contractual protection [citation omitted]" (*id.*). Indeed, the failure to obtain requested documents could generate a need to request others at some later time.

Finally, plaintiff's cross motion for the lifting of the stay of discovery is denied as moot.

Accordingly, it is

ORDERED that defendant's motion is denied; and it is further

ORDERED and ADJUDGED that plaintiff is granted summary judgment to the extent of declaring that defendant is obligated under the Lease to furnish plaintiff with the following from its books and records pertaining to (1) insurance; (2) cleaning; (3) security; (4) engineering; and (5) repairs and maintenance, and including, but not limited to, insurance policies for 2002 and 2003, and any information about the methodology used to allocate premiums among these policies; payroll register for cleaning staff, records of new or added employees, and any information on the allocation of "floater" cleaning personnel between "Four Times Square and

other Durst properties"; and it is further

ORDERED that plaintiff's cross motion for a stay of discovery is denied.

Counsel for the parties are directed to appear for a conference on Friday November 9, 2007, at 11:00 am in room 335 at 60 Centre Street.

Dated: 9/24/07

ENTER:

WALTER B. TOLUB J.S.C.