

Fifth Ave. of Long Is. Realty Assoc. v LCI Holdings, Inc.

2007 NY Slip Op 33602(U)

October 31, 2007

Supreme Court, Nassau County

Docket Number: 9458-05/

Judge: John M. Galasso

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

.....
FIFTH AVENUE OF LONG ISLAND
REALTY ASSOCIATES,

Plaintiffs,

- against -

LCI HOLDINGS, INC.,

Defendants

Index No. 019458/05
Sequence #005
Part 41

9/4/2007

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Upon the foregoing papers, the motion pursuant to by plaintiff Fifth Avenue of Long Island Realty Associates (Associates) for summary judgment pursuant to CPLR §3212 is denied.

In this action plaintiff Associates seeks to recover unpaid common area maintenance charges (CAM) due as additional rent under a written lease agreement dated March 16, 1990, with amendments, for retail space at the Americana Shopping Center located at 1990 Northern Boulevard, Manhasset, New York. The term of the lease expired in January 2006. Tenant vacated the space allegedly leaving arrears in the amount of \$193,096.62 due and owing as and for CAM charges. Tenant, defendant LCI Holdings, Inc. [LCI], has counterclaimed alleging breach of contract and incorrect billing of CAM charges in that plaintiff improperly: (1) passed through to LCI a 15% administrative charge on all CAM charges, (2) included depreciation expenses in the CAM charges, (3) included promotional expenses in the CAM charges, and (4) inflated the CAM charges by including numerous charges constituting personal perquisites and benefits to plaintiff's principal, and members of his family, that have no relationship to the maintenance of the common areas of the premises. Moreover, defendant asserts that costs associated with the construction of a new section of the shopping center were improperly included in CAM charges.

Pursuant to Paragraph 38(B) of the lease, the tenant was obligated to pay a proportionate share of the landlord's cost for the operation and maintenance of the common areas. Defendant's proportionate share was equal to a fraction "whose numerator is the gross leasable ground floor

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area of the Premises" divided by "the gross leasable ground floor area of stores in the Shopping Center which are paying such service charge." The provision also states that defendant's share of CAM charges was estimated to be equal to 3.9%.

Schedule C of the lease sets forth a detailed, but not exhaustive, list of expenses included as part of CAM charges as well as a list of costs excluded from the CAM calculation including:

the initial cost of existing or future land or buildings or expansion of the Shopping Center, and the construction costs and depreciation of a future parking facility;

the depreciation on the building of the Shopping Center (excluding a future parking facility).

* * *

depreciation or reserves.

Schedule C also provides that "[n]one of the charges included in the Common Area Maintenance cost are covered by any other provisions of this lease" and "[n]o charge paid under [the] lease will be duplicated under any other section of [the] lease."

In 2005, in accordance with its rights under the lease, defendant arranged for an audit of Associates' books and records which, defendant alleges, revealed numerous, egregious irregularities in the landlord's practices of billing and accounting for CAM charges. After the alleged irregularities were discovered, defendant initially withheld both the contested CAM charges as well as its rent payments while attempting to negotiate removal of the improper CAM charges from its account.

By letter dated October 10, 2005, defendant requested that the landlord remove certain charges including:

- 1) the duplicative 15% administrative fee which defendant claims was improperly charged in addition to the charges for an independent management service;
- 2) depreciation expenses that were barred by the lease;
- 3) improper promotional expenses; and
- 4) improper personal expenses.

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While plaintiff agreed to credit LCI for certain expenses (marketing expenses, gasoline charges, automobile and insurance costs), it refused to remove the charges for administrative expenses, amortized costs of replacement of items in CAM [i.e., sidewalks] and additional advertising, promotions and charitable expenses beyond those permitted by Paragraph 61 of the lease.

After the lawsuit was filed on or about February 3, 2006, defendant paid the rent, and additional rent, in the amount of \$369,746.34 due through the end of the lease term, i.e., February 2006, but continues to withhold the contested CAM charges which are at issue herein.

By order of this court dated June 21, 2006, defendant's motion to compel plaintiff to produce demanded documents was granted and plaintiff's motion for summary judgment was denied with leave to renew once defendant had received the applicable documents.

Plaintiff's motion for summary judgment against defendant is predicated on the grounds that the complained of items were properly included in CAM charges and correctly apportioned to defendant pursuant to the clear and unambiguous terms of the lease as well as the parties' course of performance for the past nine years. Moreover, plaintiff maintains that the counterclaims and defenses asserted by defendant *vis-a-vis* the disputed items are barred by the statute of limitations and that defendants were aware, as far back as 1997, that capital expenses, a 15% administrative charge and marketing costs were included in the computation of CAM charges.

The undersigned turns first to the statute of limitation issue.

Generally, with respect to contract actions, the six-year statute of limitations begins to run when a contract is breached or when one party omits the performance of a contractual obligation (CPLR §213(2); *CSEA Employee Ben. Fund v Warwick Valley Cent. School Dist.*, 36 AD3d 582, 584 [2nd Dept. 2007]). Where, however, a contract provides for continuing performance over a period of time, each breach may begin the running of the statute anew such that accrual occurs continuously *Stalis v Sugar Creek Stores, Inc.*, 295 AD2d 939, 940-41 [4th Dept. 2002] (internal quotation marks and citations omitted). Timely accruals, however, do not revive stale claims arising from the same contract *Bulova Watch Co., Inc. v Celotex Corp.*, 46 NY2d 606 [1979].

The Court concludes plaintiff's statute of limitations argument is unavailing. In applying a statute of limitations, the Court must look to the essence of the claim and not to the

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form in which it is pleaded. *Guzman v 188-190 HDFC*, 37 AD3d 295, 296 [1st Dept. 2007], *lv to app den.* 9 NY3d 801 [2007]. Inasmuch as plaintiff's obligation to correctly calculate and bill defendant for its proper share of CAM charges was a continuing one, defendant's counterclaim that plaintiff breached that obligation is not referable exclusively to the date on which the original wrong was committed (*1050 Tenants Corp. v Lapidus*, 289 AD2d 145, 146 [1st Dept. 2001]). Instead, a cause of action accrues anew for each continuation of the wrong (*Stalis v Sugar Creek Stores, Inc.*, *supra* (internal quotation marks and citation omitted)).

Consequently, to the extent that defendant does not challenge the methodology utilized by plaintiff in calculating the CAM charges, but rather the landlord's alleged improper inclusion of certain items within the various categories delineated in Schedule "C," for which defendant might properly be charged its proportionate share, defendant's counterclaim for damages accruing less than six years before interposition of the counterclaim is not time barred. However, the portion of defendant's counterclaims that arose more than six years prior to the counterclaim's imposition are time barred (see *Goldman Copel and Assoc. v. Goodstein*, 268 AD2d 370).

Addressing plaintiff's assertions regarding practical construction, it is well-settled that interpretation of the provisions of a lease is governed by the same rules of construction which are applicable to other agreements (*Horwitz v 1025 Fifth Ave. Inc.*, 34 AD3d 248, 249 [1st Dept. 2006]). It is axiomatic that a lease like any other contract is to be interpreted so as to give effect to the intention of the parties as expressed in the language employed (*Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995]), which, absent ambiguity, is a matter of law to be determined by the Court (*Master-Built Const. Co., Inc. v Thorne*, 22 AD3d 535 [2nd Dept. 2005]).

It is also understood that clear and unambiguous terms, as those set forth in the lease herein, should be interpreted in their plain, ordinary meaning; and circumstances extrinsic to the agreement should not be considered when the intention of the parties can be gleaned from the four corners of the instrument (*W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162 [1990]; *New York Overnight Partners, L.P. v Gordon*, 217 AD2d 20, 24 [1st Dept. 1988]), *aff'd* 88 NY2d 716 [1996]. No additional liability or requirement will be imposed upon a tenant by interpretation unless it is clearly within the provisions of the instrument under which it is claimed (*67 Wall St. Co. v Franklin Nat. Bank*, 37 NY2d 245, 249 [1979]). The rules governing the construction of ambiguous contracts are not triggered unless the Court first finds an ambiguity (*Wallace v 600 Partners Co.*, *supra* at p. 548).

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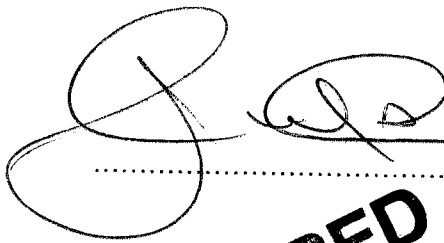
For the most part, the Court finds the lease to be unambiguous and its plain language controls what is appropriately considered a CAM charge.

For instance, under Paragraph 61, advertising and promotion, items are listed that are included separately as additional rent. However, other services that benefit all tenants and their customers, such as security, are included in and exclusive to the CAM costs.

The 2003 lease modification agreement that required a tenant to pay tenant-specific advertising adds to Paragraph 61 of the original lease agreement but does not supercede it. Consequently, Paragraph 61's additional rent is for advertising and promotion only and these types of charges should not be included as CAM costs since they are covered by another provision of the lease.

With respect to the other CAM charges, whether and the extent to which, plaintiff improperly included depreciation expenses in the CAM charges although precluded from doing so by the express language of the lease; improperly sought reimbursement of a 15% administrative fee in addition to the expenses included in the CAM charges attributable to managerial, supervisory and administrative salaries of Castagna Realty in contravention of Schedule C, which provides that a 15% fee for administrative expenses would not be charged if independent management services are charged; or otherwise improperly inflated the CAM charges by personal or duplicative expenses, all of which is alleged by defendant's auditor, are questions of fact requiring resolution at trial.

Dated: October 31, 2007

  
.....J.S.C.

**ENTERED**  
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NASSAU COUNTY  
COUNTY CLERK'S OFFICE