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

PRESENT: EMILY JANE GOODMAN Justice PART 17

Index Number : 601120/2005

FEINGOLD & ALPERT LLP

VS.

OMNICOM GROUP

SEQUENCE NUMBER : # 003

SUMMARY JUDGMENT

INDEX NO. 601120-05

MOTION DATE

MOTION SEQ. NO. #003

MOTION CAL. NO.

ad on 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 to dismiss

denied

FILED

JAN 28 2008

COUNTY CLERK'S OFFICE

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

Dated: 1/28/08

EMILY JANE GOODMAN 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: IAS PART 17
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FEINGOLD & ALBERT L.L.P. AND COGSWELL REALTY GROUP, L.L.P.,

Plaintiffs,

-against-

OMNICON GROUP INC.,

Defendant.

Index No. 601120/05

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Emily Jane Goodman, J.:

Defendant Omnicon Group Inc. (Omnicon) moves, with permission of this court, for summary judgment dismissing the complaint. Plaintiffs Feingold & Alpert LLP and Cogswell Realty Group L.L.C. cross-move for summary judgment.

This court's interpretation of the various contract provisions contained in the Underlying Lease and the subleases was fully explored in the decision of this court dated July 10, 2006 (the Decision). In the Decision, this court found that "[b]oth paragraph 8 of the sub-subleases and Article 1.09 of the Underlying Lease can be read together, in harmony, to allow plaintiffs to receive rent abatements which Omnicon receives from the Underlying Landlord, with the exception of abatements as a result of the Underlying Landlord's failure to perform any obligations under the Underlying Lease, and with the exception of abatements under the Excluded Provisions." *Id.* at 4. As a

result, plaintiffs were not entitled to summary judgment because "recovery of equivalent rent abatements is not permitted under the Excluded Provisions clause in the subsubleases." *Id.* at 50. However, this court found that Omnicon was not entitled to summary judgment, because Omnicon had submitted no affidavits showing that any abatements it may have received were granted pursuant to Article 1.09 of the Underlying Lease.

The Decision was appealed to the Appellate Division, First Department, which affirmed. The Court stated that this court had correctly denied plaintiffs' cross motion for partial summary judgment, because "[p]laintiffs' proposed interpretation of paragraph eight of their respective subleases concentrates solely upon the language that is favorable to their position and disregards the remaining language of the paragraph, as well as the Excluded Provisions clause in the subleases in question." *Feingold & Albert L.L.P. v Omnicon Group, Inc.*, 44 AD3d 313 (1st Dept 2007).

The Court continued that "[c]onsequently, the [lower] court reasonably attempted to reconcile all of the provisions relating to the matter of a rent abatement by reading the document 'as a whole to ensure that excessive emphasis is not placed upon particular words or phrases.'" *Id.*, citing *South Rd. Associates, LLC v International Business Machines Corp.*, 4 NY3d 272 (2005). The Court upheld this court's denial of summary judgment to

Omnicon, because of the "minimal discovery" which had taken place thus far, and because questions of fact existed, such as "whether defendant received any rent abatement that it was required to pass along to plaintiffs under the subleases." *Feingold & Albert L.L.P. v Omnicon Group, Inc.*, 44 AD3d 313, *supra*.

The bulk of plaintiffs' argument for summary judgment is, simply put, that the Decision was wrong, that the Appellate Division did not actually affirm this court's interpretation of the agreements, and that this court should "revisit" the Decision, and admit that it was wrong.

This court is not inclined to do any such thing, especially in light of the affirmance of the Decision. Plaintiffs argue that the Appellate Division "merely found that the Court's construction of the terms of the sub-subleases was reasonable, not that it was the only permissible construction" (Plaintiffs' Memorandum of Law, at 3), and that a fully developed record, such as now exists, would help this court make a better decision than it previously had made. However, as plaintiffs recognize, determining ambiguity in a contract is a matter for the court (*Greenfield v Philles Records, Inc.*, 98 NY2d 562 [2002]; *W.W.W. Associates, Inc. v Giancontieri*, 77 NY2d 157 (1990). This court has already made its determination as to the unambiguous nature of the various contract provisions, and interpreted them accordingly, as a matter of law, not of fact. Despite what

plaintiffs may believe, the higher Court did not suggest that there was an ambiguity in the provisions that further inquiry might resolve; it upheld this court's interpretation.

The factual issue which this court recognized would dispose of the matter was whether Omnicon received rent abatements pursuant to Article 1.09. As such, summary judgment was denied to Omnicon, until it could come up with affidavits supporting that fact. The Appellate Division recognized the same deficiency in Omnicon's evidentiary showing, when it noted that there was a question of fact as to whether Omnicon had received rent abatements "that it was required to pass along to plaintiffs under the subleases," i.e., rent abatements falling outside Article 1.09. The question is not merely whether Omnicon got any rent abatements at all.

Omnicon's present motion is based on evidence that it claims will prove that it received no abatements at all in 2004, and that F-H, the sub-lessee, and a party Omnicon identifies as a subsidiary of Omnicon, only received Article 1.09 abatements (which were not available to plaintiffs), which F-H did not pass along to Omnicon. Omnicon has produced affidavits from representatives of both F-H and Omnicon, which deny that Omnicon received any abatements, and purport to show that the abatements F-H received were granted pursuant to Article 1.09.

Rebecca Finley, Manager, Taxes for F-H (Finley) states, in

her affidavit, that, during 2004, she reviewed invoices for the leased space which F-H received from the Underlying Landlord's agent. The invoices revealed a "base rent" for $129,150, plus various charges due, such as taxes and utility expenses. She writes that "[d]uring 2004, F-H reviewed the lease between F-H and the underlying landlord ... . We determined that under Article 1.09 of the Underlying Lease, F-H should receive an abatement of the base rent of $129,150 for each of six months from April to September 2004." Notice of Motion, Finley Aff., at 2. According to Finley, F-H contacted the underlying landlord's agent and asked for the abatements, which it received.

In an effort to show that it was F-H which received the abatements, and not Omnicon, Finley describes the accounting method employed by itself and Omnicon (an internal system known as "netting"[1]), and provides invoices to show that Omnicon was only billed for, and paid, the base rent due on its lease and some pass-along charges. These invoices show no diminution of Omnicon's base rent, such as, according to Finley, would have occurred had it received any rent abatements through F-H, or directly from the Underlying Landlord. The invoices show that Omnicon's base rent never deviated at any time in 2004.

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[1]Omnicon explains that F-H and Omnicon and Omnicom's other subsidiaries have accounts in an internal treasury system, so that bills are not paid by check, but by posting credits to the appropriate account. Therefore, Omnicon allegedly paid rent due to F-H by posting credits on F-H's account.

Omnicon also presents the affidavit of Fred Canaro (Canaro), Omnicon's Vice President, Finance for Diversified Agency Services, who handles the billings for the office space occupied by the plaintiffs. Canaro also confirms that the base rent charged to Omnicon never changed during any month in 2004. He states that:

> [t]he monthly base rent that Omnicon paid in 2004 was not affected or reduced by abatements F-H received in 2004 under F-H's lease for space at 1330 Avenue of the America's. ... Omnicon received no abatement of rent from F-H, the Underlying Landlord, or anyone else for the space at 1330 Avenue of the America's.

Canaro Affidavit, at 3.

"'The proponent of a summary judgment motion 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 University Medical Center*, 64 NY2d 851, 853 (1985); *see also Those Certain Underwriters at Lloyds, London v Gray*, ___AD3d___, 2007 WL 3380450 (1st Dept 2007); *Kesselman v Lever House Restaurant*, 29 AD3d 302 (1st Dept 2006). Upon the presentation of a prima facie case by the movant, the burden then shifts to the motion's opponent to offer evidentiary facts sufficient to raise a triable issue of fact. *Kaufman v Silver*, 90 NY2d 204 (1997); *Kesselman, supra*.

Plaintiffs' primary response to Omnicon's proffer of admissible evidence showing that the abatements were made

pursuant to Article 1.09, is to attempt to prove that F-H assigned all of its right under the sublease to Omnicon, rendering the sublease a nullity, so that all abatements received by F-H were actually received by Omnicon. In taking this approach, plaintiffs make no attempt to dispute the crucial question, raised by both this court and the Appellate Division, First Department, as to whether abatements, if any, were received, and whether they fell under Article 1.09. Instead, plaintiffs offer their own interpretation of the various provisions, concluding that it is immaterial whether the abatements fell under Article 1.09 or not, as if the issue had never been a source of discussion before at any level of this court. Plaintiffs also offer affidavits of their own representatives concerning the parties' alleged intentions upon entering the agreements, as might be acceptable, as extrinsic evidence, had the lease provisions proved to be ambiguous. This is not the case, and so, this evidence is immaterial. *See Van Kipness v Van Kipness*, 43 AD3d 71, 77 (1st Dept 2007)("[e]xtrinsic evidence ... is generally inadmissible, and will be considered only if the agreement is found to be ambiguous ... .").

Plaintiffs' response to the fundamental question of the nature of the rebates received from the underlying landlord is limited to a 2 page discussion in a 27 page brief. Plaintiffs

argue that the Finley affidavit is deficient in that, while she states that she believed that abatements were due F-H from the underlying landlord, "she does not state that anybody reported this 'belief' to the underlying landlord's agent." Plaintiffs' Memorandum of Law, at 12. They continue "[Finley's] affidavit states that '*F-H* contacted the underlying landlord's agent and asked for the abatement [emphasis in original],' but makes no representation that she herself spoke with anyone at the Underlying Landlord." *Id.* Plaintiffs also cite the lack of documents "reflecting this request or stating the basis for this request." Id., at 13.

The fact that the Finley affidavit could have been differently worded, or that is not supported by documents,[2] is of no import. Finley describes her responsibilities with F-H, and describes the actions which F-H took to obtain from the underlying landlord abatements. The affidavit is sufficient to put forth a prima facie case that abatements were not abatements to which plaintiffs had any claim because they were obtained under Article 1.09. Plaintiffs failed to rebut Omnicon's showing with admissible evidence sufficient to create a question of fact. Although plaintiffs complain about the lack of detail in the Finley affidavit, plaintiffs did not take the deposition of

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[2]Plaintiffs requested all such documents. It appears that none exist.

Finley, despite an order, dated May 3, 2007, providing they could do so. Nor did plaintiffs take the deposition of the landlord's agent, Cushman & Wakefield, regarding whether the abatements were received under Article 1.09, as Finley maintains. As no issue of fact has been raised, Omnicon's motion for summary judgment is granted, and plaintiffs' cross motion for summary judgment is denied. It is therefore unnecessary to go into the convoluted arguments concerning whether Omnicon or F-H was the recipient of the rent abatements. Accordingly, it is

ORDERED that the motion for summary judgment by defendant Omnicon Group Inc. is granted, and the complaint is dismissed with costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED that the cross motion by plaintiffs Feingold & Alpert LLP and Cogswell Realty Group L.L.C. is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: January 18, 2008

ENTER:

J.S.C.
EMILY JANE GOODMAN