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

PRESENT: Hon. BARBARA R. KAPNICK Justice PART 12

400 MADISON AVENUE

- v -

GOLDIN ASSOCIATES

INDEX NO. 114608/06

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read 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 and CROSS-motion are decided in accordance with the accompanying memorandum decision.



MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

J.S.C.

DATED:

Dated: 2/15/08

BARBARA R. KAPNICK

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Reference

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

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400 MADISON AVENUE OWNER LLC,

Plaintiff,

-against-

GOLDIN ASSOCIATES, L.L.C.,

Defendant.

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DECISION/ORDER
Index No. 114608/06
Motion Seq. No. 001



**BARBARA R. KAPNICK, J.:**

Plaintiff 400 Madison Avenue Owner LLC is the current owner and landlord of a twenty-two story commercial building located at 400 Madison Avenue, New York, New York, consisting of seven retail spaces on the ground floor and approximately fifty-three office spaces on the upper floors.[1]

Defendant Goldin Associates, L.L.C. is the tenant of portions of the ninth and tenth floors of the building, i.e., Suites 9D, 10C and 10D, pursuant to a written lease agreement dated December 14, 2000 with plaintiff's affiliate and predecessor-in-interest, as amended by the First Lease Amendment dated June 18, 2001 and Second Amendment of Lease dated June 3, 2003.

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[1] The building originally contained six retail spaces. However, sometime between 2001 and 2003, one of the spaces was subdivided and leased to two separate retail tenants.

Paragraph 4(c) of the Second Amendment of Lease, which concerns the calculation of base rent (i.e., the "Renewal Rent") for the last two years of the Lease, i.e., the period from April 1, 2006 through March 31, 2008 (the "Extension Period"), provides, in relevant part, as follows:

> (i) "Average Renewal Rent" shall be the average of the per-square-foot base annual rents (exclusive of charges for electricity) applicable during the first year of the extension or renewal terms of the Designated Renewals.
>
> (ii) "Designated Renewals" means the renewal or extension transactions for space in the Building entered into by Landlord with unaffiliated third parties during the one (1) year period ending March 31, 2006.

While both sides assert that the language contained in these provisions is clear and unambiguous and susceptible to only one meaning, the parties disagree on what that "plain meaning" is.

Plaintiff's Complaint seeks: (i) to recover rent for the months of April through October 2006 and additional rent in the sum of at least $123,003.39, plus unpaid miscellaneous additional rent charges of $118.00 and interest (first cause of action); (ii) a judgment declaring that plaintiff/landlord's calculation of the Renewal Rent is proper, and that defendant/tenant is obligated to pay the Renewal Rent for the balance of the Extension Period, as per plaintiff's calculation of the Formula (second cause of

action); and (iii) to recover reasonable legal fees and other expenses of this action, pursuant to paragraph 19 of the lease (third cause of action).

Defendants' Answer seeks: (i) a declaration that the "Average Renewal Rent" be computed by employing (a) as the denominator, the total number of square feet leased during the specified period, not the number of lease transactions, and (b) as the numerator, the sum reached by adding the rent for each square foot leased (first counterclaim); and (ii) a declaration that only like office space be included as a "Designated Renewal" and that commercial retail space be excluded.

Plaintiff now moves for an order pursuant to CPLR §§ 3212, 3001 and 3025:

(1) granting summary judgment in its favor on defendant's first counterclaim by declaring that the reference in paragraph 4(c)(i) of the lease to the "average of the per-square-foot base annual rents" refers to the simple average, or mean, and does not refer to a 'weighted' average;

(2) granting summary judgment in its favor on defendant's second counterclaim by declaring that the plain language of paragraph 4(c)(ii) of the lease, calling for the calculation of the average of the rents set forth in any other tenants'

renewal/extension agreements "for space in the Building" during the applicable time period, governs, and rejecting tenant's proposal that the lease clause should be limited by the alleged contemplation of the parties to include only renewals/extensions for office spaces, and not retail spaces, within the building;

(3) granting summary judgment in favor of plaintiff on its first and second causes of action declaring that plaintiff, in accordance with the lease's formula, correctly selected a certain group of six lease renewal/extension agreements (the "Look-Back Agreements") including, in particular, the agreement with one of the retail tenants known as Colortek Image Group, Inc. ("Colortek"), and thereupon correctly calculated the average of the first-year per-square foot base rents as set forth in those six Agreements, so that tenant today owes the sums identified in the Complaint, as amended to include all sums due through the date of submission of this motion;[2] and

(4) alternatively, if, in opposition to the motion, defendant sufficiently raises any fact issue as to the details of the selection and calculations to be performed per the lease's formula, then issuing a declaration in favor of plaintiff in respect of defendant's liability, and directing, pursuant to CPLR § 3212(c)

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[2] Plaintiff has annexed an Affidavit from Kenneth Dillon, Vice President, Commercial Leasing Administration, at Macklowe Management LLC, the managing agent for the building, who claims that as of January 8, 2007, the sum of base rent and additional rent due was $179,258.34.

that any such selection/calculation issues be tried immediately, whether before this Court or before a referee.

Defendant, however, opposes the motion and cross-moves for partial summary judgment on its first counterclaim.

*Average Renewal Rent*

First, plaintiff contends that "Average Renewal Rent" is to be calculated by taking the simple "average of the per-square-foot base annual rents (exclusive of charges for electricity) applicable during the first year of the extension or renewal terms of the Designated Renewals."

Defendant, however, contends that plaintiff's method does not differentiate between a lease for 10,000 square feet at $50.00 per square foot and, for example, a lease for a 10 square foot display case in a lobby that might rent for the equivalent of $500.00 per square feet.

Defendant argues that the plain meaning of paragraph 4(c)(i) requires that the "average of the per-square-foot base annual rents" be calculated by: (a) multiplying the number of square feet in each transaction by the per square foot rental charged in that transaction, and adding these individual sums together to form the

numerator; and (b) dividing that total sum by the total number of square feet leased during the relevant one-year period.

Second, plaintiff contends that it would be illogical to interpret "annual rents ... applicable during the first year of the extension or renewal terms" to include renewals/extensions for time periods of less than a year.

Defendant, on the other hand, contends that the provision does not contain any such limitation, and that transactions for extensions for terms of less than one year should be included in the calculation.

Based on the paper submitted and the oral argument held on the record on June 20, 2007, this Court finds that the plain meaning of the phrase, "Average Renewal Rent", required the taking of a simple average and not the more complex calculation proposed by defendant.

However, this Court finds that the phrase, "annual rents ... applicable during the first year of the extension or renewal terms", does not expressly exclude (and, thus, shall be interpreted to include) renewals/extensions for time periods of less than a year, provided that said renewals/extensions were applicable at

some point "during the first year of the extension or renewal terms of the Designated Renewals."

*Designated Renewals*

Plaintiff contends that the Renewal Rent for the Extension Period is to be calculated by multiplying the square footage of defendant's leased premises,[3] by the average of the per-square foot base rents for the first year of each of "the renewal or extension transactions" for any space in the Building it entered into with unaffiliated third parties during the one year period beginning April 1, 2005 and ending March 31, 2006.

Plaintiff claims to have entered into renewal or extension transactions for space in the building with six unaffiliated third parties, including Colortek, during the applicable one year period, and contends that the Renewal Rent for the Extension Period, based on these six renewal or extension transactions, is $80.73 per square foot.

Defendant argues that plaintiff's interpretation of the relevant lease provisions would yield an absurd result because it would raise defendant's rent 38% from the previous rent of $58.00

[3] This figure was stipulated to by the parties in Schedule 2 of the Second Amendment of Lease.

per square foot, i.e., from $45,991.71 per month to $89,369.95 per month.

Defendant further alleges that at the time of the execution of the Second Amendment, the parties did not contemplate that paragraph 4(c)(ii) would include commercial ground floor retail space which traditionally rents for a much higher per square footage rent than office space.

Rather, defendant contends that the Renewal Rent for the Extension Period should be calculated based on "the renewal or extension transactions" between the Landlord and third parties during the relevant one year period for 'like-office space' in the building only, and that the renewal of Colortek's lease (the "First Lease Amendment") for retail space on the ground floor should, therefore, be excluded.

In addition, defendant argues that Colortek's renewal of its lease should be excluded because said agreement is dated "as of" March 14, 2005, which is outside the one year period beginning April 1, 2005.

Plaintiff contends that its inclusion of the renewal by Colortek was proper because defendant's interpretation of the term,

"space in the Building", to mean only office space in the building is contrary to the plain meaning of that provision.

In addition, plaintiff contends that Colortek's First Lease Amendment was, in fact, "entered into by Landlord with [Colortek] during the one (1) year period ending March 31, 2006" because it was not countersigned by the Landlord and delivered to Colortek until April 1, 2005, the date it received a Good Guy Guaranty from Tae Kyn Park a/k/a James Park, a Principal of Colortek.

> [T]he rule is well settled that a court may not, under the guise of interpretation, make a new contract for the parties or change the words of a written contract so as to make it express the real intention of the parties if to do so would contradict the clearly expressed language of the contract. (citations omitted).

Rodolitz v. Neptune Paper Products, Inc., 22 N.Y.2d 383, 387 (1968).

Moreover, "'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.' (citations omitted)." W.W.W. Associates, Inc. v. Giancontieri, 77 N.Y.2d 157, 163 (1990). The rule is particularly applicable where, as here, the written agreement, which is unambiguous on its face, was between

"sophisticated, counseled businessmen." See, Chimart Associates v. Paul, 66 N.Y.2d 570, 571 (1986).

Thus, this Court rejects defendant's argument that the term "Designated Renewals" must be interpreted to include only office space in the building in order to conform with the alleged contemplation of the parties.

Although application of the agreement may result in a sharp increase in defendant's base rent, "parties are free to make their own contracts, and courts do not serve as business arbiters between parties in approximately equal stances (citation omitted)." CBS Inc. v. P.A. Building Co., 200 A.D.2d 527 (1st Dep't 1994).

Finally, this Court finds that plaintiff's inclusion of the renewal of Colortek's lease in its calculation of defendant's Renewal Rent was proper since "delivery of the lease, in addition to its execution, is required for a written lease to become effective" (Dlugosz v. O'Brien, 36 A.D.3d 1035, 1036 [3rd Dep't 2007], citing, 219 Broadway Corp. v. Alexander's, Inc., 46 N.Y.2d 506, 511-512 [1979]), and said renewal was not delivered until April 1, 2005.

Accordingly, plaintiff's motion is granted to the extent of granting summary judgment declaring that: (i) the reference in paragraph 4(c)(i) of the lease to the "average of the per-square-foot base annual rents" refers to the simple average, or mean, and does not refer to a 'weighted' average; and (ii) calculations pursuant to paragraph 4(c)(ii) of the lease shall include renewal/extension agreements for office and/or retail space in the Building, including Colortek's First Lease Amendment which was effective during the relevant period.

Defendant's cross-motion for summary judgment on its first counterclaim is granted only to the extent of finding that annual rents (exclusive of charges for electricity) applicable during the first year of the extension or renewal terms of the Designated Renewals should be included in the calculation of said average, even if said renewal/extension was not in effect for the entire one year period.

Defendant, however, legitimately argues that it has not had an adequate opportunity to address plaintiff's claims on the issue of damages because plaintiff has not produced copies of all other

leases in the building during the applicable one year period and/or documentation establishing the rents and square footages.[4]

Therefore, plaintiff is directed to produce said documents within 30 days of entry of this order.

The issue of what sums are owed by the defendant to plaintiff is referred to a Special Referee to hear and report with recommendations (or, upon stipulation of counsel, to hear and determine).

Any disputes regarding the production of documents shall be resolved before the Special Referee.

Upon service of a copy of this order with notice of entry, the Special Referee Clerk shall place this action on the Part 50R calendar for reference to a Special Referee.

This constitutes the decision and order of this Court.

Dated: February 15, 2008

FILED
FEB 20 2008
COUNTY CLERK'S OFFICE

Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.

[4] Plaintiff has produced (subject to a confidentiality agreement) copies of only the six renewals on which it has based its calculation.