

**APW Supermarkets, Inc. v Mavco Realty, LLC**

2008 NY Slip Op 31305(U)

April 17, 2008

Supreme Court, Suffolk County

Docket Number: 0014061/2005

Judge: Elizabeth H. Emerson

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SUPREME COURT - STATE OF NEW YORK  
**TRIAL TERM, PART 8 SUFFOLK COUNTY**

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 11-20-07  
SUBMITTED: 2-6-08  
MOTION NO: 001-MD  
002-XMOTD

\_\_\_\_\_ X  
APW SUPERMARKETS, INC.,

Plaintiff,

-against-

**MARCUS ROSENBERG & DIAMOND LLP**  
Attorneys for Plaintiff  
488 Madison Avenue  
New York, New York 10022

MAVCO REALTY, LLC, PARK PLAZA PROPERTIES  
II, LLC, PARK PLAZA PROPERTIES-MAVCO, LLC  
and PARK PLAZA PROPERTIES, LLC,

Defendants.

**CARTIER, BERNSTEIN, AUERBACH &  
DAZZO, P.C.**  
Attorneys for Defendants  
77 Medford Avenue  
Patchogue, New York 11772

\_\_\_\_\_ X

Upon the following papers numbered 1 to 72 read on this motion and cross motion for summary judgment ;  
Notice of Motion and supporting papers 1-30 ; Notice of Cross Motion and supporting papers 31-49 ; Answering Affidavits  
and supporting papers 50-54 ; Replying Affidavits and supporting papers 55-62 ; Other 63-66; 67-68; 69-70; 71; 72 it is,

**ORDERED** that this motion (001) by the plaintiff, APW Supermarkets, Inc.,  
pursuant to 3212 for summary judgment striking the affirmative defenses raised in defendants'  
answer, and declaratory relief as to the first cause of action as set forth in the moving papers, is  
denied.

**ORDERED** that this motion (002) by defendants pursuant to CPLR 3212 for  
summary judgment dismissing the second and third causes of actions asserted by plaintiff,  
summary judgment on their third counterclaim and declaratory relief, is granted to the extent that  
the second and third causes of action asserted in the complaint are dismissed; and denied as to that  
part of defendants' motion which seeks declaratory relief concerning the location of employee  
parking and that plaintiff use its best efforts to prevent unauthorized parking.

This is an action arising out of a lease agreement between the parties wherein the  
plaintiff, APW Supermarkets, Inc. (hereinafter APW) seeks declaratory judgment on the first cause  
of action declaring that:

(a) the CAM charge provision annexed to the complaint is the only CAM charge

provision in the Lease;

(b) APW is entitled to a credit or refund for its overpayment of 2003 CAM charges payable under the Lease in the amount of \$2,971.76;

(c) that the Second Notice is null and void; and

(d) Landlord's affiliate, Park Plaza Properties, LLC, may not breach its restrictive covenant benefitting APW.

On the second cause of action, plaintiff seeks judgment declaring that APW is entitled to withhold 25% of each installment of fixed annual rent from February 19, 2002 until such time as Landlord cures its breach under Article 21A of the Lease.

On the third cause of action, APW seeks a money judgment consisting of 25% of each installment of fixed annual rent paid by APW to Landlord from February 19, 2002 through the date of judgment, with the right to withhold payment of 25% of each future fixed rent installment thereafter until Landlord cures its breach.

In motion (001) APW seeks an order striking each of the affirmative defenses asserted in the defendants' answer, and seeks summary judgment declaring that:

(i) the common area maintenance (CAM) charges clause with the cap is the controlling CAM charge clause in the lease at issued entered into between APW as tenant, and Mavco Realty LLC and Park Plaza Properties II, LLC as landlord, to which Park Plaza Properties-Mavco, LLC (together with Mavco Realty LLC and Park Plaza Properties, II, LLC, Landlord) claims to be successor-in-interest;

(ii) that APW owes no CAM charges and has paid all CAM charges required to be paid under the Lease to date;

(iii) APW is entitled to a credit or refund for overpayment of CAM charges in the aggregate amount of \$2,971.76;

(iv) the purported rent demand dated June 1, 2005 is null and void;

(v) APW is entitled to withhold 25% of each installment of fixed annual rent from February 19, 2002 until such time as Landlord cures its breach under Article 21 of the Lease; and

(vi) on APW's claim for monetary damages based upon Landlord's breach of Article 21 of the Lease, granting APW judgment as to Landlord's liability, with the matter set down for a hearing before a Referee to determine the amount of damages to be awarded to APW.

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. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (**Sillman v Twentieth Century-Fox Film Corporation**, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (**Winegrad v N.Y.U. Medical Center**, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (**Winegrad v N.Y.U. Medical Center**, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form and must "show facts sufficient to require a trial of any issue of fact" (CPLR

3212(b)), **Zuckerman v City of New York**, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (**Joseph P. Day Realty Corp. v Aeroxon Prods.**, 148 AD2d 499 [2<sup>nd</sup> Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (**Castro v Liberty Bus Co.**, 79 AD2d 1014 [2<sup>nd</sup> Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (**Friends of Animals v Associated Fur Mfrs.**, 46 NY2d 1065 [2<sup>nd</sup> Dept 1979]).

In reviewing motion (001), it is noted that plaintiff's motion is supported by the affidavit of Maureen Hockenbeck which was notarized in the State of New Jersey. Plaintiff's opposition to defendants' motion (002) is supported by the affidavit of Timothy S. Huttleston which was notarized in the State of New Jersey. It is determined that neither affidavit comports with the requirements of CPLR 2309(c), and therefore, neither affidavit is in admissible form and the motion and opposing papers fail to comport with the requirements set forth in CPLR 3212(b). Even if the aforementioned affidavits were in admissible form, it is determined that there are factual issues which preclude summary judgment on their application as it cannot be determined whether the parties agreed to a cap on Common Area Charges as there are different versions of Exhibit H relied upon and submitted by each of the parties.

Accordingly, motion (001) is denied.

The defendants, Mavco Realty, LLC, Park Plaza Properties II, LLC, Park Plaza Properties-Mavco, LLC, and Park Plaza Properties, LLC (collectively the Landlord) have cross-moved for summary judgment on their third counterclaim; declaring as a matter of law that, in accordance with the subject lease, plaintiff's employees may only park in designated employee parking spaces identified in the site plan attached to the lease agreement, and that plaintiff must use its best efforts to prevent unauthorized parking by its employees, and plaintiff must comply with reasonable enforcement methods proposed by defendants; and further seek dismissal of plaintiff's second and third causes of action as a matter of law.

Domenick Mavellia sets forth in his supporting affidavit that Park Plaza-Mavco, LLC is the owner of the land on which the shopping center known as 1960 Deer Park Avenue, Deer Park, New York is located and is the successor in interest to Mavco. Pursuant to a written lease dated November 27, 2001, Mavco and Park leased to the plaintiff a portion of the shopping center for use as a Waldbaums supermarket. He states that due to disputes concerning the lease provisions, the plaintiff has commenced this action seeking a judgment declaring that there is a valid cap on its share of the common area maintenance (CAM) and Mavco and Park have violated provisions of Article 21A of the lease agreement. He states that defendants agree that except for Exhibit H of the lease agreement attached to plaintiff's moving papers as Exhibit A, that Exhibit A is a true copy of the lease agreement currently in effect, and that the Exhibit H that is attached to defendants' counterpart of the lease agreement is in the form annexed to plaintiff's moving papers as Exhibit D and contains the language agreed to by Mavco and Park.

Mr. Mavellia asserts that discovery is not complete in this action in that despite

efforts to depose plaintiff's attorney who negotiated the lease agreement for plaintiff, Jeffrey Diamond, such deposition has been resisted. Mr. Mavellia states that the Exhibit H which plaintiff claims to be part of the lease agreement was not the Exhibit H that was attached to any of the counterparts signed by him and his mother on behalf of Mavco and Park and is not the Exhibit H that has at all times been attached to the bound counterpart of the fully executed lease that was delivered to them in 2001 by their attorney, Mr. Stein.

Julia Mavellia sets forth in her supporting affidavit that she is a member of Park Plaza-Mavco, LLC and also a member of Park Plaza Properties II, LLC at the time the lease in issue was negotiated and signed. She asserts that by written lease agreement dated November 27, 2001, Mavco and Park leased to the plaintiff a portion of the shopping center located at 1960 Deer Park Avenue, Deer Park, for use as a Waldbaums supermarket after a year of negotiations. She asserts that when she read the proposed lease toward the end of October or beginning of November, 2001, she and her son received from their attorney the proposed lease with all the relevant exhibits, and noted the proposed lease capped plaintiff's share of CAM charges for two years and limited the amount of future increases. She claims she advised her attorney that because Mavco and Park had no way of controlling the cost of common area expenses, particularly insurance premiums and the cost of snow removal, her attorney was advised they would not sign the lease capping plaintiff's share of those expenses. The final draft of the lease and counterparts, which were not bound or fastened, did not contain a CAM cap, so she states that she and her son both signed the lease and initialed the site plan. The lease and the counterparts were then forwarded to plaintiff for review and execution, and a fully executed counterpart of the lease was returned to them in a three-ring binder. Ms. Mavellia further avers that at no time between her execution of the lease agreements and receipt of the fully executed counterpart was she ever informed that plaintiff was objecting to the lack of a CAM cap in Exhibit H. She further states that until this motion was made by the plaintiff, she never reviewed the 2003 CAM statement and was not aware that it referred to the CAM cap found in the draft of the lease she rejected, and that the 2003 CAM statement had been inadvertently prepared using the earlier draft that she rejected in late 2001. She states she then prepared the 2004 CAM statement which did not include a CAM cap as none existed, and by letter dated February 24, 2005, APW contested the 2004 CAM charges in the statement and claimed the lease capped the plaintiff's CAM charges. Ms. Mavellia asserts that an alteration or substitution of Exhibit H of the lease was made (intentionally or unintentionally) to all the lease counterparts, except to the one returned to her and her son after they had signed the same.

Ms. Mavellia further avers that if this court were to determine that the lease does contain a CAM cap, plaintiff is not entitled to the requested declaration that it has fully paid all CAM to date as the only CAM years discussed by plaintiff in its moving papers are 2003 and 2004, and for those years, plaintiff's numbers are correct if a cap does in fact exist. She also states that since the cap plaintiff relies upon only applies for the first two lease years, plaintiff would still be responsible for fixed percentage increases, no portion of which has been paid in subsequent years, and therefore, APW is not entitled to a declaration that all CAM is paid in full to date. To the extent the CAM cap does not exist, Ms. Mavellia asserts that APW owes Mavco and Park \$17,623.16 for 2003 and \$85,386.39 for 2004 CAM.

SECOND AND THIRD CAUSES OF ACTION

On the second cause of action, plaintiff seeks judgment declaring that APW is entitled to withhold 25% of each installment of fixed annual rent from February 19, 2002 until such time as Landlord cures its breach under Article 21A of the Lease. Defendants seek dismissal of this cause of action.

Defendants seek summary judgment dismissing the third cause of action wherein APW seeks a money judgment consisting of 25% of each installment of fixed annual rent paid by APW to Landlord from February 19, 2002 through the date of judgment, with the right to withhold payment of 25% of each future fixed rent installment thereafter until Landlord cures its breach.

Article 21 RESTRICTIVE COVENANT of the subject lease provides in pertinent part "A. Landlord covenants and agrees that, except for the Demised Premises, it shall not lease, rent or occupy or permit any premises in the Shopping Center to be occupied for the sale of food for off-premises consumption,..."

Article 6A of the lease agreement provides in pertinent part that "so long as a store primarily engaged in the sale of bagels baked at such store is operating under a lease for space in the Shopping Center, Tenant shall not engage in the baking of bagels in the Demised Premises by settle system, rack system or otherwise..."

Mr. Mavellia states in his supporting affidavit that although the plaintiff seeks a declaration that Mavco and Park are in violation of Article 21 of the lease agreement and it may withhold 25% of each installment of fixed annual rent from February 19, 2002, the date of the alleged breach, until such time as the alleged breach has been cured, that the plaintiff's claim is without merit.

He states that on or about February 19, 2002, Mavco and Park entered into a written lease agreement with Deer Park Bagels, Inc. pursuant to which space in the shopping center would be rented and used as a bagel store wherein the lease provided that the premises would be used solely for the purpose of conducting the business of a bakery and bagel store, with the right to sell prepared sandwiches and other prepared food products for both on and off-premises consumption..." Mr. Mavellia also states that the Bagel store has been a tenant pursuant to a lease agreement in the shopping center with plaintiff since April 30, 1979, which lease was to expire June 30, 1989, however, in a modification and amendment between Bagels and Skyson Associates, the then landlord, Article II of that lease was amended to include a new §2.04 which granted Bagels two five-year options. Bagels exercised its first option extending its lease term through June 30, 1994, and then again through June 30, 2000, and again through June 30, 2005.

Mr. Mavellia states that at all times during the term of the 1979 Bagels' lease, the plaintiff operated a supermarket in the shopping center. A renovation of the shopping center was done to include an enlarged supermarket for plaintiff, so negotiations were entered into, wherein Mr. Mavellia claims Bagels attempted to frustrate the efforts of plaintiffs, Mavco and Park to enter into a new lease agreement. An action was commenced by Bagels while the plaintiff's lease was being negotiated wherein Bagels sought a declaration that its lease term did not expire until June 30, 2005.

Mr. Mavellia avers that by virtue of the fact that copies of the 79 Bagels lease and modifications were attached to various documents served and filed with the Court, the plaintiff was in possession of the lease and knew of its terms long before it signed its lease in November, 2001. Mr. Mavellia also avers that he also provided plaintiff with copies of that lease and modifications as plaintiff insisted during the lease negotiations that it be permitted to examine all of the existing leases for the shopping center, thus the plaintiff was fully aware of the terms of Bagels' permitted uses under §5.01 of the Bagels' lease. He states additionally, Bagels had to close its store for a period of four months in order to relocate as part of plaintiff's enlargement of its existing store.

Based upon the foregoing, it is determined that the defendants have demonstrated prima facie entitlement to summary judgment as a matter of law for dismissal of plaintiff's second and third causes of action. Plaintiff has failed to raise a triable issue of fact to preclude summary judgment.

Accordingly, that part of motion (002) wherein defendant seeks dismissal of the second and third causes of action is granted.

The defendants assert as their third counterclaim that pursuant to the terms and conditions of the parties' lease, the plaintiff was granted the use of seventeen parking stalls at the subject property along North 1<sup>st</sup> Street for employee parking, and that plaintiffs have violated this lease agreement by continuing to allow its employees to park in areas outside the designated parking area, despite letters dated April 18, 2005 and May 16, 2005 to plaintiff advising of the same. The defendants seek declaratory relief setting forth that the plaintiff's employees may only utilize the seventeen parking spaces set forth as plaintiff's designated employee areas as indicated on the site plan initialed by duly authorized representatives of the parties.

Article 11B of the subject lease provides in pertinent part that "Except as otherwise expressly provided herein, the parking spaces in the Common Area shall be used only for the parking of private vehicles of customers, invitees and employees of tenants of the Shopping Center and for no other purpose....Employees of the tenants of the Shopping Center shall not park their automobiles in the Common Area except in that portion thereof designated as Employee Parking on Exhibit A and Landlord shall require all other tenants of the Shopping Center to use their best efforts to prevent any violation of this provision."

In reviewing Exhibit A of the subject lease, it is determined that the diagram clearly marks an area designated by the legend "Employee Parking" and arrows designating the parking area along North 1<sup>st</sup> Street for employee parking. Mr. Mavellia sets forth in his affidavit that the plan identifies two employee parking areas with the legend "Employee Parking" consisting of ten spaces, and that the second area is at the bottom or east side of the plan consisting of seven spaces, making a total of 17 employee parking spaces. However, this cannot be ascertained just from looking at Exhibit A as the subject lease does not set forth the number of employee parking spaces or their specific locations, and the purported seven parking spaces set forth on the east side of the exhibit are located by the Pizzeria space and not near to the Demised Premises. Additionally, there is ambiguity concerning that part of Article 11B of the subject lease wherein it states, "Landlord shall require all other tenants of the Shopping Center to use their best efforts to prevent any

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violation of this provision” as it is not clear whether APW is part of “all other tenants.” There are, therefore, factual issues which preclude the summary declaratory relief requested by the defendants whom have not demonstrated prima facie entitlement to the same.

Accordingly, that part of defendants motion (002) which seeks declaratory relief concerning the location of employee parking and APW’s use of best efforts concerning the parking is denied.

**HON. ELIZABETH HAZLITT EMERSON**

DATED: April 17, 2008

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J. S.C.