

**Grand Deli, LLC v Seward Park Hous. Corp.**

2008 NY Slip Op 32809(U)

October 7, 2008

Supreme Court, New York County

Docket Number: 602960/06

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE  
Justice

PART 10

GRAND DELI LLC  
SEWARD PARK  
HOUSING CORP.

INDEX NO. 602960 106  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 002  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
_____
_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

**FILED**

OCT 09 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 10/7/08

JUDITH J. GISCHE, J.S.C. J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

-----X

Grand Deli, LLC,  
Plaintiff  
-against-

DECISION/ORDER

Index No.: 602960/06  
Seq. No.: 002

Seward Park Housing Corp.  
Defendant.

Present:  
Hon. Judith J. Gische  
J.S.C.

-----X

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

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**Papers**

**Numbered**

Grand Deli n/m (compel) w/IRF affirm, exhs	..... 1
SPHC x/m (amend) w/SSA affirm, exhs (sep back)	..... 2, 3
Grand Deli Opp to x/m and reply w/IRF affirm	.....
SPHC reply w/SSA affirm, exh	.....

**FILED**  
OCT 09 2008  
COUNTY CLERK'S OFFICE

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*Upon the foregoing papers the court's decision is as follows:*

GISCHE, J.

This is an action for a declaratory judgment brought by plaintiff Grand Deli, LLC (sometimes "Grand Deli"), the commercial tenant of defendant Seward Park Housing Corporation (sometimes "Seward Park"). In connection with prior motion practice by plaintiff to consolidate this action with a nonpayment proceeding pending in Civil Court [L&T No. 68275/06] the court ordered that the cases be consolidated and that defendant answer the complaint. Order, Gische J., 6/7/07. At that time defendant's preanswer motion to dismiss this action was denied.

The cases are now consolidated for all purposes, including discovery and joint

trial. Issue was joined with service of the answer on June 18, 2008. The preliminary conference was held July 5, 2007 and the parties are engaged in discovery.

Plaintiff has served discovery demands that Seward Deli has partially complied with. Seward Park has served objections as to the other demands that it contends are not discoverable. Grand Deli now moves to enforce defendant's answers to its demands. Seward Park has cross moved for permission to serve an amended answer and Third Party Complaint against the principal of Grand Deli, Noam Sokolow ("Mr. Sokolow" at times "guarantor"). It is unrefuted that Mr. Sokolow personal guaranteed Grand Deli's obligations under its lease, including the payment of rent.

The court previously set forth in its prior order the details of the parties' disputes which are incorporated by reference. Facts will not be repeated here, except as necessary.

Although defendant argues that plaintiff's motion should not even be considered by the court because of some so-ordered stipulations between the parties related to discovery, the prior stipulations did not encompass the discovery disputes now before the court. In fact the court encouraged the parties to resolve as much as they could by agreement and what they could not resolve had to be brought before the court by written motions. Therefore the disputes are properly before the court to decide.

### **Background and Arguments**

Plaintiff has served discovery demands seeking, among other things, information about Seward Park's other commercial, professional and residential tenants. Among the information sought are copies of the lease agreements for all these tenants, Seward

Park's operating budget, a list of all the nonpayment proceedings Seward Park has commenced to enforce payment of real estate tax escalations, and the aggregate dollar amount of real estate escalations charged to the commercial and residential tenants of Block 311 Lot 13 for fiscal years 2004-2005, 2005-2006 and 2006-2007. Plaintiff also seeks information about any settlements defendant has entered into with any of the commercial tenants. It also asks for the name and affiliation of each person who prepared the commercial tenants' real estate tax escalation bill for the years 2000 to present.

Plaintiff argues that this information is useful, material and necessary to its claim that Seward Park overcharged Grand Deli for real estate taxes. Grand Deli alleges that it paid more than its proportional share of these escalations because it was billed for 6% of the total escalations for Block 311, Lot 13, not 6% of the commercial strip its restaurant is located in. Block 311, Lot 13 consists of two (2) residential buildings with 850 apartments and twenty eight (28) commercial and professional spaces. There is no dispute that the dollar amount of real estate taxes Grand Deli has to pay Seward Park under its interpretation of the lease is much greater than under Grand Deli's interpretation of the lease, or if Grand Deli prevails in having the lease reformed or rescinded. In relevant part, the lease requires Grand Deli to pay 6% of any real property taxes against the "Property" exceeding the amount of real estate taxes for the base year 2002-2003. "Property" is defined as Block 311, Lot 13.

In connection with defendants' motion to dismiss, the court has already decided that plaintiff has set forth facts that support the causes of action it pled. These include

claims for reformation, or rescission based upon mutual mistake, fraudulent misrepresentation, unconscionability and/or equitable estoppel. Notwithstanding the court's decision, the defendant still objects to providing Grand Deli with any information about other tenants on the basis of materiality and relevancy. Defendant argues, for example, that the leases for any of the other tenants within Block 311, Lot 13 are immaterial because those leases were individually negotiated for those individual spaces and have no bearing to the disputes in this case about the definition of "Property" in Grand Deli's lease.

Seward Park also warns that the other commercial tenants have an expectation of privacy and have the right to keep the terms of their leases private. Seward Park, however, has provided a form proprietary lease for the residential units. Seward Park contends it does not know the names of the individuals who actually prepared the tax bills, but it has provided the names and addresses of the management companies it used. Seward Park argues plaintiff can and should serve subpoenas for any further information about how the bills were prepared.

Defendants objects to the production of any settlement agreements it has reached with other nonresidential (i.e. commercial and professional) tenants on the basis that Grand Deli's request is not "focused" on this case and those settlements have no relevancy to this action. It also objects to providing Grand Deli with a copy of its operating budget for the years at issue because it has provided plaintiff with the total real estate taxes Seward Park paid in tax years 2002-2003 through 2006-2007 for Block 311, Lot 13. Defendant has also provided the total square footage for the block and lot.

In support of its cross motion for permission to amend its answer and bring a third party action against Noam Sokolow, Seward Park contends that Mr. Sokolow, Grand Deli's guarantor, personally agreed in writing to be responsible for Grand Deli's obligations under its lease, including the payment of rent. Since the non-payment action has been consolidated with this action, defendant argues that the amendment should be permitted because any unpaid rent is also Mr. Sokolow's responsibility.

Plaintiff argues the proposed amendment will only further delay discovery in this case because Mr. Sokolow will have to be brought up to speed if he is added as a named party. Plaintiff also argues that the claims against Mr. Sokolow are tangential to the claims Grand Deli has asserted against Seward Park. In reply to defendant's opposition to its enforcement motion, plaintiff agrees to accept redacted copies of any of the materials it has requested, if that is what the court deems is necessary.

### **Discussion**

The court first addresses Seward Park's cross motion for permission to serve an amended answer and assert third party claims against Mr. Sokolow. CPLR §§ 3025 (b), 3019 (a) and 1007. Leave to amend and supplement pleadings should be freely given upon such terms as may be just. CPLR § 3025 (b). This is true particularly when the denial of the motion would create a greater prejudice than would be granting it. Murray v. City of New York, 43 NY2d 400 (1977). Since this court removed the nonpayment from Civil Court and consolidated with this action for a declaratory judgment, it makes sense that Mr. Sokolow should be made a party. Not only is he the principal and owner of Grand Deli, he also personally guaranteed Grand Deli's lease.

The lease is not only the subject of this action for a declaratory judgment, it is at the heart of the nonpayment proceeding. Both cases are before this court. There is no prejudice to adding Mr. Sokolow to these cases as a named party. Any delays in completing discovery can be addressed as needed and is expected to be *de minimus*. Therefore, Seward Park's cross motion is granted. Seward Park may serve an amended answer and third party complaint in the form proposed within Ten (10) Days hereof.

Turning to plaintiff's motion to compel, the court must decide whether the disclosure Grand Deli demand from Seward Park is "material and necessary" to Grand Deli's claims against Seward Park and/or Grand Deli's defense against Seward Park's nonpayment action against it. CPLR § 3101. The words, 'material and necessary', are to be interpreted liberally to require disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." Allen v. Crowell-Collier Pub. Co., 21 N.Y.2d 403, 407 (1968).

A real estate tax escalation clause is not intended to confer a financial windfall on a landlord, but meant to afford a landlord relief where it has actually made an increased payment as a result of an increased assessment. see Wellington Tower Associates, L.P. v. New York First Ave. CVS, Inc., 3 A.D.3d 460 (1<sup>st</sup> Dept. 2004). Applying this principal to the case at bar, if Seward Park is charging Grand Deli more than its share of real estate tax escalations - and doing the same thing to other commercial tenants - Seward Park may be recovering more than 100% of its increased

real estate taxes in any given fiscal year. A corollary argument (by plaintiff) is that the parties intended Grand Deli's share of the real estate tax escalations to correlate to its actual proportionate share of the square footage. To prove its claims (and its defense in the nonpayment proceeding) Grand Deli has to know and compare the real estate taxes that the City billed Seward Park for and what Seward Park billed its tenants for. It cannot prove that Seward Park is charging plaintiff more than its share of the real estate tax escalations otherwise.

Therefore, the court will require that Seward Park provide Grand Deli with the leases for its non-residential (i.e. commercial and professional office space) tenants within Block 311, Lot 13 that were in effect for the period April 2002 through the present. The leases, however, may be provided in their redacted form. All information may be redacted except for the first page of the lease and any of the provisions pertaining to real estate tax escalation clauses, including definitions. Seward Park shall provide these leases no later than Ten (10) Days following service of a copy of this Decision and Order with Notice of Entry.

The court will also require that Seward Park provide plaintiff with information about the real estate tax escalations it billed all the tenants (Block 311, Lot 13) during the same period of time (April 2002 - present). Copies of the bills that were sent to the tenants shall be provided no later than Ten (10) Days following service of a copy of this Decision and Order with Notice of Entry.

Although plaintiff has asked for copies of defendants' operating budget, the court will not require that Seward Park provide that information at this time because Grand

Deli has not established this information is material and necessary. If defendant provides plaintiff with copies of the bills it sent to the tenants, and also about the real estate taxes Seward Park was itself billed for by the City, then Grand Deli has the information necessary to determine whether defendant billed in excess of what it actually paid. The operating budget is synthesized or interpreted information about the financial health of the corporation that is neither useful nor necessary to plaintiff's claims or defenses. Reyes v. Riverside Park Community (Stage I), Inc., 47 A.D.3d 599, 600 (1<sup>st</sup> Dept 2008). There is no reason why plaintiff has to have this information to make its own comparisons.

To the extent not already complied with, defendant shall also provide plaintiff with the names, addresses, telephone numbers, and any contact information it has for the management companies it used during the period 2000 to present. With this information plaintiff can then issue subpoenas and depose the individual(s) who prepared the tax bills for Seward Park for that period of time.

Seward Park has already provided Grand Deli with a form proprietary lease for the residential tenants. Grand Deli has not articulated why it would need a copy of each residential tenant's proprietary lease. No argument is made that the corporation prepared individualized leases for different tenants. Therefore, this branch of plaintiff's motion to compel is denied.

A major point of contention is whether Grand Deli is entitled to copies of any settlement agreements that defendant may have entered into with other non-residential (i.e. commercial and professional) tenants related to the real estate tax escalations in

their leases. Grand Deli argues this information is useful, material and necessary to its claims because it will show that Seward Park never intended to bill the commercial tenants for the real estate tax escalations for the entire block and lot, but only the commercial strip. Grand Deli claims several non-residential tenants have negotiated new real estate escalation clauses, or that they have been eliminated from their leases altogether.

As a general matter, the court has the discretion to allow a settlement agreement to remain private, thereby encouraging the settlement of disputes privately, rather at a trial. Even in cases where some defendants have settled, but others have not, the non-settling defendants were not automatically entitled to disclosure of the settlement agreement, unless it bears on the issue of damages. In re New York County Data Entry Worker Product Liability Litigation, 222 A.D.2d 381 (1<sup>st</sup> Dept 1995). Having already ordered Seward Park to provide copies of its leases with the non-residential tenants, the court will further require that Seward Park provide plaintiff with copies of any revisions to those leases that were executed 2002 and thereafter. The evidence of settlements is not important to Grand Deli's claims or defenses. However, information about the adjustment in percentages or elimination of real estate tax escalation clauses directly bears on Grand Deli's claims that it is being over billed for these taxes.

The court will also direct that Seward Park provide a list of the cases it has commenced against the non-residential (i.e. commercial and professional) tenants of Block 311, Lot 13 from 2002 to present. To the extent that any settlement agreements have been filed in those proceedings, they are a matter of public record and available to

Grand Deli. Grand Deli's motion for copies of any settlement agreements that Seward Park has entered into with its non-residential tenants is otherwise denied.

**Conclusion**


Plaintiff's motion to compel discovery is granted to the extent provided in this decision/order, otherwise it is denied. Defendants' cross motion to serve an amended answer and third party complaint is granted.

This case has an a compliance conference scheduled for December 11, 2008. At that time the will entertain whether the time to file the Note of Issue (now due December 12, 2008) has to be extended.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York  
October 7, 2008

So Ordered:  
  
Hon. Judith J. Gische, JSC

**FILED**  
OCT 09 2008  
COUNTY CLERK'S OFFICE  
NEW YORK