

Georg Jenson, Inc. v 130 Prince Assoc., LLC

2009 NY Slip Op 30692(U)

March 27, 2009

Supreme Court, New York County

Docket Number: 102554/09

Judge: Walter B. Tolub

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

PRESENT: **WALTER B. TOLUB**

Justice

PART 15

Georg Jensen, Inc.

INDEX NO.

102554/09

MOTION DATE

- v -

MOTION SEQ. NO.

1

136 Prince Assoc., Inc.

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 ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Repeating Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED

MAR 31 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/2/09

WALTER B

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: IAS PART 15

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GEORG JENSON, INC.,

Plaintiff,

-against-

130 PRINCE ASSOCIATES, LLC,
Defendant.

Index No.102554/09
Mtn Seq.001

FILED

MAR 31 2009

COUNTY CLERK'S OFFICE
NEW YORK

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WALTER B. TOLUB, J.:

This is Plaintiff's motion to (1) enjoin Defendant from terminating the lease dated November 11, 2003 or taking any action interfering with Plaintiff's possession of the premises; and (2) remove the non-payment action entitled *130 Prince Associates, LLC v. Georg Jenson, Inc.* (L&T Index 09N057012) (Civil Court Action) from Civil Court and consolidate it with this action.

Defendant opposes Plaintiff's motion and cross-moves for an order dismissing Plaintiff's Complaint comprising of causes of action for a declaratory judgment, breach of contract, injunctive relief and attorneys' fees respectively, pursuant to CPLR §3211(a) (1) and/or §3211(a) (7).

Facts

Defendant is the owner and landlord of a building located at 130 Prince Street, New York, New York (Building). Plaintiff claims, and Defendant disputes, that CB Richard Ellis, Inc. (CBRE) manages and leases the Building's space.

Plaintiff is a New York corporation which rented space from Defendant.

On November 11, 2003, Plaintiff as tenant and Defendant as landlord, entered into a lease agreement (Lease) for store space on portions of the ground floor and lower levels of the Building (Premises).

The Lease provided for the initial term to end on January 31, 2009 with one five year renewal option. Paragraph 82 of the Lease provides that:

82. Tenant may extend this Lease for a period of five years on the following terms and conditions:

[a] Tenant shall give Landlord written notice (marked on the envelope "URGENT: RENEWAL NOTICE") of its election to renew the Lease no less than nine (9) months prior to the expiration of the initial Lease terms. The notice of election must be timely sent and **once sent by Tenant may not be revoked unilaterally.**

[b] Tenant shall not be in default beyond any applicable grace or cure period under any material terms of this Lease at the time it exercises the renewal option and at any time prior to the commencement of the renewal terms, as a condition of its rights hereunder.

[c] All the terms and provisions of the Lease shall be applicable to the renewal period except that (I) Tenant shall have no further rights of renewal, and (ii) **the basic annual rent shall be the Fair Market Value of the demised premises as defined in paragraph [d] below determined as of the commencement date of the renewal term.** The basic annual rental rate for each succeeding year of the renewal

term shall be increased by [x] four (4%) percent per year, [y] the Tax Escalation Rider, except that the Tax Base shall be the Base Tax Year July 1, 2009 to June 30, 2010, and [z] Operating expense Escalation, except the Base Year shall be 2009.

[d] Fair Market Value shall mean the current market rent for similar space within the geographical area in which the building is located, assuming standard escalation with current base years, and all other relevant factors as determined by an independent M.A.I. Appraiser chosen by Landlord, whose fee shall be borne equally by Landlord and Tenant.

(Emphasis Added Order to Show Cause Ex. A)

By Notice of Renewal dated April 11, 2008, Plaintiff exercised its option to renew the Lease for an additional five year term (Order to Show Cause Ex. B).

By letter dated June 30, 2008, Plaintiff contacted Defendant and stated that "Although we recognize that the choice of appraisers is yours, we thought it would be helpful to solicit the advice of one of the leading MAI appraisers in the City of New York to help us both establish the basic annual rent for the option." (Order to Show cause Ex. C). Plaintiff's appraiser, Robert Van Anken, concluded that the basic annual rent was \$300 per square foot (Id.)

By letter dated October 17, 2008, Defendant acknowledged Plaintiff's exercise of the renewal option and memorialized an earlier phone conversation explaining that Defendant's appraiser, Mr. Pecorino of CBRE, established the Fair Market Rental Value at

\$630 per square foot. (Order to Show Cause Ex. D).

Plaintiff responded to Defendant by letter dated October 22, 2008 whereby it rejected Defendant's demand of \$630 per square foot.

By letter dated December 4, 2008, Defendant's managing agent wrote to Plaintiff stating that the base rent would be reduced to \$885,000 per year [which amounted to \$600 per square foot] (Order to Show Cause Ex. G).

Then, by letter dated January 30, 2009, Plaintiff informed Defendant that the manner in which the rent was fixed constituted a material breach of the Lease and therefore a nullity. Plaintiff further stated that "[u]nless this breach is remedied by no later than the renewal commencement date, tenant will deem its Renewal Notice to be void and without force or effect." (Order to Show Cause Ex. J).

Defendant continued to maintain that it followed the provisions of the Lease agreement, specifically, paragraph 82 and that the Renewal Notice could not be revoked unilaterally and that it in fact had not been revoked.

On February 18, 2009, Defendant commenced a summary non payment proceeding against the Plaintiff in Civil Court entitled *130 Prince Associates, LLC v. Georg Jenson, Inc.* (L&T Index 09N057012) seeking payment of \$45,387.03, representing the difference between the payment Plaintiff made for February's base

rent and the base rent Defendant determined was appropriate.

Plaintiff then commenced this action seeking: (1) a declaration that Defendant breached the Lease; (2) breach of contract and rescission; (3) an order enjoining defendant from taking any action depriving plaintiff of its rights under the Lease; and (4) attorneys' fees.

Plaintiff now moves for an order granting the injunctive relief pursuant to CPLR §§ 6301 and 6313 and for removal of the Civil Court action to this Court for consolidation pursuant to CPLR 602(b). Plaintiff argues that \$600 per square foot does not represent the Premises' Fair Market Rental Value and that Defendant's appraiser was not independent by virtue of CBRE managing the Building.

Defendant opposes Plaintiff's motion cross-moves for an order dismissing the complaint pursuant to CPLR §3211.

Discussion

When a defendant moves for summary judgment, it must show prima facie entitlement to judgment, at which point the burden shifts to plaintiff to show the existence of a material issue of fact (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §36:481). In contrast, to prevail on a motion to dismiss under 3211(a)(1), the defendant must show that the documentary evidence alone definitively disposes of the plaintiff's claim (Id.).

Here, the main document to be considered is the Lease. "The first and best rule of construction of every contract, and the only rule we need here, is that, when the terms of a written contract are clear and unambiguous, the intent of the parties must be found therein" (Nichols v. Nichols, 306 NY 490, 496 [1954] citing Hartigan v. Casualty Co. Of America, 227 NY 175). Where the language of a contract is unambiguous and the words are plain and clear, conveying a distinct idea, there is no occasion to resort to other means of interpretation, and effect must be given to the intent as indicated by the language itself (Rainbow v. Swisher, 72 NY2d 106 [1988]).

Here the language of the Lease, specifically paragraph 82, is clear and unambiguous. And although the application of the agreement may result in a sharp increase in Plaintiff's base rent, the parties are, and were, free to make their own contracts. Courts do not serve as a business arbiters between parties in approximately equal stances (CBS Inc., v. P.A. Building Co., 200 AD2d 527 [1st Dept 1994]).

However, the issue which Plaintiff raises which creates a material question of fact is whether Defendant's appraiser, Mr. Pecorino was independent. Plaintiff argues that Mr. Pecorino, was not independent because he works for CBRE which Plaintiff contends manages the Building for the Defendant. To support this claim, Plaintiff submits an August 21, 2007 "Notice to Tenants"

stating that Defendant has hired CBRE to provide property management and accounting services. Plaintiff also provides a rent invoice dated February 1, 2009 issued by CBRE (Aff. In Opp. to cross-motion Exs. A, B). Defendant disputes the contention that CBRE managed the Building and submits the affidavit of Mr. Waterman stating that, *inter alia*, CBRE was not working directly with the Defendant so as to make Mr. Pecorino anything less than independent. Even assuming *arguendo* that CBRE manages and leases space in the Building, this alone does not impinge on Mr. Pecorino's status as an independent appraiser (New York Restaurants Exchange, Inc. v. Chase Manhattan Bank, NA, 226 AD2d 312 [1st Dept 1996]). However, the issue remains one of fact and precludes the granting of summary judgment.

As to Plaintiff's motion to remove the summary non-payment action entitled *130 Prince Associates, LLC v. Georg Jenson, Inc.* (L&T Index 09N057012) (Civil Court Action) from Civil Court and consolidate it with this action, that motion is granted. The Civil Court has jurisdictional limitations which render it unable to resolve all issues involved in the underlying action. The Civil Court's subject matter jurisdiction is limited by both the New York State Constitution and the New York City Civil Court Act (NYCCCA). Specifically, the Civil Court's jurisdiction is limited to specified types of cases, usually with claims not exceeding \$25,000 (New York State Constitution, Article VI,

Section 15(b); NYCCCA §202). The Civil Court may not consider actions for rescission or reformation of a transaction if the amount in controversy exceeds \$25,000 (NYCCCA §213).

Additionally, the Civil Court has jurisdiction for declaratory judgment purposes only in relation to the obligations of an insurer to indemnify or defend a defendant in an action in which the amount sought to be recovered exceeds \$25,000 (NYCCCA §§202, 212-a). Equitable defenses also fall outside the Civil Court's jurisdiction as they are limited to times when a party raising an equitable defense uses it to defeat a proceeding but not as a basis to obtain affirmative relief (New York State Constitution, Article VI, Section 15(b); NYCCCA §905).

As such, the Civil Court lacks jurisdiction to hear Plaintiff's claims for a declaratory judgment and rescission of the Lease since both claims involve amounts over \$25,000. Because the Civil Court lacks jurisdiction over the causes of action and related equitable defenses Plaintiff may assert, Plaintiff's motion to remove the Civil Court action to this Court for consolidation is granted.

The parties remaining arguments have been considered and the Court finds them unavailing.

Accordingly, it is

ORDERED that Plaintiff's motion is grated to the extent stated above; and it is further

ORDERED that injunction in place in this matter is continued; and it is further

ORDERED that the action entitled *130 Prince Associates, LLC v. Georg Jenson, Inc.* (L&T Index 09N057012) is removed from Civil Court and consolidated it with this action and shall bear the following caption:

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GEORG JENSON, INC.,

Index No.102554/09

Plaintiff,

-against-

130 PRINCE ASSOCIATES, LLC,
Defendant.

-----x

And it is further

ORDERED that the pleadings in the actions are hereby consolidated and shall stand as the pleadings in the consolidated action; and it is further

ORDERED that upon service on the Clerk of the Court a copy of this order with notice of entry, that the Clerk shall consolidated the papers in the actions hereby consolidated and shall mark the records to reflect the consolidation; and it is

further


ORDERED that a copy of this order with notice of entry shall also be served upon the Clerk of the Trial Support Office (Room 158), who is hereby directed to mark the court's records to reflect the consolidation; and it is further

ORDERED that defendant's cross-motion is denied.

Counsel for the parties are directed to appear for a pre-hearing conference on April 3, 2009 at 11:00 am in room 335 at 60 Centre Street.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 3/27/09



HON. WALTER B. TOLUB, J.S.C.

FILED
MAR 31 2009
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NEW YORK