

127 E. 23rd St., LLC v 30 Lexington Ave. LLC

2009 NY Slip Op 32579(U)

October 30, 2009

Supreme Court, New York County

Docket Number: 109115/2009

Judge: Walter B. Tolub

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

PRESENT: TOLUB
Justice

PART 15

127 East 23rd Street NYC
- v -
30 Lexington Avenue NYC

INDEX NO. 109115/09
MOTION DATE _____
MOTION SEQ. NO. 001
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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

NOV 05 2009

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/30/09

TOLUB
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST

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

-----x
127 EAST 23rd STREET, LLC

Plaintiff,

-against-

30 LEXINGTON AVENUE LLC d/b/a 30 LEX AVE
LLC d/b/a LEXINGTON AVENUE,

Defendant.
-----x

Index No.109115/2009
Mtn. Seq.001

FILED
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WALTER B. TOLUB, J.:

This is Plaintiff's motion for an order restraining Defendants from interfering with Plaintiff's rights under and Easement Agreement, alternatively, extending the time period in which Plaintiff may make payment in connection with Plaintiff's exercise of its option to extend the Easement Agreement.

FACTS

The facts of this case are undisputed.

Plaintiff is the fee owner of the property located at 127 East 23rd Street, New York, New York. 127 East 23rd Street is currently occupied by the Gramercy Theatre.

Defendant is the fee owner of the property located at 30 Lexington Avenue, New York, New York.

By Agreement of Easement (Easement Agreement) dated February 28, 1979, the parties' predecessors in interest agreed that Plaintiff's predecessor in interest would have a non-exclusive easement through a portion of 30 Lexington Avenue.

Paragraph 2 of the Easement Agreement provides that:

JOSEPH SOTTILE hereby grants for the term and/or additional term as hereinafter provided, unto Number Fourteen Theatre, Inc. its successors and assigns, a non-exclusive easement and right to use the walkway on a portion of the property known as 30 Lexington Avenue, designated as Lot 59 in Block 879 on the tax map of the County of New York, for themselves, their invitees, licensees or guests, for purposes of ingress and egress over the same leading from the adjoining property at the rear, said property being now used as a theatre, which walkway is now used as a fire exit from said theatre to the street known as Lexington Avenue. . .
 (Plaintiff's Ex. 3 ¶2).

Paragraph 3 of the Easement Agreement provides that:

The easement and right of way herein granted shall terminate on December 31, 1999 unless extended by the exercise of an option or options to extend as hereinafter provided...
 (Id. ¶3).

As per paragraphs 4, 5 and 6 of the Easement Agreement, Plaintiff would have the option to renew the easement for a term of ten years commencing January 1, 2000 through December 31, 2009, an option to renew for from January 1, 2010 through December 31, 2019 and an additional option from January 1, 2020 through December 31, 2029.

The conditions for exercising the options to renew are set forth in paragraph 7 which states that the option to extend shall be conditioned upon:

- a. Payment to JOSEPH SOTTILE or the then owner a sum of money equal to forty (40%) per cent of the aggregate total for the yearly increase, if any, in New York City real estate taxes or any fee, charge or tax which

replaces, supplements or supercedes the New York City Real Estate Tax including but not limited to assessments . . .

b. Notice of election to renew accompanied by payment of the sum of money as by subparagraph "a" provided, on or before July 1, 1999 for the first option period and notice of extension on or before the first day of July preceding the end of each separate extended term.

A failure of compliance with subparagraph "a" and "b" shall void any right of extension on and after the expiration of the term ending December 31, 1999 for any subsequent extension.

(Emphasis added Id. ¶7).

Paragraphs 8, 9 and 10 of the easement Agreement provide the fee payable for each new term.

Plaintiff served Defendant with a Notice exercising its right to extend the agreement for a second renewal period by letter dated December 29, 2008 (Plaintiff's Ex. 9). Defendant has demanded that Plaintiff make a payment of \$168,061.62 in addition to serving the written notice to renew (Plaintiff's Ex. 10).

Plaintiff commenced this action for a declaration that, pursuant to paragraph 7(b) of the Easement Agreement, in order to exercise its option to renew the easement from January 1, 2010 through December 31, 2019, Plaintiff is only required to provide Defendant with notice. By this motion, Plaintiff seeks an order restraining Defendants from interfering with Plaintiff's rights under and Easement Agreement, alternatively, Plaintiff seeks an

order extending the time in which Plaintiff may make payment in connection with Plaintiff's exercise of its option to extend the Easement Agreement.

Defendant opposes the motion and argues that there are two conditions that have to be met in order for the Plaintiff to exercise its option to renew the easement, namely notice and payment.

Discussion

Contractual disputes often arise because parties do not agree on the interpretation of contractual terms. The general rule is that contractual terms will be given their plain meaning where the intention of the parties is clearly and unambiguously set forth (South Road Associates, LLC v. Intern. Business Machines Corp., 4 NY3d 272 [2005]). Contracts are interpreted so that no portion of the contract is rendered meaningless (RM 14 FK Corp. v. Bank One Trust Co, NA, 37 AD3d 272 [1st Dept 2007]). In examining an agreement in order to find the intent of the parties as to a particular provision, the best approach is to read the entire agreement as a whole and consider the entirety of the agreement in the context of the parties' relationship, rather than "culling distinct provisions out of an entire agreement." (Matter of Riconda, 90 NY2d 733, 738 [1997]).

Plaintiff's argue that a payment is only required for the first extension period because paragraph 7(b) of the Easement

Agreement does not mention the word "payment" when it refers to the time that notice must be made in the second and third extension notices.

Inasmuch as the Easement Agreement does not qualify or limit the requirement that payment be made for any particular extension term, and multiple paragraphs of the Agreement provide fee calculating methods, the Agreement, taken as a whole, requires payment upon the exercise of Plaintiff's option to renew.

As to the actual payment, Plaintiff dispute that the amount owed to Defendant for renewal is \$168,061.62.

Paragraphs 7(a), 8 and 9 of the Agreement provides for the method of computation of the amount due to continue the easement. Paragraph 7(a) provides that payment to the owner shall be:

. . . a sum of money equal to fort (40%) per cent of the aggregate total for the yearly increase, if any, in New York City real estate taxes or any fee, charge or tax which replaces, supplements or supercedes the New York City Real Estate Tax including but not limited to assessments . . . on the land portion of the assessed valuation of the property known as 879 Lot 59 on the tax Map of the County of New York over One Thousand Five Hundred Twenty Two and 50/100 (\$1,522.50) Dollars, which is forty (40%) per cent of the land portion of the real estate taxes on Block 879 Lot 59 . . . for the taxable year 1978/79.

(Plaintiff's Ex. 3 ¶7(a)).

Paragraph 8 of the Agreement provides:

The fee payable for the period commencing January 1, 2000 to December 31, 2009 shall be Two Thousand Seven Hundred (\$2,700.00)

Dollars per annum. . . plus forty (40%) per cent of real estate taxes on the land portion of the property known as Block 879 Lot 59...

(Id. ¶8).

The method of calculation was preciously established between the parties in June of 1999 when the payment under 7(a) was billed by Defendant's predecessor-in-interest and paid by Plaintiff in connection with the first option to renew and paragraph 8 of the Agreement (Plaintiff's Ex. 11-16). For the first option to renew, the parties used a Department of Finance Tax Bill for the second half of the 1998/99 tax year and doubled them.

\$5,306.54 X 2 = \$10,613.09 (total tax)
 -\$1,522.50 (per Agreement ¶7a)

X \$9,090.58
 40%

Balance Due: \$3,636.23

(Plaintiff's Ex. 12).

It is this same method of calculation that is to be used for the purposes of calculating the second option to renew pursuant to the Easement Agreement. The Court does not have all of the tax documents before it and is therefore unable to ascertain the exact amount owed at this time.

Accordingly, it is

ORDERED that Plaintiff's motion for a declaration that it does not have to pay for its second option to renew is denied;

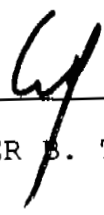
and it is further;

ORDERED that Plaintiff's motion for an order extending the time in which Plaintiff may make payment in connection with Plaintiff's exercise of its option to extend the Easement Agreement is granted to the extent that Plaintiff has 30 days from service of a copy of this order with notice of entry to make such payment and then to use the property in accordance with the Agreement. If either or both of these conditions are not met, it shall render the Agreement null and void pursuant to paragraphs 13 and 14.

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

Dated: 10/30/09

FILED
NOV 05 2009
NEW YORK
COUNTY CLERK'S OFFICE



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