

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

2009 NY Slip Op 32878(U)

December 7, 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 28 ST

- v -

30 LEXINGTON AVE

INDEX NO. 109115/09

MOTION DATE _____

MOTION SEQ. NO. 2

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
DEC 09 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/7/09

WALTER B. TOLUB 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

-----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.

Index No.109115/2009
Mtn. Seq.001

FILED
DEC 09 2009
NEW YORK
COUNTY CLERK'S OFFICE

WALTER B. TOLUB, J.:

This is Plaintiff's motion for an order restraining Defendant from interfering with Plaintiff's rights under and Easement Agreement, extending the time period in which Plaintiff may make payment in connection with Plaintiff's exercise of its option to extend the Easement Agreement and declaring that in order to exercise its option to renew, Plaintiff must tender \$8,865.96 to the Defendant.

Defendant cross-moves for an order renewing and rearguing this Court's October 30, 2009 decision arguing that this Court misapprehended the appropriate method of calculating the payment due for renewing of the easement option.

FACTS

As stated in this Court's October 30, 2009 decision and order, 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 the underlying 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 would only be required to provide Defendant with notice. By decision and order dated October 30, 2009, this Court held that:

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.

(Plaintiff's Ex. 1 p.5).

Additionally, this Court held that:

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)

\$9,090.58

X 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.

(Id. at 6).

After the issuance of the October 30, 2009 decision, Plaintiff's tax attorney calculated the amount due pursuant to this Court's order and the Department of Finance Statement of Account for the 2008/09 tax year.

The calculation was as follows:

\$23,687.41	(total tax for 2008/09)
- 1,522.50	(per agreement ¶7a)
<hr/>	
\$22,164.91	
X	40%
<hr/>	
\$8,865.96	Amount Due

(Plaintiff's Ex. 6).

Plaintiff's counsel sent Defendant a check for \$8,865.96 (Plaintiff's Ex. 7).

Defendant argues that the amount and method of calculation is incorrect. Defendant argues that the Easement Agreement, which was entered into between both parties' predecessors in interest, provides that the amount owed is forty (40%) per cent of the aggregate total of the yearly increases (Agreement ¶¶7a and b). Therefore Defendant argues that the initial calculation for the first option to renew was done incorrectly pursuant to the agreement and that the parties are not bound by their

predecessors in interest prior conduct and incorrect calculations. Defendant's calculations show that in order to exercise the option to extend the Easement, Plaintiff must pay Defendant \$111,725.41.

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]).

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 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 . . . 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 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. Although Defendant argues that this is inappropriate, it nonetheless establishes a prior course of conduct relating to the calculation method for the renewal of the easement.

It is this same method of calculation that was used between the parties for the first option to renew that is to be applied for the purposes of calculating the second option to renew.

Accordingly, it is

ORDERED that Plaintiff's motion for an order restraining Defendant from interfering with Easements rights as established under the Easement Agreement is granted; and it is further

ORDERED 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 payment of \$8,865.96, to the extent not already paid, and then to use the property in accordance with the Agreement; and it is further

ORDERED that Defendant's cross-motion for an order renewing and rearguing this Court's October 30, 2009 decision is granted and upon reargument this Court adheres to its prior decision; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

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

Dated: 12/7/09



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

FILED
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COUNTY CLERK'S OFFICE