

**Adams, Stevens & Bradley Ltd. v Empire State Bldg.
Co. L.L.C.**

2009 NY Slip Op 33045(U)

December 23, 2009

Supreme Court, New York County

Docket Number: 106023/08

Judge: Jane S. Solomon

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12-30-09
to

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

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 106023/2008

ADAMS, STEVENS & BRADLEY

vs
EMPIRE STATE BUILDING

Sequence Number : 003

DISMISS

INDEX NO. _____

MOTION DATE 8/25/09

MOTION SEQ. NO. _____

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

1-3

4-5

6-7

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

* Counsel are advised to use the caps on of record in any action on these papers until and unless ^{any} order amending same is made. *JS*

Dated: 12/23/09

JS
JANE S. SOLOMON ^{V.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):

ESB has uniformly billed plaintiffs, pursuant to a formula that ESB has fabricated, that the Leases do not expressly state that ESB is entitled to profit from electric charges, and that ESB's billing practice regarding electricity charges is onerous and against public policy and controlling law.

The amended complaint alleges that the Leases confusingly define "Electricity Rent Inclusion Factor" (ERIF) (defined in the Leases as \$3.45 per square foot) as a computation that includes the cost of providing and maintaining electricity, and is partially determined based upon an estimate of each tenant's "connected electrical load" necessary to use "standard office equipment." The amended complaint further alleges that, in reality, ESB is charging electricity based additional rent well above \$3.45 per square foot, while any electric rent increases owed by tenants should be based on actual cost to ESB over and above \$3.45 per square foot. When Con Edison increases ESB's electricity costs, ESB actually increases its profit margin on additional rent charges related to electricity by passing on percentage increases to tenants. Plaintiffs argue that ESB should not be allowed to substantially increase its profits simply because Con Edison increases its rate.

Moreover, according to the amended complaint, the Leases themselves contemplate being found to be unenforceable with regard to the collection of electric overcharges, and provide an alternative, more reasonable method of passing on electric

charges to tenants.

The amended complaint contains five causes of action. The first cause of action, for breach of the Leases, seeks to recover the alleged electricity overcharges. The second seeks rescission of the electricity provisions of the Leases, based upon ESB's alleged misrepresentation and fraud regarding additional rent charges. The third alleges that ESB has breached the covenant of good faith and fair dealing, and seeks a declaration that plaintiffs are not in default of their Leases regarding electricity and "fuel cost adjustment" charges. The fourth seeks a permanent injunction, enjoining ESB from taking any steps to terminate plaintiffs' Leases, based upon alleged electricity and fuel cost adjustment arrears. The fifth seeks damages, based upon the billing by ESB for attorney's fees and late charges that are not owed by plaintiffs.

The allegations contained in the complaint in the Related Action are substantially the same as the allegations contained in the amended complaint in this action. In the Related Action, the defendants sought, and were granted, dismissal of the complaint on the following grounds: (1) a defense founded upon documentary evidence; (2) the causes of action may not be maintained because they previously were asserted and rejected; (3) the complaint fails to state a cause of action; and (4) the causes of action are pleaded improperly.

For the reasons discussed below, the motion is granted.

As stated in the Prior Decision, dismissal of the amended complaint is warranted because, pursuant to 3211 (a) (1), the documentary evidence, namely, the Leases, conclusively establishes a defense to the asserted claims as a matter of law (*Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Sempra Energy Trading Corp. v BP Prods. N. Am., Inc.*, 52 AD3d 350 [1st Dept 2008]).

"[W]here a written agreement (such as the lease in this case) unambiguously contradicts the allegations supporting a litigant's cause of action for breach of contract, the contract itself constitutes documentary evidence warranting the dismissal of the complaint pursuant to CPLR 3211 (a) (1), regardless of any extrinsic evidence or self-serving allegations offered by the proponent of the claim"

(*150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]).

Whereas the amended complaint states that ESB represented that the average cost of electricity usage to tenants is \$3.45 per square foot, the Leases expressly state that the ERIF of \$3.45 per rentable square foot per annum is subject to adjustment, and the relevant provisions contain a formula for the application of that adjustment.

Plaintiffs contend that the court's determination in the Prior Decision in the Related Action was faulty, because it had not analyzed a First Department line of cases. They argue that the crux of their claim is not that ESB here (and Fisk Bldg. Assoc. L.L.C. in the Related Action) is making a "mere profit" from the electricity additional rent clause, but, rather, an

illegal windfall profit. As discussed below, the First Department line of cases that plaintiffs cite is distinguishable from the situation presented here.

In *Rudd v 176 W. 87th St. Owners Corp.* (283 AD2d 202 [1st Dept 2001]), the First Department affirmed the trial court's determination that, under the parties' commercial lease calling for the tenant's payment of a specified share of any real estate tax escalations against the building, the tenants were entitled to a refund of rent representing their proportionate share of a real estate tax refund that the landlord received in a tax certiorari proceeding. In doing so, the Court stated: to "hold otherwise would allow the landlord to realize a profit from the tenants' compliance with a clause that was not intended to provide the landlord with a windfall" (*id.*).

In *S.B.S. Assoc. v Weissman-Heller, Inc.* (190 AD2d 529 [1st Dept 1993]), the trial court determined that the commercial tenant was not obligated to make rent escalation payments pursuant to the terms of the lease unless the landlord actually made rent escalation payments to the owner of the building. In so doing, the First Department stated: to "hold otherwise would allow the plaintiff-landlord to reap a windfall not envisioned by the parties' agreement" (*id.* at 529-30).

In *Fairfax Co. v Whelan Drug Co.* (105 AD2d 647 [1st Dept 1984]), also cited by plaintiffs, the First Department

determined that the tax escalation clause in the parties' lease of commercial premises was meant to provide relief for the landlord where assessed tax required actual payment, but the tax bill was actually reduced by more than 50%. The Court held that to "allow a 4.95% payment on taxes not requiring actual payment would provide Fairfax with a windfall not envisioned by this clause" (*id.* at 648).

In all of these cases, the courts cited the landlords' actions as contrary to the terms of the leases involved. In contrast, and as stated in the Prior Decision, the amended complaint does not allege that ESB is not enforcing the electricity charge provisions in conformance with the terms of the Leases, but, rather, that ESB is making a profit as the charges from Con Edison increase. The amended complaint does not allege that this alleged profit violates the terms of the Leases, and there is no merit to the amended complaint's assertion that the Leases must expressly provide that ESB is entitled to make a profit from the electric rent charges. The public policy in New York is to respect negotiated commercial leases. In *Holy Props. v Cole Prods.* (87 NY2d 130, 134 [1995]), the Court of Appeals stated:

"Parties who engage in transactions based on prevailing law must be able to rely on the stability of such precedents. In business transactions, particularly, the certainty of settled rules is often more important than whether the established rule is better than another or even whether it is the 'correct' rule. This is

perhaps true in real property more than any other area of the law, where established precedents are not lightly to be set aside."

(*id.* [internal citations omitted]).

Although the amended complaint alleges in conclusory fashion that the Leases are ambiguous concerning electric charges, it offers no explanation as to its alleged ambiguity.

In subparagraph "A (i)" the electricity is said to be provided on a rent inclusion basis; the ERIF is defined, begins at \$3.45 per square foot to compensate for wiring and other installations facilitating distribution, and, under subparagraph "A (ii)" is to be changed measured by certain factors set forth. Moreover, that subparagraph provides for ESB's selection of "a reputable, independent electrical consultant" who is to "determine the percentage change in the ERIF due to Landlord's changed costs."

Thereafter, subparagraph "C (i)" provides for a challenge by a tenant to the determinations of the electrical consultant. Those determinations are to be "binding and conclusive on Landlord and on Tenant from and after the delivery of a copy of each such relevant determination to Landlord and Tenant, unless, within fifteen (15) days after delivery thereof, Tenant disputes such determination." In that event, the Lease contemplates that the tenant would engage an electrical consultant to make a determination and then try to resolve its determination with that of the Landlord's consultant, failing

which a third consultant is to make a controlling determination and, failing agreement on that third consultant, this court is to make the appointment.

Paragraph 89 of the amended complaint asserts that, by its terms, the electricity section of the lease has remedy for, and therefore contemplates, a finding of unenforceability. That is a misreading of the relevant portion of subparagraph "C (iii)." The text there anticipates changes in pricing and methods or rules of billing, in which event a formula is set forth explicitly contemplating that the Landlord's actual utility payments are a floor, above which certain percentage increases are to be applied.

Plaintiffs argue that ESB should be judicially estopped from seeking a profit from electricity charges because, in another action, ESB's Comptroller, Alex Chin, stated that the "electricity charges are billed to Tenant so as to adequately reimburse [ESB] for its capital outlay that it pays to Consolidated Edison for electrical service" (see Exhibit G to Affirmation in Opposition of Eduardo A. Fajardo, Esq.). According to ESB, plaintiffs ignore the difference between "capital outlay" and "usage" of electricity. Nevertheless, plaintiffs have not alleged that they have satisfied the requirements for the application of the judicial estoppel doctrine. This doctrine precludes a party that assumed a certain position in a prior legal proceeding and secured a judgment in

that party's favor from assuming a contrary position in another action merely because the party's interests have changed (*Gale P. Elston, P.C. v Dubois*, 18 AD3d 301, 303 [1st Dept 2005]; see also *Factory Mut. Ins. Co. v Mutual Mar. Off., Inc.*, 57 AD3d 304 [1st Dept 2008]). The securing of a judgment is not even alleged here.

Plaintiffs also refer to two decisions rendered by the Honorable Peter Moulton of the New York City Civil Court, involving the landlord in the Related Action, noting the decision of Judge Moulton wherein he ruled that "Supreme Court was the best forum to resolve all the issues raised by the parties." Contrary to plaintiffs' assertion, that statement has no bearing on how this court should resolve the issues presented by the instant motion.

Finally, plaintiffs request that the court make a determination as to whether it is permissible for a landlord to reap a windfall profit from electricity billing because, they argue, if the court rules for ESB, that is, in effect, what the court is saying. The issue here, however, is not whether a landlord is entitled to reap what plaintiffs characterize as a "windfall profit from electricity billing," but whether the amended complaint adequately alleges that ESB is in breach of the Leases through its application of the electricity provisions of the Leases, which has been addressed above.

Accordingly, none of the causes of action are viable.

The issues pertaining to the first cause of action, for breach of the Leases, have been addressed above. The second cause of action, which seeks rescission of the electricity provisions of the Leases based upon ESB's alleged misrepresentation and fraud regarding additional rent charges related to electricity, is not viable because the amended complaint does not identify any alleged misrepresentations, and it merely suggests fraud (*Sempra Energy Trading Corp. v BP Prods. N. Am., Inc.*, 52 AD3d at 350; *Samsung Am. v GS Indus.*, 250 AD2d 368 [1st Dept 1998]). The third cause of action, which alleges that ESB has breached the covenant of good faith and fair dealing, is duplicative of the non-viable breach of contract claim, because both claims arise from the same facts (*Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [1st Dept 2009]). In view of the foregoing, the fourth cause of action, which seeks a permanent injunction, enjoining ESB from taking any steps to terminate plaintiffs' Leases based upon alleged electricity and fuel cost adjustment arrears, is dismissed, as is the fifth, which seeks damages based upon the billing by ESB of plaintiffs for attorney's fees and late charges that are not owed by plaintiffs. There are no allegations in the amended complaint as to the nature or the basis of these alleged charges.

Finally, to the extent that any of the plaintiffs challenge the accuracy of the electric calculations made by ESB,

those parties could pursue that issue in any nonpayment summary proceedings that may be brought by ESB in Civil Court.

Accordingly, it is

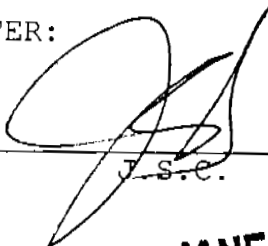
ORDERED that the motion to dismiss is granted, and the amended complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it further is

ADJUDGED and DECLARED that plaintiffs have not established that they are not in default of their leases with regard to electricity and final cost adjustment charges; and it further is

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: December 23, 2009

ENTER:



J.S.C.

JANE S. SOLOMON

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).