

Goldstein v 12 Broadway Realty LLC

2009 NY Slip Op 33078(U)

December 21, 2009

Supreme Court, New York County

Docket Number: 601048/09

Judge: Joan A. Madden

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

HON. JOAN A. MADDEN

PRESENT: _____ J.S.C.

PART 11

Index Number : 601048/2009

GOLDSTEIN, LAWRENCE A.

vs

12 BROADWAY REALTY LLC.

Sequence Number : 001

SUMMARY JUDGEMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

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

FILED

DEC 30 2009

NEW YORK COUNTY CLERK'S OFFICE

Dated: December 24, 2009

J.S.C.

Check one: FINAL DISPOSITION

HON. JOAN A. MADDEN
NON-FINAL DISPOSITION
J.S.C.

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 11

-----X

LAWRENCE A. GOLDSTEIN and PHILIP GOLDSTEIN,
as Co-Trustees of The Ethel Goldstein Irrevocable Trust
f/b/o Helene Joy Goldstein, dated June 23, 2000;
LAWRENCE A. GOLDSTEIN and LARRY LEVIN, as
Co-Trustees of The Ethel Goldstein Irrevocable Trust
f/b/o Lawrence A. Goldstein, dated June 23, 2000;
PHILIP GOLDSTEIN and KENNETH HIRSCH,
as Co-Trustees of The Ethel Goldstein Irrevocable Trust
f/b/o Philip Goldstein, dated June 23, 2000; LARRY LEVIN,
as Trustee of the Lawrence A. Goldstein Irrevocable Trust
f/b/o Clark Goldstein, dated December 15, 2005;
KENNETH HIRSCH, as Trustee of the Philip H. Goldstein
Irrevocable Trust f/b/o Jackie A. Baxa, dated August 23, 2005;
MARK BURTON, as Trustee of the Rebecca F. Burton
Irrevocable Trust f/b/o Mark C. Burton, dated December 15,
2005; 60 EAST 12TH STREET, LLC; 818 BROADWAY LLC;
REBECCA FROMER BURTON; ARTHUR FEIGENBAUM;
and KENNETH HIRSCH;

INDEX NO. 601048/09

Plaintiffs,

-against-

12 BROADWAY REALTY LLC,

Defendants.

-----X

JOAN A. MADDEN, J.:

In this action involving a long-term commercial lease, plaintiffs/landlord (collectively “landlord” or “lessor”) move for an order pursuant to CPLR 3212 granting summary judgment on their first cause of action for specific performance requiring defendant/tenant to establish that its proposed appraiser, Jerome Haims, satisfies the requirements of Section 19.4 of the lease; and summary judgment on their second cause of action for specific performance requiring defendant/tenant to agree to a “reasonable substitute methodology for the selection of the third

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appraiser.” Defendant/tenant opposes the motion.

The following facts are not disputed unless otherwise noted. By a ground lease dated July 14, 1961, the landlord’s predecessor-in-interest leased to the tenant’s predecessor-in-interest, the land known as and located at 818, 820, 822 and 824 Broadway, and 64 East 12th Street, in Manhattan. The lease provided for a initial term of 25 years, three successive renewal periods of 20 years each, and a fourth renewal period of 15 years. Section 19.1 of the lease governs the rent amount for each renewal term. The rent for the first renewal term is “a basic rental which shall equal six (6%) percent per annum of the fair market value of the land herein described, considered as vacant and unimproved, but in no event less than thirty thousand (\$30,000) dollars per annum or the basic rent payable at the termination of the first term, whichever is greater.” The rent for the second renewal term is “a basic rental of six (6%) of the then market value of the land, but in no event less than the basic rent payable during the previous rental term.” For the third and fourth renewal terms, the rent is “at basic rentals of six (6%) of the then market value of the land, but in no event shall any basic rental be less than the basic rental of the previous term.”

Pursuant to Section 19.2, the tenant exercises its right to a renewal term by notifying the landlord at least 12 months prior to the expiration of any renewal term, of “its election to exercise the right to renew the term of the lease for the first renewal term or the subsequent renewal terms,” and “[u]pon the giving of such notice of election, the lease . . . shall be deemed to be renewed.” Under Section 19.4, if tenant exercises its right to renew for any renewal term and the parties

shall be unable to agree in writing on or before a date nine (9) months prior to the date of commencement of the relevant term as to the fair market value of the land described in Article I (considered as vacant and unimproved), such value shall be

determined in the following manner: not less than eight (8) months prior to the date of commencement of the relevant renewal term, either party may give a notice to the other stating the name and address of a impartial person to act as appraiser hereunder, and within thirty (30) days after the receipt of such notice, the other party shall give notice to the sender of the first-mentioned notice, likewise stating the name and address of an impartial person to act as appraiser hereunder. The appraisers so specified in such notices shall be licensed real estate brokers doing business in the Borough of Manhattan, City and State of New York, and having not less than ten (10) years active experience as real estate brokers in said Borough. . . . If, within thirty (30) days following the appointment of the latter of said appraisers, said two appraisers shall be unable to agree upon the then fair market value of said land as aforesaid, the said appraisers shall appoint, by an instrument in writing, as third appraiser an impartial person, similarly qualified who . . . shall proceed with the two appraisers first appointed to determine the then fair market value of said land as aforesaid; provided however, that if such value is not determined prior to the date of commencement of the relevant renewal term, the said value shall be determined as of such date. The written decision of any two of the appraisers so appointed fixing such fair market value of said land as aforesaid shall be binding and conclusive on the parties. If, after notice of the appointment of an appraiser, the other party shall fail, within the above-specified period of thirty (30) days, to appoint an appraiser, such appointment of a similar qualified appraiser may be made upon application without notice by the person who shall have been appointed an appraiser by the then President of the Chamber of Commerce of the State of New York, or the successor body hereafter constituted exercising similar functions. If the two appraisers aforesaid shall be unable to agree within thirty (30) days following the appointment of the latter of said appraisers upon such value of said land and shall fail to appoint in writing a third appraiser within thirty (30) days thereafter, the necessary appraiser shall be appointed by said President . . . If such fair market value shall not be determined by the appraisers appointed as aforesaid prior to the date of commencement of the renewal term, Lessee shall continue to pay the basic rent payable during the immediately preceding term of the lease, and upon such value being determined by said appraisers, Lessee shall pay to Lessor any rent due to Lessor . . . or in the event of an overpayment, Lessee shall be entitled to a credit . . .

Pursuant to provisions quoted above, the lease was renewed for the first 20-year renewal term which commenced in 1986. The parties do not dispute that defendant/tenant exercised its right to renew for the second 20-year renewal term which commenced in 2006. In November 2005, the parties met but could not reach an agreement as to the fair market value of the land,

which is used to compute the rent amount for the second renewal term. In accordance with the procedures prescribed by Section 19.4 of the lease, by letter dated November 11, 2005, the landlord notified the tenant that it was appointing Brian Corcoran of Cushman & Wakefield as its appraiser to determine the fair market value of the land. By letter dated December 9, 2005, the tenant notified the landlord, that it was appointing Jerome Haims, President of Jerome Haims Realty, Inc., as its appraiser.

At some point, the landlord objected that the appraisal should not consider the lease in valuing the premises for purposes of establishing the rent for the renewal term. In March 2007, the landlord commenced an action in this court for declaratory and injunctive relief (Lawrence A. Goldstein and Philip Goldstein, as Co-Trustees of the Ethel Goldstein Irrevocable Trust, et al v. QAN Corp., 12 Broadway Realty LLC, et al, Index No. 103476/07, Supreme Court, New York County), seeking to resolve the issue as to whether the appraisal should account for the lease, and another issue as to whether the lease was improperly assigned in violation of the lease. By a stipulation filed on September 24, 2008, the landlord discontinued that action with prejudice. Addressing the underlying issue raised in the complaint as to whether the lease should be considered in valuing the property, the parties explicitly stipulated that the property “shall be appraised under the ground lease . . . as vacant and unimproved [and] subject to the Lease including, without limitation, considering the effect of the Lease’s existence and duration on the appraised value of the Land.”¹

¹In June 2008, the Court of Appeals resolved the issue in another case involving the identical issue, reversing the First Department and holding that “absent an agreement to the contrary, the effect of a net lease must be considered in valuing property for the purpose of setting rent for a renewal term.” 936 Second Avenue LP v. Second Corporate Development Co, 10 NY3d 628, 633 (2008). Defendant/tenant argues that the Court of Appeals decision in New

It appears that nothing further happened with the appraisal process until November 26, 2008, when landlord's counsel wrote to tenant's counsel that the New York State Chamber of Commerce no longer selects appraisers and suggested a substitute method for appointing a third appraiser. By letter dated December 5, 2008, tenant's counsel responded that the landlord's letter "came as a bit of a surprise" and that "the two-party appointed appraisers should be given an opportunity to reach agreement prior to appointing a third appraiser."

By letter dated December 11, 2008, landlord's counsel responded that he was "somewhat surprised" since they had "been talking on and off with respect to a methodology for fixing the third appraiser in the event that our two respective appraisers cannot agree as to value or as to the third appraiser." Landlord's counsel explained that his suggestion "that they agree on a methodology to be used, if necessary, going forward . . . was not intended to forestall the two appraisers meeting and attempting to resolve matters but rather to save time in the event that issue arose." Counsel also stated that "[w]hile you have confirmed that Jerome Haims of Jerome Haims Realty, Inc. is the Tenant's appraiser, you have not confirmed that he meets the Lease requirements. . . . We believe that compliance with this requirement is integral to the process set forth in the Lease. Please have Mr. Haims confirm that he meets those requirements." Tenant's counsel asserts that the parties "continued to correspond on these issues through March 2009."

On or about April 3, 2009, the landlord commenced the instant action seeking specific performance. The complaint includes one claim for "a decree of specific performance" requiring

York Overnight Partners LP v. Gordon, 88 NY2d 716 (1996), already controlled the "ground rule of such an appraisal," in contravention of the Appellate Division First Department's holding in 936 Second Avenue LP v. Second Corporate Development Co., 37 AD3d 190 (1st Dept 2007), reversed 10 NY3d 628 (2008).

defendant/tenant to establish that its proposed appraiser, Jerome Haims, satisfies the requirements of section 19.4 of the lease, and a second claim for “a decree of specific performance” requiring defendant/tenant to agree to a “reasonable substitute methodology for the selection of the third appraiser.”

Plaintiff/landlord is now moving for summary judgment on both claims for specific performance. The motion is denied, and upon a search of the record pursuant to CPLR 3212(b), this Court exercises its discretion to grant summary judgment to defendant/tenant dismissing the complaint. See Eighty eight Bleeker Co, LLC v. 88 Bleeker Street Owners, Inc., 34 AD3d 244 (1st Dept 2006); Jackson v. Rockefeller Center Properties, Inc., 290 AD2d 315 (1st Dept 2002). Defendant has produced sufficient evidentiary proof establishing that its designated appraiser, Jerome Haims, satisfies the qualifications set forth in the Section 19.4 of the lease, which require appraisers to “be licensed real estate brokers doing business in the Borough of Manhattan, City of New York and having not less than ten (10) ten years active experience as real estate brokers in said Borough.”

Defendant submits an affidavit from Jerome Haims that he has been in the “real estate business in Manhattan for more than fifty years” and has “conducted hundreds if not thousands of appraisals over the years.” Haims further states that he is an “experienced and licensed real estate broker,” and “[f]or more than ten years, I have been an active ‘real estate broker’ in Manhattan as I understand that term to be defined in the Real Property law.”² Haims annexes a

²Since the lease does not define the term “real estate broker,” defendant/tenant relies on the definition used in New York’s Real Property Law, RPL § 440:

“real estate broker” means any person . . . who for another and for a fee, commission or other valuable consideration, lists for sale, sells, at auction or

copy of a New York State license, effective from June 2009 through May 2011, for Jerome Haims Realty Inc., which “has been duly licensed to transact business as a real estate broker and to represented by Haims, Jerome.” He also provides a print out from the New York Department of State eAccessNY website for the Occupational Licensing Management System, indicating that Jerome Haims is currently licensed through May 2011 as a corporate real estate broker.

Haims specifically explains that “for more than ten years, I have advised commercial clients on real estate market strategy, including, among other things, timing, location, mortgage financing and investment rates, and, on behalf of such clients, I have negotiated the purchase, sale and rental of commercial properties throughout Manhattan.” He gives Presbyterian Hospital an example of “the clients for whom I have provided such services,” explaining that he “advised the hospital on its purchase of many commercial properties,” including “approximately a dozen such properties located east of Broadway adjacent to the Harlem River Drive and another on Baker Field. I also negotiated the hospital’s purchase of two properties: the White Rose Warehouse in the Bronx from Larry Silverstein, and the hospital’s satellite facility on 61st Street between Park Avenue and Madison Avenue.” Haims further explains that he “negotiated the hospital’s attempted purchase of property located on Third Avenue and 66th Street, where the hospital planned to acquire the Foundling Hospital for an East Side location,” and “negotiated the hospital’s lease for its midtown Sports Medicine Facility located on Madison Avenue between 61st and 62nd Streets.”

otherwise, exchanges, buys or rents, or offers to attempts to negotiate a sale, at auction or otherwise, exchanges, purchase or rents of an estate of interest in real estate, . . . or negotiates or offers or attempts to negotiate, a loan secured or to be secured by a mortgage, other than a residential mortgage loan . . .

As another example, Haims states that he “advised the United Nations Development Corporation on the sale of a Manhattan property and, among other things, advertised the property in the Wall Street Journal.” Finally, Haims notes that “[o]ver the last three and one half years, I have met with defendant and/or its counsel many times – and spoken or emailed them on many other occasions – in preparation for the appraisal,” and “[a]s a result of the many communications (probably numbering in the dozens), I have become familiar with the facts necessary to perform the appraisal and I have generated substantial work product at considerable expense to Lessee.”

Based on the foregoing, it is clear that Haims has substantial experience as an active licensed real estate broker in Manhattan, for at least ten years, which satisfies the qualifications for appraisers as specified in section 19.4 of the lease. In light of this determination, plaintiff’s first claim for specific performance requiring defendant to establish that Haims satisfies the requirements of section 19.4 of the lease, is now moot, and is dismissed as such.

Plaintiff’s second claim for specific performance requiring defendant to agree to a substitute method for selecting a third appraiser, is dismissed without prejudice, as premature. The lease provision requiring the designation of a third appraiser is triggered when the two appraisers selected by the parties are unable to reach an agreement as to the market value of the property. Since it is undisputed that the parties’ appraisers have not even begun the process of determining the market value of the property, it is uncertain whether a third appraiser will even be necessary, so any issue to the method for designating a third appraiser is premature.

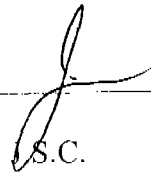
Accordingly, it is hereby

ORDERED that plaintiffs’ motion for summary judgment is denied; and it is further

ORDERED that upon a search of the record pursuant to CPLR 3212(b), this Court exercises its discretion to grant summary judgment to defendant, dismissing the first claim in the complaint with prejudice, and dismissing the second claim in the complaint without prejudice, and the Clerk is directed to enter judgment accordingly.

DATED: December 21, 2009

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