

<b>Sayville Browning Props., Inc. v GMRI, Inc.</b>
2010 NY Slip Op 31767(U)
July 9, 2010
Supreme Court, Suffolk County
Docket Number: 36224-2009
Judge: Emily Pines
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SHORT FORM ORDER

Index Number: 36224-2009

**SUPREME COURT - STATE OF NEW YORK**  
**COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY**

***Present:*** **HON. EMILY PINES**

J. S. C.

Original Motion Date: 11-30-2009

Motion Submit Date: 04-27-2010

Motion Sequence .: 001 MD

002 MD

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X**SAYVILLE BROWNING PROPERTIES, INC.,  
AND LEE BROWNING, INC.,****Plaintiffs,****-against-****GMRI, INC., AND DARDEN RESTAURANTS,  
INC.,****Defendants.**\_\_\_\_\_  
X**Attorney for Plaintiff**Randolph M. Medalie, Esq.  
Flower, Medalie & Markowitz  
24 East Main Street  
Suite 201  
New York, New York 11706**Attorney for Defendant**Joseph P. Asselta, Esq.  
Agovino & Asselta, LLP  
170 Old Country Road, Suite 608  
Mineola, New York 11501

**ORDERED**, that the motion (motion sequence number 001) by defendants to dismiss the Complaint has been converted to a motion for summary judgment pursuant to CPLR Rule 3211(c) and upon notice to counsel for all parties; and it is further

**ORDERED**, that defendants' motion for summary judgment dismissing the Complaint is denied; and it is further

**ORDERED**, that plaintiffs' cross motion (motion sequence number 002) for summary judgment is also denied; and it is further

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**ORDERED**, that defendants are directed to serve and file an Answer within twenty (20) days from service of a copy of this Order with Notice of Entry; and it is further

**ORDERED**, that a preliminary conference is scheduled for September 21, 2010 at 9:30 a.m. before the undersigned.

Plaintiffs commenced this action against defendants by the filing of a Summons and Verified Complaint on or about September 29, 2009. The gravamen of the action is that defendants owe plaintiffs certain additional monies arising out of the construction of certain sewage treatment facilities pursuant to two (2) leases between the parties and amendments thereto. Specifically, the record reflects that Browning Restaurant Properties, predecessor in interest to plaintiff Sayville Browning Properties, Inc. (collectively “plaintiffs”) entered into these leases with defendant GMRI, Inc. (“GMRI”) for the lease of portions of a parcel of land located at 5012 Express Drive South, Ronkonkoma, New York (the “subject premises”). The parties refer to these identical leases, each dated May 24, 2003, as “pad leases”, wherein a certain portion of the subject premises was to be the site of a “Smokey Bones” restaurant and another portion a “Red Lobster” restaurant. Also located on the subject premises was a Courtyard by Marriott hotel.

As relevant to the motions *sub judice*, the leases contained the following definitions and provisions:

**I. DEFINITIONS**

**LANDLORD’s INITIAL WORK:** The work described in Section 3 to be completed by LANDLORD as set forth therein.

**LANDLORD’s SITE WORK:** The work described in Section 4 to be completed by LANDLORD to TENANT’s satisfaction following TENANT’s waiver of the CONDITIONS PRECEDENT.

**PERMITTING PERIOD:** The period of 120 days from the date of the Approval Notice. In the event

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an application is pending before any governmental agency or entity at the end of the 120 period, the PERMITTING PERIOD will be automatically extended for an additional 60 days.

### III. TERMS AND CONDITIONS

3. LANDLORD'S INITIAL WORK. LANDLORD at its sole cost and expense will complete/obtain the following within the time frames set forth below as additional CONDITIONS PRECEDENT under this LEASE.

A. LANDLORD Approvals. LANDLORD will obtain all applicable site plan approvals for the development of the CENTER in accordance with the initial site plan attached hereto as Exhibit I attached hereto and provide written evidence as to the same to TENANT no later than the end of the FEASIBILITY PERIOD (the "Initial Approval Notice").....

4. LANDLORD'S SITE WORK.

A. LANDLORD, at its sole cost and expense, will complete the following work prior to the end of the PERMITTING PERIOD. Completion occurs upon certification by a licensed engineer and acceptance by TENANT.

(i) Utilities. LANDLORD will bring utilities (electricity, water, sanitary and storm sewers, gas) to locations on the PREMISES property line acceptable to TENANT and in capacities sufficient to meet the minimum utility requirements set forth on Exhibit "C-1". LANDLORD will obtain all easements required to bring utilities to the PREMISES. TENANT will pay all applicable utility tap-in fees.

B. If LANDLORD'S SITE WORK is not completed prior to the end of the PERMITTING PERIOD, the COMMENCEMENT DATE will be extended by the number of days equal to the delay in completion of LANDLORD'S SITE WORK, and TENANT will have the option to:

(i) Complete LANDLORD'S SITE WORK and deduct all actual

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documented costs, including reasonable overhead, plus interest, from any sums due LANDLORD, until repaid in full.

(ii) Terminate this LEASE by notice to LANDLORD. In this case, LANDLORD will promptly reimburse TENANT the actual out-of-pocket expenditures incurred in connection with this transaction up to \$100,000.00. After this payment, neither party will have rights or obligations under this LEASE.

(iii) Give LANDLORD additional time, in which case TENANT's options (I) and (ii) will be preserved pending LANDLORD's completion of the work.

C. Upon the later of (i) the completion of LANDLORD's SITE WORK and (ii) TENANT's satisfaction of all CONDITIONS PRECEDENT, TENANT shall within 5 days of such date pay to LANDLORD the sum of \$200,000.00 as a one-time contribution toward LANDLORD's costs of completing the LANDLORD's SITE WORK.

The First Amendment of the Net Lease (to each of the foregoing leases), added a new definition for "Sewage Plant Improvements" as follows:

Modification of the existing private sewage treatment plant as approved in advance by municipal authorities, including installation of an equalization tank of a size to be agreed to by Tenant and the municipal authorities, and aeration, treatment and pumping equipment.

Other sections were added and/or modified in the leases regarding the construction and payment for the improvement to the sewage treatment facilities. Specifically, the following terms were added:

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2B(ii)<sup>1</sup> Sewage Plant Improvements Reimbursement. Tenant shall pay, in equal monthly installments over the Initial Term of the Lease, fifty percent (50%) of the cost of such improvements capitalized over the Initial Term at a rate equal to the rate of interest paid by Landlord for the loan to fund the Sewage Plant Improvements.

4A(iv)<sup>2</sup> Sewage Plant Improvements. Landlord shall design, permit and construct the Sewage Plant Improvements in accordance with the requirements of the municipal health department. Landlord shall design and construct such improvements in the most economical manner possible and shall provide a budget of such proposed expenditures to Tenant prior to commencement of construction. Landlord acknowledges that the cost of the improvements is currently estimated at \$150,000. After the improvements are completed, Landlord shall provide complete documentation of the expenses related to the improvements.

On or about December 17, 2004, the parties entered into a letter agreement which provided in relevant part that “Within 100 days of Tenant commencing construction on the Premises, Landlord shall complete the ....Sewage Plant Improvements set forth in Section 4A(iv)(I) which is more particularly described as the following work...(iv) installation of new pump set relating to the sewage plant improvements. ... Upon completion of the Remaining Work, Landlord will provide Tenant with an engineer’s certification that such work has been completed in accordance with approved plans and specifications and a request for the remaining Site Work contribution in the amount of \$100,000.00. Upon such receipt of such certification and request by Tenant, Tenant will pay Landlord the remaining \$100,000.00 Site Work contribution as further set forth under Section 4C of the Lease within 10 days.”

The Complaint alleges that pursuant to the terms of the leases and amendments thereto, and the December 17, 2004 letter agreement, plaintiff agreed to construct certain sewage treatment facilities on the subject premises such as would be sufficient to sustain the two restaurants, the Courtyard by Marriot and a second potential hotel to be constructed by plaintiffs. The second hotel was to be constructed on

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<sup>1</sup>This term was added in the section providing for the additional rents to be paid by tenant defendants.

<sup>2</sup>This term was added in the section providing for Landlord’s Site Work.

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an adjacent parcel plaintiffs acquired from the Town of Brookhaven, purportedly in reliance on defendants' agreement to pay for the sewage treatment facility improvements. According to plaintiff, pursuant to the lease and first amendment, defendants agreed to pay fifty percent (50%) of the costs of said improvements and/or modifications. Plaintiffs allege that when they acquired the parcel from the Town of Brookhaven, they notified defendants of their obligation to pay for a portion of the sewage treatment improvements so the second hotel could be constructed, but defendants refused to pay. Plaintiffs thus seek a declaratory judgment that defendants are responsible for the payment of these sewage plant improvements and seek damages in the amount of \$1,500,000.00, which they say represents the amount invested in acquiring the adjacent parcel for the construction of the second hotel.

Defendants move to dismiss the Complaint on the ground that they were only required to pay for the improvements if they were completed during the "PERMITTING PERIOD" as same was defined under the leases and amendments thereto. Defendants assert that plaintiffs did not make the sewage plant improvements during this period and thus, they are not responsible for the costs of the improvements. Additionally, defendants claim that the improvements plaintiffs seek reimbursement for are additional to and separate from those referenced in the leases and amendments thereto. Further, defendants move to dismiss as against defendant Darden, as they claim it was not in privity of contract with plaintiffs.

Plaintiffs cross-move for summary judgment in their favor and argue that the construction of the sewage plant by the end of the "PERMITTING PERIOD" was not a requirement under the leases and amendments thereto. Plaintiffs explain that the subject premises actually consists of three parcels, which they denominate "A", "B" and "C" and that at the time the leases were executed with defendants, the Courtyard by Marriot existed on parcel "A" and there was also a sewage treatment plant on parcel "A". This sewage treatment plant, according to plaintiffs, had sufficient capacity to service this hotel, plus one restaurant and a second hotel planned for parcel "C". The restaurants were to be constructed on parcel "B" and plaintiffs claim that the Suffolk County Department of Health would not approve the construction of the two restaurants plus the additional hotel unless the capacity of the sewage treatment facility was expanded. Thus, plaintiffs claim that the parties agreed that defendants would pay 50% of

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the cost of the improvements of the sewage treatment facilities. Plaintiffs argue that defendants' position that their obligation to pay only arose if the improvements were completed within the "permitting period" is without merit. Specifically, plaintiffs note that certain conditions precedent had to occur before the construction of the second hotel would begin, including acquisition of parcel "C" from the Town of Brookhaven and obtaining approvals for such construction, such that it was not practical for the improvements to the sewage treatment facility to occur prior to the end of the "PERMITTING PERIOD". If plaintiffs chose not to build the second hotel, the sewage treatment facility improvements would not be necessary. In sum, plaintiffs argue that the leases required defendants to pay for the sewage treatment plant improvements whenever they are completed and thus, the motion to dismiss must be denied.

With regard to the claim of lack of privity with Darden, plaintiffs claim that the motion to dismiss against Darden is premature at this point. Plaintiffs allege in the Complaint that GMRI assigned its lease to Darden or subleased to Darden and without the benefit of discovery, the motion to dismiss must be denied as premature.

Turning to plaintiffs' request for summary judgment, they argue that there is no question of fact that defendants are required to pay for the sewage treatment facility improvements and that plaintiffs have been prevented from constructing the second hotel due to defendants' failure to pay.

In reply, defendants reiterate that they were not obligated to pay for additional sewage treatment facility improvements that were not completed during the "PERMITTING PERIOD", and were not needed for the operation of the restaurants. Moreover, plaintiffs did not obtain defendants' approval with regard to the size of the equalization tank and the construction budget. Thus, defendants argue that the plain, unambiguous language of the parties' agreements contradicts their claim of entitlement to reimbursement for the sewage plant improvements. Additionally, defendants argue that none of the parties' agreements discuss plaintiffs' claims that the existing sewage treatment facilities were insufficient to service two hotels and two restaurants, but instead, plaintiff's engineers had submitted a report to the Suffolk County Department of Health Services that the sewage treatment plant was

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sufficient for such use and that the only improvements, per the December 17, 2004 letter agreement, was the installation of a new pump set. Thus, any additional sewage treatment facility improvements are beyond the scope of the parties' agreements.

Defendants also emphasize that the sewage plant improvements were part of the "Landlord's Site Work" which was required to be completed prior to the end of the "PERMITTING PERIOD" and for which a proposed budget was supposed to be provided to defendants. Since such improvements were not completed during this time period, and plaintiffs did not provide defendants a proposed budget, defendants are not obligated to pay for same. Defendants argue that the plain language of the leases and first amendments thereto bar plaintiffs' recovery, there are no questions of fact and the motion to dismiss (considered herein as a motion for summary judgment) must be granted and plaintiff's cross-motion for summary judgment denied.

It is well settled that to obtain summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. *Goldberger v. Brick & Ballerstein, Inc.*, 217 A.D.2d 682, 629 N.Y.S.2d 813 (2d Dept. 1995) (internal citations omitted). The burden then shifts to the party opposing the motion to come forward with proof in admissible form demonstrating there are genuine issues of material fact which preclude the granting of summary judgment. *Zayas v. Half Hollow Hills Cent. School Dist.*, 226 A.D.2d 713, 641 N.Y.S.2d 701 (2d Dept. 1996). However, if the movant fails to meet its prima facie burden, the Court need not consider the sufficiency of the opposition papers. *McMahan v. McMahan*, 66 A.D.3d 970, 886 N.Y.S.2d 825 (2d Dept. 2009). "It is not up to the court to determine issues of credibility or the probability of success on the merits, but rather to determine whether there exists a genuine issue of fact." *Triangle Fire Protection Corp. v. Manufacturer's Hanover Trust Co.*, 172 AD2d 658, 570 NYS2d 960 (2d Dept. 1991). A motion for summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." *Scott v. Long Island Power Auth.*, 294 AD2d 348, 741 NYS2d 708 (2d Dept. 2002).

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In actions to recover for breach of contract, it has been repeatedly held that whether a contract is ambiguous is a question of law for the court “and is to be determined by looking within the four corners of the document.” *Geothermal Energy Corp., v. Caithness Corp.*, 34 A.D.3d 420, 825 N.Y.S.2d 485 (2d Dept. 2006)(internal quotations omitted). *See also, Siegel v. Golub*, 286 A.D.2d 489, 729 N.Y.S.2d 755 (2d Dept. 2001). The Court must read the agreement as a whole so as not to place undue emphasis on certain words and terms, and must be careful not to distort the meaning of the terms so as to create a new contract between the parties. *Better Living Now, Inc., v. Image Too, Inc.*, 67 A.D.3d 940, 889 N.Y.S.2d 653 (2d Dept. 2009); *CNR Healthcare Network, Inc., v. 86 Lefferts Corp.*, 59 A.D.3d 486, 874 N.Y.S.2d 174 (2d Dept. 2009); *Best v. Brazal South Holdings, LLC.*, 35 A.D.3d 695, 826 N.Y.S.2d 684 (2d Dept. 2006); *Snug Harbor Square Venture v. Never Home Laundry, Inc.*, 252 A.D.2d 520, 675 N.Y.S.2d 365 (2d Dept. 1998). Furthermore, “in interpreting the provisions of a lease, the court should refrain from rewriting the lease under the guise of construction, should not construe the language of the lease in such a way as would distort its meaning, and should not construe the language in a manner that would render one or more of its provisions meaningless.” *J.W. Mays, Inc., v. Snyder Fulton Street, LLC.*, 69 A.D.3d 572, 893 N.Y.S.2d 162 (2d Dept. 2010). When questions of fact exist as to the terms of the contract or whether defendant breached the contract, summary judgment must be denied. *Lipski v. C.W. Post College*, 276 A.D.2d 599, 714 N.Y.S.2d 136 (2d Dept. 2000); *Mid-Orange Mechanical Corp., v. Triangle Mechanical and Electrical Co.*, 260 A.D.2d 611, 688 N.Y.S.2d 678 (2d Dept. 1999). *See also, Shadlich v. Rongrant Assoc.*, 66 A.D.3d 759, 887 N.Y.S.2d 228 (2d Dept. 2009).

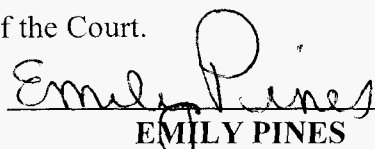
Here, there are questions of fact which preclude granting summary judgment to either plaintiffs or defendants. The leases, together with the first amendments thereto, plainly required defendants to pay, as additional rent, 50% of the costs of certain sewage treatment plant improvements on the subject premises. The question is what improvements did defendants agree to pay for and were those improvements required be completed during the “Permitting Period”. The first amendment specifically defined these improvements as “Modification of the existing private sewage treatment plant as approved in advance by the municipal authorities, including installation of an equalization tank of a size to be agreed to by the Tenant and the municipal authorities, and aeration, treatment and pumping equipment.”

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This definition was then included in the section describing landlord's "Site Work", which was to be completed within the "Permitting Period". However, failure to complete this work within the "Permitting Period", gave defendants certain options with regard to leases, which it does not appear they exercised - that is, defendants could have completed the work on their own and charged the amount back to plaintiffs, terminate the leases or give plaintiffs additional time. Here, according to the December 17, 2004 letter agreement between the parties, it appears that the parties agreed that plaintiffs were to install a "new pump set relating to the sewage plant improvements" within 100 days of defendants commencing construction. No other specification with regard to sewage plant improvements was described. It also appears from the submissions that plaintiffs failed to provide defendants with an estimated budget for the installation of the improvements. Additionally, while plaintiffs claim that the parties all understood that these significant improvements were necessary because of the construction of a second hotel, nowhere is such referenced in any of the documentary evidence submitted to the Court. Based on the all of the foregoing and a review of the record, the Court finds that reading the documents as a whole, as is required, there is a question of fact as to the parties' intent regarding the installation and payment for the sewage treatment facility improvements. The Court notes that it took approximately 8 years for plaintiff to obtain title from the Town of Brookhaven on the adjacent parcel (and 5 years from when they entered into the initial leases with defendants). Although plaintiffs claim it was always their intent to construct the second hotel on this parcel (and that defendants were aware of this and the requirement for the substantial sewage treatment facility improvements), nowhere is this mentioned in the documents. Thus, there are questions of fact which must be resolved and preclude granting summary judgment to either plaintiffs or defendants. The motion and cross-motion are therefore denied, defendants are directed to serve and file an Answer within twenty (20) days of service of a copy of this Order with Notice of Entry, and this matter is set down for a preliminary conference on September 21, 2010 at 9:30 a.m. before the undersigned.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: July 9, 2010  
Riverhead, New York

  
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**EMILY PINES**  
J. S. C.