

Fisk Bldg. Assoc., L.L.C. v The Dannelisse Corp.

2010 NY Slip Op 32269(U)

August 23, 2010

Sup Ct, NY County

Docket Number: 110716/2009

Judge: Louis B. York

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

LOUIS B. YORK
J.S.C.

PART 2

PRESENT.

Index Number : 110716/2009

FISK-BUILDING

vs

DENNELISSE

Sequence Number : 002

SUMMARY JUDGMENT

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

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.**

FILED
AUG 24 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/23/10

Luoy J.S.C.

LOUIS B. YORK
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 2

_____ x

FISK BUILDING ASSOCIATES, L.L.C.,

Plaintiff,

-against-

Index No. 110716/2009

THE DENNELISSE CORP.,

Defendant.

_____ x

FILED
AUG 24 2010
NEW YORK
COUNTY CLERK'S OFFICE

LOUIS B. YORK, J.:

In 1999 and 2000, The Dennelisse Corporation ("Tenant") entered into four separate lease agreements, in which it leased four suites in a building which Fisk Building Associates, L.L.C. ("Landlord") owned. The base rents for the suites were \$3,063.83, \$8,419.25, \$7,505.00 and \$2,630.33.

In its reply papers Landlord notes that there was a Civil Court litigation between these parties, over the same lease. In that case, The Dennelisse Corp. v. Fisk Building Assoc., LLC, Index No. 300047 TSN 2007 (Civ. Ct. N. Y. County, Sept. 28, 2007) ("Dennelisse I"), Tenant sued Landlord for unjust enrichment based on the CPI, ERIF and tax increases due under the lease. Tenant's goal was to recover alleged rent overcharges. Of particular interest here, Tenant moved to amend the complaint to add causes of action for breach of contract and unjust enrichment, and to add causes of action to recover alleged overcharges for electricity, real estate taxes, and fuel costs. The Civil Court addressed Tenant's claim that Landlord breached its obligations under the lease by including the ERIF in the base rent, resulting in a higher CPI. The Civil Court noted that all four leases between the parties clearly state that the ERIF is part of the

fixed annual rent. Therefore, the Civil Court concluded that Tenant's argument was "in direct contravention of the terms of the lease agreements between the parties." Id. at p. 5. The Civil Court further noted that the leases provided for periodic upward adjustments of the ERIF and stated that the ERIF would in no event be reduced.

Tenant also alleged in the Civil Court action that Landlord overbilled it for electricity, real estate tax and fuel costs. The Civil Court rejected that argument as well, concluding that Tenant's failure to submit "a figure or even an estimate of the amount that they claim [Landlord] has overbilled them in electricity, real estate tax and fuel cost" was fatal to its claim. In addition, the Court found that Tenant's proposed cause of action for overbilling of real estate taxes lacked merit. The Civil Court concluded that the increased real estate charges were proper under the clear terms of the leases in question. According to the Civil Court, Landlord demonstrated that it followed the prescribed formula and Tenant did not allege either that Landlord failed to follow the formula or that Landlord ever received a tax refund and did not reimburse Tenant accordingly.

In addition, the Civil Court noted that Tenant did not challenge the accuracy or appropriateness of the electricity or tax payments. Instead, it made the payments without disputes for seven years prior to the Civil Court litigation. Under the voluntary payment doctrine, therefore, Tenant's claims were precluded. See id. at 8-9; Citicorp North America, Inc. v. 5th Avenue 58/59 Acquisition, 70 A.D.3d 408, 409, 895 N.Y.S.2d 39, 40 (1st Dept. 2010) (doctrine properly applied where plaintiff failed to challenge overbilling for nine years). The Civil Court also found that the challenges were barred by the statute of limitations, which began to run at the time of the first alleged overcharge. See Denelisse I, at 7-8; Goldman Copeland Assoc., P.C. v. Goodstein Bros & Co., Inc., 268 A.D.2d 370, 371, 702 N.Y.S.2d 260, 270 (1st

Dept. 2000). The Civil Court also rejected Tenant's argument that the escalation clause was against public policy, noting that such clauses are common in commercial leases.

Despite the ongoing litigation over the additional rent charges, the parties continued their landlord-tenant relationship. It appears that Tenant continued to pay the base rent for each suite; but, commencing in December of 2007, it withheld some or all of the additional rent costs which it had challenged in the Civil Court action. On April 30, 2009, the leases expired naturally and Tenant vacated the premises – according to Landlord, with a substantial sum outstanding.

Landlord filed its complaint around July 29, 2009, a few months after Tenant evacuated the premises. In the complaint, Landlord seeks to recover the rent and additional rent which Tenant allegedly still owes under the various leases. According to Landlord, when Tenant moved out of the offices it still owed Landlord \$260,221.62 in rent and additional rent. Landlord breaks down this debt as follows: (1) \$21,618.41 in base rent for April 2009; (2) \$30,106.47 in tax escalations, constituting its proportionate share of the increase in real estate taxes for 2008 and 2009; (3) \$123,947.46 in consumer price index (CPI) escalations, for monthly cost of living adjustments from December 2007 through April 2009; (4) \$41,720.66 in the electricity rent inclusion factor (ERIF) for its estimated share of electrical use from December 2007 through April 2009; and (5) \$44,673.79 in rate increases, also based on electrical use, from the second quarter of 2007 through the second quarter of 2009 (the last quarter was computed to include April 2009 only).

According to Landlord, the leases set forth the procedure by which Tenant must assert a challenge to the electric charges described above. Apparently, Landlord's electrical consultant determined the rates described in item 4 above. Landlord points to a provision in all the leases which states that Tenant had 15 days from its receipt of a printed copy of the ERIF charges to

dispute the computation of Landlord's electrical consultant. At that point, Tenant would retain an independent electrical consultant to compute the proper charges. If the parties could not resolve the dispute, the parties would hire a third consultant, at their joint expense, to resolve the issue. As Tenant allegedly did not challenge the computation, Landlord contends, it has waived the right to challenge these charges. Landlord further suggests that it has the right to litigate the issue of the ERIF charges in court in this action, but Tenant, which did not follow the mandated procedure, cannot challenge Landlord with respect to this particular claim.

Tenant's answer is dated September 17, 2009. In the answer, it generally denies virtually all of Landlord's contentions. On October 13, 2009, before the parties exchanged any discovery, Landlord filed its note of issue. As part of this document, counsel for Landlord represented that "discovery proceedings now known to be necessary completed," "there has been a reasonable opportunity to complete [discovery]" and "the case is ready for trial."

Tenant promptly moved to strike the note of issue. The motion was scheduled for argument on November 25, 2009 and adjourned until January 13, 2010. On January 13, 2010, the Court granted the motion. It stated that Landlord erred in filing the Note of Issue two weeks after issue was joined. In particular, it stressed that by filing the Note of Issue so quickly, Landlord deprived Tenant of the right to conduct discovery.

On December 3, 2009, approximately one week after the original argument date for the motion to strike, Landlord brought this motion for summary judgment. It is not clear whether Landlord mentioned this to the Court during the January 13, 2010 argument of the motion to strike. At any rate, the motion ultimately was submitted to the Part on February 16, 2010 and the Court scheduled oral argument and a preliminary conference for March 24, 2010. The parties requested an adjournment until June 16, presumably because of the pending summary judgment

motion. On June 16, with this motion undecided, the parties again adjourned the conference, this time until August 11. It appears that no discovery has taken place during this time.

In the current summary judgment motion, Landlord contends that the overdue charges are clear and are beyond dispute. Alternatively it states that if the Court determines there should be a hearing on the issue of damages, there should still be judgment on the issue of liability. In response, Tenant states that (1) the motion is premature as discovery has not begun; (2) discovery is necessary to enable Tenant to determine whether the charges are excessive – and if so, to what extent; (3) Landlord attempts to reap a “windfall” from the various electricity charges. Tenant also suggests that the inclusion of ERIF charges in the base rent, and then measuring the CPI with reference to the base rent enables Landlord to double bill Tenant for electricity costs.

While it is debatable whether collateral estoppel applies, cf. Accurate Copy Serv. of America, Inc. v. Fisk Bldg. Assoc. L.L.C., Index No. 101802/08 (Sup. Ct. N.Y. County 2009) (avail at 2009 WL 1401179) (finding that res judicata did not apply to the Civil Court order because the did not decide the issues on the merits), aff’d on other grounds, 72 A.D.3d 456, 899 N.Y.S.2d 157 (1st Dept. 2010), the reasoning of the Civil Court is highly persuasive at the very least. For one thing, the parties briefed and litigated many of the same issues before that court, and the dispute arose under the same provisions of the leases. For another, the Civil Court thoroughly evaluated the claims Tenant sought to add, finding them palpably lacking in merit based on controlling case law. For a third, Tenant here does not proffer any arguments sufficient to counter the Civil Court decision or Landlord’s arguments.

In addition, the First Department recently affirmed a Supreme Court order which dismissed the tenant’s challenges to the electrical charges and tax escalation charges in a case

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involving the Landlord involved in this lawsuit and a different tenant. Accurate Copy Serv. of America, Inc. v. Fisk Bldg. Assoc. L.L.C., 72 A.D.3d 456, 899 N.Y.S.2d 157 (1st Dept.

2010)(“Accurate Copy”). In that case, the First Department also rejected the tenant’s arguments based on unconscionability and public policy, noting that “the public policy in New York is to respect negotiated commercial leases.”

After consideration of the First Department’s decision in Accurate Copy and of the Civil Court decision in Dennelisse I, this Court rejects Tenant’s challenges to the computation of the ERIF, the real estate tax escalations, and the cost of living computation. The Court also agrees that, pursuant to Dennelisse I and the numerous cases cited therein, the accepted rent doctrine and the statute of limitations also bar those challenges. Finally, the Court concludes that Tenant’s challenges to summary judgment are insufficiently specific or detailed to warrant denial of the motion, as it pertains to liability.

As stated above, Landlord seeks not just additional rent but one month of base rent. Tenant has not argued that it paid the last month’s rent or presented any reason why it should be credited for the rent due in April 2009. On the contrary, based on Tenant’s opposition papers, it appears that its challenges lie solely with the additional rent. Accordingly, as Tenant has failed to raise a triable issue of fact as to the base rent for April 2009, the Court grants summary judgment as to this portion of the complaint.

This does not dispose of the case altogether, however. The fact that Tenant cannot challenge the method of computation or the inclusion of the ERIF and tax escalation charges does not mean that Tenant has to accept the computations themselves. A hearing is necessary to determine the actual amounts due under the lease in additional rents charged between December 2007 to April 2009. Landlord has submitted detailed bills concerning the computation of the

additional rent and expert affidavits substantiating its charges. However, Tenant has 30 days from entry of this order to serve discrete document demands relating to the computation of additional rent between December 2007 and April 2009.

Finally, the Court notes that Landlord did not proceed efficiently in this matter. In its January 13, 2010 order this Court vacated the Note of Issue to permit the parties to conduct discovery. When the Court made this ruling, Landlord already had moved for summary judgment and – despite the Court’s conclusion in the January decision that discovery was permissible – apparently viewed discovery as stayed pending resolution of this motion, which it viewed as dispositive of this case. If plaintiff had cross-moved for summary judgment in connection with the original motion, the Court could have considered these intertwined issues at once and been able to make a global ruling.

Accordingly, it is

ORDERED that summary judgment is granted on the issue of liability and a hearing is directed on the issue of damages; and it is further

ORDERED that Tenant has 30 days from the date of entry of this order to serve discrete discovery demands relating to the issue of the computation of additional rent from December 2007 to April 2009; and it is further

ORDERED that Landlord has 30 days from the service of these demands to respond; and it is further

ORDERED that when discovery is complete, the parties shall notify the Court, annexing

a copy of this order; and at that time the Court shall issue an order directing the parties to proceed to a hearing before a referee.

Dated: 9/23, 2010

8/23/10

Enter:

LY
LOUIS B. YORK, J.S.C.

LOUIS B. YORK
J.S.C.

FILED
AUG 24 2010
NEW YORK
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