

HSBC Bank USA v DRMBRE-85th Fee LLC
2010 NY Slip Op 32690(U)
September 23, 2010
Supreme Court, New York County
Docket Number: 104866/09
Judge: Paul G. Feinman
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PAUL G. FEINMAN

PRESENT: _____ J.S.C.

PART 12

Index Number : 104866/2009

HSBC BANK USA

vs

DRMBRE-85TH FEE LLC

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. 104866/09

MOTION DATE _____

MOTION SEQ. NO. 002

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 ...
Notice of Cross Motion
~~Answering Affidavits -- Exhibits~~

PAPERS NUMBERED

1, 2
3, 4
5, 6

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION AND CROSS MOTION(S) ARE DECIDED
IN ACCORDANCE WITH ANNEXED DECISION, ~~AND ORDER~~.**

Settle order & judgment.

Dated: September 23, 2010

Paul G. Feinman

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

Settle Order/judgment

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: IAS PART 12

HSBC BANK USA, NATIONAL ASSOCIATION,
Plaintiff,

-against-

DRMBRE-85TH FEE LLC and 85TH ESTATES
COMPANY,
Defendants.

INDEX NUMBER 104866/2009
MOT. SEQ. NO. 002
DECISION

Appearances:

Plaintiff:

Phillips Lytle LLP
By: Keith M. Brandofino, Esq.
437 Madison Avenue, 34th Fl.
New York NY 10022
(212) 759-4888

Defendants:

Seyfath Shaw LLP
By: Jerry A. Montag, Esq.
620 Eighth Avenue
New York NY 10018
(212) 218-5500

Papers considered on this motion for summary judgment and cross motion for partial summary judgment:

PAPERS	NUMBERED
Notice of Motion, Affirmation, Exhibits	1
Memorandum of Law in Support of Motion	2
Notice of Cross Motion for Partial Summary Judgment	3
Memorandum of Law in Opposition to Motion and in Support of Cross Motion	4
Reply Memorandum in Further Support of Motion and in Opposition to Cross Motion & Aff. of Service	5, 6

PAUL G. FEINMAN, J.:

Plaintiff HSBC Bank USA, National Association (HSBC) moves for summary judgment in its favor on the amended complaint. Defendants DRMBRE-85TH Fee LLC (DRMBRE) and 85TH Estates Company (85EC) cross-move for partial summary judgment dismissing the fifth and sixth causes of action in the amended complaint, granting 85EC a money judgment on the first counterclaim in their answer, and dismissing the amended complaint in its entirety as against DRMBRE.

Background

HSBC is the successor sublessee of commercial premises at 185 East 85th Street, New York County (the Building). The underlying property was owned by Manhattan Savings Bank (MSB), which executed a ground lease with T.F.C. of New York, Inc. (TFC), granting TFC the right to build a high-rise residential building on the property with commercial space at street level. In conjunction with the ground lease, MSB and TFC executed a branch lease, sometimes referred to as "the occupancy lease" in the papers and exhibits, on December 8, 1961 (Not. of Mot., Ex. A). The branch lease was amended and modified by an agreement, dated March 16, 1965 (the 1965 Agreement) (Not. of Mot., Ex. B), and a "Lease Modification Agreement," dated July 9, 1996 (the 1996 Modification) (Not. of Mot., Ex. C). The 1965 Agreement extended the initial term of the ground lease and the branch lease to February 22, 2002, and granted MSB three 22-year renewal periods. The ground lease and the branch lease expire in 2068. TFC subsequently assigned its interest to an entity which purchased the Building from MSB in 1979 and became 85EC. As a result of various mergers and restructuring of various banking institutions, HSBC now operates a bank branch on the premises. DRMBRE claims to be one of seven tenants-in-common who own the fee interest in the Building, without any landlord-tenant relationship to HSBC.

In 1996, 85EC, Republic National Bank of New York (Republic), then successor to MSB, and Nine West Group (9West) executed an "Agreement Relating to Proposed Construction of a New Storefront and Installation of Air Conditioning Unit" (1996 Construction Agreement) (Amended Compl., Ex. B), which provided for construction and air conditioning to accommodate a retail shoe store in space sublet to 9West by Republic. The 1996 Modification resulted, to some degree, from the anticipated arrival of 9West. Notably, it required Republic to install

electric metering equipment for billing electricity usage in Republic's commercial space, including the 9West space. Additionally, it replaced Article 41 in the branch lease with language which provides that, whenever landlord or tenant required approval or consent of the other, a request for approval or consent shall be responded to within 60 days, and approval or consent shall not be unreasonably withheld (1996 Modification, Art. 5) (the consent clause). The earlier language did not contain any time limit for a response to a request for consent or approval, although it provided that approval or consent shall not be unreasonably withheld.

On January 12, 2009, HSBC requested that 85EC consent to alterations to its premises that would reduce the space needed for the bank's operations from 12,910 gross square feet to 10,530 gross square feet and, thereby, allow the bank to sublease space to another unidentified commercial tenant. The alterations consisted of a new storefront and entrance for the new tenant, interior partitioning of the space between the bank and the new tenant, and replacement of air conditioning systems on the roof of the Building. HSBC and 85EC corresponded back and forth on the proposed alterations without reaching agreement. *See*, Amended Compl., Exs. C - I. This impasse has given rise to this litigation in which HSBC has filed a complaint originally asserting four causes of action: (1) a declaration that the proposed alterations do not require 85EC's consent; (2) a declaration that, if 85EC's consent is required, the withholding of its consent is unreasonable; (3) breach of the branch lease; and (4) breach of the implied duty of good faith.

Additionally, Article 36 of the branch lease, as amended by the 1965 Agreement, obliges the tenant, during each renewal term, to pay "5% of any increase in real estate taxes levied against the entire premises of which the demised premises form a part in each tax year over the real estate taxes so levied during the last tax year of the initial term of this lease." The landlord's

property manager has asked HSBC for payment, in aggregate, of \$306,658.96 for tax increases for the fiscal years 2001-2002 through 2008-2009, based on the fiscal tax year 2000-2001. HSBC refuses to pay this amount for several reasons, including its claim that certain tax certiorari proceedings brought by DRMBRE and/or 85EC reduced 85EC's real estate tax liability and that 85EC used the wrong base year for its calculations. The amended complaint asserts a fifth and sixth cause of action: (5) a declaration that the computation of real estate taxes under the branch lease should be based on the fiscal tax year 2001-2002; and (6) an accounting of all tax certiorari proceedings involving the underlying property and/or the Building.

HSBC's Motion for Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002).

HSBC contends that, after its initial notice to 85EC of the proposed alterations, it has been forthcoming with its plans and specifications.¹ On February 19, 2009, its architect

¹Both sides submit over 30 pages of plans and drawings by HSBC's architect.

responded to 26 questions posed by 85EC concerning the nature and range of the proposed alterations. 85EC responded, on March 10, 2009 (Not. of Mot., Ex. I) that the proposed alterations “without limitation” violated Article 7 of the branch lease, which reads, in relevant part:

Tenant may without Landlord’s consent make and install such alterations, decorations, additions or improvements (including paneling, partitions, mezzanine floors, railings, galleries and the like), and may at any time and from time to time remove the same, provided, however, that Tenant makes no structural changes in the demised premises, creates no hazardous conditions, and at all times complies with the laws, ordinances, rules and regulations of any governmental agencies having jurisdiction over the premises.

HSBC asked 85EC for specifics on March 18, 2009, but alleges that it received no answer.

In the 1996 Construction Agreement, at paragraph 4, the parties “specifically acknowledge[d] and agree[d] that if Landlord shall permit Tenant to proceed with the construction of a new storefront for the Sublet Space and the installation of an air conditioning unit on the roof above the Sublet Space, same shall not be deemed a modification, revision or waiver of any of the provisions of Article 7 of the Occupancy Lease.” To a significant degree, the 1996 project was a precursor to the project now in dispute. In both instances, the bank was carving out a piece of its space to sublet to a commercial sub-tenant, adding an additional entrance to the premises for the new occupant, and updating the air conditioning system to accommodate the change in the commercial space. However, the 1996 Construction Agreement is self-limiting and the associated introduction of 9West cannot be regarded as exemplary of the parties’ course of conduct.

Defendants contend that the proposed changes are prohibited by the branch lease, because they are structural changes and change the Building’s “character.” Mandel Affidavit in

Opposition, ¶ 4. In addition to Article 7, defendants refer to Article 38 (ii), “Tenant shall have the right to assign this Lease and/or to sublease the demised premises, in whole or in part, without the Landlord’s consent, but not sooner than ten (10) years after Tenant shall taken possession of the demised premises,” apparently because HSBC succeeded Republic less than 10 years ago. The exact date of this transition is not provided by HSBC, but it states that Republic acquired “HSBC Bank USA,” took its name and, upon becoming a national bank, “changed its name to HSBC Bank USA, National Association.” Affidavit in Support, ¶ 7. There is no evidence that, name change aside, HSBC has been the tenant in the Building for less than 10 years. Therefore, Article 38 (ii) offers no basis for defendants to object to HSBC’s plans.

Defendants also cite Article 38 (a): “Tenant’s assignee or sublessee, as the case may be, shall not use the premises for any purpose . . . which would not be consistent with the character of the building.” Defendants’ objections based on the “character” of the Building have no basis in fact and are unreasonable when they speculate that the proposed alterations “would create a non-uniform series of small stores with separate identities, a further entrance in the façade of the Building and multiple signage.” *Id.*, ¶ 26. The addition of another sub-tenant without seeking defendants’ consent is allowed by Article 38 (ii) of the branch lease. Another entrance is a given, but there is no evidence that uniformity in appearance is not or could not be part of HSBC’s plan, or that uniformity is requisite to character. Defendants claim that the proposed alterations “would transform a stately, first class anchor banking space into a strip mall that would make the Building a less desirable residential space.” *Id.*, ¶ 4. The experience of introducing 9West as a subtenant weighs heavily against defendants’ objections of this type, and their blanket objection to HSBC’s plans are seemingly in conflict with the consent clause in the branch lease.

The original branch lease, executed before construction of the Building, contemplated the use of the commercial space primarily by a banking tenant. Article 4, titled “Construction and Completion,” provides that the construction “shall be first-class work comparable in quality to standards prevailing in high-class savings banks in the City of New York.” Article 14 addresses “Vaults, Vault Space, Etc.” However, Article 6, titled “Occupancy,” states that:

Tenant shall use and occupy the demised premises for the business of a savings bank or for any other legal purposes, provided, however, that no use (other than use for the business of a savings bank) shall violate any restrictive provisions of any lease of any other portions of the building of which the demised premises form a part which is in force and effect at the time that such use is proposed.

Additionally, Article 38 (ii) allows the tenant the right “to sublease the demised premises, in whole or in part, without Landlord’s consent” after possessing the space for 10 years.

In contrast to the generalities of the original branch lease, the 1996 Modification offers insight into what might be consistent with the character of the Building, if only by identifying what sort of tenancy is explicitly unacceptable, according to paragraph 1, titled “Occupancy” – cooking, food preparation, food service, obscene or pornographic purposes, commercial sex establishment, nude or semi-nude live performances, nude modeling, rap sessions, rubber goods shop, sex club, or massage parlor. Until a prospective sub-tenant is made known to defendants, any objections they raise based on the purported character of the Building are premature.

The instant motion requires the court to resolve three issues: (1) whether HSBC’s proposed alterations are structural in nature; (2) whether the right to sublet overrides the bar to structural changes; and (3) whether Article 7 is subject to the consent clause.

1. Whether HSBC’s Proposed Alterations Are Structural in Nature

HSBC submits an affidavit by Maria D. Lopez DiGiorgi (Lopez), a studio manager of the

Nelson New York Architecture Operating Company, LLC, the firm retained by HSBC to redesign the branch at issue. Lopez contends that the proposed alterations to the Building's façade consist primarily of replacing a glass panel and the wall below it with a glass door as an entrance for the new commercial tenant, and changes to the canopy over the storefront. She claims that these alterations will be reversible "without significant delay or expense." Lopez Affidavit, ¶¶ 6-7. She maintains that the proposed internal alterations for the new commercial tenant would only affect the bank's current space, without any structural modifications, and would also be reversible "without significant delay or expense." *Id.*, ¶¶ 8-9. Proposed roof alterations would replace existing heating/ventilation/air conditioning (HVAC) units with new, higher-efficiency units no larger than the current ones, according to Lopez, who concludes that the proposed alterations are not structural changes.

Defendants, in opposition to the proposed alterations, submit the affidavits of Ronald R. Erickson, a professional engineer, and Tobias Arianna, an architect, who both label HSBC's plans as "structural alterations." However, neither offers a definition of or guidance on what constitutes a structural alteration. Each also drifts into addressing interior modifications, such as a new bathroom and ramps, as if they were within defendants' purview.

However, *Two Guys from Harrison-N.Y. v S.F.R. Realty Assocs.* (63 NY2d 396, 401-402 [1984]), a case cited by HSBC for other purposes, offers practical guidance. The lease in that case allowed the tenant, without the landlord's permission, to "make any interior non-structural alterations, additions and improvements . . . which it may deem necessary or desirable provided Tenant does not thereby weaken the structure of the building." The Court described the changes and ruled on their character, as follows:

[Tenant] proposed four exterior changes: (1) extending an existing sign canopy, which would require piercing the roof's waterproofing membrane; (2) adding decorative brick fascia to the I-beams that would support the canopy extension; (3) installing a new ingress/egress door and a related glass front; and (4) adding a loading door at the rear of the building. It is obvious that these constituted substantial structural modifications.

Id. at 400. The Court of Appeals' characterization of those alterations as "substantial structural modifications" leads this court to conclude that HSBC's proposed alterations in the case at bar, which also involve a change in the canopy and a new door, are structural changes as a matter of law. Accordingly, the first inquiry, whether the changes are structural in nature, must be answered in the affirmative.

2. Whether the Article 38 Right to Sublet Overrides the Article 7 Bar Against Structural Changes

HSBC relies upon *Two Guys* for the proposition that "a contract which expressly permits an activity will not be construed to prohibit other conduct necessary to carrying out that activity." 63 NY2d at 405. To HSBC, this means that its right to sublease, pursuant to Article 38 of the branch lease, allows it "to perform the customar[y] and necessar[y] alterations incidental to the sublease, including the ability to alter the space to accommodate subtenants." Memorandum of Law in Support, at 12. Article 7 cannot be invoked against HSBC, it argues, under these circumstances. However, HSBC ignores the actual ruling in *Two Guys* that, when "the instrument governing the tenancy prohibits such alterations, the tenant may not proceed under either authority [of statute or contract]." 63 NY2d at 399. In the instant action, Article 7, the bar to structural changes, cannot be ignored in order to satisfy Article 38, the right to sublet. Thus, the second inquiry, whether the right to sublet in Article 38 overrides the bar against structural changes in Article 7 must be answered in the negative.

3. Whether Article 7 is Subject to the Consent Clause

While HSBC's current proposed alterations resemble those disallowed as structural in *Two Guys*, they also resemble those previously performed in 1996 to accommodate 9West. What was reasonable to the Building's landlord in 1996 would, absent a change in circumstances not identified here, seem to be reasonable in 2010, and HSBC contends that the consent clause applies to Article 7 of the branch lease where, as now, structural changes are at issue. Article 7 states that "Tenant may without Landlord's consent make and install such alterations, decorations, additions or improvements . . . provided, however, that Tenant makes no structural changes." The consent clause, Article 5 of the 1996 Modification, states "that wherever the provisions of this lease require that Landlord or Tenant shall approve or consent, the Landlord or Tenant, such as the case may be, shall not unreasonably withhold such approval or consent." Nowhere in Article 7 is approval or consent required. The need for the landlord's consent is expressly excluded for alterations, decorations, additions or improvements that are not structural changes, but nothing is said about consent for structural changes. However, the lease requires the landlord's prior written consent for tenant to mortgage, pledge, encumber or assign the lease or sublet the premises, with some exceptions. *See* Art. 38. There is no reason to believe that the consent clause, and its reasonableness standard, must apply where there is no mention of consent. *Dress Shirt Sales, Inc. v Hotel Martinique Associates*, 12 NY2d 339, 342 (1963) ("It is settled that, unless the lease provides that the lessor's consent shall not be unreasonably withheld, a provision against subleasing without the lessor's consent permits the lessor to refuse arbitrarily for any reason or no reason"); *Arlu Associates, Inc. v Rosner*, 14 AD2d 272, 273 (1st Dept 1961), *aff'd* 12 NY2d 693 (1962) ("The law in New York is clear that where there is merely a provision

against assignment without the landlord's consent, such consent may be refused for any or even no reason."); *Ogden v Riverview Holding Corp.*, 134 Misc 149, 150 (Sup Ct, NY County), *aff'd* 226 App Div 882 (1st Dept 1929) ("The defendant was under no duty to give its consent and if desired could even arbitrarily and unreasonably withhold its consent"). Nothing in the lease bars HSBC from seeking approval or consent from the defendants, even where it might be difficult to obtain, or else the 1996 Construction Agreement would never have emerged. However, in this instance, the court may not impose a requirement upon defendants which is absent from the parties' agreement. In other words, the court cannot graft the consent clause and a reasonableness standard into Article 7 and this third inquiry must also be answered in the negative.

Given the above conclusions, HSBC's motion for summary judgment in its favor on the first four causes of action, those dealing with the proposed alterations, must be denied. The balance of HSBC's motion addresses the same issues as defendants' cross motion, in the main, and they will be considered together.

Defendants' Cross Motion for Partial Summary Judgment

85EC has demanded payment of \$306,658.96 from HSBC, pursuant to Article 36 of the branch lease, for fiscal tax years 2001-2002 through 2008-2009 using 2000-2001 as the base year. HSBC responded that 85EC erroneously used fiscal tax year 2000-2001, instead of 2001-2002, as the base for its calculations, and that HSBC deserved credits for decreases in real estate taxes gained by 85EC in certain tax certiorari proceedings. Pursuant to a stipulation dated May 5, 2009, HSBC paid \$249,371.19 without prejudice against the outstanding real estate taxes in resolving an earlier motion (Mot. Seq. 001).

According to Article 36, as amended by the 1965 Agreement,

[T]he Tenant shall pay during each renewal term 5% of any increase in real estate taxes levied against the entire premises of which the demised premises form a part in each tax year over the real estate taxes so levied during the last tax year of the initial term of this lease.

HSBC argues that it exercised its right to renew the branch lease effective February 2002, making the correct base year for these tax calculations 2001-2002. 85EC agrees that the initial term of the lease ended on February 28, 2002, but contends that 2000-2001 is the base year, that is, the last complete fiscal tax year, which runs July 1 to June 30, one year to the next. The difference in calculating the additional rent by the two approaches is \$57,287.77, the amount sought in the defendants' first counterclaim.

The plain language of Article 36 comports with 85EC's understanding, not HSBC's. Fiscal tax year 2001-2002 was incomplete when the initial term of the lease expired on February 28, 2002. The last tax year on February 28, 2002 was 2000-2001, which provided the parties the requisite financial information for the additional rent payments as they entered into the renewed lease term. However, 85EC only asserted this claim in its answer and counterclaims, dated September 9, 2009, which HSBC contends limits its exposure to damages back to September 10, 2003 and later, a six-year period determined by the statute of limitations for contract actions (CPLR 213 [2]). 85EC quotes Article 36, stating that the "additional rent [is] payable in semi-annual installments within ten (10) days after written demand therefore accompanied by a copy of the real estate tax bill showing such increase and a computation of the amount payable," a demand made here on March 27, 2009 (Not. of Cross Motion, Ex. N). 85EC contends that its legal right arose when it demanded payment of HSBC, regardless of how long this occurred after the taxes were assessed.

“Where, as here, the claim is for payment of a sum of money allegedly owed pursuant to a contract, the cause of action accrues when the plaintiff possesses a legal right to demand payment.” *Swift v New York Med. Coll.*, 25 AD3d 686, 687 (2d Dept 2006) (internal quotation marks and citation omitted). The court agrees with HSBC that 85EC had the legal right to demand payment of additional rent when 85EC received each year’s real estate tax bill and for six years thereafter, given the statute of limitations. Therefore, HSBC is obligated to pay additional rent arising on or after March 28, 2003 through March 27, 2009, measured by the date of the landlord’s demand letter, not the date of the answer to the complaint. Thus, with regard to the fifth cause of action in the amended complaint, HSBC is not entitled to a declaratory judgment that the computation of real estate taxes under the branch lease should be based on the 2001-2002 tax year, but is entitled to a declaration that it is liable for additional rent under the branch lease only for the period March 28, 2003 through March 27, 2009.

HSBC claims that Article 14 of the 1965 Agreement, amending Article 36 of the branch lease, entitles it to benefit from real estate tax reductions resulting from tax certiorari proceedings, and that defendants have failed to pass along any such reductions. Therefore, HSBC asks for an accounting of all tax certiorari proceedings involving the underlying property and/or the Building. 85EC counters with the affidavit of Bert Tuchman, its real estate tax counsel, who states, at paragraph 2, that “all taxes billed for the period commencing 2000/01 through and including 2008/09 were net of any benefits that the building derived by way of any real estate tax proceeding reductions, J51 abatements, and SCRIE benefits.” HSBC offers no evidence otherwise. Therefore, the only evidence before the court, as opposed to allegations, supports defendant’s cross motion for dismissal of the sixth cause of action requesting an

accounting.

Defendants' cross motion on their first counterclaim for a money judgment of \$57,287.77 (the difference between the parties' calculation) against HSBC is denied, given that in the court has determined, as set forth in the discussion above pertaining to the fifth cause of action, that defendants are only entitled to additional rent under the branch lease for the period March 28, 2003 through March 27, 2009. The undisputed amount having already been paid pursuant to the May 5, 2009 stipulation of the parties, without prejudice to this claim, defendants are owed no additional sums. Accordingly, the first counterclaim should be dismissed.

Defendants request dismissal of the complaint in its entirety against DRMBRE, claiming that it is only one of seven tenants-in-common, who own the fee interest in the Building. They maintain that DRMBRE is not a party to the lease and has no rights or powers under the lease. However, defendants submit New York City real estate tax reports on the property for the period 2001-2002 through 2008-2009 in support of their position on the complaint's fifth cause of action. Not. of Cross Mot., Ex. N. For each of the eight tax fiscal years, there is a Final Assessment Roll. On the first four, 2001-2002 through 2004-2005, the owner of the property, identified as "1524 3 Avenue," is listed as "BW-85TH FEE LLC"; for the next four years, 2005-2006 through 2008-2009, the owner is listed as "DRMBRE-85 FEE LLC." Thus, although not a signatory to the lease, the causes of action related to the tax issues which seek a declaration as to plaintiff's obligation clearly have implications for DRMBRE warranting its inclusion as a party to the action. However, inasmuch as the only issue left unresolved is the second counterclaim for attorney's fees and DRMBRE is, by its own admission not a party to the lease containing the attorney's fees clause, it can be dismissed as a party to the second counterclaim.

Conclusion

HSBC's motion for summary judgment is denied in part because its proposed alterations are declared to be structural changes as a matter of law. Furthermore, while defendants' cross motion for partial summary judgment does not request such a declaration, nor seek dismissal of any of the complaint's first four causes of action, the court may, upon searching the record before it, extend the scope of the requested relief pursuant to CPLR 3212 (b). Accordingly, the motion for summary judgment in plaintiff's favor is denied, and a declaration made in favor of the defendants that the proposed alterations are structural. Thus, the first four causes of action cannot succeed and must be dismissed. The fifth cause of action, which is the subject of both HSBC's motion and defendants' cross motion, is resolved as explained above and by the declaration made below in the decretal section. The sixth cause of action, also the subject of HSBC's motion and defendants' cross motion, is dismissed pursuant to the court's granting defendants' cross motion. Defendants' cross motion on their first counterclaim for a money judgment seeking additional rent in excess of \$249,371.19, i.e., the \$57,287.77 difference between the parties' calculations, is denied. Left to be decided is the defendants' second counterclaim for attorney's fees. While the complaint and first counterclaim are resolved by this decision, the second counterclaim shall be severed and continued under this index number, but DRMBRE is dismissed as a party to the second counterclaim.

As to the first four causes of action, the parties shall settle an order and judgment: (1) searching the record pursuant to CPLR 3212 (b); (2) denying HSBC Bank USA, National Association's motion for summary judgment in its favor on the first, second, third and fourth causes of action in the complaint; (3) declaring that the proposed alterations are structural; and

(4) dismissing the first, second, third and fourth causes of action.

As to the fifth cause of action, the parties shall settle an order and judgment: (1) granting in part and denying in part HSBC Bank USA, National Association's motion for summary judgment; (2) declaring that HSBC Bank USA, National Association is liable for additional rent under the branch lease for the period March 28, 2003 through March 27, 2009 on the basis of the tax fiscal year 2000-2001; and (3) denying as academic the branch of DRMBRE-85TH Fee LLC and 85TH Estates Company's cross motion seeking partial summary judgment in their favor.

As to the sixth cause of action, the parties shall settle an order: (1) denying the branch of HSBC Bank USA, National Association's motion for summary judgment in its favor on the sixth cause; and (2) granting the branch of DRMBRE-85TH Fee LLC and 85TH Estates Company's cross motion for partial summary judgment dismissing the sixth cause of action for an accounting.

As to the first counterclaim, the parties shall settle an order and judgment: (1) denying the branch of DRMBRE-85TH Fee LLC and 85TH Estates Company's cross motion which seeks partial summary judgment in their favor and entry of a money judgment in favor of 85TH Estates Company; and (2) dismissing the first counterclaim.

The order and judgment should also provide for the: (1) denial of the branch of DRMBRE-85TH Fee LLC and 85TH Estates Company's cross motion which seeks to dismiss the complaint against DRMBRE-85TH Fee LLC; and (2) severance and continuation of the second counterclaim for attorney's fees.

This is the decision of the court. Settle order/judgment.

Dated: September 23, 2010



J.S.C.

2010 Pt 12_104866_2009_002_LD_AG