

**700 Broadway 1891 LLC v Project for Pub. Spaces**

2011 NY Slip Op 30108(U)

January 13, 2011

Supreme Court, New York County

Docket Number: 603345/09

Judge: Louis B. York

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

LOUIS B. YORK

PRESENT: \_\_\_\_\_ J.S.C. Justice

PART 2

700 Broadway 1891 LLC

INDEX NO. 603345/09

MOTION DATE \_\_\_\_\_

- v -

Project for Public Spaces

MOTION SEQ. NO. 002

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 FOR DECISION  
**FILED**

JAN 19 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 1/13/11

Luy  
LOUIS B. YORK *s.c.*  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

700 BROADWAY 1891 LLC and  
WEITZ & LUXENBERG, P.C.,

Index No. 603345/09

Plaintiffs,

- against -

PROJECT FOR 'PUBLIC SPACES,

Defendant.

-----x

PROJECT FOR PUBLIC SPACES, INC.,

Third-Party Plaintiff,

- against -

WEITZ & LUXENBERG, P.C.,

Third-Party Defendant.

-----x

Index No. 591158/09

**FILED**

JAN 19 2011

NEW YORK  
COUNTY CLERK'S OFFICE

HON. LOUIS B. YORK, J.:

In this declaratory judgment action, defendant/third-party plaintiff, Project for Public Spaces, Inc., ("Project" or "Tenant"), moves, pursuant to CPLR 3211(a)(1) and (7), to dismiss the third, fourth, and fifth causes of action in the amended Complaint, to the extent that the causes of action seek recovery of Operating Expense Escalation costs and real estate taxes.

**BACKGROUND**

Plaintiffs 700 Broadway 1891 LLC ("700 Broadway") and Weitz & Luxenberg, P.C. ("Weitz & Luxenberg") (collectively, "Landlord") commenced this action seeking to recover damages based on Tenant's alleged breach of a Sub-lease agreement. The amended Complaint includes the following factual allegations.

### The Parties

700 Broadway is a New York limited liability company, and Weitz & Luxenberg is a 60-attorney Manhattan law firm. Both have their principal places of business at 700 Broadway, New York, New York.

Project is a New York not-for-profit corporation dedicated to helping people create and sustain public spaces and build stronger communities. Its principal place of business is located on the fourth floor of 700 Broadway, New York, New York.

Pursuant to a Sub-Lease agreement, commencing January 12, 2005, and ending November 30, 2014, Project leased a portion of the fourth floor in the office building located at 700 Broadway, New York, New York, from nonparty National Audubon Society ("NAS"). NAS had leased the office building from nonparty New York City Industrial Development Agency ("IDA"), a not-for-profit, tax-exempt organization, pursuant to a proprietary Master Lease, dated December 1, 1989. NAS financed the Master Lease through triple tax-exempt bonds issued by IDA. Among other things, the Master Lease required all sub-lessees of NAS to be not-for-profit, tax-exempt organizations.

In December 2006, IDA sold the office building to nonparty W2005/Lincoln 700 Broadway, LLC ("Lincoln"). At the closing, NAS paid the IDA triple tax-exempt bonds in full, and the Master Lease terminated.

On June 23, 2008, Lincoln sold the office building to 700 Broadway. At the time of the sale, EastWest Studies, Inc.

("EWI") and Project were the only two tenants in the office building. Simultaneously with the closing, 700 Broadway leased the second through ninth floors of the office building to Weitz & Luxenberg, subject to the leases and rights of EWI and Project. Pursuant to Article 35 of the 700 Broadway/Weitz & Luxenberg Lease, 700 Broadway assigned to Weitz & Luxenberg all rights and obligations as landlord under the existing leases. Lincoln notified the tenants of the assignment.

Project's Sublease & Rider

Exhibit B of Project's Sublease includes a schedule of Project's annual rent rate (see Not of Mot, Exh B to Kent Affid). In addition, paragraph 71 of the Rider to the Sublease states, in part:

Provided that Tenant is not then in default under any provision of this Lease beyond the applicable notice and cure period, if any, Tenant shall not be obligated to pay the monthly installments of Base Rent which would otherwise be due and payable for the months of February 2006, February 2008, February 2010 and February 2012

(Rider, Not of Mot, Exh B to Kent Affid).

The lease also provides for the payment of additional rent and other expenses. Paragraph 38 of the Rider defines the term "Additional Rent" to mean "[a]ll payments other than the annual Base Rent to be made by Tenant pursuant to this Lease" (*id.*). Paragraph 38 also states that, "in the event of any nonpayment [of Additional Rent], Landlord shall have all rights and remedies provided for herein or by law for nonpayment of rent" (*id.*).

Paragraph 63 of the Rider, entitled "Operating Expense

Escalation," states, in part:

Within twenty (20) days after being billed therefore by Landlord, Tenant shall pay Landlord as additional rent under this Lease its Pro Rata Share (hereinafter defined) of any increase in Operating Expense (hereinafter defined) of the Condominium Unit over and above said Operating Expenses for the base year January 1, 2005 through December 31, 2005. The bill shall be accompanied by a statement of annual operating expenses certified to by the chief financial officer of Landlord. The term "Operating Expenses" shall mean the aggregate of all costs and expenses incurred in the management, operation, maintenance and repair of Condominium Unit, including but not limited to expenses and costs of any nature whatsoever ... which are determined in accordance with sound management practices utilizing Generally Accepted Accounting Principles in the United states ("GAAP") to be Operating Expenses ...

(*id.*).

Paragraph 70 of the Rider grants Tenant the right to use the conference room located on the ninth floor of the office building, under certain specified terms and conditions, provided that Tenant is not in default of the Sublease (see *id.*).

Paragraph 20 of the Sublease, entitled "Building Alterations and Management," states:

Owner shall have the right at any time without the same constituting an eviction and without incurring liability to Tenant therefor, to change the arrangement and/or location of public entrances, passageways, doors, doorways, corridors, elevators, stairs, toilets or other public parts of the building ... . There shall be no allowance to Tenant for diminution of rental value and no liability on the part of Owner by reason of inconvenience, annoyance or injury to

business arising from Owner or other Tenants making any repairs in the building or any such alterations, additions and improvements. Furthermore, Tenant shall not have any claim against Owner by reason of Owner's imposition of such controls of the manner of access to the building by Tenant's social or business visitors as the owner may deem necessary for the security of the building and its occupants

(Sublease, Not of Mot, Exh B to Kent Affid).

Paragraph 66 of the Rider states that the Sub-Lease "shall be subject and subordinate at all times to the Mortgage and to the Master Lease" (Rider, Not of Mot, Exh B to Kent Affid).

Section 4.3 of the Master Lease, entitled "Payment in Lieu of Real Estate Taxes," states, in part:

So long as the Lessee remains ... an eligible not-for-profit corporation pursuant to the regulations of the New York City Department of Finance for purposes of determining exemption from New York City real estate taxes, for the period from the PILOT Commencement Date until the earlier of (i) the payment in full of all Bonds Outstanding in accordance with Section 10.01 of the Indenture, and (ii) the date on which the Agency no longer owns the facility Realty, the Lessee shall make no payments in lieu of real estate taxes with respect to the land constituting part of the Facility Realty. If the Lessee ceases to remain (or become, as provided above) so eligible, the lessee shall pay Full Land Taxes. Full Land Taxes shall mean that amount of taxes with respect to the land constituting part of the Facility Realty as the Lessee would otherwise be required to pay from time to time if it were the owner of such land

(Master Lease, Not of Mot, Exh C to Kent Affid)

The Disputes

By letter, dated August 19, 2008, Landlord presented Project with an invoice, in the amount of \$15,483.59, for "2007 and prior [Common Area Expenses] CAM expenses."

In October 2008, Landlord undertook extensive renovations to the exterior and interior of the office building. Safety concerns rendered the entire ninth floor of the office building, including the conference room, unavailable to all regular users. Landlord offered the existing tenants alternative conference room space, both in and out of the building. EWI and Project rejected the proposed alternative conference facilities as unsuitable.

EWI commenced an action (*The Institute for EastWest Studies, Inc. v 700 Broadway 1891 LLC*, Index No. 603275/08, Sup Ct, NY County), alleging that the unavailability of the conference room resulted in a partial eviction. The parties eventually settled the action, and 700 Broadway agreed to buy out the remaining term of EWI's Sublease. However, Landlord subsequently rejected Project's buyout efforts.

By letter, dated August 31, 2009, Landlord sent Project an invoice in the amount of \$52,744.17, for "2008 CAM expenses and 2008 Real Estate tax expenses." In addition, Landlord again requested payment of the \$15,483.59, for "2007 and prior CAM expenses." Landlord sent another letter dated September 21, 2009, requesting payment of the above expenses.

Project responded by letter dated September 21, 2009, essentially denying responsibility for payment of the invoices, and asserting that it was constructively evicted from the ninth floor conference room in the office building.

By letter, dated March 15, 2010, Landlord sent Project an invoice, in the amount of \$585,297.40, for CAM and real estate tax expenses for 2009. By letter dated March 25, 2010, Tenant again disputed liability for payment of the invoice, and this action ensued.

The Amended Complaint alleges causes of action for damages and declaratory relief based on Project's refusal to pay the expenses requested by plaintiffs. In particular, the first cause of action seeks judgment declaring that the unavailability of the ninth floor conference room does not constitute constructive eviction, and that Project is liable for all Base Rent and Additional Rent due under the Sublease. The second cause of action seeks judgment declaring that Project permanently forfeited its right to use the Conference Room, pursuant to paragraph 70 of the Sublease. In the third cause of action, Landlord seeks judgment declaring that the 2007, 2008, and 2009 Operating Expense Escalation invoices are valid and enforceable. In the fourth cause of action, Landlord seeks judgment declaring that Project is obligated to pay Base Rent for February 2010. In the fifth cause of action, Landlord seeks judgment declaring that Tenant is obligated to pay an increased Factor of up to \$14,510.53 per year, and to reimburse Landlord for previous expenditures relating to the electricity provided to Project. In the sixth cause of action, Landlord seeks judgment declaring that Landlord has the right to elect to terminate the Sublease based on the termination of the Master Lease. The seventh cause of action seeks damages based on Project's default under the

Sublease agreement, including the failure to pay Base Rent and Additional Rent for 2008 to 2010 and reimbursement for electrical expenses paid by Landlord.

While the submissions indicate that Project commenced a third-party action against Weitz & Luxenberg, the documents do not include the pleadings in that action.

Project now seeks to dismiss the third, fourth, and seventh causes of action in the amended Complaint, to the extent that the causes of action seek recovery of Operating Expense Escalation costs arising from work performed on the facade of the office building or real estate taxes.

#### DISCUSSION

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The Court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez, supra*).

Under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claim as a matter of law" (*id.*). In asserting a motion under CPLR 3211(a)(7), however, the Court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*id.*, quoting *Guggenheimer v Ginsburg*, 43 NY2d

268 [1977]).

As stated, the third cause of action seeks judgment declaring that the invoices for payment of the 2007, 2008, and 2009 expenses Operating Expense Escalation invoices are valid and enforceable under Project's Sublease. This claim is also incorporated into the relief requested in the fourth and seventh causes of action. As further stated, Landlord sent Project invoices for 2007 CAM expenses, in the amount of \$15,483.59; 2008 CAM and real estate tax expenses in the sum of \$52,744.17; and 2009 CAM and real estate tax expenses in the sum of \$585,297.40.

Project contends that the terms of the lease agreements do not require it to pay any real estate taxes and operating expenses relating to Landlord's work on the facade of the office building. However, Landlord argues that Tenant's objections to the expenses are based on a strained reading of selected portions of the parties' agreements, and that a thorough reading of the Master Lease and Sublease supports the position that the parties intended that Tenant pay its pro rata share of all maintenance and repair costs for the office building, including work on the facade, and real estate taxes.

It is well established that a clear and unambiguous contract must be enforced according to its terms (see *Reiss v Financial Performance Corp.*, 97 NY2d 195, 198 [2001]). This principle is particularly important in the context of real estate transactions, where commercial certainty is a paramount concern, and where the instruments are negotiated between sophisticated, counseled business people negotiating at arms' length (*Rocar*

*Realty Northeast, Inc. v Jefferson Valley Mall Ltd.*, 38 AD3d 744, 746-747 [2d Dept. 2007]). The same rules of construction applicable to contracts generally apply in the interpretation of leases (see *George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 217 [1978]).

Construed in the light most favorable to Landlord, the pleadings state a valid cause of action for operating expense escalation for 2007, 2008, and 2009. "It is axiomatic that a contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed (*Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995]). As stated, the Sublease requires Tenant to pay annual base rent and additional rent, including operating expenses. A review of the submissions reveals no documentary evidence to conclusively establish that the parties intended to exclude work on the facade of the building from operating expenses. Moreover, Project's objection to the specific charges are unavailing at this juncture, where the inquiry is whether Landlord has a cause of action, not whether it has stated one (see *Leon v Martinez*, *supra*). Thus, the branch of the motion that requests dismissal of so much of the third, fourth and seventh causes of action as seek recovery for Operating Expense Escalation costs must be denied.

Similarly, the pleading states a valid claim for recovery of real estate taxes. As stated, the parties' Sublease is subject and subordinate to the Master Lease. Section 4.3 of the Master Lease essentially states that not-for-profit tenants may become

liable for real estate taxes if the office building is sold to a for-profit owner (Master Lease, Not of Mot, Exh C to Kent Affid). Thus, the branch of the motion that requests dismissal of so much of the third, fourth and seventh causes of action as seek recovery for real estate taxes must also be denied.

Accordingly, it is .

ORDERED that the motion to dismiss is denied; and it is further

ORDERED that defendant is directed to serve an answer to the amended Complaint within 20 days after service of a copy of this order with notice of entry.

Dated: 1/13/11

ENTER:

*[Handwritten Signature]*  
\_\_\_\_\_  
J. S. C.

**LOUIS B. YORK**  
J.S.C.

**FILED**  
JAN 19 2011  
NEW YORK  
COUNTY CLERK'S OFFICE