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

PRESENT: EMILY JANE GOODMAN PART 17

Index Number : 114046/2009

132 EAST 35TH ST. OWNERS

VS

132 E 35TH STREET

Sequence Number : 003

PARTIAL 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 Cond Cross Motion are decided per attached

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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

Dated: 3/24/11

EMILY JANE GOODMAN J.S.C.

Check one: ☑ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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132 EAST 35th ST. OWNERS INC.,

Plaintiff,

-against-

132 E 35th STREET CO.,

Defendant.

Index No. 114046/09

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Emily Jane Goodman, J.S.C.:

This action involves the question of whether defendant 132 E 35th Street Co., a proprietary lessee of a number of apartments in a cooperative run by plaintiff 132 East 35th St. Owners Inc., (the Corporation), is obligated to pay the Corporation for electricity used by defendant's subtenants. In this motion, defendant moves, pursuant to CPLR 3212, for partial summary judgment dismissing the complaint, and granting its first counterclaim for a declaration as to its rights in the matter. The Corporation cross-moves, pursuant to CPLR 3212, for partial summary judgment declaring that defendant is required to pay its subtenants' electrical charges, and for partial summary judgment dismissing defendant's first, second, third and fourth counterclaims.

I. Background

Prior to 1982, defendant was the owner of the subject building, located at 132 East 35th Street, New York, New York

(building). In that year, defendant converted the building to cooperative ownership, pursuant to an offering plan (Offering Plan). Notice of Motion, Ex. D. The building was subsequently sold to the Corporation. Defendant became the proprietary lessee of a number of apartments in the building (defendant's apartments), mostly occupied by rent stabilized tenants who had declined to purchase their apartments, thus becoming defendant's subtenants. Some of defendant's apartments are occupied by subtenants paying market rate. Apparently, some of defendant's apartments are empty.

All of the subleases for the defendant's apartments from 1982 required the subtenants to obtain electricity from Con Edison. Con Edison provided separate meters for each apartment in the building prior to 2001.

In 2001, the Corporation determined that it would install a master meter in the building to measure all of the electricity used in the building, which would allow the Corporation to purchase electricity from other vendors than Con Edison. The plan called for the installation of separate submeters in each apartment, although, in some cases, the old Con Edison submeters were deemed sufficient.

Residents of the building were given the option to join in this plan in a Memorandum dated July 3, 2001 [Memorandum]. Notice of Motion, Ex. F. Specifically, the Memorandum stated

that:

> Being a RENTAL RESIDENT you have the OPTION of becoming a submetered tenant as your neighbors are, or you may remain a customer of the Consolidated Edison Company. The Corporation would appreciate your joining the rest of the Residents in the building by becoming a submetered Resident ...
>
> In order to become submetered or to remain a Con Edison customer it will be necessary to sign the agreement at the conclusion of this informational letter and return it to the Managing Agent ...
>
> No response will be taken as affirmative.

The Memorandum further provides that "[t]he new meters will be read monthly and bills prepared by Bay City Metering Company, Inc., a private Submetering Company retained by the corporation. The monthly bill will indicate all of the charges and most of the information now contained on the Consolidate Edison monthly bill." *Id.* The Memorandum goes on to say that "[t]he completed bills are sent to Residents by the Managing Agent. The Residents will pay the monthly bill for electrical service to the CORPORATION directly, NOT to the Con Edison Company, NOR to the Bay City Metering Company, Inc., NOR to the Apartment Owner [i.e., defendant] [emphasis in original]." *Id.* The Memorandum explains that the new system will "provide electrical service to the BUILDING at the lowest possible cost" because the electricity will be purchased in bulk, resulting, allegedly, in bills at least 15% lower than owed previously by each tenant.

Apparently, at some point, some subtenants in defendant's

apartments, who had been receiving submetered electricity, failed to pay their bills. The Corporation commenced this action directly against defendant claiming that it was responsible for paying the electric charges owed by these subtenants, on the ground that defendant, having received the Memorandum, had never opted out of the sub-metering program, and, as such, was a "Resident" obligated to pay the unpaid bills.

Defendant counters that the Corporation dealt entirely with the building's residents, i.e., the persons abiding in each apartment, including defendant's subtenants, when the Corporation implemented the sub-metering program, billing defendant's subtenants for years without defendant's participation. Defendant maintains that nothing in the Memorandum or the Offering Plan requires defendant to pay its subtenants' electric bills.

The Corporation contends that the matter is governed by language in each proprietary lease, as incorporated in the Offering Plan, which reads, in pertinent part,

> CHARGES FOR GAS AND ELECTRICITY
>
> 46. If at any time or times during the terms of this Lease the consumption of gas or electricity, or both, in the Apartment is measured by a meter which also measures consumption outside the Apartment, the Lessor may determine from time to time by resolution of the Board of Directors thereof, the charges, if any, to be paid by the Lessee on account of such consumption of such gas or electricity, or both, and any such charges shall be payable monthly in advance or in such payments or installments as shall be required by the Directors,

> and at such times as shall be provided in such resolution.

Proprietary Lease, Offering Plan, at 233.[1]

Based on this language, the Corporation claims that, having switched to a system involving a master meter for the entire building, meting out electricity as needed to individual tenants, defendant became liable to pay the electrical charges on the apartments for which it holds proprietary leases, regardless of the language in the Memorandum, which seems to indicate that it is the individual resident subtenants who are to pay the Corporation directly for their electrical usage.

II. Discussion

"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 University Medical 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

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[1]The Corporation is not in possession of any of the proprietary leases for the defendant's apartments, but, defendant, which has not provided any leases, despite the Corporation's requests, does not dispute the content of the leases as provided by the Corporation herein.

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 (1978); *Gross v Amalgamated Housing Corporation*, 298 AD2d 224 (1st Dept 2002).

The resolution of this dispute rests in the language employed by the parties in the relevant documents. The interpretation of unambiguous contracts is a matter of law for the court's determination. *805 Third Avenue Corp. v M.W. Realty Associates*, 58 NY2d 447 (1983); *Fetner v Fetner*, 293 AD2d 645 (2d Dept 2002). It is settled that "'when parties set down their agreement in a clear, complete document, their writing should ... be enforced according to its terms.'" *South Road Associates, LLC v International Business Machines Corporation*, 4 NY3d 272, 277 (2005), quoting *Vermont Teddy Bear Company v 538 Madison Realty Company*, 1 NY3d 470, 475 (2004). "[T]he cardinal rule" of the interpretation of contracts is that "where the language of the contract is clear and unambiguous, the parties' intent is to be gleaned from the language of the agreement and whatever may be reasonably implied therefrom [internal quotation marks and citation omitted].'" *Reiss v Financial Performance Corporation*, 279 AD2d 13, 29 (1st Dept 2000), *affd as mod* 97 NY2d 195 (2001); *see also Dudick v Gulyas*, 4 AD3d 604 (3d Dept 2004).

The plain meaning of paragraph 46 of the Proprietary Lease does not support the Corporation's argument. The section envisions a situation where a master meter reads the electric usage stemming both from the apartments, and from areas outside the apartment, at which time the Corporation, through a resolution of its Board, would have to determine which part of that usage, if any, would be due from the lessees of the apartments. However, in the arrangement now in force, despite the existence of a master meter, submeters measure the amount of use for which each individual apartment lessees is responsible. Thus, no "resolution of the Board of Directors" is needed to determine the cost to apartment lessees. Consequently, paragraph 46 does not apply to the present situation.

In the absence of any controlling language in the Offering Plan or Proprietary Leases, the court is left with the Memorandum, as a writing presented by the Corporation, intending to create an agreement with each of the Building's "Residents" concerning whether or not they wished to be included in the submetering. From its terms, it is apparent that the Corporation intended that the Memorandum be binding on its "Residents."

Although "Resident" is not defined, it appears from the Memorandum that the term cannot refer to defendant, as the "Apartment Owner" (that is, defendant), is specifically singled out from the Residents, as a party to which payments from

Residents should not be made. By making this statement, the Corporation is apparently aiming the Memorandum at, among other parties, defendant's subtenants, because only apartment subtenants have "Apartment Owners." Therefore, the Memorandum anticipates payments will be made directly from defendant's sub-tenants to the Corporation, and signifies that defendant is not itself a party intended to be subject to the new sub-metering program. The fact that the Memorandum is directed to "All Sponsor Tenants" (on the top of the Memorandum), is irrelevant, as the body of the Memorandum is directed at the actions and obligations of apartment "Residents."[2]

Both defendant and the Corporation discuss at length communications between the parties, and the alleged course of dealing between the two over the years since the submetering went into effect. For instance, defendant insists that there was no time when it was singled out by the Corporation as a party owing payment to the Corporation for electrical charges, while the Corporation, through its agent, Robert Grant, in its sur-reply, claims, without benefit of any documentation, that it tried for years to make defendant itself pay for the charges.

The Memorandum is a document which was meant by the

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[2]The only exceptions appear to be apartments owned by defendant which are not occupied by subtenants. Defendant admits that it is the resident and owner of these apartments. However, these apartments are not at issue.

Corporation to bind the parties to which it was addressed.[3] Under that writing, defendant is not obligated to pay electrical charges which will be billed by Bay City Metering to its subtenants. As such, it is not appropriate to discuss the extrinsic and parol evidence offered by the parties (such as the course of conduct, and communications between the parties) to determine the writing's intent (*see South Road Associates LLC v International Business Machines Corporation*, 4 NY3d 272 [2005]), and the above arguments are without effect.[4]

III. Conclusion

The evidence as presented in the parties' writings does not evince an intent to obligate defendant to pay the electric

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[3]The court makes no finding as to whether the Corporation can unilaterally bind parties to whom the Memorandum is addressed.

[4]The Corporation's references to the Rights and Obligations section of the Offering Plan (paragraph 10), which bars certain increases from being imposed on defendant, under certain circumstances, and requires that, after the closing date, that the building be maintained and operated in substantially the same manner and condition, as on the closing date, are not persuasive. The Corporation has not demonstrated that it is in fact maintaining and operating the building in substantially the same manner and condition as a result of the change to submetering. Moreover, contrary to the Corporation's one paragraph argument, assuming that the installation is deemed a substantial change, paragraph 10 of the Offering Plan does not render paragraph 41 of the Proprietary Lease meaningless. Assuming a conflict, the Corporation concedes that the Offering Plan governs. Further, assuming that the installation is deemed a substantial change, adoption of the Corporation's argument renders the Offering Plan's requirement that the building be operated in the same manner and condition, meaningless.

charges amassed by its subtenants under the submetering scheme imposed by the Corporation on the building's residents in 2001. Therefore, defendant is entitled to a judgment declaring that fact, as well as dismissal of the Complaint, which contains a First Cause of Action for a declaration that defendant is obligated to pay the electric charges of its subtenants and a Second Cause of Action for legal fees, arising out of the First Cause of Action. The Corporation's cross motion for summary judgment dismissing defendant's counterclaims is denied, as the Corporation has made no real effort to oppose these claims.

Accordingly, it is

ORDERED that the motion brought by defendant 132 E 35th Street Co. for partial summary judgment on its first counterclaim and for dismissal of the Complaint is granted and the Complaint is dismissed; and it is further

ORDERED that the cross motion by plaintiff 132 Street 35th St. Owners Inc. for partial summary judgment for a judicial declaration that defendant is obligated to pay the electric charges of its subtenants, and for an order dismissing all of defendant's counterclaims is denied; and it is further

ADJUDGED and DECLARED that defendant 132 E 35th Street Co. is not obligated to pay the electric charges of its subtenants, as measured by the submeters in its subtenants' apartments; and it is further

ORDERED that the remainder of the action is severed and shall continue on the Second Counterclaim.

This Constitutes the Decision and Order of the Court.

Dated March 24, 2011

ENTER:

J.S.C.

EMILY JANE GOODMAN

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).