

123 E. 18th St. Corp. v Merlagre, Inc.

2011 NY Slip Op 32460(U)

September 6, 2011

Sup Ct, NY County

Docket Number: 112781/09

Judge: Judith J. Gische

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

PRESENT: **HON. JUDITH J. GISCHE**

PART 10

J.S.C.

Index Number : 112781/2009
 123 EAST 18TH STREET
 VS.
MERLAGRE
 SEQUENCE NUMBER : 001
 PARTIAL SUMMARY JUDGMENT

INDEX NO. 112781/09
 MOTION DATE _____
 MOTION SEQ. NO. 001
 MOTION CAL. NO. _____

his 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 (s) and cross-motion(s)
 decided in accordance with
 the annexed decision/order
 of even date.**

FILED

SEP 08 2011

NEW YORK
 COUNTY CLERK'S OFFICE

Dated: SEP 6, 2011

J.S.C.
HON. JUDITH J. GISCHE *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: PART 10

-----X
123 EAST 18TH STREET CORP.,

Plaintiff,

-against-

MERLAGRE, INC., d/b/a PAUL AND JIMMY'S
RESTAURANT f/k/a 54 IRVING PLACE CORP.,

Defendants.

-----X

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers

Pltf n/m 3212, 3211(b) and 3013 w/MSB affirm, SK affid, exhs
Def opp w/ AMD affirm, LA affid
Pltf reply w/ MSB affirm

Numbered

FILED
1
3

-----X
Gische, J.S.C.:

SEP 08 2011

Upon the foregoing papers, the decision and order of the court is as follows.

NEW YORK
COUNTY CLERK'S OFFICE

This is an action arising from an alleged breach of a commercial lease. Issue has been joined and the Plaintiff, 123 East 18th Street Corp. ("123 East" or "Plaintiff"), now seeks partial summary judgment against the defendant, Merlagre, Inc., d/b/a Paul and Jimmy's Restaurant f/k/a 54 Irving Place Corp. ("Merlagre" or "Defendant"), on its first cause of action. Plaintiff also seeks to dismiss Defendant's first, second, third, fourth and fifth affirmative defenses. Defendant opposes the motion. Since the note of issue has not yet been filed, the motion is properly before the court and will be decided on the merits. CPLR § 3212; Brill v. City of New York, 2 N.Y.3d 648 (2004).

Facts and Arguments Presented

Plaintiff, owner and landlord of the building known as 123 East 18TH Street, New

York, New York ("Premises"), commenced this action seeking, *inter alia*, a judgment for \$199,240.34 in unpaid consumer price index ("CPI") charges allegedly due from Defendant. The parties entered into an Agreement of Lease, dated January 3, 1995, that was to expire on April 30, 2005 ("Initial Lease"). The Initial Lease was modified by Rider to Store Lease dated May 25, 2000 ("Lease Modification") (Initial Lease and Lease Modification collectively referred to as "Lease"). Plaintiff claims that pursuant to the Lease, Defendant was required to tender not only base rent and a percentage of the real estate taxes, but that commencing May 1, 2005, the net annual fixed rent due was to be adjusted annually in accordance with the Cost of Living Adjustment Formula ("COLA") as provided in Article 42 of the 1995 Rider to Lease ("Initial Lease Rider"). COLA is a rent escalation tied to the CPI published by the Bureau of Labor Statistics of the U.S. Department of Labor for New York City. Plaintiff argues that despite the escalation date of May 1, 2005, the Defendant has continued to pay only the \$8,000.00 base rent amount. Article 1 of the Rent Rider annexed to the Initial Lease ("Initial Rent Rider") provides that the Defendant promises to pay Plaintiff base rent at the following rate:

- (1) \$6,250.00 from May 1, 1995 to August 31, 1996;
- (2) \$6,500.00 from September 1, 1996 to December 31, 1997;
- (3) \$6,750.00 from January 1, 1998 to March 31, 1998;
- (4) \$7,000.00 from April 1, 1998 to April 30, 2000;
- (5) \$7,250.00 from May 1, 2000 to July 31, 2001;
- (6) \$7,500.00 from August 1, 2001 to October 31, 2002;
- (7) \$7,750.00 from November 1, 2002 to January 31, 2004; and
- (8) \$8,000.00 from February 1, 2004 to April 30, 2005.

Article 2 of the Initial Rent Rider sets forth that Defendant had "the option to extend the [Initial Lease] for an additional term of five years, from May 1, 2005 through April 30, 2010 ... The rental rate shall be as follows: For the period from May 1, 2005 through April

30, 2010 the monthly rent shall be \$8,000.00 payable on or before the first date of each month in advance.”

Pursuant to Article 41 of the Initial Lease Rider, Defendant agreed to pay an annual real estate tax escalation in the amount of 25% of any increase in real estate taxes over the base tax year July 1, 1986 and ending June 30, 1987.

Pursuant to Article 42 of the Initial Lease Rider, however, Defendant agreed to pay a rent escalation commencing May 1, 2005 and recalculated annually thereafter.

Specifically, the Article 42(b) of the Initial Lease Rider provides COLA as follows:

(b) Effective as of and on May 1, 2005, and annually thereafter on the first day of May of every year of the lease term thereafter, there shall be made a cost of living adjustment at the then fixed annual net rent payable hereunder.

(i) In the even the [Consumer Price index as published by the Bureau of Labor Statistics of the U.S. Department of Labor, for New York City, all item (“Price Index”)] on May 1, 2005 reflects an increase over the Price Index for May, 1995 then the fixed annual net rent originally herein provided shall be multiplied by the percentage difference between the Price index for May 1995 and the Price Index on May 1 2005. The adjusted fixed annual net rent (as same may be periodically changed) shall be payable in the monthly installments until May 1, of the following year.”

(ii) The [C]ost of [L]iving [A]djustment [F]ormula set forth in Article 42(b)(i) shall be recomputed as of and become effective on the first day of May 2005 and annually thereafter on the first days of May in each and every year of the term of this lease.

Prior to the expiration of the Initial Term, on May 25, 2000, Plaintiff and Defendant entered into the Lease Modification. The two-page Lease Modification is comprised of eight paragraphs and modifies only certain provisions of the 17-page Initial Lease.

Plaintiff offers the following interpretation of the Lease Modification: (1) Paragraph 1 of the Lease Modification modified and annexed the Initial Term for the period commencing June 1, 2000 and terminating May 31, 2020 (“Extended Lease Term”); (2)

Paragraph 3 of the Lease Modification modified the real estate tax escalation to be paid by Defendant; (3) Paragraph 4 of the Lease Modification eliminated the Renewal Term Rental Charge provided for in Rent Rider of the Initial Lease. Furthermore, Plaintiff claims that although the Lease Modification expressly modified certain terms of the Initial Lease, no modification was made to Article 42 of the Initial Lease Rider and, therefore, it remains in full force and effect.

Defendant opposes the motion and asserts that, *inter alia*, pursuant to the terms of the Lease, the base rent for the extension period of May 1, 2005 through April 3, 2010 was to be \$8,000.00 per month plus a sum equal to the percent increase of the CPI, if any, during the specified period of time. On January 1, 1997, Merlagre purchased the lease and good will of the business Paul & Jimmy's Restaurant from 54 Irving Place Corp. and continued to operate the business under the same name. Defendant claims that in 1999 a principal of 123 East furnished Merlagre with a Letter of Intent. Defendant maintains that it was granted a small business loan for 90% of the purchase price, but soon thereafter the offer to sell was withdrawn by Plaintiff. Defendant claims the Lease Modification was subsequently entered into on May 25, 2000 as a concession for plaintiff's failure to consummate the sale of the premises.

Defendant further claims that the Lease Modification was entered into by the parties with the understanding that the COLA stated in the Initial Lease Rider would only apply to the rent if a five year extension was exercised in the year of 2020. Furthermore, Defendant claims that the understanding between the parties was that the base rent would be \$8,000.00 per month, from June 1, 2000 through June 1, 2020, and would only be recomputed if the tenant exercised the five year lease extension after 2020. Defendant

maintains that the Lease Modification defines "additional rent" as being 25% of the real estate taxes due on the Premises, application of which was to commence June 1, 2000. Defendant cites as support the an undated Tax Notification Statement, which it claims was submitted to it in June of 2007, wherein Plaintiff acknowledged that the total monthly rent due was \$8,000.00 plus additional rent, such additional rent being only the 25% of the real estate taxes. Defendant argues the Tax Notification Statement is otherwise completely devoid of a demand, request or provision regarding the alleged CPI escalation that was to commence on May 1, 2005 and, therefore, cannot now be collected by Plaintiff.

In the alternative, Defendant argues that the CPI escalation is inapplicable because plaintiff abandoned the claim. Defendant maintains that the first time Plaintiff demanded payment for the CPI escalation was in a June 19, 2007 demand letter through their attorneys, Sol M. Israel & Associates. Pursuant to paragraph 27 of the Initial Lease "[e]xcept as otherwise in this lease provided, a bill, statement, notice or communication which Owner may desire or be required to give to Tenants, shall be deemed sufficiently given if rendered if, in writing, delivered to Tenant personally or sent..." Defendant claims that Plaintiff waited two years to advise it of the proportionate increase resulting from the CPI escalation and to request the alleged additional rent due. Defendant further claims that throughout the two year period plaintiff failed to notify Defendant that it was in default of rent pursuant to paragraph 47 of the Lease.

In its Reply, Plaintiff first argues that Defendant did not oppose its motion to dismiss the affirmative defenses, and that this portion of the motion must be granted. Plaintiff further claims that since Defendant only disputes that any additional rent is due, but does not challenge the amount Plaintiff claims is due or how it was calculated by Plaintiff, that

there is no triable issue of fact as to specific liability.

Plaintiff then argues that Defendant's opposition is erroneous in that (1) there was no implicit release of the Defendants from the obligation to pay CPI charges, because the Lease Modification only references "base rent" and taxes during the renewal term and (2) there was no waiver of a claim for CPI escalation, due to a lack of notice, because no such notice is required by the Lease.

Plaintiff's first cause of action is for Breach of Contract and requests judgment against Defendant for the following: (a) money damages in the amount of \$165,750.54 for payment of unpaid and uncollected rent from May 1, 2005 to September 1, 2009 together with interest from May 1, 2005, attorney's fees, costs and such other relief as the Court may deem proper and equitable; (b) Liquidated Damages, as reserved under the Lease, for the payment of fixed rent and additional rent due and owing, from October 1, 2009 through the expiration of the Lease together with attorney's fees, costs and such other relief as the Court may deem proper and equitable; and © Possession of the Premises.

Defendant's first, second, third, fourth and fifth affirmative defenses are as follows: (1) Plaintiff "123 EAST 18TH STREET CORP." is a non-existing corporation and therefore lacks capacity to sue; (2) Plaintiff has failed to join a necessary and indispensable party; (3) The action is barred based on the modification of the "Lease"; (4) The action is barred based on the doctrine of Laches; and (5) The Complaint as served upon the Defendant was not endorsed in accordance with 22 NYCRR § 130-1.1-a.

Discussion

[I] Dismissal of Merlagre's Affirmative Defenses.

Pursuant to CPLR § 3013, statements in a pleading shall be sufficiently particular

to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense. CPLR § 3211 (b) provides that a party may move for judgment dismissing one or more defenses, on the ground that a defense is not properly stated or has no merit.

Defendant's first affirmative defense asserts that Plaintiff is a non-existent corporation and, therefore, lacks capacity to sue. Plaintiff, through the affidavit of Stuart Kreiner and further supported by its Exhibit G, which is a Selected Entity Status Information printout from the New York State Department of State, Division of Corporations, has sufficiently established that it is a Domestic Business Corporation whose certificate of incorporation was filed February 5, 1945. Therefore, Defendant's first affirmative defense is dismissed because it lacks merit.

Defendant's second affirmative defense asserts that Plaintiff has failed to join a necessary and indispensable party. Based on the documents submitted by all present parties, it is clear that the plaintiff has named the Defendant, which is the tenant under the Lease. It is also clear, based on the record, that no other party is responsible for Defendant's obligations. Therefore, as there is no other necessary and indispensable party, Defendant's second affirmative defense is dismissed because it lacks merit.

Defendant's third affirmative defense asserts that the action is barred based on the Lease Modification. Based on the plain language of the Lease Modification, there is no restriction to filing by one party against the other. Therefore, this action is not barred by the terms of the modification of the Lease and Defendant's third affirmative defense is dismissed because it lacks merit.

Defendant's fourth affirmative defense asserts that the action is barred based on the doctrine of Laches. Laches is an equitable doctrine and such doctrines are not applicable to actions in law. It is well settled that the defense of laches is not a viable defense to commercial nonpayment disputes. (See Diversified Bldg. Co., LLC v Nader Enters., LLC, 30 Misc.3d 1222(A) [2011] citing Landlord and Tenant Practice in New York, Section 14:351 at 14-186 [West's NY Practice Series, vol F, 2007] footnote No.1, citing: Kalimian v. Collezioni Fifth Ave., Inc., N.Y.L.J., 11/13/98, p. 28, col. 3 [App. Term, 1st Dept.]; U.B.O. Realty Corp. v. Fulton, N.Y.L.J., 9/8/93, p. 21, col. 1 [App. Term, 1st Dept.] [laches "finds application only in the context of residential non-payments"]). Therefore, this action is not barred by the doctrine of Laches and Defendant's fourth affirmative defense is dismissed because it lacks merit.

Defendant's fifth affirmative defense asserts that the Complaint as served upon Defendant was not endorsed in accordance with 22 NYCRR § 130-1.1-a. 22 NYCRR § 130-1.1-a requires that "every pleading, written motion, and other paper, served on another party or filed or submitted to the court shall be signed by an attorney, or by a party if the party is not represented by an attorney, with the name of the attorney or party clearly printed or typed directly below the signature." The Complaint was signed by "Peter A. Kreiner, Esq." and the Reply was signed by "Seth A. Kreiner, Esq." both of Kreiner and Kreiner, LLC. Therefore, Defendant's fifth affirmative defense is dismissed.

[II] Plaintiff's Motion for Summary Judgment

[a] Standard applied to Motions for Summary Judgment

A party seeking summary judgment in its favor has the initial burden of setting forth evidentiary facts to prove a *prima facie* case, such that it would be entitled to judgment in

its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Only if this burden is met, will it then shift to the opposing party who must establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. When an issue of law is raised in connection with a motion for summary judgment, the court may and should resolve it without the need for a testimonial hearing. See Hindes v. Weisz, 303 A.D.2d 459 (2nd Dept. 2003).

At the outset, the Court rejects any claim that this motion is premature since no discovery was held. There is no showing that further discovery would be necessary to decide what is essentially a contract dispute. A general belief, unsupported by any specific details, that further discovery may reveal additional facts to support the case, does not provide sufficient basis pursuant to CPLR 3212(f) for delaying a determination of a summary judgment motion (See Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 A.D.3d 324 [1st Dept 2004]).

[b] *The Effect of the Lease Modification*

Where a lease is modified, the lease and its modifications must be taken together and construed as one contract in order to carry out the parties' intent. 74 N.Y. Jur. 2d, Landlord and Tenant, § 59 (1999). Where a lease is modified, the provisions for "rent" in the lease modification do not preclude the collection of "additional rent" under the original lease. See Executive Park West I v. Jung, 224 A.D.2d 990 [4th Dept. 1996]; 74 N.Y. Jur. 2d, Landlord and Tenant, §§ 60, 72. Therefore, the intentions of the parties to an agreement modifying an original lease will be determined by the language used. Raleigh Assoc. v.

Henry, 302 N.Y. 467, 474 (1951); see Barnan Assoc. LLC v. 196 Owners Corp., 14 N.Y.3d 780, 784 (2010). Where a lease is subsequently modified, the lease and its modifications must be taken together and construed as one contract to effect the intentions of the parties. 350 East 30th Parking, Ltd. v. Board of Managers of 350 Condominium, 280 A.D.2d 284 (1st Dept. 2001). Changes in a lease will not be presumed or implied. 455 Seventh Ave v. Frederick Hussey Realty Corp., 295 N.Y.166 (1946). Furthermore, it is well settled law that when a contract is clear and unambiguous, interpretation of the contract is a question of law and no trial is necessary to determine the legal effect of the contract. See Bethlehem Steel Co. v. Turner Constr. Co., 2 N.Y.2d 456 (1957); see e.g., Daiichi Seihan USA v. Infinity USA, 214 A.D.2d 487 (1st Dept. 1995).

The Initial Lease and Lease Modification, when read together, require the tenant to pay "base rent" as well as separate a CPI escalation. Here, Defendant argues, in its opposition, that the Lease Modification, which specifically only referenced "base rent" and taxes during the renewal term, implicitly released Defendant from the obligation to pay CPI charges from the years of 2000 to 2020. This is an erroneous reading of the documents. While the Lease Modification does eliminate other obligations (such as the obligation to make an annual payment to Plaintiff of \$5,000.00), there is no express reference to an elimination of the CPI charge. Therefore, a reading of the contracts will not support a conclusion that Defendant's obligations to tender monies pursuant to the COLA were vitiated. If the parties had wanted to eliminate Article 42, they could have expressly provided for this in the Lease Modification. In this case, the Lease Modification, which is clear and unambiguous on its face, does not modify or amend Article 42 of the Initial Lease Rider, therefore, the Defendant has breached its obligation under the Lease.

(ii) *Waiver*

Defendant argues that Plaintiff has waived the right to collect the COLA by having failed to seek it for years. Defendant relies on a June 19, 2007 letter in which the landlord acknowledges that he has not billed for any COLA increase for a two year period. Waiver is the voluntary abandonment or relinquishment of a known right (Excel Graphics Technologies, Inc. v. CFG/AGSCB 75 Ninth Ave., L.L.C., 1 A.D.3d 65, 69-70 [1st Dept. 2003] citing Jefpaul Garage Corp. v. Presbyterian Hosp., 61 N.Y.2d 442, 446 [1984]; see also 457 Madison Ave. Corp. v. Lederer De Paris, Inc., 51 A.D.3d 579 [1st Dept. 2008]). Here, Defendant argues that by accepting payment of rent with knowledge of Defendant's breach, Plaintiff has waived the breach as a matter of law. In Excel Graphics Technologies, Inc., as here, the lease contained a non-waiver and merger clause that provided: "The receipt by Landlord of rent with knowledge of the breach of any covenant of this lease shall not be deemed a waiver of such breach and no provision of this lease shall be deemed to have been waived by Landlord unless such waiver be in writing, signed by the Landlord (*Id.*)" The court held that tenant's waiver argument was barred by the clause, stating, "[i]ts language is clear and unambiguous. The parties having mutually assented to its terms, the clause should be enforced to preclude a finding of waiver of the conditions precedent to renewal" (*Id.*). Thus, it is clear that the parties to a commercial lease may mutually agree that conduct, which might otherwise give rise to an inference of waiver, shall not be deemed a waiver of specific bargained for provisions of a lease (Excel Graphics Technologies, Inc. v. CFG/AGSCB 75 Ninth Ave, L.L.C., 1 A.D.3d at 69-70; see Monarch Information Services v. 161 William Assoc., 103 A.D.2d 703 [1st Dept. 1984]). Here, Article 24 of the Initial Lease contains just such a provision, and this provision was

not modified or nullified by the Lease Modification. Consequently, the failure to seek the COLA increase in the past is not a waiver.

Conclusion

Plaintiff's motion for partial summary judgment is granted on its first cause of action to the extent requested. Plaintiff has established that the total damages due and owing by Defendant, from May 1, 2005 through April 2011, are \$199,240.34. Defendant has not come forward with any triable issues of fact that the sum is incorrect. Plaintiff's motion to dismiss Defendant's first, second, third, fourth and fifth affirmative defenses is granted as well, for the reasons stated herein.

For the foregoing reasons, it is hereby:

Ordered that plaintiff, 123 EAST 18TH STREET CORP.'s, motion for partial summary judgment against defendant, MERLAGRE, INC., d/b/a PAUL AND JIMMY'S RESTAURANT f/k/a 54 IRVING PLACE CORP., on its first cause of action is granted to the extent provided above; and it is further

Ordered that Plaintiffs motion to dismiss Defendant's first, second, third, fourth and fifth affirmative defenses is also granted; and it is further

Ordered that a **Status Conference** is presently scheduled for **November 10, 2011 at 9:30 a.m., in Part 10, room 232, 60 Centre Street, N.Y. N.Y.** on the remaining claims; and it is further

Ordered that any relief not expressly addressed is hereby denied and it is further

Ordered that this constitutes the decision and order of the court.

Dated: New York, New York
September 6, 2011

So Ordered:

NEW YORK
COUNTY CLERK'S OFFICE
Hon. Judith J. Gische, J.S.C.

FILED

SEP 08 2011