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

PRESENT: EMILY JANE GOODMAN PART 17

Index Number : 105751/2009
K-BAY PLAZA, LLC
vs.
KMART CORPORATION
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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 is decided as stated

FILED
OCT 07 2011
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/3/11

EMILY JANE GOODMAN J.S.C.

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

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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K-BAY PLAZA, LLC,

Plaintiff, Index No. 105751/2009

-against-

KMART CORPORATION,

Defendant.

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Emily Jane Goodman, J.S.C.:

In this lease rent dispute, plaintiff landlord, K-Bay Plaza, LLC (K-Bay), moves for an order granting it summary judgment against defendant tenant, Kmart Corporation (Kmart), or alternatively permitting K-Bay to amend its complaint to assert a lease reformation cause of action.

Background

Kmart and Prestige Bay Plaza Development Corp. (Prestige), the former landlord of the premises which, in November 1996, assigned its leasehold interest to K-Bay,[1] entered into a lease, dated November 18, 1993, under which Kmart was to build, at its expense, and lease a Kmart store on K-Bay's property in Co-op City in the Bronx. Among those involved in the lease negotiations were Joseph Comparetto (Comparetto), who was then a Prestige officer and is now the Executive Vice President of the

[1]Prestige and K-Bay appear to be related entities, since the assignment indicates that the consideration was $10 and that both entities had the same address.

entity which is the managing member of another entity which is K-Bay's manager; Allan Cooperman (Cooperman), the principal of K-Bay's real estate broker; Jerry Siegelman (Siegelman), K-Bay's counsel on the lease negotiations; Charles Lotzar (Lotzar), who was Kmart's Director of Special Real Estate Projects; and Bruce Kauderer (Kauderer), counsel for Kmart on the lease negotiations.

The lease term was 25 years, with four additional five-year renewal options and a shorter fifth renewal option. Since the store was not built at the time of the lease's execution, the initial rent of $11 per square foot was based on an estimated square footage, which was set forth in Article 3 of the lease, which was entitled "Annual Minimum Rental." Article 3's first two paragraphs explained in detail how and when the square footage was to be determined and recited in relevant part, at the end of the second paragraph, that

> "It is anticipated that the Initial Square Footage shall be 131,780, and all annual rent numbers set forth below are based upon said number *(assuming rent of $11.00 per square foot and 10% cumulative increases every five years)*. Should the actual Initial Square Footage differ from 131,780 by more than 50 square feet either way, then there shall be an appropriate upward or downward adjustment of all annual rents to conform to the actual Initial Square Footage [Emphasis added]."

Article 3's following paragraph indicated that the tenant was, during the lease term and any renewal period, to "pay ... annual rental, as follows." What followed were the amounts, set forth in uppercase lettering, as well as in numerals, the tenant

was to pay for each five-year period under the original 25-year lease term and under its five option periods. In this regard during the first five years of the lease, Kmart was to pay $11 per square foot. Under each of the remaining five-year periods of the original 25-year lease term, the rent was cumulatively raised, not 10%, but $.50 cents per square foot. For each of the five option terms the rent was cumulatively raised 10%, commencing with the first option period, when the rent was raised 10% over the rent charged during the last five years of the initial 25-year term. After the store was built, the square footage was adjusted to an undisputed 134,032 square feet. On October 14, 1994, Kmart and Prestige entered into a Commencement of Term Agreement, which provided that the lease term was to begin on November 14, 1994.

Under the lease, the annual rent was to be paid in equal monthly installments, in advance, and without prior demand. The lease, which recited that it contained the parties' entire agreement, and could only be changed via an executed writing, also provided (at Article 3) that

> "No payment by the Tenant or receipt by Landlord of an amount less than any payment of rent or additional rent then due and payable shall be deemed to be other than on account of the rent or additional rent then due and payable, nor shall any endorsement or statement on any check or any letter accompanying any check or payment as rent or additional rent be deemed an accord and satisfaction, and Landlord may accept such check or payment without prejudice to Landlord's right to recover the balance of such rent or additional rent or pursue any other remedy provided for in this Lease or

available at law or in equity."

Further, the lease contained a no-waiver provision (at Article 34), which afforded reciprocal rights to the tenant with respect to payments due it from the landlord. Article 34 also provided that "[t]he failure of either party to seek redress for violation of, or to insist upon the strict performance of any term, covenant or condition contained in this Lease shall not prevent a similar subsequent act from constituting a default under this lease."

Lease Article 21 sets forth the landlord's remedies. One cause of default under that article (at [A] [I]), which gave the landlord the right to cancel the lease, was the tenant's failure to pay a required rent installment where such failure continued for 15 days "after written notice of Tenant's delinquency shall have been given to Tenant[.]" Alternatively, in the event of any breach, instead of canceling the lease, the landlord, "following the aforesaid notice period for Tenant's curing of the same," was permitted to cure such breach at the tenant's expense and for its account. Lease, Article 21 (F). Any amount that the landlord so expended was required, on demand, to be reimbursed by the tenant, with interest at an annual rate of 15% "or such lesser rate as shall be the highest rate legally permissible (the 'Lease Interest Rate') which interest shall accrue from the date of such expenditure by Landlord until the date of payment by Tenant."

Id. Further, if the landlord "at any time, by reason of such breach, [was] compelled to incur any expense, including reasonable attorneys' fees, in instituting or prosecuting any action or proceeding to enforce [the] Landlord's rights thereunder, the sum or sums so paid by [the] Landlord, with interest thereon at the Lease Interest Rate, [was to] be deemed ... additional rent [t]hereunder and [was] ... due from [the] Tenant to [the] Landlord on the first (1st) day of the month following the payment of such respective sums or expenses." *Id.*

Following the lease term commencement date, Kmart paid annual rent at the $11 per square foot rate for the first five years. During the second five-year period, which commenced on December 1, 1999, Kmart paid $11.50 per square foot. *See* Schwartz aff., ¶ 12. On January 22, 2002, about two years after the commencement of the second rent period, Kmart filed a Chapter 11 bankruptcy petition, ultimately emerging from bankruptcy in April 2003, and continued to pay at the $11.50 per square foot rate until the beginning of the third five-year period. During that latter period, which ran from December 1, 2004 through November 30, 2009, Kmart paid rent at the annual rate of $12.00 per square foot. When the next five-year period began, Kmart paid rent at the annual rate of $12.50 per square foot.

The Instant Action

Meanwhile, in April 2009, K-Bay commenced this action

against Kmart. The complaint alleges that, under the lease, at the end of each five-year period, during both the original lease term and any extended term resulting from Kmart's exercise of its options, the rent was to cumulatively increase by 10%. The complaint indicates that Kmart had filed for bankruptcy and that Kmart's Chapter 11 plan had been confirmed in April 2003. Additionally, the complaint alleges that, under the lease, Kmart's monthly rent, from May 1, 2003 through November 30, 2004, was $135,148.93, and from December 1, 2004 through November 30, 2009 was $148,663.83, but that during the former period Kmart paid monthly rent of only $128,447.33 and during the latter period through April 30, 2009, paid monthly rent of only $134,032.00, which amounts were based on a $.50 per five-year increase. As a result, the complaint alleges that Kmart was in arrears in the payment of its rent, and also owed late fees, interest, and attorneys' fees.

According to the complaint (¶ 27), the lease allegedly provided that if the tenant failed to pay any rent installment within 15 days after notice that such rent had become due, the tenant was in default under the lease. Further, it was alleged that K-Bay billed Kmart for, and had demanded that it pay, the full amount of rent, with the 10% increases, but that Kmart had failed to do so, and will likely fail to do so in the future. The complaint then recited that if Kmart failed to pay a rent installment within 15 days of that notice, such installment would

bear interest at the Lease Interest Rate, as provided in Article 21 (F) of the lease. Additionally, the complaint recited that, under lease Article 21, K-Bay was entitled to treat any lease default as a material breach of that instrument.

The complaint sets forth five causes of action. The first sounds in breach of contract, the second sounds in unjust enrichment, and the third sounds in account stated. The fourth cause of action requests a declaration, in essence, that the initial base rent was $11 per square foot; that at the end of each five-year period the rent was to, and in the future is to, cumulatively increase by 10% through the end of the lease term, including any renewals obtained via exercise of the options; and that Kmart had agreed to pay rent on this basis and was required to do so, that it has failed to do so, and that it is in default in its rent obligations as of the date of the complaint in the amount of $902,817.21, plus interest, late fees and attorneys' fees. Under the fifth cause of action, K-Bay seeks, pursuant to the lease terms, all legal fees, costs and disbursements it incurred in collecting outstanding rent, in an amount to be determined at trial.[2]

Issue was joined by service of a June 2009 answer, which, as is relevant, asserted that K-Bay's claims were waived because neither it nor its predecessor, Prestige, alleged any default in

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[2] Under the lease, any trial was to be held nonjury.

rent payment "until very recently." Answer, ¶ 64. Following joinder of issue, some documentary discovery ensued, but although noticed close to two years ago, no depositions have taken place, including that of Lotzar, who apparently has not worked for Kmart for many years. Also, although this action was commenced about 2 ½ years ago, the parties never requested a preliminary conference.

The Instant Motion

K-Bay now moves for an order granting it summary judgment. It does not specify upon which causes of action it seeks summary judgment, but in its initial moving papers it seems to be seeking relief on its first (breach of contract) and fifth (legal fees) causes of action. In this regard, Siegelman, in his supporting affirmation, merely asserts in the wherefore clause that summary judgment should be granted to K-Bay and that a judgment be entered in the amount of the unpaid rent to the judgment date, with interest, attorneys' fees, expenses, and costs.

In support of the summary judgment application, Siegelman submits his affirmation, which is based on personal knowledge "or" on annexed documents. Siegelman aff., ¶ 1. He observes that, during lease negotiations, Lotzar sent Cooperman an August 13, 1992 lease proposal on behalf of Kmart, which provided for $.50 per square foot increases for each five-year lease period and on each option renewal. By letter dated August 26, 1992,

Cooperman responded that in a prior deal between the parties the increases were $.50 a square foot, which amounted to 10% increases, and that his principals wished to maintain the 10% increase every five years on the current deal. Cooperman also acknowledged receipt from Kmart's counsel of the proposed lease and advised that it would be forwarded to Siegelman for review. Siegelman, who stated that neither he nor the client could find a copy of that draft or any other draft, and that he discarded all drafts, believed that the initial Kmart draft had "illustrations" of projected rents for each five-year period, using the assumed square footage times $11, with a $.50 per square foot increases every five years. Siegelman aff., ¶ 15. The final lease also had "illustrations."

Siegelman claims that, on September 14, 1992, more than a year before the lease was signed, Prestige prepared a term sheet, as he alleges was customary with large retail leases, to set forth for the prospective tenant the main lease terms to which the landlord would agree, in this case that the base rent would be $11 per square foot with five-year increases of 10%. Siegelman further notes that, by letter of October 14, 1992, he wrote Kauderer, setting forth required lease revisions, including under one of the numbered revisions, that there would be five-year increases of 10%, and that Kmart would pay three months of base rent in advance upon the lease's execution. Siegelman observes that, in response to his letter, Lotzar, by letter of

November 13, 1992 addressed to Cooperman, indicated that the base rent would be $11 per square foot with five-year cumulative increases of 10%, including on the renewals, but that Kmart would not agree to paying three-months rent in advance. Siegelman asserts that, during lease negotiations in his conversations with Lotzar, Kauderer, and Cooperman, before Lotzar issued his letter, everyone agreed that Kmart's proposed $.50 would be replaced by 10% increases every five years during the initial 25-year term and for the renewal periods. Siegelman further asserts that, following Lotzar's letter, there was no other correspondence or document discussing the periodic rent increases, and that, as reflected in Lotzar's letter, the last word on the issue was Kmart's agreement to the 10% increases.

Siegelman, who does not purport to have personal knowledge of what the scriveners did, claims that during the redrafting, they were busy with other issues and failed to correct the illustrations for the lease's initial 25-year term to reflect the 10% increases. He maintains that "[w]e changed the illustrations ... for the **renewal** periods to reflect the **10%** 'bumps', but forgot" to change them for the lease's initial term. Siegelman aff., ¶ 26, emphasis in the original. He further claims that no one paid much attention to the rent numbers for the first 25 years of the lease because they knew that the illustrations were not final and had to be adjusted once the building's actual

square footage was known. Siegelman further maintains that in the drafting process everyone overlooked the mistake.

In further support of the summary judgment application, K-Bay appends the affidavit of Charles Farmer (Farmer), its controller, who bases his statements on personal knowledge and/or on his review of K-Bay's records and books. Farmer appends a table showing the amounts of the base rent K-Bay allegedly billed Kmart for each month after it emerged from bankruptcy through November 2010, and the amounts Kmart paid. Farmer maintains that the table was prepared from actual invoices sent to Kmart. According to the table, the base rent allegedly billed each month reflected the 10% cumulative increases over the lease, but that Kmart paid on the basis of a $.50 per square foot bump. The table further shows that, as of November 1, 2010, Kmart was $1,305,539.49 in arrears in base rent. Siegelman urges, in light of the foregoing, that there can be no genuine dispute that the lease provided for 10% increases during the initial lease term, and that, therefore, K-Bay should be granted summary judgment in the amount of unpaid rent to the date of judgment, with interest from the date on which each rent payment was due, and attorneys' fees, expenses and costs pursuant to Article 21 (F) of the lease.

Alternatively, K-Bay claims that since there was a mutual mistake in the lease's specified rent amounts, in that it did not reflect the 10% increases during the initial 25-year term, which mistake also affected the calculations of the rents due during

the renewals, K-Bay should be permitted to amend its complaint to assert a lease reformation cause of action.

Kmart opposes the motion, and asserts that its evidence, including Kauderer's affirmation and the affidavit of Cheryl Schwartz (Schwartz), a Real Estate Asset Manager for Sears Holding Management Corporation, who has, since 2005, been responsible for managing real estate leased by Kmart in various states, including New York, raises triable issues of fact, warranting the denial of K-Bay's summary judgment application. Specifically, Kauderer, who asserts that he negotiated the lease on behalf of Kmart, denies K-Bay's version of the lease negotiations, and claims that, following the issuance of Lotzar's letter, Kmart believed that the project was becoming too costly, and, that during the year between the letter's issuance and the execution of the lease, rejected the 10% increases during the initial 25-year lease term. Kauderer maintains that the parties resumed negotiations at some time in 1993 and reached a compromise whereby there would be $.50 per square foot increases during the initial lease term and 10% increases during the renewal periods, as is reflected in the executed lease. Kauderer, states that it was he who prepared various lease drafts, including the final lease, and maintains that the small parenthetical language regarding 10% increases every five years, was overlooked. Asserting that rent provisions are "the most important terms" in commercial leases, he condemns as ludicrous

Siegelman's statement that the scriveners were too busy and therefore overlooked the rent figures for the lease's original term and only changed them for the renewal periods. Kauderer aff., ¶ 6. Kauderer urges that this is especially true, since the specific rent figures spilled over two pages, and were set forth in numerals and in solid capital letters. Additionally, Kauderer notes, relying on a table showing the amounts of rent Kmart paid since May 1999, that K-Bay began accepting the $.50 per square foot increase in 1999, at the start of the lease's second five-year period, years before Kmart filed for bankruptcy. He urges that no sophisticated landlord would wait for years to correct a perceived mistake.

Schwartz adds that K-Bay's acceptance of rents, based on the $.50 per square foot increases, before and after Kmart emerged from bankruptcy, was without dispute. She maintains that the landlord first "demanded" rents based on 10% increases in a letter dated October 24, 2006 from Ysabel Chang (Chang) of Prestige to Anne O'Neil (O'Neil) of Kmart. Schwartz aff., ¶ 17. Chang, in responding to O'Neil's request as to Kmart's outstanding balance, provided the balance which represented the difference between the base rent which was charged after Kmart's emergence from bankruptcy and what Kmart paid. Chang asserted that the lease provided for 10% increases, but that a mistake was made in the lease with respect to the calculation of increases after the initial five-year period. Chang demanded the immediate

payment of monies owed. Schwartz responded, and disputed Chang's lease interpretation, observing that the lease set forth annual amounts which reflected $.50 per square foot increases, and insisted that the additional charges be removed from the tenant history.

Schwartz further noted that K-Bay was given, in 2004, Kmart's 1996 term sheet showing $.50 per square foot rent increases during the initial 25-year term, and 10% increases during the renewal periods. She further pointed to a December 26, 2007 estoppel certificate given by Kmart to K-Bay and its lender in connection with K-Bay's refinancing of its property, in which certificate Kmart's rent was based on a $.50 per square foot increases.

In light of the foregoing, Kmart asserts that it has raised a triable issue as to the interpretation of the lease's rent provisions, thereby warranting the denial of K-Bay's summary judgment application. Kmart also asserts that by demonstrating that K-Bay accepted rent, without protest or taking any action, it has raised a triable issue as to whether K-Bay waived any alleged rent default, thereby further warranting the denial of summary judgment. As to K-Bay's request for leave to amend its complaint to add a reformation cause of action, Kmart asserts that such relief must be denied because such cause of action is time-barred and is meritless, and because the application was inexcusably made after a protracted delay.

In reply, K-Bay is silent with respect to its application to amend its complaint. As to its summary judgment application, Siegelman asserts that Kmart's waiver arguments are without merit in light of the lease's non-waiver provisions. Additionally, he urges that Kmart's reference to the estoppel certificate is misleading because K-Bay, in the closing certificate, disclosed to the lender for whom the estoppel certificate was obtained that the rents Kmart set forth in the estoppel certificate were disputed and that K-Bay claimed that the initial term's increases were 10% every five years. Siegelman also disputes Kauderer's claim that the parties entered into a rent escalation compromise. According to Siegelman, Kauderer's version of the events is unworthy of belief because there is no document supporting his claim of a renegotiation of the rent escalation provisions after Lotzar had initially agreed to the 10% increase in November 2002, even though there are numerous documents showing that other lease provisions were being negotiated. Moreover, Siegelman maintains that, following Lotzar's letter, there were no discussions about the rent escalation terms.

K-Bay, in reply, also submits Comparetto's affidavit. Comparetto observes that Schwartz was never involved in the lease negotiations. He also states that Kauderer's claims regarding the renegotiation of the rent escalation provisions following the issuance of Lotzar's November 1992 letter are false, and that there were no subsequent discussions in phone calls,

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correspondence, documents, or at meetings regarding the rent escalations. Comparetto also provides copies of monthly rent invoices allegedly sent to Kmart following its emergence from bankruptcy, showing monthly rent figures based on 10% raises every five years. Each bill carried over Kmart's unpaid balance. Comparetto also maintains that Kmart sent K-Bay its 1996 term sheet in December 2004, only in response to K-Bay's continual demands and billing for the rent at the 10% increase rate, and for the outstanding balance, which by December 2004 was close to $170,000. Comparetto surmises, from the fact that Lotzar was not listed on that term sheet's distribution list, that he was no longer with Kmart at that time, and, thus, was not consulted as to the proper rent. Comparetto also explains that the instant action was not commenced until the last minute because K-Bay was attempting to work out an amicable resolution with unspecified individuals at Kmart, a major tenant. He adds that K-Bay knew it could not have asserted claims for unpaid rents which accrued before Kmart emerged from bankruptcy, but that, to obtain the unpaid rents accruing after, K-Bay had to serve the complaint to avoid the bar of the six-year statute of limitations. Although not specifically sought in the original moving papers, he also requests that K-Bay be granted declaratory relief.

Discussion

Initially, to the extent that K-Bay seeks, in connection

with its summary judgment application, declaratory relief for the first time in its reply papers, the motion is denied. The purpose of reply papers is to address the opponent's arguments, not to set forth new grounds for, or arguments in support of, the motion. *Matter of Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 381 (1st Dept 2006). This rule serves to prevent the moving party from curing in its reply papers deficiencies in its prima facie showing, and, as a consequence, shifting to the opponent the burden of showing that a triable issue exists when that opponent has neither the chance nor obligation to respond. *Id.*

The balance of K-Bay's application for summary judgment is also denied.[3] The law is well settled that the movant on a summary judgment application bears the initial burden of prima facie establishing that party's entitlement to the requested relief, by eliminating all material allegations raised by the pleadings. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Kuri v Bhattacharya*, 44 AD3d 718 (2d Dept 2007). The failure to do so mandates the denial of the application, "regardless of the sufficiency of the opposing papers." *Winegrad*, 64 NY2d at 853. Where a moving party makes its

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[3] Because this branch of K-Bay's motion is denied, I need not and do not address any claim set forth in the complaint that it is entitled to the lease interest rate on unpaid rent, which claim is questionable since K-Bay does not assert that it cured Kmart's failure to pay the adequate rent by expending any sums, and it is unclear when a written notice of delinquency was first given to Kmart. *See* Lease Article 21.

required showing, the burden shifts to the other side to demonstrate the existence of a material fact. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986).

Regarding Kmart's claim that K-Bay's summary judgment application must be denied because it waived any entitlement to 10% increases during the original 25-year term, it is well settled that "waiver is an intentional relinquishment of a known right and should not be lightly presumed." *EchoStar Satellite, L.L.C. v ESPN, Inc.*, 79 AD3d 614, 617 (1st Dept 2010) (internal quotation marks and citation omitted). The intent to waive must be unmistakable, "and is not to be inferred from a doubtful or equivocal act." *Id.* (internal quotation marks and citations omitted) (a party's failure to press for the payment of outstanding interest on late payments constitutes mere inaction or silence, which is inadequate to demonstrate waiver). Waiver is not created by "[n]egligence, oversight or thoughtlessness ... ." *Alsens Am. Portland Cement Works v Degnon Contr. Co.*, 222 NY 34, 37 (1917). As an affirmative defense, waiver must be proved by its proponent, here, Kmart. *Levin v Yeshiva Univ.*, 96 NY2d 484, 491 n 3 (2001); *Bono v Cucinella*, 298 AD2d 483, 484 (2d Dept 2002). Waiver may not be inferred "to frustrate the reasonable expectations of the parties ... when they have expressly agreed otherwise," via lease terms. *Jefpaul Garage Corp. v Presbyterian Hosp. in City of N.Y.*, 61 NY2d 442, 446 (1984).

In the instant case, Kmart has failed to establish through anyone with personal knowledge that K-Bay did not seek, for example through invoices, the rent to which it claims it is entitled. Moreover, assuming that the lease provided for 10% increases during the original term, the specific language of the lease under Articles 3 and 34, demonstrates that the parties had agreed that there would be no waiver of the balance of the rent by acceptance of lower amounts or because of a failure to insist on strict performance with respect to rent due before Kmart emerged from bankruptcy. Additionally, assuming that the parties had agreed to the 10% increases during the original lease term, Kmart, at most, has demonstrated that K-Bay's failure to act was caused by negligence or inadvertence, rather than an intentional relinquishment of a known right. Therefore, Kmart has failed to establish its defense of waiver, or that summary judgment must be denied on the ground of waiver.

Turning to the substance of K-Bay's motion, which turns on the meaning of the lease, a contract which "is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Greenfield v Philles Records*, 98 NY2d 562, 569 (2002); *see also Bailey v Fish & Neave*, 8 NY3d 523, 528 (2007). In construing a contract, it is the parties' intent which is controlling. *American Express Bank v Uniroyal Inc.*, 164 AD2d 275, 277 (1st Dept 1990). Where that intent can be found

from the agreement itself, summary judgment is appropriate, but if reference to extrinsic facts is required to discern the parties' intention, summary judgment is inappropriate. *Ibid.* Where there is no extrinsic evidence to consider, ambiguities may be resolved by the court on a summary judgment motion. *Hudson-Port Ewen Assoc. v Chien Kuo*, 165 AD2d 301, 303 (3d Dept), *affd* 78 NY2d 944 (1991); *see also Discovision Assoc. v Fujiphoto Film Co., Ltd.*, 71 AD3d 488 (1st Dept 2010). In considering extrinsic evidence, "the parties' course of performance under the contract is considered to be the most persuasive evidence ... ." *Federal Ins. Co. v Americas Ins. Co.*, 258 AD2d 39, 44 (1st Dept 1999) (internal quotation marks and citation omitted).

In the instant case, the lease's rent escalation provisions are clearly internally inconsistent, and the parties' intent cannot be gleaned from the lease as a whole. Therefore, the rent escalation provisions are ambiguous. In light of the conflicting affidavits and affirmations of some of the individuals involved in the lease negotiations as to what the parties agreed to with respect to the rent escalation provisions, summary judgment is inappropriate. *468-470 Ninth Ave. Corp. v Randall*, 199 AD2d 13 (1st Dept 1993). This is especially true here where little discovery has occurred and depositions, particularly of those involved in the lease negotiations, including Lotzar and Cooperman, have not taken place.

Also, Kmart has not had the opportunity to respond to some evidence offered by K-Bay on this motion, e.g., the post-bankruptcy rent invoices, since that evidence was only provided in K-Bay's reply papers. Moreover, neither Farmer nor Comparetto claimed to have personal knowledge of the sending of these invoices to Kmart or of K-Bay's customary practices in sending rent invoices. In addition, it is troubling that K-Bay has presented no evidence by anyone with firsthand knowledge as to whether and for how much it billed Kmart after the first five-year lease period, during the several years before it filed a bankruptcy petition. Although perhaps not entitled to much weight, it is also unclear what steps, if any, K-Bay took to recover what it perceived to be the correct rent during the entire period, including in the several years before Kmart filed for bankruptcy, when Kmart paid rent calculated on only a $.50 per square foot increase. Comparetto's claims, that K-Bay continually demanded outstanding rent and was trying to work out an amicable agreement are conclusory and only made in the reply papers.

Also, that K-Bay, which lacks the lease drafts, does not possess any correspondence demonstrating that the rent escalation provisions were renegotiated after Lotzar's November 1992 letter, is not controlling, especially since the parties' correspondence following Lotzar's letter (*see* Siegelman reply aff., ex. J)

refers to phone discussions and meetings between the parties where the rent escalation provisions could have been renegotiated, and set forth in the missing drafts. It is also unclear, at least from Siegelman's initial affirmation, whether his statement that Lotzar's letter was the last word on the rent escalation clause was based on personal knowledge or on his review of the documents appended to his initial moving papers. *See e.g.* Siegelman aff., ¶ 26("[a]s shown in the attached correspondence there can be no real dispute that the rent increase every five years is a cumulative 10% increase"). I further note the absence of any affidavit from Cooperman, the only other person mentioned by Siegelman in his initial moving affirmation as having been involved in the lease negotiations on behalf of K-Bay.

Additionally, K-Bay has not presented any evidence that the September 1992 term sheet, which according to Siegelman was the type of document which is customarily prepared for a tenant, was ever provided to Kmart, and if it was not provided, explaining why that is so. Also, the lease does not characterize the specific rents Kmart was to pay as illustrations of how the increases were to be calculated, and the parenthetical language in Article 3, upon which K-Bay relies, is contained in a paragraph that deals with the calculation of square footage, rather than of rent escalations, lending some credence to Kmart's

version of where in the lease the mistake was made. Moreover, Siegelman does not explain in his moving affirmation why "[w]e" (Siegelman aff., ¶ 26) would start in the middle of the lease's list of rent "illustrations," correcting only those illustrations relating to the renewal options, but not those relating to the original lease term's second through fifth five year periods.

This is not to say that Kmart's opposing papers were exemplary. In particular, Kmart does not assert that it was unable to obtain Lotzar affidavit to support its position that the rent escalation clause was renegotiated, and Kauderer's claims regarding those renegotiations in the year between Lotzar's letter and the execution of the lease are rather thin. Further, Schwartz, who was first involved with Kmart in 2005, presumably lacks personal knowledge as to when K-Bay first sought rent based on a 10% increase, or as to whether K-Bay accepted the lower rent without dispute, both before and after the bankruptcy. I also note that, although invoices allegedly sent to Kmart were first provided in K-Bay's reply papers, Kmart acknowledged in its response to K-Bay's statement of undisputed facts that Kmart received five invoices, the first of which was dated April 29, 2005. The dates of those five invoices correspond to dates of some of the invoices appended to K-Bay's reply papers, thereby tending to undermine Schwartz' assertion that the rent amounts paid by Kmart were never disputed, and lending credence to K-Bay's claim that, at least after Kmart emerged from bankruptcy,

K-Bay billed Kmart for rent based on 10% increases, and carried over the outstanding balances each month, when Kmart failed to pay the total amount billed.

However, "the remedy of summary judgment is a drastic one, which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable, since it serves to deprive a party of his day in court [internal citations omitted]." *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 (1st Dept 1987). Accordingly, in light of the foregoing and "draw[ing] all reasonable inferences in favor of the party opposing summary judgment" (*Bautista v David Frankel Realty, Inc.*, 54 AD3d 549, 556 [1st Dept 2008]), K-Bay's summary judgment application is denied.

This leaves the branch of K-Bay's motion which seeks alternative relief in the form of an order permitting it to amend its complaint to add a reformation cause of action. "Leave to amend a pleading should be freely granted where there is no prejudice or surprise to the other side, and where the proposed pleading is not "totally devoid of merit." *Rodriguez v Paramount Dev. Assoc., LLC*, 67 AD3d 767, 768 (2d Dept 2009); *Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 22, 25 (1st Dept 2003). Further, "[i]n the proper circumstances, mutual mistake ... may furnish the basis for reforming a written agreement. ... In the case of mutual mistake, the parties have reached an oral agreement and,

unknown to either, the signed writing does not express that agreement." *Chimart Assoc. v Paul*, 66 NY2d 570, 573 (1986) (internal citations omitted).

Nonetheless, a reformation cause of action, which is based on a claim of mistake, is subject to a six-year statute of limitations, which runs from the date of the "scrivener's error." *Matter of Wallace v 600 Partners Co.*, 86 NY2d 543, 547 (1995); *1414 APF, LLC v Deer Stags, Inc.*, 39 AD3d 329, 330 (1st Dept 2007). Since the lease was executed on November 18, 1993, the statute of limitations has clearly expired, and K-Bay does not urge otherwise. Because the reformation cause of action is time-barred, K-Bay's application to amend its complaint must be, and hereby is, denied. *Karagiannis v North Shore Long Is. Jewish Health Sys., Inc.*, 80 AD3d 569 (2d Dept 2011); *Casa de Meadows Inc. (Cayman Is.) v Zaman*, 76 AD3d 917, 920 (1st Dept 2010); *Walls v Prestige Mgt., Inc.*, 73 AD3d 636 (1st Dept 2010) (application to amend pleadings properly denied where the claim is time-barred).

Conclusion

In conclusion, it is

ORDERED that the branch of K-Bay Plaza, LLC's motion which seeks an order granting it summary judgment against Kmart Corporation is denied; and it is further

ORDERED that the branch of K-Bay Plaza, LLC's motion which

seeks an order granting it leave to serve an amended complaint to add a reformation cause of action is denied; and it is further

ORDERED that the parties shall appear on November 3, 2011, at 10am, for a preliminary conference in Part 17, courtroom 422, at 60 Centre Street, Manhattan.

This Constitutes the Decision and Order of the Court.

Dated: October 3, 2011

ENTER:

J.S.C.
EMILY JANE GOODMAN

FILED

OCT 07 2011

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COUNTY CLERK'S OFFICE