Miller's Supermarket v Rite Aid of N.Y., Inc.
2013 NY Slip Op 30728(U)
January 9, 2013
Supreme Court, Rensselaer County
Docket Number: 236415
Judge: George B. Ceresia Jr
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.

[* 1]

STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

MILLER'S SUPERMARKET,

Plaintiff,

-against-

Index No. 236415
RJI No. 41-0741-2011

RITE AID OF NEW YORK, INC.,

Defendant.

All Purpose Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

Appearances:

CORRIGAN, McCOY & BUSH, PLLC
Attorneys for Plaintiff
(Joseph M. McCoy, Esq., Of Counsel)
220 Columbia Turnpike
Rensselaer, New York 12144

RAVEN & KOLBE, LLP
Attorneys for Defendant
(Sheryl Fyffe-Gauntlett, Esq., Of Counsel)
126 East 56th Street, Suite 202
New York, New York 10022

DECISION/ORDER

George B. Ceresia, Jr., Justice

This action arises from the alleged breach of two provisions of an amended lease agreement, dated May 26, 1994, executed between plaintiff-landlord Miller's Supermarket (hereinafter plaintiff) and defendant-tenant Rite Aid of New York, Inc. (hereinafter defendant). In April 2009, the parties executed a second amended lease agreement, which

provided, in pertinent part:

> Commencing November 1, 2009, and expiring January 31, 2010 (the "Extension Term"), Tenant shall pay monthly minimum rent in the amount of Twelve Thousand Eight Hundred Eighty-Two and 19/100 Dollars ($12,882.19) each on the first day of each month in advance. During said Extension Term, Tenant shall continue to pay Landlord percentage rent as set forth in the Lease agreement with respect to the first renewal period.
>
> Tenant shall promptly pay any outstanding invoices for taxes and shall pay its usual proportionate share of the taxes through the end of its tenancy.

(Fyffe-Gauntlett Aff., Ex. C, at Ex. C). In the first cause of action, plaintiff alleges that defendant breached its contractual obligation to pay real estate taxes for the years 1994 through 2008 (see Fyffe-Gauntlett Aff., Ex. A, at p. 1-2). In the second cause of action, plaintiff alleges that defendant breached its contractual obligation to pay percentage rent for the entire extension term – November 1, 2009 through January 31, 2010 – set forth in the second amended lease agreement (see Fyffe-Gauntlett Aff., Ex. A, at p. 2-3).

By Decision and Order, dated December 23, 2011, Supreme Court (Hummel, A.S.C.J.) determined that plaintiff's claim for reimbursement of taxes for the years 1994 through 2005 was barred by the statute of limitations (see Fyffe-Gauntlett Aff., Ex. E, at p. 3). With respect to taxes for the years 2005 through 2008, Supreme Court found that plaintiff's claim was barred by the terms of the exculpatory clause contained within the second amended lease agreement (see Fyffe-Gauntlett Aff., Ex. E, at p. 3-4).

Plaintiff now moves for summary judgment, an order granting plaintiff reimbursement

of tax credits for April 2009 through December 2009, and an order directing defendant to pay percentage rent for November 1, 2009 through January 31, 2010. Defendant submitted papers in opposition to plaintiff's motion and cross-moved for summary judgment dismissing the complaint.

STANDARD OF REVIEW

"Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue" (Currier v Wiltrom Assocs., 250 AD2d 956, 956 [1998] [internal quotation marks and citations omitted]). To obtain summary judgment, a movant must establish his or her position "sufficiently to warrant the court as a matter of law in directing judgment" in his or her favor (Friends of Animals, Inc. v Associated Fur Mfrs., 46 NY2d 1065, 1067 [1979], quoting CPLR 3212[b]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any genuine material issues of fact from the case (see Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). The failure to make such a showing mandates denial of the motion, regardless of the sufficiency of the opposing papers (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). If, however, a prima facie showing is made, the burden shifts to the party opposing the motion for summary judgment to come forward with evidentiary proof in admissible form to establish the existence of material issues of fact which require a trial (see Zuckerman v City of New York, 49 NY2d 557, 562 [1980]).

DISCUSSION

Initially, defendant points out that plaintiff failed to annex the pleadings to its motion for summary judgment as required under CPLR 3212(b). Although such a procedural defect ordinarily warrants denial of the motion without prejudice, the Court elects to address the merits given defendant's submission of the pleadings in opposition (see e.g. Crossett v Wing Farm, Inc., 79 AD3d 1334, 1335 [2010]; Sanacore v Sanacore, 74 AD3d 1468, 1469 [2010]).

As to plaintiff's request for an order granting reimbursement of tax credits for April 2009 through December 2009, the Court finds that the complaint wholly fails to plead a cause of action for such relief. More particularly, in the first cause of action, plaintiff solely seeks credit toward real estate taxes paid "for the years 1994 through and including 2008" and "during the years 1994 through 2008" (Fyffe-Gauntlett Aff., Ex. A, ¶¶17-18). Stated differently, the complaint is devoid of any reference to defendant's alleged tax obligations for the April 2009 through December 2009 time frame. This prong of defendant's cross-motion for summary judgment should, therefore, be granted and the first cause of action dismissed.[1]

Next, the Court turns to the second cause of action and plaintiff's request for an order granting percentage rent for November 1, 2009 through January 31, 2010. To prevail on a breach of contract claim, a party must prove the existence of a contract, performance by the

[1] To the extent a prior court stated that plaintiff had a claim "for taxes which may or may not have been paid during the period of April 30, 2009 to January 1, 2010," this Court deems such language mere dicta insofar as it contradicts the request for relief sought in the complaint (Fyffe-Gauntlett Aff., Ex. E, at p. 4).

injured party, breach by the adverse party and damages (see Clearmont Prop., LLC v Eisner, 58 AD3d 1052, 1055 [2009]). In support of its motion, plaintiff failed to present a proper affidavit from an individual with personal knowledge, or otherwise provide an adequate foundation for the documentary evidence submitted. Rather, plaintiff presented an unsigned affidavit from Joseph Quillinan, an officer and part-owner of the corporation, together with two unauthenticated business records. In the absence of competent evidence, the Court finds that plaintiff did not sustain its burden of establishing prima facie entitlement to judgment as a matter of law (see e.g. Legion Ins. Co. v Northeastern Plate Glass Corp., 41 AD3d 933, 933-934 [2007].; cf. Kool-Temp Heating & Cooling v Ruzika, 6 AD3d 869, 869-870 [2004]).

Finally, turning to the remaining prong of the cross-motion, defendant maintains that plaintiff was only entitled to percentage rent on gross sales until October 29, 2009, the date it vacated the leased premises. Stated differently, defendant urges the Court to find that the lease and subsequent amendments did not require payment of percentage rent throughout the extension term (November 1, 2009-January 31, 2010). To this end, it is well established that the purpose of contract interpretation is to give effect to the parties' intention (see Desautels v Desautels, 80 AD3d 926, 928 [2011]; AGCO Corp. v Northrop Grumman Space & Mission Sys. Corp., 61 AD3d 562, 564 [2009]). Where the intention of the parties is clearly and unambiguously set forth, effect must be given to the intent as indicated by the language used (Goldman v White Plains Ctr. for Nursing Care, LLC, 11 NY3d 173, 176 [2008]).

Moreover, the threshold determination of whether an ambiguity exists is a question

[* 6]

of law (see Riverside S. Planning Corp. v CRP/Extell Riverside, L.P., 13 NY3d 398, 404 [2009]; Hudock v Village of Endicott, 28 AD3d 923, 924 [2006]). Here, defendant presented the second amended lease agreement, which was signed by the parties' representatives and contained the following express language:

> Commencing November 1, 2009, and expiring January 31, 2010 (the "Extension Term"), Tenant shall pay monthly minimum rent in the amount of Twelve Thousand Eight Hundred Eighty-Two and 19/100 Dollars ($12,882.19) each on the first day of each month in advance. **During said Extension Term, Tenant shall continue to pay Landlord percentage rent as set forth in the Lease agreement with respect to the first renewal period**.

(Fyffe-Gauntlett Aff., Ex. C, at Ex. C) (emphasis supplied). After carefully reviewing the foregoing language, the Court finds that defendant was unambiguously required to pay plaintiff percentage rent for the entire extension term, *i.e.* November 1, 2009-January 31, 2010, regardless of the leased premises' location. Accordingly, the Court finds that summary judgment is not warranted.

Accordingly it is

ORDERED that plaintiff's motion for summary judgment is hereby denied; and it is further

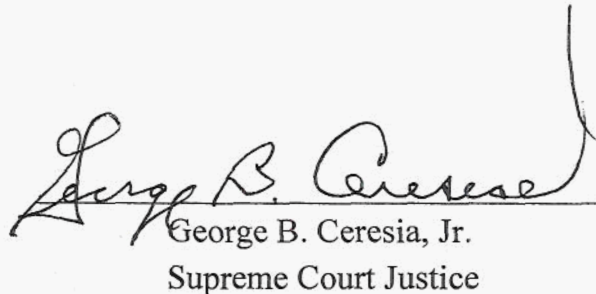
ORDERED that defendant's cross-motion is granted insofar as plaintiff's first cause of action is dismissed, and in all other respects denied.

This Decision/Order is being returned to the Attorneys for Defendant. All original

[* 7]

supporting documentation is being filed with the County Clerk's Office. The signing of this Decision/Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that rule relating to filing, entry and notice of entry.

Dated: Troy, New York
January 9, 2013



George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Motion for Summary Judgment, dated August 29, 2012; Affirmation of Joseph M. McCoy, Esq., with annexed exhibits;[2]

2. Notice of Cross-Motion for Summary Judgment, dated September 23, 2012; Affirmation of Sheryl Fyffe-Gauntlett, Esq., in Support of Cross Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment, dated September 23, 2012, with annexed exhibits; and

3. Affirmation of Joseph M. McCoy, Esq. in Response to Defendant's Reply, dated October 1, 2012.

[2] Plaintiff also submitted an unsigned affidavit from Joseph Quillinan in support of its motion for summary judgment.