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

PRESENT: DONNA M. MILLS PART 58

DONNA M. MILLS, J.S.C. *Justice*

ZETA PARKING CORP.,

Plaintiff,

-against-

215 EAST 80TH STREET ASSOCIATES, LLC,

Defendant.

INDEX NO. 105023/11

MOTION DATE

MOTION SEQ. NO. 004

MOTION CAL NO.

The following papers, numbered 1 to ____ were read on this motion for ____:

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1, 2
Answering Affidavits– Exhibits	3, 4
Replying Affidavits	5

CROSS-MOTION: ____ YES ✓ NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: 4/15/13

J.S.C.
DONNA M. MILLS, J.S.C.

Check one: ____ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

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215 EAST 80TH STREET ASSOCIATES, LLC,

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DECISION/ORDER

DONNA M. MILLS, J:

The Plaintiff, Zeta Parking Corp., is the current tenant of the garage space located at 213-215 East 80th Street New York, N.Y., and the operator of the parking garage business. In February 1986, Plaintiff's predecessor, Seagull Parking, as tenant, entered into a written agreement with defendant, 215 East 80h Street Associates, LLC, as landlord, for the lease of the garage space located at the subject premises. The lease was thereafter assigned to Plaintiff in 1999. In 1986, the building was a class A multiple dwelling consisting of 146 rental units and 1 commercial unit.

On March 18, 2002, defendant filed a plan for condominium ownership of the property. Defendant was the condominium sponsor of the plan, which provided for 146 residential units an 1 commercial unit (the garage space) which Plaintiff currently occupies. Over the years, defendant sold some of the apartments to third parties but retained ownership in the garage space and is the rightful landlord of such space.

The lease specifically says that the tenant (plaintiff herein) is to pay 10% of the taxes imposed on the building. The lease also provided that if the defendant was to convert the building to a cooperative form of ownership, the real estate taxes would remain at 10%, however, if the defendant was to sell the building in an arms' length transaction then the

plaintiff's real estate percentage of 10% would be reduced to 5%.

Plaintiff is seeking a declaration from this Court that it should not be responsible for the real estate tax escalation from the date the within property filed a plan for condominium ownership, to wit; March 18th, 2002 through the years 2010/2011 and ensuing years, to the extent that they are based on language contained in the parties lease, because the conversion of the building to condominiums or the improvements made towards said conversion was not within the parties reasonable commercial expectations. Plaintiff is also seeking restitution for an amount it paid to the Defendant for real estate taxes assessed against it since the conversion of the building.

CPLR § 3212(b) requires that for a court to grant summary judgment, the court must determine if the movant's papers justify holding, as a matter of law, "that the cause of action or defense has no merit." It is well settled that the remedy of summary judgment, although a drastic one, is appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact (Vamattam v Thomas, 205 AD2d 615 [2nd Dept 1994]). It is incumbent upon the moving party to make a prima facie showing based on sufficient evidence to warrant the court to find movant's entitlement to judgment as a matter of law (CPLR § 3212 [b]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Summary judgment should be denied when, based upon the evidence presented, there is any significant doubt as to the existence of a triable issue of fact (Rotuba Extruders v Ceppos, 46 NY2d 223 [1978]). When there is no genuine issue to be resolved at trial,

the case should be summarily decided (Andre v Pomeroy, 35 NY2d 361, 364 [1974]). Moreover, in considering a summary judgment motion "the court should draw all reasonable inferences in favor of the nonmoving party (Robinson v. Strong Mem. Hosp., 98 A.D.2d 976, 470 N.Y.S.2d 239) ...").

" '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' " (Breed v. Insurance Co., 46 N.Y.2d 351, 355, 413 N.Y.S.2d 352, 385 N.E.2d 1280 quoting Morlee Sales Corp. v. Manufacturers Trust Co., 9 N.Y.2d 16, 19, 210 N.Y.S.2d 516, 172 N.E.2d 280). Thus, "clear, complete writings should generally be enforced according to their terms" (W.W.W. Assocs. v. Giancontieri, 77 N.Y.2d 157, 160, 565 N.Y.S.2d 440, 566 N.E.2d 639). This "sensible proposition of law", imparts " 'stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses [and] infirmity of memory' " (id., at 162, 565 N.Y.S.2d 440, 566 N.E.2d 639, quoting Fisch, New York Evidence § 42, at 22 [2d ed.]). The rule has even greater force in the context of real property transactions, "where commercial certainty is a paramount concern" (id.), and where, as here, the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length (see Chimart Assocs. v. Paul, 66 N.Y.2d 570, 574, 498 N.Y.S.2d 344, 489 N.E.2d 231).

Plaintiff's first cause of action, while claiming to seek declaratory judgment as to the proper amount of real estate taxes due for the 2010/2011 tax year and ensuing years to the extent that they are based on language contained in paragraph 20(a) of the lease, essentially seeks reformation of the lease based upon mistake.

The purpose of reformation is to "restate the intended terms of an agreement when

the writing that memorializes that agreement is at variance with the intent of both parties" (George Backer Mgt. Corp. v. Acme Quilting Co., 46 N.Y.2d 211, 219, 413 N.Y.S.2d 135, 385 N.E.2d 1062). " 'A party seeking reformation must establish, by clear and convincing evidence, that the writing in question was executed under mutual mistake or unilateral mistake coupled with fraud' " (Herron v. Essex Ins. Co., 34 A.D.3d 913, 914, 823 N.Y.S.2d 571 [2006], lv. dismissed 8 N.Y.3d 856, 831 N.Y.S.2d 103, 863 N.E.2d 107 [2007], quoting Leavitt–Berner Tanning Corp. v. American Home Assur. Co., 129 A.D.2d 199, 201–202, 516 N.Y.S.2d 992 [1987], lv. denied 70 N.Y.2d 609, 522 N.Y.S.2d 109, 516 N.E.2d 1222 [1987]).

Considering the record in its entirety, in light of these principles, this court finds no proof of fraud in the record. Neither the affirmation by plaintiff's counsel or affidavit by Mrs. Kombothecras submitted by Zeta establishes any facts in evidentiary form sufficient to establish a prima facie showing for summary judgment. Plaintiff offers no legal authority to set aside provisions of the lease requiring the payment of real estate taxes.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied in its entirety.

Dated: 4/15/13

ENTER:

DONNA M. MILLS, J.S.C.

J.S.C.