

**833 Madison Enterprises, Inc. v A.L. Holdings, Inc.**

2013 NY Slip Op 30897(U)

April 22, 2013

Sup Ct, New York County

Docket Number: 112729/10

Judge: Joan A. Madden

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

PRESENT: HON. JOAN A. MADDEN  
Justice

PART 11

833 Madison Enterprises, Inc.  
Plaintiff,  
- v -  
A. L. Holdings, Inc.  
Defendants.

INDEX NO.: 112729/10  
MOTION DATE:  
MOTION CAL. NO.  
MOTION SEQ. NO. 02

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion ~~to~~ for Summary Judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
_____	_____
_____	_____
_____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached Memorandum Decision + Order.

**FILED**  
APR 29 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: April 22, 2013

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 11

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833 MADISON ENTERPRISES, INC.

Index No. 112729/10

Plaintiff,

-against-

A.L. HOLDINGS, INC.,

Defendant.

**FILED**

APR 29 2013

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JOAN MADDEN, J.:

NEW YORK  
COUNTY CLERK'S OFFICE

In this action arising out of a commercial lease, the defendant/landlord A.L. Holdings, Inc. ("A.L. Holdings") moves for an order (i) granting summary judgment dismissing the complaint against it, and (ii) granting summary judgment on its first counterclaim for legal fees and costs. The plaintiff/tenant 833 Madison Enterprises, Inc. ("833 Madison") opposes the motion. For the reasons set forth below, the motion is denied.

Background

Since 1997, 833 Madison has occupied a portion of the first floor, second floor and basement premises (the "Premises") of a building located at 833 Madison Avenue, New York, New York. This dispute concerns 833 Madison's entitlement to a rent abatement based on certain renovations performed by 833 Madison in accordance with a lease agreement that it entered into for the Premises on February 27, 2004 between it, as tenant, and A.L. Holdings, as landlord (the "Lease").

The Lease provides that 833 Madison would perform renovations to the Premises at the beginning of the Lease term. Article 1, Subparagraph G provides in pertinent part:

Tenant hereby represents to Landlord that during the period of March 1, 2004 through February 28, 2005[,] it shall cause to be performed a major Alteration (the "Premises Renovation").... No later than thirty (30) days prior to the commencement of the Premises Renovation, Tenant shall serve written notice upon Landlord of the commencement date thereof and no later than ten (10) days prior to the completion of the Premises Renovation, Tenant shall serve written notice of the completion date thereof. Provided Tenant is not in default of its obligations and undertakings as set forth in this Lease, Tenant shall be entitled to an abatement of Minimum Rent at the rate of \$1,694.44 per diem for the period commencing on the commencement date of the Premises Renovation and ending on the completion date of the Premises Renovation, provided, however, that (i) at all times during the Period of the Premises Renovation the Premises

shall have been closed for business and not accessible to the public and (ii) in no event shall such abatement exceed the aggregate amount of \$101,666.66.

833 Madison did not commence its renovation work until 2007, and the renovations were completed in 2008. The renovations cost 833 Madison in excess of \$2,000,000. It is undisputed that 833 Madison did not provide A.L. Holdings with written notice of the commencement and termination of the renovation work in accordance with the express terms provided by the Lease; however, 833 Madison alleges that A.L. Holdings was aware of the project's timing throughout the construction as it was required to sign off on various permits, and a Letter of Completion from the Department of Buildings constituted proof that the work was finalized.

A.L. Holdings did not provide the rent abatement to 833 Madison and 833 Madison did not make payments for minimum rent and real estate taxes in August and September 2010. As a result, 833 Madison received a Notice of Default Under Lease (the "Notice of Default") dated September 20, 2010, stating that 833 Madison was in default under the Lease for failure to pay \$97,113.11 for "Minimum Rent," real estate taxes, late fees, and legal fees and costs incurred in connection with 833 Madison's failure to pay rent. The Notice of Default further provided that unless 833 Madison cures the default by paying A.L. Holdings \$97,113.11 on or before September 27, 2010, the Lease will be terminated.

In response to the Notice of Default, 833 Madison filed the complaint in this action asserting causes of action for i) declaratory relief that 833 Madison is not in default of its Lease obligations and that it is entitled to a rent abatement, ii) monetary relief in the amount of \$101,666.66 plus interest, and iii) injunctive relief enjoining A.L. Holdings or anyone acting on its behalf from taking any action to terminate the Lease or obtain possession of the Premises. 833 Madison also moved, by order to show cause, for a Yellowstone injunction: i) staying and tolling the expiration of the cure period in the Notice of Default, and ii) restraining A.L.

Holdings or persons acting on its behalf from commencing any action to take possession of the Premises.

In support of its order to show cause, 833 Madison submitted, inter alia, the affidavit of Francesco Ferrante, the Assistant Secretary for 833 Madison, in which Ferrante states that in 2009, Lisa Firshing (“Firshing”), an employee of IMT Real Estate Solutions, Inc. (“IMT”), the managing agent for the Premises, “repeatedly promised that the rent credit would ‘not be a problem’ and that it would be afforded once all documentation of the renovation cost was provided.” Ferrante’s Yellowstone Aff. at ¶7. Ferrante further states that he believed this documentation would provide an economic benefit to A.L. Holdings and that he only agreed to provide it to Firshing after she assured him that 833 Madison would receive the rent abatement provided for in the Lease. *Id.*

In a decision dated March 16, 2011, this court determined that 833 Madison was entitled to a Yellowstone injunction, finding that 833 Madison demonstrated a willingness to cure its default by paying its arrears in the event that the court determined that 833 Madison was not entitled to an abatement. Moreover, the court noted that A.L. Holdings “merely address[ed] the likelihood of [833 Madison’s] success on the merits,” even though it is well established that a Yellowstone injunction “may be granted on less than the normal showing required for preliminary injunctive relief.” March 16, Decision and Order, at 3 (internal citations omitted).

On or around March 29, 2011, A.L. Holdings filed its answer, denying 833 Madison’s claims and asserting a counterclaim for attorneys’ fees and cost relating to this litigation, pursuant to Article 19 of the Lease.<sup>1</sup>

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<sup>1</sup> Article 19 of the Lease provides that if either party institutes an action against the other party, the non-prevailing party shall pay the costs and expenses incurred by the prevailing party.

A.L. Holdings now moves for summary judgment dismissing the complaint against it and granting its counterclaim for legal fees and costs. A.L. Holdings argues that the complaint should be dismissed as 833 Madison is not entitled to a rent abatement since 833 Madison failed to complete the renovations contemplated by Article 1(G) of the Lease within the period from March 1, 2004, through February 28, 2005, and failed to provide the notices of commencement and completion specified in Article 1(G) of the Lease. A.L. Holdings argues that these were material terms of the rent abatement provision and submits the affidavit of its President, Perry Haberman ("Haberman"), in which Haberman states that A.L. Holdings would not have agreed to a rent abatement if the Premises renovation were completed after February 28, 2005, since A.L. Holdings was attempting to rent the adjacent premises.

Additionally, A.L. Holdings argues that 833 Madison is not entitled to a rent abatement since the abatement is only available if 833 Madison is not in default of its Lease obligations and 833 Madison defaulted on its Lease obligations by failing to pay the sums referred to in the Notice of Default.

A.L. Holdings further argues that Ferrante's statement and deposition testimony that Firshing had assured him that 833 Madison would be given the rent abatement are inadmissible hearsay and that the e-mail which Ferrante cites in support of this contention does not evidence any assurance from Firshing. Furthermore, A.L. Holdings argues that Firshing could not have promised the rent abatement to 833 Madison since it is not entitled to the abatement under the terms of the Lease, and Article 24 of the Lease prohibits oral waivers of Lease rights, provides that the Lease constitutes the complete agreement of the parties, and that no modifications of the Lease are enforceable unless in writing.<sup>2</sup>

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<sup>2</sup> Article 24(B) and (C) provide, in pertinent part, that  
"No provision of this Lease shall be deemed to have been waived by Landlord or Tenant, unless such waiver be in writing signed by the other party.... Any executory agreement

Additionally, A.L. Holdings argues that in the event it prevails on its request to dismiss the complaint, it is entitled to summary judgment on its counterclaim for an award of legal fees and costs.

In opposition, 833 Madison argues that it only withheld rent as a result of A.L. Holdings' wrongful refusal to provide the rent abatement and that it had asserted its request for the rent abatement as early as February 2008. 833 Madison also asserts that, based on equitable principles, the fact that the construction undertaken was more extensive than initially contemplated and, therefore, took longer than anticipated, should not nullify 833 Madison's right to a rent abatement. Additionally, 833 Madison argues that completion of the renovations during the period provided under the Lease was not a material Lease term, as evidenced by the absence of any penalties for delays other than limiting the rent abatement to \$101,666.66.

Furthermore, Ferrante states in his affidavit in opposition that he took part in the Lease negotiations and that there was "no special magic to the end date of construction [and that] [t]he date was included in the Lease on a pro forma basis" Ferrante Aff. in Opposition, ¶5. He further states that "[d]uring the entire renovation project, [A.L. Holdings] never raised concerns involving time frame." Id., ¶10. Ferrante also denies the veracity of Haberman's statement that the time period for the renovations was limited as A.L. Holdings had a vacant adjacent space that it was trying to rent, asserting that "[i]n reality the adjacent space was rent to Karl Kemp Antiques in 2004, before the construction even commenced..." Id., ¶ 12.

833 Madison further asserts that A.L. Holdings was apprised in writing of the completion of the project by the Letter of Completion from the Department of Buildings.

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hereafter made shall be ineffective to change, modify, discharge or effect an abandonment of this Lease in whole or in part unless such executor agreement is in writing and signed by the party against whom enforcement of the change, modification, discharge or abandonment is sought."

In reply, A.L. Holdings argues that a determination that completion of the renovations within the period designated under the Lease is not a material term would violate the rule that a court should not adopt an interpretation of a contract that will leave one of its provisions without force and effect. A.L. Holdings further argues that the court cannot award the rent abatement based on equitable principles since a court is not free to alter a contract to reflect its notions of fairness where a tenant has failed to perform applicable conditions under a contract.

### Discussion

On a motion for summary judgment, the proponent “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case....” Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

It is well settled that the interpretation of a lease provision is governed by the same rules of construction applicable to other agreements. Missionary Sisters of the Sacred Heart v. New York State Division of Housing & Community Renewal, 283 A.D.2d 284, 288 (1st Dept 2001); New York Overnight Partners, L.P. v. Gordon, 217 A.D.2d 20 (1st Dept 1995), aff'd 88 N.Y.2d 716 (1996). When interpreting a contract, “the document must be read as a whole to determine the parties' purpose and intent, giving a practical interpretation to the language employed so that the parties' reasonable expectations are realized.” Snug Harbor Square Venture v. Never Home Laundry, 252 A.D.2d 520, 521 (2<sup>nd</sup> Dept 1998); see also Zodiac Enterprises, Inc. v. American

Broadcasting Companies, Inc., 81 A.D.2d 337, 339 (1<sup>st</sup> Dep't 1981), aff'd, 56 N.Y.2d 738 (1982).

“[W]hen parties set down their agreement in a clear, complete document, their writing should...enforced according to its terms.” W.W.W. Assocs., Inc. v. Giancontieri, 77 N.Y.2d 157, 162 (1990). It is also fundamental to contract interpretation that agreements are construed in accord with the parties' intent. See Slatt v. Slatt, 64 N.Y.2d 966, 967 (1985); see also Hartford Acc. & Indem. Co. v. Wesolowski, 33 N.Y.2d 169, 171 (1973). “Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide.” Greenfield v. Philles Records, Inc., 98 N.Y.2d 562, 569 (2002) citing W.W.W. Assocs., Inc. v. Giancontieri, 77 N.Y.2d at 162; see also Matter of Wallace v. 600 Partners Co., 86 N.Y.2d 543, 548 (1995).

Generally, a contract is unambiguous if “on its face [it] is reasonably susceptible of only one meaning.” Greenfield v. Philles Records, Inc., 98 N.Y.2d at 570; see also Chimart Assocs. v. Paul, 66 N.Y.2d 570, 572-573 (1986). In determining whether an agreement is ambiguous, the court “should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed.” Kass v. Kass, 91 N.Y.2d 554, 566 (1998). “If the court concludes that the agreement is ambiguous, extrinsic evidence may be used to discern its meaning.” Nappy v. Nappy, 40 AD3d 825, 826 (2d Dep't 2007)(internal citation omitted).. “Resolution of the ambiguity is for the trier of fact.” Id. (internal citation omitted)

Here, it cannot be said as a matter of law that the parties intended to make the completion of renovations within the period designated in the Lease or the providing of the specified notices prerequisites to 833 Madison's right to a rent abatement. Notably, while Article 1(G) of the Lease provides a time period for the renovation and specifies that notice should be provided to

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the landlord, it explicitly conditions 833 Madison's entitlement to a rent abatement only on i) the requirement that 833 Madison not be in default of its Lease obligations, and ii) the requirement that the Premises be closed during construction. Next, the only explicit consequence for a delay in the renovation consists of limiting the amount of the abatement, which accrues at the rate of \$1,694.44 per day during the period of construction, to \$101,666.66, or approximately two months rent.

Nor can it be said that the delay commencing the renovations and the failure to provide the specified notice constitute "defaults in [833 Madison's] obligations and undertakings as set forth in the Lease," for the purposes of Article 1(G) as such language would appear to refer to the defaults delineated in Article 17 which contains the default provision of the Lease.

Furthermore, as there is evidence that 833 Madison only withheld rent in August and September of 2010, after the dispute regarding the abatement, at the very least, there are issues of fact, as to whether such failure to pay rent constitutes a default that would preclude 833 Madison from obtaining the rent abatement.

As Article 1(G) is ambiguous as to whether 833 Madison's right to a rent abatement was conditioned on it completing the renovations within the designated period and providing the specified notices, the court may consider the extrinsic evidence submitted by the parties as to these issues. Here, even assuming that A.L. Holdings met its burden on summary judgment, including consideration of Haberman's statements that A.L. Holdings would not have agreed to the inclusion of the rent abatement provision if the Premises renovation were not completed prior to February 28, 2005, Ferrante's affidavit raises triable issues of fact as to the parties' intention to make the completion of the renovations within the period designated in the Lease a prerequisite to 833 Madison's entitlement to rent abatement. Likewise, there are issues of fact as

to whether 833 Madison's admitted failure to provide notice in accordance with Article 1(G) precludes its entitlement to the abatement.

Next, although Article 24 of the Lease contains a "no waiver" provision, such provisions may be waived by the parties "where the reasonable expectations of both parties under the lease have been modified by subsequent actions of the parties." Ray & W Cut Inc. v. 240 W. 37 LLC, 22 Misc.3d 1103(A)(Sup. Ct. N.Y. Co. 2008)(citations omitted); see also Kenyon & Kenyon v. Logany, LLC, 33 A.D.3d 538, 539 (1st Dep't 2006). Here, even if the fact finder determines that Article 1(G) required 833 Madison to complete the renovations during the designated period and/or satisfy the notice provisions, the record raises triable issues as to whether these requirements were waived by the conduct of A.L. Holdings and/or its managing agent. See Kenyon & Kenyon v. Logany, LLC supra. at 538-539.

In consideration of the above, A.L. Holdings has failed to demonstrate entitlement to summary judgment.

Conclusion

In view of the above, it is

ORDERED that A.L. Holding's motion for summary judgment dismissing the complaint and seeking judgment on its first counterclaim is denied; and it is further

ORDERED that the parties shall appear on May 16, 2013 at 9:30 a.m. in Part 11, room 351, 60 Centre Street, New York, New York.

Dated: April 22, 2013

  
J.S.C.

**FILED**  
APR 29 2013  
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