

**Building Serv. Local 32B-J Pension Fund v Sup Ct,  
NY County**

2013 NY Slip Op 32987(U)

November 21, 2013

Sup Ct, NY County

Docket Number: 652266/10

Judge: Melvin L. Schweitzer

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

PRESENT: MELVIN L. SCHWEITZER  
Justice

PART 45

BUILDING SERVICE LOCAL 32 BS PENSION FUND, et al

INDEX NO. 652266/10

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 006

MOTION CAL. NO. \_\_\_\_\_

- v -

(0) Limited Partnership

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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 *by plaintiffs for partial summary judgment is DENIED per the attached Decision and Order.*

Dated: November 21, 2013

Melvin L. Schweitzer  
MELVIN L. SCHWEITZER 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):



“Net Cash Flow” for any period shall mean an amount equal to all of (i) Landlord’s cash receipts solely from the Building for such period (other than cash receipts constituting Capital Items), less the sum of (A) an amount on account of Landlord’s overhead costs equal to .5% of such cash receipts, (B) *the amount of the debt service paid* during such period for all then existing Secured Loans, including any Secured Lender’s equity or interest “kicker,” (C) the Rent Rebates paid during such period other than from Landlord’s Capital Items and (D) *the expenses incurred by Landlord in connection with operating the Building* which have not been paid by Tenant and the Other Tenants under (i) above or which have been paid solely as reimbursement of or “pass through” for amounts paid or payable by Landlord to third parties, plus (ii) *amounts released during such period from Landlord’s reserves*, if any.

Tenant brought suit in 2010 claiming breach of contract and seeking money damages and injunctive relief for the dispute over Section 46.01, and an associated dispute over Tenant’s repair obligations. Landlord moved for partial summary judgment dismissing Tenant’s claim relating Section 46.01, based on its interpretation of the calculation of Net Cash Flow. In an order dated March 6, 2012, this court found that Section 46.01 is ambiguous, and denied the Landlord’s motion.

Now, the Tenant makes a claim for partial summary judgment grounded again in Section 46.01. Tenant argues that it has unearthed a document in discovery that uncontrovertibly supports its interpretation of Section 46.01 and that entitles it to summary judgment.

### Discussion

A summary judgment motion pursuant to CPLR 3212 should be granted only “where there are no material and triable issues of fact.” *Paulin v Needham*, 28 AD3d 531, 531 (2d Dept, 2006); *see also Brunetti v Musalla*, 11AD3d 280, 280 (1st Dept 2004). Specifically, in a breach of contract case, the moving party must show that its interpretation of the contract provision at issue is the only reasonable one. *Kohman v Rochambeau Realty & Dev. Corp.*, 17 AD3d 151, 152 (1st Dept 2005) (“The motion court correctly found that each party’s interpretation of the

key words, 'Apartment Garden Floor Through on the Ground floor,' was reasonable and properly denied summary judgment to both parties on the ground that the lease provision is ambiguous and the intent of the parties must be resolved at trial from disputed evidence or from inferences outside written words.”)

Both parties offer multiple arguments supporting their reading of Section 46.01.

Defendant argues that the establishing of reserves is the same as payment of an expense incurred by Landlord in the operation of the building or Debt Service. Plaintiffs contends that the Lease says they are not the same – indeed the parties purposefully struck such a clause during the negotiation of the Lease.

Plaintiffs say that by asking this court to revive and enforce a contract provision that the parties consciously excluded 17 years before, defendant violates a basic principle of New York law. *See e.g. Salvano v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 85 NY2d 173, 182 (1995) (“The court’s role is limited to interpretation and enforcement of the terms agreed to by the parties; it does not include the rewriting of their contract and the imposition of additional terms.”) Plaintiffs say this negates defendant’s position as a matter of law.

Plaintiffs argue further that defendant carried the reserves on its books and records as assets, which meant that they could not simultaneously be expenses or Debt Service and, for years, defendant’s accountants made no deduction from Net Cash Flow for reserves. Indeed, defendant’s accountants did not include the payments into reserves as either Operating Expenses or Debt Service, but instead created a special additional deduction category for reserves.

Plaintiffs contend that defendant produced in discovery documents showing that the parties consciously eliminated reserves as a deduction from Net Cash Flow when they negotiated the Lease 24 years ago. Defendant’s documents show that, early in the negotiating history of the

Lease, there was a provision in the drafts that expressly stated that the reserves would be deducted from Net Cash Flow. However, it was later taken out at the request of plaintiffs. Plaintiffs say the "documents are unequivocal and allow only one rational conclusion."

Defendant contends that the full drafting history of the Lease demonstrates that plaintiffs' position is erroneous and misleading. It says that, originally, the Lease drafts provide for a two-step calculation of plaintiffs' "participation." Plaintiffs would share only (i) after certain items were subtracted, and then (ii) after subtraction of a floor amount of approximately \$14 million. It further says that documentation shows that plaintiffs were concerned that duplicate deductions would be taken. Plaintiffs did not then assert that no reserves could ever be subtracted, but objected only to a possible duplication with respect to reasonable reserves.

Defendant points out that later the parties shifted to a one-step subtraction process, entirely eliminating the \$14 million floor, and including a new and broad itemized subtraction category of an expense incurred by Landlord in operation of the building. Defendant argues that plaintiffs were primarily concerned with duplicate subtractions, and that the elimination of the floor resolved this concern. It argues that a supporting affidavit by its lead business negotiator confirms that the business sense of what the parties agreed to was, in fact, that reserves needed to be subtracted. In short, it offers evidence to debunk plaintiffs' negotiating-history argument as not accurately describing the particular deletion, or the full course of the drafting history.

Defendant further argues that if the court were to adopt the plaintiffs' interpretation of the Lease term, it would result in a windfall to the plaintiffs. This is so, according to defendant, because plaintiffs would be paid a percentage of Net Cash Flow for years during which

defendant's distribution to owners was "less than zero" due to the reserves. Plaintiffs respond with the contention that the defendant is asking the court to prevent a contractually determined outcome by adding terms to the parties' contract that are not in the Lease, and that were intentionally deleted before the Lease was signed.

Defendant also attacks plaintiffs' secondary arguments regarding the defendant's own treatment of reserves. It points out that an expert's affidavit explains that there is no inconsistency in listing the amount paid-in to reserves as an asset. Defendant further rebuts the criticism of its accounting firm's treatment of required reserves. It points out that both it and the plaintiffs were not bound by anything the accountant did, that the plaintiffs have confused the term "Operating Expense" with "expenses incurred by Landlord in connection with operating the Building," and that the accountant's treatment of the contested item is not inconsistent, and to the extent the accountant made an error, it duly corrected it.<sup>1</sup>

In sum, defendant contends that its affidavits show the business purpose of Section 46.01, the background and drafting history of the Lease, and why the reserve payments should be subtracted in calculating any "participation" in Net Cash Flow by plaintiffs.

The defendant then moves on to its position on the law relating to this motion. It argues that where a lease provision has been held to be ambiguous, as is the case here, and one party later moves for summary judgment, but the movant's extrinsic evidence is contradicted by the opposing party, the motion should be denied. *Credit Suisse Securities (USA) LLC v Ask Jeeves*,

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<sup>1</sup> The parties also put forth opposing views regarding the Defendant's 2005 loan refinancing and the deposition testimony of the lead negotiator for the defendant in connection with such financing. Plaintiffs contend that the deposition testimony is contrary to deponent's subsequent affidavit on these matters. Defendant sets forth a critique of the limited nature of the deposition testimony, arguing that plaintiffs deliberately refused to inquire about the business sense of the transaction- recognizing that an understanding of the facts and business sense would be disadvantageous to it.

*Inc.*, 2009 WL 2619396 (Sup Ct NY Co) *affd* 71 AD3d 590, 896 (1st Dept 2010). Second, it contends that when addressing an ambiguous provision in a contract or lease, the trier of fact at trial should adopt an interpretation that is reasonable as a business matter and does not grant the other side a windfall. *Time Warner Entertainment Co. LP v Brustowsky*, 221 AD2d 268 (1st Dept 1995). It submits that it has established grounds upon which the court at trial can conclude that plaintiffs' position is not reasonable, and would yield them a windfall.

The court finds Section 46.01 on its face can reasonably be read to provide for the subtraction of the reserves as expenses in calculating plaintiffs' "participation". The court finds that defendant's extrinsic evidence clearly controverts plaintiffs' proffers, and puts at issue material facts, which must be resolved by the court at trial.

Accordingly, it is --

ORDERED that plaintiffs' motion for summary judgment is denied.

Dated: November 2), 2013

ENTER:

  
J.S.C.

MELVIN L. SCHWEITZER