

**Chatham 44 Commercial Assoc., LLC v Emera
Group Inc.**

2013 NY Slip Op 33498(U)

October 30, 2013

Supreme Court, New York County

Docket Number: 400102/2011

Judge: Andrea Masley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY
Justice

PART 43

Index Number : 400102/2011
CHATHAM 44 COMMERCIAL ASSOC.
VS.
EMERA GROUP INCORPORATED
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

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

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

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

*Decided consistent with annexed
decesm*

FILED
DEC 03 2013
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 11/28/13

[Signature]
HON. ANDREA MASLEY J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

FILED

CLERK OF THE COURT
NEW YORK
COUNTY OFFICE

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

CHATHAM 44 COMMERCIAL ASSOCIATES, LLC,
Plaintiff,

-against-

THE EMERA GROUP INCORPORATED, DUNKIN'
DONUTS, SHERIF EMERA AND MALA EMERA,
Defendants.

DECISION/ORDER

HON. ANDREA MASLEY
Judge

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Plaintiff's Motion for Summary Judgment	1
Affirmation in support	2
Memo of Law	3
Affirmation in Opposition	4
Reply	5
Defendant's Motion for Summary Judgment	6
Memo of Law	7
Affirmation in Opposition	8
Reply	9

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NEW YORK
COUNTY CLERKS OFFICE

Pursuant to CPLR 3212, in this action for breach of a commercial lease, plaintiff landlord Chatham 44 Commercial Associates, LLC moves for summary judgment on three of four causes of action in the complaint. Defendant tenants The Emera Group Incorporated, Dunkin' Donuts, Sherif Emera and Mala Emera move for summary judgment to dismiss. Discovery is complete and plaintiff has filed a Note of Issue.

Plaintiff seeks \$56,765.46 for use, operation and maintenance of the cooling tower from April 2008 to March 2013. Plaintiff calculates defendant's monthly cost of \$946.09 by dividing the cost of installation by 40 years, the expected service life of the components and divided by three tenants. Defendants use the cooling tower for air conditioning and refrigeration. The issue is whether defendants are liable for chilled water usage only or the costs associated with obtaining chilled water.

Defendants and Chatham 44 Associates, LLC¹ entered a 15-year store lease on November 28, 2007 for commercial space located at 606 10th Avenue, N.Y., N.Y., where defendants Sherif and Mala Emera have operated a Dunkin' Donut franchise since May of 2008. Defendants Sherif Emera and Mala Emera signed the lease as guarantors and own the franchise.

Plaintiff alleges in the complaint: (1) breach of the lease for defendants' alleged failure to pay costs of \$26,588.12 associated with the heating and cooling utilities for the leased space; (2) breach of guarantee against defendants Sherif and Mala Emera; (3) account stated; and (4) unjust enrichment.

Initially, the movant has the burden on a motion for summary judgment to come forward with sufficient proof in admissible form to enable a court to determine that it is entitled to judgment as a matter of law. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). "When reviewing a motion for summary judgment the focus of the court's concern is issue finding, not issue determination, and the affidavits should be scrutinized carefully in the light most favorable to the party opposing the motion." *Goldstein v County of Monroe*, 77 AD2d 232, 236 (4th Dept 1980). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Winegrad*, 64 NY2d at 853. However, once a moving party has made a prima facie showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1976). Summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be

¹The lease was assigned to plaintiff.

presented at trial. *Andre v Pomeroy*, 35 NY2d 361, 364 (1974).

Defendant's motion to dismiss the third and fourth causes of action is granted. For its account stated claim, plaintiff relies on the affidavit of Mr. Mcinerney who states that he demanded payment, but fails to state, when, where, how. "An account stated is an agreement between parties to an account based upon prior transactions between them" with respect to the correctness of the account items and balance due. *Marino v Watkins*, 112 AD 2d 511, 512 (3d Dept 1985). An agreement between the parties can be inferred by receipt of invoices and failure to object for an unreasonable amount of time. *Jim-Mar Corp. v Aquatic Constr.*, 195 AD 2d 868, 869 (3d Dept), *leave to appeal denied*, 82 NY2d 660 (1993). Plaintiff has offered no invoices, nor any evidence that such an account was delivered to defendants. While defendants admit to receiving one such document, no one provides it to the court. Plaintiff's fourth cause of action for unjust enrichment is precluded by its contract claim. *MJM Adver, Inc v Panasonic Indus Co*, 294 AD2d 265 (1st Dept 2002). This leaves the first and second causes of action.

In dispute is whether defendants are obligated under the terms of the lease at rider ¶150(b) to pay costs associated with cooling utilities. Rider ¶150(b) provides:

"Tenant shall, at its sole cost and expense and whether measured by a meter, submeter or otherwise, pay for all electricity, gas (if any), water, sewer charges, chilled water for air conditioning, and fuel consumed during the Term, as well as all telephone, cable and/or satellite television, computer cabling and all other services and utilities of any kind whatsoever and shall open and maintain all such utility and other services in Tenant's name and shall be responsible for all costs and expenses in connection with obtaining such services, including, without limitation, any costs in connection with the installation of cabling, metering devices and equipment." (emphasis added).

Based on the clear language of the lease, defendants are responsible for the cost of "water, . . . chilled water for air conditioning, and . . . any costs in connection with the installation of . . . equipment." "Whether or not a writing is ambiguous is a question

of law to be resolved by the courts." *WWW Associates, Inc v Giancontieri*, 77 NY2d 157 (1990). Extrinsic evidence may not be considered unless the document is ambiguous. *South Rd Assocs, LLC v IBM*, 4 NY3d 272 (2005). The contract is clear and unambiguous that defendants are responsible for the cost of the chilled water as well as the chilled water equipment. This reading of ¶509b) is consistent with the other sections of the lease referenced by defendants. See e.g. 50(a) which provides that tenant is responsible for the maintenance of the premises and its equipment. The lease also includes a merger clause which precludes consideration of discussions preceding the lease. Accordingly, it is unnecessary to resort to the parole evidence that both parties offer the court. It is unnecessary for the court to address defendant's objection to plaintiff's discovery responses raised for the first time. It is unnecessary for the court to consider the custom and practice in the industry as plaintiff wishes. Defendant's argument that the lease does not expressly allow for this charge is simply wrong. Defendant's objection to the lease's silence as to the method of calculation is contradicted by the language in ¶50b "whether measured by a meter, submeter or otherwise." Therefore, plaintiff's motion is granted as to the first cause of action for breach of contract.

Plaintiff's motion for summary judgment on its second cause of action based on a personal guarantee signed by the individual defendants is also granted for the same reasons.

As to the amount of damages, plaintiff's documentary evidence establishes \$56,765.46. Defendants fail to offer an alternative calculation or to point out errors in plaintiff's calculation. However, in the absence of any documentation as to when plaintiff demanded payment, the court declines to award interest.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted as to the first and second causes of action and plaintiff shall have judgment against all defendants jointly and severally for \$56,765.46 with costs and disbursements; and it is further

ORDERED that defendants' motion to dismiss the ^{Forth} ~~second~~ and third causes of action is granted and otherwise denied.

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11/25/13

The clerk shall enter judgment accordingly.

Dated: _____

10/30/13

Andrea Masley, Judge

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