SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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CAREY & ASSOCIATES LLC,

Plaintiff,

-against-

521 FIFTH AVENUE PARTNERS, LLC, et al.,

Defendants.

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DECISION AND ORDER

Index No. 650165/08

HON. ANIL C. SINGH, J.:

Motion sequence 003 and 004 are consolidated for disposition.

In motion sequence 003, defendant Green 521 Fifth Avenue LLC moves pursuant to CPLR 3212 for partial summary judgment dismissing the seventh cause of action contained in the Second Amended Complaint. Plaintiff opposes the motion.

In motion sequence 004, plaintiff Carey & Associates LLC moves for partial summary judgment in its favor on the same cause of action. Defendant opposes the motion.

The material facts are as follows.

Defendant 521 Fifth Avenue Partners, LLC, as landlord, entered into a written lease agreement dated January 7, 2003, with plaintiff Carey & Associates LLC, as tenant. The subject premises are the entire 33rd floor of 521 Fifth Avenue in Manhattan. The lease is for a term of approximately ten years and five months.

Defendant Green 521 Fifth Avenue LLC ("Green 521") became the ground lessee of the building pursuant to a ground lease dated March 10, 2006, between Green 521 and an entity called 104-521 Fee LLC, the then-owner of the fee interest of the building and property.

At issue is the proper interpretation of section 3.1(A) of the lease as it relates to the electrical expense in calculating additional rent.

Section 3.1, which is an escalation clause, states in pertinent part as follows:

> (A) "Operating Expenses" shall mean the aggregate of those costs and expenses (and taxes thereon, if any) paid or incurred by landlord ... including without limitation:
>
> . . .
>
> (iii) the cost of electricity, gas, oil, steam, water, sewer rental, HVAC and other utilities furnished to the building and utility taxes; [and]
>
> . . .
>
> (xviii) fifty percent (50%) of all electrical costs incurred in the operation of the real property.
>
> Notwithstanding any provision of this Section 3.1(A) to the contrary, if landlord shall discontinue the redistribution or furnishing of the electrical energy to all tenants in the building, then the cost and expense incurred by landlord for electricity shall thereafter be deemed to be one hundred percent (100%) of the total cost and expense to landlord of purchasing electricity for the real property.
>
> Provided, however, that the foregoing costs and expenses shall exclude or have deducted from them, as the case may be:
>
> . . .
>
> (14) fifty percent (50%) of all electrical costs incurred in the operation of the real property.

(Lease Agreement, pp. 8-10).

Landlord argues that the lease permits it to include 50% of the electricity costs (Section 3.1(A)(xviii)) plus 100% (Section 3.1(A)) less 50% (Section 3.1(A)(14) for a total of 100%.

Tenant argues that Section 3.1(A) is a general clause that defines all the costs associated with landlord's operating expenses. To the extent that Section 3.1(A)(i) through 3.1(A)(xvii) conflict with Section 3.1(A)(vxiii) and with Section 3.1(A)(14), the clauses following Section 3.1(A)(xvii) govern, for they are specific provisions of the lease.

Tenant asserts that the lease provides in specific language that landlord would charge for electric costs, not at 150% nor at 100%, but at 50% of all electrical costs incurred in the operation of the property. According to tenant, Section 3.1(A)(14) specifically excludes the 50% electric operating expenses from those charged tenant using the same terminology as Section 3.1(A)(xviii). In tenant's view, the two sections cancel each other – in other words, plus 50% minus 50% equals zero.

In addition, tenant asserts that landlord's interpretation would fail to give practical effect to every part of the lease. Tenant contends that reading general Section 3.1(A)(iii) as including 100% of the costs of electricity would make superfluous two specific clauses of the lease – that is, Section 3.1(A)(xviii) adding 50% (total 150%)

and specific exclusion Section 3.1(A)(14) subtracting 50% (total 100%).

Finally, tenant asserts that landlord is not interpreting the lease reasonably, for it ignores the specific clause in the lease immediately following Section 3.1(A)(xviii) (the "electric discontinued" clause).

Discussion

The issue before the Court is whether either party is entitled to summary judgment regarding the seventh cause of action asserted in the second amended complaint. The cause of action states:

> Electric sub-meter charges billed to and paid by [plaintiff] should not be included in the calculation of additional rent owed by [plaintiff].

(Second Amended Complaint, p. 34, para. 256).

Because a lease is both a conveyance of an interest in real property and a contract, like other contracts its meaning is determined by the intent of the parties (See Farrell Lines, Inc. v. City of New York, 30 N.Y.2d 76, 82-3 [1972]). Where a written lease is complete, clear and unambiguous on its face, it must be enforced according to the plain meaning of its terms (Nola Realty LLC v. DM & M Holding L.L.C., 33 A.D.3d 523, 526 [1st Dep't, 2006]). A court may not re-write the terms of a lease in order to reflect the real intention of the parties where to do so would contradict the clearly expressed language of the document (Ran First Associates v. 363 East 76th Street Corporation, 297 A.D.2d 506, 508 [1st Dep't, 2002]).

Neither parties' interpretation is supported by the plain meaning of Article 3. Article 3 contemplates two possible scenarios which are mutually exclusive – either the landlord was providing electricity, or the landlord was not providing electricity.

Where electricity is furnished to the building to the tenant, 50% of all electrical costs incurred in the operation of the real property shall be included as operating expenses.

However, if the landlord discontinues the redistribution or furnishing of electricity to the tenants in the building – as the landlord had done here – the cost for electricity is 100%. However, the provision further provides that 50% (under Subsection 14) will be deducted from the costs and expenses. Under the latter scenario as well, the landlord is entitled only to 50% of the electrical costs as an operating expense.

Moreover, despite how the defendant now interprets the calculation of electricity, it is undisputed that the landlord has been charging only 50% in its calculation of operating expenses. It is well settled that the Court should look to evidence of the parties' course of conduct, including the landlord's billing for, and the tenant's payment of, additional rent since the inception of the tenancy, showing the methodology that had been utilized to compute additional rent (One Hundred Grand, Inc. v. Chaplin, 70 A.D.3d 513, 513 [1st Dept., 2010]).

The decision of the Court in Murray Hill Mews Owners Corp. v. Rio Restaurant

Associates, L.P., 92 A.D.3d 453 [1st Dept., 2012], is instructive. The First Department wrote:

> There is no ambiguity in the rent escalation clause of the parties' lease. Pursuant to the plain terms of the clause, the fixed rental is a changing, not static, figure to be used in determining annual rent increases, including increases based on changes in the consumer price index. This interpretation of the clause best accords with the remainder of the lease. Further, when viewing the parties' course of conduct –including respondent's consistent payment over eight years, without protest, of rent increases based on a compounded fixed rent figure, and its renegotiation of the renewal lease on the same terms as the original lease – it is clear that petitioner's construction of the escalation clause comports with the parties' intent. Respondent's affirmative defense that it was overcharged is undermined by its admitted receipt of at least some of the rent notices and its long-term acquiescence in petitioner's interpretation of the escalation clause.

(Murray Hill, 92 A.D.3d at 454 (internal citations omitted)).

For the above reasons, it is

ORDERED that defendant's for partial summary judgment dismissing the seventh cause of action (mot. seq. 003) is granted; and it is further

ORDERED that plaintiff's motion for partial summary judgment (mot. seq. 004) is denied.

The foregoing constitutes the decision and order of the court.

Date: March 31, 2015
New York, New York

Anil C. Singh