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At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 28 day of October, 2015.

PRESENT: HON. LOREN BAILY-SCHIFFMAN
JUSTICE

REMSEN STREET OWNERS, INC,
Plaintiff(s),
- against -

100 REMSEN STREET, LLC,
Defendant(s).

Index No.: **501293-2015**

Motion Seq. # 2

ORDER

As required by CPLR 2219(a), the following papers were considered in the review of this motion.

The following papers numbered 1 to 4 read on this motion

	PAPERS NUMBERED
Notice of Motion - Order to Show Cause - Affidavit(s) Affirmation(s), Petition, and Exhibits Annexed	1
Answering Affidavit(s) and Affirmation(s)	2
Reply Affidavit(s) and Affirmation(s)	3
Other Papers	4

In dispute herein is a ground lease agreement entered into by Henry Kraushar, as Landlord, and M. Robert Steel, as Tenant, for an 80-unit apartment building located at 100 Remsen Street in Brooklyn. Upon the foregoing papers Defendant, the successor in interest to the Landlord Kraushar, moves this court for an order dismissing the complaint of Plaintiff, the successor in interest to the Tenant, Steel, pursuant to CPLR §3211(a)(1) and (7). Paragraph Thirty-eight of the lease provides in relevant part that the tenant shall pay the landlord "net rent" of $73,000 per annum, plus "additional rent" consisting of "all taxes, assessments, water rates and charges, sewer rents and other governmental impositions and charges of every kind." The lease was originally executed in 1959 for a 21-year term and provided for its renewal, solely at the tenant's option, for up to three consecutive 21-year terms. If the option to renew was exercised, the "net rent" of each

year of each renewal term was to be $66,000, together with "additional rent." Further, Paragraph Thirty-eight of the lease also obligated the tenant to pay, during each year of each renewal term, a sum designated as "additional net rent," which was defined as "15% of the gross income in excess of $175,000 per annum received by the Tenant in the operation of and from the sub-tenants of the Demised Premises" (emphasis added).

The leasehold interest was assigned to Plaintiff, as Tenant, a Shareholder Cooperative Corporation, in 1981 and thereafter the subject property was successfully converted into a co-op. Plaintiff commenced the within action on or about February 4, 2015 and the first and second causes of action seek a declaration for the purposes of calculating the amount of "additional net rent." Specifically, Plaintiff seeks a declaration that "gross income" pursuant to the terms of the lease herein **excludes** the assessment fees paid by the shareholders, as reimbursement for the costs of financing and installing new windows and a new boiler. Additionally, Plaintiff seeks a declaration that the amount payable every year as "net rent," $66,000, should be excluded from the calculation of "additional net rent" as well. Plaintiff claims that these amounts are not properly classified as "gross income" and therefore should not be included in the calculation of "additional net rent." Moreover, according to Plaintiff, the inclusion of these amounts in prior payments was erroneous and plaintiff seeks a credit for those amounts previously paid from 2009 to the present. Plaintiff's third cause of action seeks an Order preventing Defendant from terminating the lease herein and the fourth cause of action seeks attorney's fees.

Defendant Landlord has brought the instant motion to dismiss asserting that the documentary evidence submitted herein establishes a complete defense to this action and that

the complaint fails to state a cause of action pursuant to CPLR §3211(a)1 and 7, respectively. In support of the within motion, Defendant annexes 1) the subject ground lease; 2) an appraisal report for the subject property dated February 12, 2007; 3) a letter dated January 27, 2003 reflecting failed negotiations for the sale and financing of the subject property; and 4) reports and letters entitled "Breakdown of Income" for the years 2000, 2002-2009, 1995-1996 and 1998-1999.

DOCUMENTARY EVIDENCE

Defendant asserts that the documentary evidence submitted herein establishes a complete defense to the within action. A motion to dismiss a complaint pursuant to §3211(a)(1) may be granted "only where the documentary evidence utterly refutes [a] plaintiff's factual allegations, conclusively establishing a defense as a matter of law." ***Goshen v Mutual Life Ins Co of NY, 98 NY2d 314, 326 (2002), citing Leon v Martinez, 84 NY2d 83, 88 (1994); see also, Parkoff v Stavsky, 109 AD3d 646, 647 (2nd Dept 2013).*** However, not all printed materials constitutes documentary evidence under CPLR §3211(a)(1). ***Flushing Savings Bank v Siunykalimi, 94 AD3d 807,808 (2nd Dept 2012), citing Fontanetta v John Doe 1, 73 AD3d 78, 84-85 (2nd Dept 2010).*** To be considered "documentary," the evidence must be unambiguous, authentic and essentially undeniable, ***Sunset Café, Inc v Mett's Surf & Sports Corp, 103 AD3d 707, 708 (2nd Dept 2013) (citations omitted); Parekh v Cain, 96 AD3d 812, 815 (2nd Dept 2012)***. The evidence submitted by Defendant herein does not meet the criteria set forth above. This Court notes that many of the exhibits attached to the moving papers are incomplete and therefore cannot support a dismissal based upon documentary evidence pursuant to §3211(a)(1). Additionally, the remaining exhibits relied upon by Defendant do not provide evidence that is essentially undeniable and therefore are insufficient

to support the within motion to dismiss the complaint. ***Fontanetta v John Doe 1, supra at 86.***

FAILURE TO STATE A CAUSE OF ACTION

Upon a motion to dismiss a pleading for failure to state a cause of action pursuant to CPLR § 3211 (a) (7), the court must construe the pleading liberally, accepting all of the facts alleged therein to be true, and the allegations contained therein should be afforded the benefit of every possible favorable inference. The court needs to "determine only whether the facts alleged fit within any cognizable legal theory." ***Leon v Martinez, supra at 87-88; Hurrell-Harring v State of New York, 15 NY3d 8 (2010).*** Therefore, in order to prevail on a CPLR § 3211 (a) (7) motion, a movant must establish definitively that the facts as alleged in the complaint are not facts at all. ***Nunez v Mohammed, supra at 922, citing, Rietschel v Maimonides Med Center, 83 AD3d 810 (2nd Dept 2011)***; ***Cog-Net Bldg Corp v Travelers Inde Co, 86 AD3d 585, 586 (2nd Dept 2011)***; ***Stewart v NYC Transit Authority, 50 AD3d 1013-1014 (2nd Dept 2008).*** Plaintiff's first and second causes of action herein seek a declaration excluding the shareholders' payments for capital improvements as well as the $66,000 paid as"net rent" from the calculation of "additional net rent."

Defendant contends that the causes of action seeking a declaration clarifying Paragraph 38 of the lease herein, are inadequate as a matter of law and should be dismissed pursuant to CPLR § 3211 (a) (7). Further, Defendant argues that the meaning of "gross income" in Paragraph Thirty-eight of the lease is self-evident and unambiguous. Plaintiff, relies upon two separate prior decisions by the Appellate Division concerning the subject building: ***Remsen Apartments, Inc v Nayman, 89 AD2d 1014 (2nd Dept 1982) and Nayman v Remsen Apartments, Inc, 125 AD2d 378 (2nd Dept 1986)***. While the aforementioned ***decisions*** are not res judicata of the specific issues

presented herein, the Second Department held not once but twice that the definition of "gross income" as set forth in the actual lease in dispute, required clarification by the Court. ***Remsen Apartments, Inc v Nayman, supra at 1015*** and ***Nayman v Remsen Apartments, Inc, supra at 382.*** The issue raised in each of the aforementioned decisions was whether or not "gross income" for the purposes of calculating "additional net rent" included the consideration given for the assignment of the original Tenant's leasehold interest and the monies paid by the shareholders to purchase shares of the cooperative corporation. The Appellate Division held that the monies paid for the assignment of the leasehold interest as well as to purchase shares in the cooperative corporation were not included in the definition of "gross income" for the purposes of calculating "additional net rent."

CAPITAL ASSESSMENTS

The question presented herein is whether the monies repaid by the shareholders to reimburse the Tenant for payments previously made for capital improvements constitute monies received "in the operation of and from the sub-tenants of the Demised Premises." Clearly when the lease herein was executed the parties were not contemplating a coop conversion. Therefore the parties, and more specifically Defendant, did not intend for the amount of income generated by the property to be constrained by the interests of a cooperative corporation. However, it has been held that amongst sophisticated commercial entities, an overlap between lease clauses may reflect different although similar concerns, but it is the bargain the parties agreed to freely. ***City of Hope, Inc v Fisk Bldg Assoc, 63 AD2d 946 (1st Dept1978)***. When a party regrets a bargain made long ago the "[C]ourts do not serve as business arbiters between parties in approximately equal

stances." ***CBS Inc v PA Bldg Co, 200 AD2d527(1st Dept 1994)***. While the Lease requires that the Tenant pay for all of the repairs and capital improvements, there is no language that prevents reimbursement by the shareholders. The principle of *inclusio unius est exclusio alterius* is therefore applicable to the definition of "gross income" herein. Because the lease was specific as to what was included, it must be read as implicitly prohibiting other considerations. ***Two Guys from Harrison-NY v SFR Realty Assoc, 63 NY2d 396, 403-404 (1984); United Equities v Mardordic Realty Co, 8 AD2d 398 (1959)*** and ***New York Overnight Partners v Gordon, 88 NY2d 716 (1996).*** The Appellate Division held that any definition of "gross income" for that purpose requires a finding as to the parties' intent when the lease was drafted and stated that the monies received ". . . for rent or maintenance would, of course, constitute "gross income." ***Remsen Apartments, Inc, supra at 1015.*** Moreover, monies paid for capital improvements are neither rent nor maintenance.

THE NET RENT OF $66,000

The second cause of action seeks a declaration that the $66,000 paid in "net rent" annually should also be excluded from the calculation of "additional net rent." Plaintiff alleges that the inclusion of this amount in prior payments was erroneous and they, therefore, also seek a credit for the amounts paid from 2009 to the present. However, Plaintiff has not submitted sufficient law or facts to indicate that "net rent" should be excluded from the calculation of "additional net rent." The Lease at paragraph Thirty Fifth clearly states that "net rent," "additional rent" and "additional net rent" may be used interchangeably.

The law is clearly established that 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. ***Farrell Lines, Inc v City of New York, 30 NY2d 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 LLC, 33 AD3d 523, 526 (1st Dept 2006)***. A court therefore may not rewrite 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 AD2d 506, 508 (1st Dept 2002).*** Therefore, defendant's motion to strike the second cause of action in the complaint is granted.

Plaintiff's third cause of action seeks an Order enjoining defendant from terminating the lease herein. As set forth above any possible lease violations have been resolved and Defendant, therefore has no basis upon which to terminate the lease herein.

This issue of attorneys fees will await the resolution of the entire action.

Accordingly, it is hereby ORDERED that Defendant's motion to dismiss the complaint for failure to state a cause of action is granted to the extent of dismissing the second cause of action and it is hereby ORDERED that the motion is denied in all other respects.

This is the decision and ORDER of the court.

ENTER,

LOREN BAILY-SCHIFFMAN
JSC