Segal Co. (E. States), Inc. v 333 W34 SLG Owner LLC
2016 NY Slip Op 31006(U)
May 11, 2016
Supreme Court, New York County
Docket Number: 650244/2015
Judge: Shirley Werner Kornreich
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH **PART** 54
Justice

Index Number : 650244/2015
SEGAL COMPANY (EASTERN STATE,) INC.
vs.
333W34 SLG OWNER, LLC
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE 4/28/16
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).** 7-33

Answering Affidavits — Exhibits _____ **No(s).** 61-64

Replying Affidavits _____ **No(s).** 74-85

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER

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

Dated: 5/11/16

SHIRLEY WERNER KORNREICH 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

THE SEGAL COMPANY (EASTERN STATES), INC., Index No.: 650244/2015

Plaintiffs, **DECISION & ORDER**

-against-

333W34 SLG OWNER LLC, ARC NY333W3401, LLC, and SAM ASH NEW YORK MEGASTORES LLC,

Defendants.

----------X

SHIRLEY WERNER KORNREICH, J.:

Motion sequences numbers 001, 002, and 003 are consolidated for disposition.

Defendants 333W34 SLG Owner LLC (SLG) and ARC NY333W3401, LLC (ARC) separately move, pursuant to CPLR 3211(a)(1), (5), and (7) and CPLR 7503, to dismiss the first four causes of action in the complaint (the Tax Escalation and Operating Expenses Claims, defined below). Seq. 001 & 003. Plaintiff, The Segal Company (Eastern States), Inc. (Tenant), moves by order to show cause, pursuant to CPLR 7503, to stay the arbitration commenced against it by SLG and ARC. Seq. 002. Subsequently, Tenant filed an amended complaint (the AC). It opposes dismissal and only addresses arbitrability. SLG and ARC oppose Tenant's motion to stay arbitration. Defendant Sam Ash New York Megastores LLC (Sam Ash) filed an answer and did not take a position on any of the motions. For the reasons that follow, SLG's and ARC's motions are granted and Tenant's motion is denied.

I. Background

As this is a motion to dismiss, the facts recited are taken from the complaint, the AC, and the documentary evidence submitted by the parties. Further, the court considers the dismissal

motions in regard to the AC.[1]

SLG is the former owner of a building located at 333 West 34th Street in Manhattan (the Building). The Building had been entirely occupied by Citibank. Citibank left, and SLG undertook a multi-year renovation of the Building, which was completed in 2010. More than two years before the renovations were completed, and well before the Building was fully leased to new tenants, on February 6, 2008, Tenant entered into a 15-year lease (the Lease) with SLG for the second, third, and fourth floors and a portion of the fifth floor and the below-ground concourse of the Building. *See* Dkt. 10.[2] The Lease is a highly complex agreement that was heavily negotiated between sophisticated parties, who were represented by counsel. It contains a merger and integration clause and prohibits oral modifications. *See id.* at 77. On August 9, 2013, SLG sold the Building to ARC.

On January 28, 2015, Tenant commenced this action by filing a complaint against its former landlord (SLG), its current landlord (ARC), and another tenant in the Building, Sam Ash. The complaint seeks redress for four issues. *First*, Tenant asks the court to absolve it of liability under the Lease's tax escalation provision (Article 32) (*see* Dkt. 10 at 58-62) on the ground that an unexpectedly low appraisal by the New York City Department of Finance (DOF) was not anticipated by the parties (the Tax Escalation Claim). Tenant originally sought reformation of the Lease on the ground of mutual mistake. It abandoned that theory and, instead, sought reformation or rescission due to frustration of purpose. It now seeks termination. *Second*, Tenant claims that SLG and ARC each overcharged Tenant for Tenant's share of operating expenses

[1] Nonetheless, a discussion of the claims in the original complaint is necessary to understand the procedural posture of this case and the evolution of Tenant's claims.

[2] References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

under Article 49 of the Lease (*see* Dkt. 10 at 79-87) (the Operating Expenses Claim). *Third*, Tenant complains that Sam Ash, a music retailer, is depriving it of its right to quiet enjoyment because Sam Ash's store is making noise, particularly in the instrument testing room, which is disturbing the work of Tenant's employees, some of whom are actuaries (the Noise Claim). *Fourth*, Tenant seeks reimbursement from ARC of the $380,000 it spent to remove mold in the Building (the Mold Claim).

Tenant's original complaint asserted seven causes of action: (1) reformation of the Lease on the ground of mutual mistake, asserted against ARC; (2) breach of the Lease (the Tax Escalation Claim), asserted against SLG and ARC; (3) an accounting, asserted against SLG and ARC; (4) breach of the Lease, asserted against SLG and ARC (the Operating Expenses Claim); (5) breach of the Lease, asserted against ARC (the Noise Claim); (6) breach of the Lease, asserted against ARC (the Mold Claim); and (7) nuisance, asserted against Sam Ash (the Noise Claim). *See* Dkt. 1. Sam Ash answered the complaint. *See* Dkt. 36 (original answer).

On March 4, 2015, SLG moved to dismiss the Tax Escalation and Operating Expenses Claims in the complaint. SLG contends that the Tax Escalation Claim was not viable because Tenant did not plead a mistake of fact, as opposed to an unexpected future contingency, and because the claim is time-barred. SLG further contends that reformation is not a viable remedy because Tenant did not plead the terms of the parties' actual agreement, that the voluntary payment doctrine applies, and that the claim is barred by the terms of an estoppel certificate, dated July 26, 2013, which Tenant signed before the Building was sold to ARC. *See* Dkt. 16. Paragraph 3 of the estoppel certificate provides:

> To Tenant's actual knowledge, Landlord is not in default in the performance of any covenant, agreement or condition contained in the Lease. However, Tenant has protested Landlord's calculation of Expenses and its manner of submitting statements setting forth such Expenses, as more particularity described in the

> letter attached hereto as Exhibit A. In addition, Tenant is extremely upset with the sound emanating from the ground floor retail space in the Building (the **"Sam Ash Space"**) occupied by [Sam Ash], which continually disturbs Tenant. Tenant has no present opinion at this time as to whether such disturbances are the result of Sam Ash violating the terms of its lease, faulty construction, rooms which should be sound-proofed, or inadequate sound attenuation within the Sam Ash Space, within Tenant's space or elsewhere in the Building, nor does Tenant know whether Tenant has rights under its Lease or otherwise at law or in equity with respect to these disturbances.

See Dkt. 16 at 2 (bold in original).

SLG, moreover, contends that the Operating Expenses Claim is subject to the alternative dispute resolution clause in section 49.07(c) of the Lease, which provides:

> In the event that Tenant, after having opportunity to examine the Records in accordance with Section 49.07(b), shall disagree with the Landlord's statement, then Tenant may at any time prior to the expiration of the Examination Period (time being of the essence) send a written notice ("Tenant's Statement") to Landlord of such disagreement, specifying in reasonable detail the basis for Tenant's disagreement and the amount of the Expense Payment Tenant claims is due. Landlord and Tenant shall attempt to resolve such disagreement. **If they are unable to do so within thirty (30) days, and provided that the amount of the Expense Payment Tenant claims is due is substantially different from the amount of the Expense Payment, as the case may be, Landlord claims is due, Landlord and Tenant shall designate a Certified Public Accountant (the "Arbiter") whose determination made in accordance with this subsection 49.07(c) shall be binding upon the parties**; it being understood that if the amount of the Expense Payment Tenant claims is due is not substantially different from the amount of the Expense Payment, Landlord claims is due, then Tenant shall have no right to protest such amount and shall pay the amount that Landlord claims is due to the extent not theretofore paid. If the determination of Arbiter shall substantially confirm the determination of Landlord, then Tenant shall pay the cost of the Arbiter. If the Arbiter shall substantially confirm the determination of Tenant, then Landlord shall pay the cost of the Arbiter. In all other events, the cost of the Arbiter shall be borne equally by Landlord and Tenant. The Arbiter shall be a member of an independent certified public accounting firm having at least three (3) accounting professionals and having at least five (5) years of experience in commercial real estate accounting. In no event shall the Arbiter be Tenant or any Related Entity or Successor Related Entity. In the event that Landlord and Tenant shall be unable to agree upon the designation of the Arbiter within thirty (30) days after receipt of notice from the other party requesting agreement as to the designation of the Arbiter, which notice shall contain the names and addresses of two (2) or more certified public accountants who are acceptable to the party sending such notice (any one (1) of whom, if acceptable to

> the party receiving such notice as shall be evidenced by notice given by the receiving party to the other party within such thirty (30) day period, shall be the agreed upon Arbiter), then either party shall have the right to request the American Arbitration Association located in New York, New York (or any organization which is the successor thereto) (the "AAA") to designate as the Arbiter, a certified public accountant whose determination made in accordance with this subsection 49.07(c) shall be conclusive and binding upon the parties, and the cost charged by the AAA (or any organization which is the successor thereto), for designating such Arbiter, shall be shared equally by Landlord and Tenant ...

See Dkt. 10 at 86-87 (underline original; bold added for emphasis).

On March 25, 2015, Tenant moved by order to show cause (OSC) for a temporary restraining order (TRO) and preliminary injunction staying the arbitration proceeding commenced by SLG and ARC on the Operating Expenses Claim. On March 26, 2015, SLG filed opposition to the OSC. Later that day, the court signed the OSC, but declined to issue the TRO sought by Tenant. Instead, the court issued a TRO staying the arbitration pending oral argument and ordered the parties to exchange names of potential Arbiters. *See* Dkt. 49. SLG and ARC complied with the TRO by submitting proposed Arbiters. Tenant did not.

On March 27, 2015, ARC filed its motion to dismiss the Tax Escalation and Operating Expenses Claims in the complaint. ARC makes arguments similar to those proffered by SLG. ARC also seeks its attorneys' fees on the Operating Expenses Claim, based on section 32.04 of the Lease, which provides:

> If, after Tenant shall have made a payment of Additional Rent under Section 32.02, Landlord shall receive a refund of any portion of the Real Estate Taxes payable for any Tax Comparative Year after the Base Tax Year on which such payment of Additional Rent shall have been based, as a result of a reduction of such Real Estate Taxes by final determination of legal proceedings, settlement or otherwise, Landlord shall within ten (10) days after receiving the refund pay to Tenant Tenant's Share of the refund less Tenant's Share of expenses (including reasonable or customary attorneys' and appraisers' fees) incurred by Landlord in connection with any such application or proceeding. In addition to the foregoing, Tenant shall pay to Landlord, as Additional Rent, within ten (10) days after Landlord shall have delivered to Tenant a statement therefor, Tenant's Share of all expenses incurred by Landlord in reviewing or contesting the validity or

> amount of any Real Estate Taxes or for the purpose of obtaining reductions in the assessed valuation of the Building Project prior to the billing of Real Estate Taxes, including without limitation, the fees and disbursements of attorneys, third party consultants, experts and others.

See Dkt. 10 at 61-62 (underline original).

On April 24, 2015, Tenant filed an amended complaint (the AC). *See* Dkt. 59. The AC asserts nine causes of action: (1) reformation or rescission of the Lease on the ground of frustration of purpose, asserted against SLG and ARC (the Tax Escalation Claim); (2) damages due to frustration of purpose, purportedly based on a non-existent tenth cause of action, asserted against SLG and ARC (the Tax Escalation Claim); (3) breach of the implied covenant of good faith and fair dealing, asserted against SLG and ARC (the Tax Escalation Claim); (4) a declaratory judgment regarding the Tax Escalation Claim, asserted against SLG and ARC; (5) an accounting, asserted against SLG and ARC; (6) breach of the Lease, asserted against SLG and ARC (the Operating Expenses Claim); (7) breach of the Lease, asserted against ARC (the Noise Claim); (8) breach of the Lease, asserted against ARC (the Mold Claim); and (9) nuisance, asserted against Sam Ash.

For the purposes of the instant motions, the only material difference between the original complaint and the AC is that Tenant changed its legal theory on its Tax Escalation Claim, abandoning its mutual mistake claim in favor of a frustration of purpose theory. On April 24, 2015, the date it filed the AC, Tenant submitted a brief in opposition to SLG's and ARC's motions to dismiss in which Tenant: (1) claims that the parties agreed that Tenant would not need to oppose the substantive arguments for dismissal in light of the AC;[3] and (2) opposes arbitration of the Operating Expenses Claim. Sam Ash filed an answer to the AC on May 6, 2015. *See* Dkt. 70.

[3] A claim denied by defendants.

On May 8, 2015, SLG and ARC responded to Tenant's arguments regarding arbitration, noted that Tenant was in default on the balance of the motion, and explained why the new legal theories in the AC are legally deficient. The court reserved on the instant motions after oral argument. *See* Dkt. 88 (5/19/15 Tr.). It should be noted that, during oral argument, Tenant altered the relief it requested (likely in light of defendants' reply briefs' accurate description of the remedies available on a frustration of purpose claim) to seek termination of the Lease. *See id.* at 28. However, Tenant noted that it still wants damages and rescission. *See id.* at 29.[4]

II. Discussion

A. Legal Standard

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing

[4] By order dated May 19, 2015, the parties were referred to the court's ADR program. *See* Dkt. 86. By email on March 24, 2016, the court was notified by the director of that program that the parties did not settle. The instant motions were held in abeyance until the parties submitted the oral argument transcript on April 28, 2016, after their prolonged mediation efforts failed.

Caniglia v Chicago Tribune-New York News Syndicate, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

B. The Tax Escalation Claim

SLG and ARC move to dismiss the Tax Escalation and Operating Expenses Claims. The court need not rule on whether Tenant's original legal theory supporting its Tax Escalation Claim – mutual mistake – is viable, because Tenant did not oppose the arguments made in SLG's and ARC's moving briefs[5] and because Tenant abandoned its mutual mistake claim in the AC. That said, the Tax Escalation claim, whether founded on mutual mistake or Tenant's new frustration of purpose theory, is without merit. Putting aside the fact that the Tax Escalation Claim is likely time barred for the reasons set forth in SLG's and ARC's briefs (i.e., the claim was asserted more than six years after the Lease was executed), Tenant has no basis to avoid paying its share of the real estate tax escalation on the ground of frustration of purpose.

Tenant, SLG, and ARC agree about the meaning and effect of the Lease's tax escalation provision set forth in Article 32. Simply put, a tax escalation provision hedges a landlord's exposure to uncertain future real estate tax increases by requiring the tenant to pay a portion of the increased taxes attributable to the leasehold. For example, if a tenant occupies 50% of the property, and the appraised value of the property increases by 25%, the lease might require the

[5] Tenant did not address the affidavit of Neil Kessner, the Executive Vice President and General Counsel of SLG's parent company. *See* Dkt. 8. Kessner provided an extensive explanation of the tax issues and set fourth numerous purported inaccuracies in the complaint, many of which do not appear to have been corrected in the AC. However, since this is a motion to dismiss, the court does not rely on Kessner's affidavit in making its decision on the instant motions. *See U.S. Fire Ins. Co. v N. Shore Risk Mgmt.*, 114 AD3d 408, 409 (1st Dept 2014).

tenant to pay 50% of the increase in real estate taxes attributable to the higher valuation. In this case, Article 32 of the Lease (which was entered into in 2008, prior to the Building being fully leased and prior to the renovations being completed) obligates Tenant to pay 41.512% of the taxes based on increases in the annual appraised value, as determined by DOF, above the tax assessment for the 2012/2013 tax year (defined as the Base Tax Year). In 2008, none of the parties could have known what DOF's future assessments would be. Hence, the parties were each taking a risk based on an unknowable future determination that would be made by a third-party, government regulator. Moreover, the 2012/2013 tax year was picked instead of the initial year of the tenancy because the parties wanted the Base Tax Year to be one when the Building was fully leased.

The Building's 2012/2013 tax assessment was lower than the assessments in prior years. Consequently, when DOF's tax assessment increased the following year, the amount Tenant became obligated to pay under Article 32 was greater than it would have been had a previous year (e.g., 2011/2012) been used as the Base Tax Year.[6] As noted, Tenant originally contended that it should be relieved from paying its share of the taxes based the 2012/2013 assessment because the parties somehow made a mutual mistake in 2008. As further noted, Tenant abandoned this theory and now claims that the required rate based on the 2012/2013 assessment constitutes a frustration of purpose. Tenant is wrong.

---

[6] Since the Tenant's taxes are based on the spread between the Base Tax Year assessment and subsequent higher assessments, the higher the Base Tax Year assessment, the lower Tenant's taxes will be. Hence, by virtue of DOF's 2012/2013 assessment being lower than the assessment in prior years, Tenant's tax bill under Article 32 was, in Tenant's view, unexpectedly high. Tenant's theory is that SLG wanted a low Base Tax Year assessment to maximize the value of the Building in a sale to ARC because Tenant's leasehold is more valuable to ARC if Tenant's share of taxes is higher by virtue of a low Base Tax Year assessment.

As SLG and ARC correctly contend, Tenant has neither pleaded the elements of a frustration of purpose claim, nor is the relief of rescission available even if Tenant had stated such a claim. As this court explained in *Gelita, LLC v 133 Second Ave., LLC*, another commercial landlord-tenant dispute (albeit involving facts far more sympathetic to the tenant than here):

> "[T]o invoke frustration of purpose as a defense for nonperformance, the frustrated purpose must be so completely the basis of the [] contract that, as both parties understood, without it, the transaction would have made little sense." *PPF Safeguard, LLC v BCR Safeguard Holding, LLC*, 85 AD3d 506, 508 (1st Dept 2011) (quotation marks omitted); *see also Rockland Dev. Assocs. v Richlou Auto Body, Inc.*, 173 AD2d 690, 691 (2d Dept 1991) (the doctrine of frustration of purpose applies when the frustration is substantial). **However, unlike the doctrine of unilateral mistake, the remedy for frustration of purpose of a commercial lease is termination, not rescission.** Additionally, even if plaintiffs are entitled to termination, [tenant] is still liable to pay rent for the time it occupied the Premises. *See Phillips & Huyler Assocs. v Flynn*, 225 AD2d 475 (1st Dept 1996), citing [*Elkar Realty Corp. v Kamada*, 6 AD2d 155, 158 (1st Dept 1958)].

2013 WL 2728386 (Sup Ct, NY County 2013) (emphasis added); *see also* 42 Misc3d 1216(A), at *3 (Sup Ct, NY County 2014).

There is no frustration of purpose here. In commercial landlord-tenant cases, a tenant will not be relieved from its obligations under the lease unless "the leased premises could not be used for its intended purpose." *Phillips & Huyler*, 225 AD2d at 475. Tenant makes no such allegation. Unlike the tenant in *Gelita*, who could not legally use the premises for a restaurant as intended, Tenant does not claim that its actuaries cannot perform their work due to the taxes owed under Article 32.[7] Rather, Tenant complains that DOF made an inexplicable error in its 2012/2013 assessment, and thus Tenant should be entitled to pay an unspecified lower amount of

[7] The Sam Ash noise issue allegedly disrupting the actuaries has nothing to do with the tax escalation issue.

taxes instead of the amount required under Article 32. Tenant does not plead any facts explaining why it cannot use the leased premises for its intended purpose. Tenant, therefore, has not pleaded frustration of purpose.[8]

That being said, Tenant is granted leave to replead a claim for breach of the implied covenant of good faith and fair dealing. Tenant appears to be alleging that SLG knowingly submitted false data to DOF, which caused the lower 2012/2013 assessment. While Tenant cannot actually challenge DOF's assessment in this action, a claim for breach of the implied covenant may be stated if, in a well pleaded second amended complaint, it can clearly set forth facts supporting its contention that the data provided to DOF was inaccurate. Under New York law, the implied covenant prohibits parties from engaging in conduct not expressly prohibited by the contract but which, nonetheless, serves to defeat the parties' reasonable expectations. *See 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 (2002). The intentional submission of inaccurate data to DOF for the purpose of procuring an artificially low assessment might constitute such a breach.

The court will not assess whether the AC could be liberally construed to validly plead such a claim because Tenant did not bother to defend the merits of the AC in its opposition brief. Tenant, despite this sharp practice, is given one final opportunity to defend its claim. The court will not sustain its claim in the absence of actual opposition, nor will the court make Tenant's arguments for it. Tenant's new pleading, however, may not include any claim dismissed herein. Doing so will be considered frivolous conduct subject to sanction. *See Orient Overseas Assocs. v XL Ins. Am., Inc.*, 132 AD3d 574, 578 (1st Dept 2015).

---

[8] SLG also correctly avers that Tenant's failure to surrender possession and the foreseeability of DOF's assessment preclude the maintenance of a frustration of purpose claim. *See* Dkt. 85 at 16-19.

Moreover, unlike Tenant's first two pleadings, and particularly given the complexity of the issues, Tenant must be precise with its allegations, ensuring that the inaccuracies and conflation of issues identified in defendants' briefs, and never refuted by Tenant, are either rectified or substantively rebutted. The court will not permit Tenant to go on a fishing expedition in discovery regarding the appraisal process unless it is clear that Tenant can validly state a claim and defend its merit on a motion to dismiss, a task Tenant thus far has eschewed.[9]

C. The Operating Expenses Claims

The merits of Tenant's Operating Expenses Claims cannot be litigated in this court. It is undisputed that the first steps of the alternative dispute resolution process in section 49.07(c) have been complied with and completed. It was Tenant who initiated that process, which only appears to have been derailed when the associate acting as Arbiter at the audit firm left. The court issued the TRO because it was evident that appointment of a CPA Arbiter was the required next step. As noted, Tenant violated the TRO by failing to nominate an Arbiter. In doing so, Tenant forfeited its right to propose an Arbiter, and unless the parties agree otherwise, one of defendants' nominees shall be used. While the court will entertain Tenant's discovery requests, if any, in aid of arbitration at the preliminary conference set forth below (though the court is not yet reaching the issue of whether any such discovery is warranted), the court is not permitted to reach the merits of the Operating Expenses Claims. Section 49.07(c), which states that the Arbiter's decision is binding on the parties, constitutes agreement to submit this dispute to mandatory arbitration. CPLR 7503(a) provides that where, as here, "there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be

[9] The court will not opine on ARC's entitlement to attorneys' fees under section 32.04 because Tenant never addressed such demand in its brief. Since this is a pre-answer motion to dismiss, and the action is not dismissed against ARC, there is no need to reach the issue at this juncture.

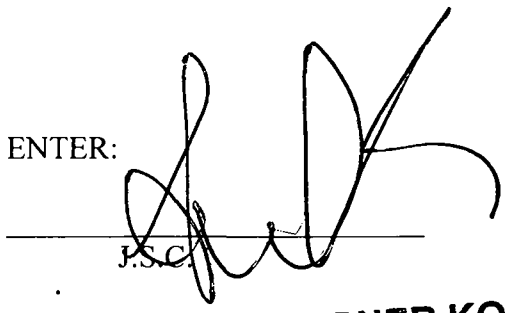
arbitrated is not [time] barred ...[,] the court *shall* direct the parties to arbitrate" (emphasis added); *see Waldron v Goddess*, 61 NY2d 181, 183 (1984). Moreover, that SLG is no longer Tenant's landlord is of no moment. SLG and Tenant have a dispute over the Operating Expenses Claim, and the parties expressly agreed that such dispute must be resolved by the Arbiter. Accordingly, it is

ORDERED that the motions to dismiss by defendants 333W34 SLG Owner LLC and ARC NY333W3401, LLC and the motion to stay arbitration by plaintiff The Segal Company (Eastern States), Inc. are decided as follows: (1) the causes of action asserted in the complaint and amended complaint regarding plaintiff's Tax Escalation Claim are dismissed to the extent they seek reformation, rescission, or termination of the Lease, but Tenant has leave to replead a claim for breach of the implied covenant of good faith and fair dealing to the extent set forth herein; (2) plaintiff shall file a second amended complaint in conformity with this decision within 21 days of the entry of this order on the NYSCEF system, and defendants shall file a responsive pleading or motion to dismiss within 15 days thereafter; (3) the causes of action asserted in the complaint and amended complaint regarding the Operating Expenses Claim are dismissed without prejudice in favor of arbitration, which, unless the parties agree otherwise, shall be conducted by one of the Arbiters proposed by SLG and ARC in response to the court's TRO; (4) unless the parties agree otherwise, the arbitration commenced before the AAA for the purpose of having the AAA select the Arbiter is permanently stayed; and (5) the motions are otherwise denied; and it is further

ORDERED that the parties shall appear in Part 54, Supreme Court, New York County, 60 Centre Street, Room 228, New York, NY, for a preliminary conference on June 14, 2016, at 11:00 in the forenoon.

Dated: May 11, 2016

ENTER:



J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C