Health Ins. Plan of Greater N.Y. v New Water St. Corp.
2018 NY Slip Op 30657(U)
April 12, 2018
Supreme Court, New York County
Docket Number: 651791/2017
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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HEALTH INSURANCE PLAN OF GREATER NEW YORK

Plaintiff,

-v-

NEW WATER STREET CORP.,

Defendant.

INDEX NO. 651791/2017

MOTION DATE 6/2/2017

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 14, 15, 16, 17, 18, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 46, 47

were read on this application to/for Dismiss

HON. SALIANN SCARPULLA:

This action arises from a commercial lease, in which plaintiff Health Insurance Plan of Greater New York ("Tenant") alleges that its landlord, New Water Street Corp. ("Landlord"), breached their contract by overbilling for tax escalation charges and tax related legal fees associated with its tenancy at 55 Water Street in New York, New York ("Building"). Landlord moves to dismiss the complaint, in its entirety, pursuant to CPLR 3211 (a)(1) and (a)(7). Tenant opposes and cross-moves to convert Landlord's motion to dismiss to one for partial summary judgment against Landlord, pursuant to CPLR 3211(c), and for appointment of a special referee, pursuant to CPLR 4317 (b), to hear and

determine the damages Tenant is allegedly entitled to recover from Landlord, together with its attorneys' fees, costs and interest.

Background

Tenant is a New York non-profit corporation with a principal place of business in New York, New York. Landlord is a Delaware corporation also with a principal place of business in New York, New York. The parties entered a multi-year commercial lease, dated April 11, 2003, which was subsequently amended on December 19, 2003 ("Lease").

In 2013, Landlord entered into separate commercial lease with non-party New York City Health and Hospitals Corporation ("HHC"), a public benefit corporation operating the City's healthcare system, for tenancy in the Building. After HHC began its tenancy in the Building, the New York City Department of Finance determined that HHC was exempt from real estate tax payments, and that this exemption applies to the entire term of HHC's tenancy. Although Tenant and HHC are not affiliates or otherwise related, this dispute involves the effect HHC's tenancy and corresponding real estate tax exemptions has on Tenant's past and future obligations regarding tax liabilities under the Lease.

Section 2.04 of the Lease sets forth the parties' respective rights and obligations regarding the tax liabilities of the "Project."[1] Section 2.04(e) provides that "[i]f Taxes for any Tax Year . . . shall exceed the Base Tax Amount, Tenant shall pay to Landlord . . .

[1] The Lease's "Recitals" define the Building and the land on which it sits, with "all plazas, sidewalks and curbs adjacent thereto" as the "Project."

Tenant's Tax Share of the amount by which Taxes for such Tax Year are greater than the Base Tax Amount." "Base Tax Amount" is defined as the "Taxes" for the 2004/2005 tax year, and "Tenant's Share" is 14.58% as amended.

In defining "Taxes" section 2.04 (b) states, in part:

> "If the owner, or lessee under a Superior Lease, of all or any part of the Building and/or the Land is an entity exempt from the payment of taxes described in clauses (i) and (ii), there shall be included in "Taxes" the taxes described in clauses (i) and (ii) which would be so levied, assessed or imposed if such owner or lessee were not so exempt and such taxes shall be deemed to have been paid by Landlord. . ." (underscoring in original).[2]

Tenant alleges that in assessing real estate taxes for each tax year from 2013/2014 through 2016/2017, Landlord reduced its annual real estate tax liability by the amount of HHC's exemption but calculated "Tenant's Share" of "Taxes" based on the real estate taxes that would have been owed absent HHC's exemption. Consequently, according to Tenant, it overpaid its share based on a fictional and inflated sum of taxes.[3]

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[2] Clauses (i) and (ii) define taxes as "(i) the real estate taxes, vault taxes, assessments and special assessments levied, assessed or imposed upon or with respect to the Project by any federal, state, municipal or other government or governmental body or authority and giving effect to any and all abatements, refunds, reductions, credits and the like and calculated as if the Building and the Land were Landlord's sole assets, and (ii) all taxes assessed or imposed with respect to the rentals payable under this Lease other than general income and gross receipts taxes; provided, that any such tax shall exclude Commercial Rent or Occupancy Taxes imposed pursuant to Title 11, Chapter 7 of the New York City Administrative Code."

[3] Section 2.06 (c) provides that "computations under this Article 2 are intended to constitute an actual reimbursement to Landlord for Taxes and other costs and expenses incurred by Landlord with respect to the Project. . ." (underscoring in original).

Tenant also alleges that Landlord has overbilled it for legal fees incurred in prosecuting real estate tax appeals. Section 2.04(f) of the Lease provides that:

> [i]f with respect to any Tax Year . . . , Landlord [] receive[s] a refund of or credit against Taxes with respect to such Tax Year, Landlord shall pay to Tenant Tenant's Share of such refund or credit . . . (after deducting from such refund or credit the actual costs and expenses of obtaining the same, including, without limitation, appraisal, accounting and legal fees) . . . .

Tenant alleges that Landlord has overcharged it by billing Tenant for legal fees that resulted in future assessment reductions, not in refunds or credits against taxes already paid.

Tenant's complaint asserts three causes of action: (1) Landlord's breach of contract, for, *inter alia*, overcharging Tenant for "Fictional Taxes" and improperly assessed legal fees incurred in prosecuting real estate tax appeals under the Lease; (2) a demand for a declaratory judgment, determining the parties' rights and obligations under section 2.04; and (3) Tenant's recovery of the attorneys' fees, costs and expenses it incurred in this action, as the prevailing party, under section 6.11 of the Lease.[4] The parties now cross-move for judgment as a matter of law.

I. Landlord's Motion to Dismiss

The Landlord argues that it is entitled to dismissal of the complaint under the unambiguous terms of the Lease. A lease that is "complete, clear and unambiguous on its

[4] Section 6.11 of the Lease generally provides that the prevailing party in a dispute over enforcement of the Lease or collection of rent or other payment due is entitled to reimbursement of "its reasonable, out-of-pocket attorneys' fees and disbursements and court costs."

face must be enforced according to the plain meaning of its terms" *Greenfield v Philles Records*, 98 N.Y.2d 562, 569 (2002). "A contract is unambiguous if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion'" *Id.* (citation omitted). "Whether or not a writing is ambiguous is a question of law to be resolved by the courts" *W.W.W. Assoc., Inc. v Giancontieri*, 77 N.Y.2d 157, 162 (1990).

Tax Escalation Overcharge

Section 2.04 of the Lease provides that "[i]f the owner, or lessee under a Superior Lease, of all or any part of the Building and/or the Land is an entity exempt from the payment of taxes described in clauses (i) and (ii), there shall be included in 'Taxes' the taxes described in clauses (i) and (ii) which would be so levied, assessed or imposed if such owner or lessee were not so exempt and such taxes shall be deemed to have been paid by Landlord. . ." (underscoring in original).

Landlord argues that as the "owner," it is entitled under the unambiguous terms of the Lease to add back the taxes (for purposes of calculating "Tenant's Share" of "Taxes") that would have been owed had HHC's tax exemption not applied. Tenant disputes Landlord's interpretation and argues that Landlord improperly calculated "Tenant's Share" of "Taxes" because HHC, not Landlord, is "an entity exempt from the payment of taxes." Therefore, according to Tenant, the provision applies only when "the owner" is a third-party tax-exempt entity.

According to the unambiguous terms of the Lease, the gross-up provision applies to Landlord as "the owner" irrespective of whether Landlord is a tax-exempt entity. Contrary to Tenant's interpretation, section 2.04(b) does not apply only when "the owner" is a tax-exempt entity. Such an interpretation conflates tax-exempt entities with tax exemptions generally, implying a condition not expressly provided. *See Herr v Herr*, 5 A.D.3d 550, 552 (2d Dep't 2004) ("[w]e may not now imply a condition which the parties chose not to insert in their contract"). Here, Landlord qualifies for tax exemptions because it is "the owner" of property partially leased to a tax-exempt entity and therefore, Landlord is "an entity exempt from the payment of Taxes."

In opposition, Tenant notes that section 2.04(b) uses two different words – "owner" and "Landlord" – in the same sentence, demonstrating that the words convey distinct meanings. Specifically, Tenant argues that "owner" means a future tax-exempt entity while Landlord means the party to the Lease. Tenant places unwarranted emphasis on the word "owner" as signifying a distinct meaning when the Lease plainly defines Landlord in section 8.04 as "the owner, at the time in question, of the Project[.]" *See S. Rd. Assoc., LLC v Intern. Bus. Machines Corp.*, 4 N.Y.3d 272, 277 (2005) (stating that "[i]t is important to read the document as a whole to ensure that excessive emphasis is not placed upon particular words or phrases").

Tenant further argues that "Taxes," as defined in clause (i) of section 2.04 (b), gives "effect to any and all abatements, refunds, reductions, credits and the like . . . ." According to Tenant, this demonstrates the parties' intent to calculate "Tenant's Share" of "Taxes" giving effect to HHC's exemption. However, section 2.04 (b) specifies that

the gross-up provision refers to "the taxes described in clauses (i) and (ii)[,]" and precedence is given to a specific contractual clause over an arguably conflicting general one. *See Isaacs v Westchester Wood Works, Inc.*, 278 A.D.2d 184, 185 (1st Dep't 2000).[5] I also note that an abatement, which reduces taxes by applying credits, is not necessarily the same as an exemption, which lowers taxes by reducing the property's value. *See U.S. Bank N.A. v GreenPoint Mtge. Funding, Inc.*, 157 A.D.3d 93, 100 (1st Dep't 2017) ("[W]here two seemingly conflicting contract provisions reasonably can be reconciled, a court is required to do so and to give both effect").

This analysis is consistent with *Barnan Assoc. LLC v 196 Owners Corp.*, 14 N.Y.3d 780, 784 (2010), which involved a real estate tax escalation clause that calculated additional tax "without regard or giving effect to any exemption or abatement." *Id.* at 784. In *Barnan Assoc. LLC v 196 Owners Corp.* the Court of Appeals held that, under the unambiguous terms of that agreement, "it would be illogical to give effect to exemptions and abatements in calculating the . . . [taxes] and the resulting escalation." Similarly, under the unambiguous terms of the Lease, "Tenant's Share" of "Taxes" should be "assessed or imposed [as] if such owner [] were not [] exempt [due to HHC's tenancy] and such taxes shall be deemed to have been paid by Landlord. . . ."[6]

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[5] For the same reason, I am not persuaded by Tenant's reference to section 2.06(c), which generally provides that "computations under [] Article 2 are intended to constitute an actual reimbursement to Landlord for Taxes," as demonstrating support for its interpretation.

[6] Tenant cites *Ran First Assocs. v 363 E. 76th Street Corp.* 297 A.D.2d 506 (1st Dep't 2002) for the opposite outcome. However, *Ran First* is distinguishable on its facts.

Accordingly, Landlord's motion to dismiss the complaint, with respect to Tenant's first cause of action for breach of contract, is granted to the extent that claim is premised on the alleged tax escalation overcharge.

Attorneys' Fee Overcharge

Section 2.04 (f) of the Lease provides, "If, with respect to any Tax Year for which Tenant has paid to Landlord a Tax Payment, Landlord shall receive a refund of or credit against Taxes with respect to such Tax Year, Landlord shall pay to Tenant Tenant's Share of such refund . . . (after deducting from such refund or credit the actual costs and expenses of obtaining the same, including, without limitation, appraisal, accounting and legal fees)[.]" Tenant alleges that Landlord overcharged Tenant for attorneys' fees by charging Tenant for legal fees related to reducing the Building's tax assessment for future tax liabilities. According to Tenant, such conduct violates the Lease because attorneys' fees only pass on to Tenant when it results in refunds on tax years previously paid, as opposed to future tax savings.

In seeking to dismiss this portion of Tenant's breach of contract claim, Landlord references 2.05(a), 2.05(d)(xii), and 2.05(f), under the section entitled "Operating Payments." Section 2.05(d)(xii) generally provides that "all reasonable costs and expenses of legal, bookkeeping accounting and other professional services" are included when calculating Tenant's share of "Operating Expenses." Landlord argues that those provisions permit it to seek payment for all tax-related legal fees.

Landlord's reliance on a general provision is misplaced, because a specific provision already addresses how to apportion tax-related legal fees. Here, the specific

provision controls, and legal fees for "the actual costs and expenses" pass on to Tenant "with respect to any Tax Year for which Tenant has paid to Landlord a Tax Payment [and] Landlord [] receive[s] a refund," and not with respect to future tax savings. *See W2001Z/15 CPW Realty, LLC v Lexington Ins. Co.*, 127 A.D.3d 643, 644 (1st Dep't 2015). Accordingly, because Tenant has sufficiently alleged a cause of action, specifying improper overcharges for attorneys' fees pertaining to specific years, I deny Landlord's motion to dismiss Tenant's breach of contract claim relating to the legal fee assessment.

Declaratory Judgment and "Prevailing Party" Legal Fees

Landlord does not offer any argument to support dismissal of Tenant's second cause of action, for a declaratory judgment, or Tenant's third cause of action, for an award of legal fees as the "prevailing party" under the Lease. In any event, it would be premature to consider which party will prevail, "for purposes of reimbursement of reasonable attorneys' fees and costs" under the Lease. *See Gedula 26, LLC v Lightstone Acquisitions III LLC*, 150 A.D.3d 583, 584 (1st Dep't 2017) (citation omitted). Accordingly, Landlord's motion to dismiss is denied as to those causes of action.

II. Tenant's Cross-Motion

Tenant cross-moves, pursuant to CPLR § 3211 (c), to convert Landlord's motion to dismiss to one for partial summary judgment based on the undisputed facts with respect to the alleged tax escalation overcharges. Tenant states it does not seek to convert the motion to dismiss the complaint as to all causes of action but rather, only as to the parties' dispute over "Tenant's Share" of "Taxes."

Considering the discussion *intra* regarding tax escalation overcharges, Tenant's cross-motion to convert is denied as moot. In any event, Landlord has specifically objected to conversion in its reply, making conversion inappropriate. *See Wadiak v Pond Mgt., LLC*, 101 A.D.3d 474, 475 (1st Dep't 2012). Additionally, denial of Tenant's cross motion also precludes the grant of partial summary judgment to Tenant as to Landlord's liability, and the denial of Tenant's cross motion for appointment of a special referee, to hear and determine damages under CPLR 4317(b).

For the foregoing reasons, it is hereby

ORDERED that defendant New Water Street Corp.'s motion to dismiss plaintiff Health Insurance Plan of Greater New York's complaint is granted with respect to that part of the first cause of action premised on tax escalation overcharges, and is otherwise denied; and it is further

ORDERED that plaintiff Health Insurance Plan of Greater New York's cross-motion for partial summary judgment, pursuant to CPLR 3211 (c), and for appointment of a special referee, to hear and determine plaintiff's claims for damages, pursuant to CPLR 4317 (b), is denied.

This constitutes the order and decision of the Court.

4/12/18
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE