

101 W. Owner I LLC v 715-723 Sixth Ave. Owners Corp.

2018 NY Slip Op 31918(U)

August 2, 2018

Supreme Court, New York County

Docket Number: 650905/18

Judge: Charles E. Ramos

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This opinion is uncorrected and not selected for official publication.

January 1, 2018. Accordingly, the parties commenced the appraisal proceeding as required by schedule B to the lease, whereby the owner and tenant each appointed a real estate appraiser to determine the value of the land and building.

The party-appointed appraisers were unable to reach agreement on value. Consistent with the terms of the lease in the event of a dead-lock, the appraisers selected Daniel Sciannameo to act as a third, neutral appraiser (neutral) whose appraisal is to be final and binding on the parties.

The neutral rendered his own valuation conclusion, which was ratified by the owner's board of directors. In calculating their valuations, the neutral and owner's appraiser included the value of the Commercial Space (including the retail rent roll) to the fair market value of the building. The tenant's appraiser determined that the value of the Commercial Space was excluded from the value of the building.

The tenant opposes the petition on the ground that the neutral failed to comply with the terms of the lease by including the value of the Commercial Space in its calculation of the fair market value of the building.

Discussion

In general, "the market value of real property is the amount which one desiring but not compelled to purchase will pay under ordinary conditions to a seller who desires but is not

compelled to sell' ... 'Unless there be express provisions to the contrary, the provisions of the lease between the parties insofar as they affect the fair market value of the land must be given effect'" (*936 Second Ave. L.P. v Second Corporate Dev. Co., Inc.*, 10 NY3d 628, 632-33 [2008]).

Moreover, appraisal determinations will be upheld in the absence of irrationality, fraud, bad faith or bias (*Matter of Village of Johnson City*, 241 AD2d 874, 877 [3d Dept], *lv denied* 91 NY2d 802 [1997]).

In drafting schedule B, the parties to the lease intended to exclude the existing Commercial Space from the value of the building for the purpose of calculating the building's fair market value. The lease also provides that for the relevant time period, the annual rent is to be calculated at 36% of the "FMV [fair market value] Index" multiplied by the Mortgage Index Percentage.¹ As set forth in Schedule B, the FMV Index is computed in two components, the value of the land plus the value of the building.

Schedule B specifies the elements to be considered in valuing the land component, as follows:

"determined with reference to the highest and best use of said Land without regard to this Lease and without regard to any other liens and encumbrances, i.e., subject only to then existing zoning regulations applicable thereto, and assuming

¹ The parties agree that the Mortgage Index Percentage is readily available from public sources, and is not in dispute.

the right to erect on said Land of such structure or structures constituting the highest and best use of the property and without regard to any building or buildings existing on said Land at the time of the appraisal."

Therefore, in valuing the land, the appraisal ignores all other factors, including the existence of the lease. There is no exclusion of any value attributable to the commercial tenancies.

However, with respect to valuing the building component, Schedule B does not contain a similar provision which would avoid consideration of the existence of encumbrances on the building. It does not provide "without regard to any other liens and encumbrances." Schedule B states,

"For the purposes of this Lease, the value of the building shall mean the fair market value of the building existing on said Land."

Failing to include such a provision requires that the Commercial Space, comprised of an underground parking garage, a Citibank branch, a Dunkin Donuts and UPS Store, leased by the owner to other parties not party to the co-op lease, is not to be considered in the valuation of the building. In other words, in valuing the building, the appraisal must be conducted with regard to the existence of the lease, which excludes the Commercial Space (see *936 Second Ave. L.P.*, 10 NY3d at 632-34).

Despite the clear language of the lease, the parties agree that the neutral included the value of the Commercial Space, namely the retail rent roll, in calculating the fair market value of the building. Because the neutral appraiser failed to comply

with the terms of the lease, the appraisal award is wholly irrational and cannot stand. Accordingly, it is

ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: August 2, 2018

ENTER:

J.S.C.

CHARLES E. RAMOS