

**JJ 201 LLC v 201 E. 62nd Apt. Corp.**

2019 NY Slip Op 33020(U)

October 7, 2019

Supreme Court, New York County

Docket Number: 652214/2017

Judge: Robert R. Reed

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT R. REED PART 43

Justice

-----X
JJ 201 LLC

Plaintiff,

- v -

201 EAST 62ND APARTMENT CORPORATION,
Defendant.

INDEX NO. 652214/2017
MOTION DATE 10/15/2018
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42

were read on this motion for SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing documents, it is ordered that this motion is granted.

On or about September 15, 1995, plaintiff and defendant entered into a commercial lease agreement for the ground floor space located at 201 East 62nd Street, New York, New York. Present in the lease is an escalation clause, which provides that, in addition to base rent, in any tax year, plaintiff is obligated to pay a set percentage of the amount, if any, by which defendant's real estate taxes for that year exceed defendant's real estate taxes for the "base tax year" -- the first fiscal year of the lease. Plaintiff alleges that, for fiscal years 2010/2011, 2011/2012, 2012/2013, 2013/204, 2014/2015, 2016/2016, and 2016/2017, defendant has inaccurately calculated its tax escalations by failing to include abatements and exemptions, and that, as a result, plaintiff has been overcharged in additional rent for each of those fiscal years. Plaintiff now moves, pursuant to CPLR 3212, for summary judgment on its breach of contract cause of action, for declaratory judgment and to dismiss defendant's affirmative defenses. Defendant

opposes, arguing that plaintiff was not entitled to abatements or exemptions, and cross-moves for summary judgment.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion (*Alvarez v Hospital*, 68 NY2d 320). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the “burden of production” (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact (*id.*). In the case at bar, plaintiff argues that, under the terms of the lease, defendant should have calculated plaintiff’s tax escalations based on actual taxes/taxes payable (net exemptions and abatements) that defendant is required to pay, and not based on the gross taxes New York City charges to defendant. Plaintiff relies on the section of the lease that states “if taxes payable for any tax year or any part thereof shall exceed the base taxes, tenant shall pay to landlord as additional charges for the premises for such tax year an amount (herein called “tax payment”) equal to tenant’s tax percentage of the amount by which the taxes for such tax year are greater than the base taxes.” Plaintiff proffers to the court as evidence its lease with defendant, New York City Department of Finance Co-op tax benefits statement for defendant for years 2011 through 2017, and its real estate tax escalations received from defendant for years 2011 through 2017.

In opposition, defendant argues, inter alia, that plaintiff is attempting to claim advantage of tax relief that only the individual homeowners and shareholders, not tenants, qualify for. Defendant also notes that the tax relief from the abatements and exemptions pass through the co-op to the qualifying homeowners and shareholders. Defendant provides the same NYC Dept. of

Finance Co-op tax documents and the real estate tax escalations documents sent to defendant as evidence. Defendant likens its circumstances to the landlord in *Barnan Assoc. LLC v. 196 Owners Corp.* As in the present case, the landlord in *Barnan* was accused of overcharging plaintiff in tax rents when the landlord failed to deduct tax abatements and exemptions. The Court of Appeals ruled in favor of the landlord, holding that “the terms of the lease determined whether plaintiff was entitled to deduct the relevant tax abatements and exemptions from its tax rents, and the tax escalation clause ... unambiguously stated that the base assessed valuation would be made without regard or giving effect to any abatement or exemption” (*Barnan Assoc. LLC v. 196 Owners Corp.*, 14 NY3d 780). *Barnan*, however, is distinguishable from the case at bar. In *Barnan*, the lease agreement unambiguously addressed abatements and exemptions and stated within the four corners of the document that the tax valuation would be made without regard to abatements or exemptions; that is not the case here. Defendant’s lease agreement makes no mention of abatements or exemptions except to state “landlord represents that the building is not presently receiving any tax abatement or exemption.” Notably it is plain that such representation is not current, inasmuch as defendant’s affidavits and exhibits presented in opposition to the motion and in support of its cross-motion acknowledge that defendant’s building is at this point receiving -- and has been receiving -- abatements and exemptions.

Defendant, in any event, argues that plaintiff is not entitled to the specified tax relief, and that defendant as landlord would not be receiving a windfall because the tax relief passed through to qualifying shareholders. This argument was previously rejected as “unavailing” by the First Department in *Ran First Assocs. v. 363 E. 76<sup>th</sup> St. Corp.*, 297 AD2d 506. The Court in *Ran First Associates* held that, though the benefits of the abatements to the landlord netted zero, the opposite is true for the landlord’s collection of rent based on taxes that were not paid by landlord.

“To permit landlord to collect additional rent based on taxes forgiven by the taxing authorities, and therefore not payable by either the landlord or the shareholders, would allow the landlord to reap a windfall not envisioned by, and contradictory to, the parties’ agreement” (*id.*, 297 AD2d at 509).

The parties’ tax escalation clause unambiguously requires plaintiff to pay 20% of the amount by which taxes payable exceed base taxes for any tax year. The escalation clause defines base taxes as “taxes payable for the base tax year.” The escalation clause defines taxes as “all real estate taxes, sewer rents, water frontage charges and assessments, special or otherwise, levied, assessed or imposed by the City of New York or any other taxing authority upon or with respect to the Building and the parcel of land on which it is located.” The definition present in the lease does not include any reference to tax exemptions or abatements. Therefore, calculating additional rent to be charged to plaintiff under the tax escalation provision, as written, does not depend on whether a specific tenant is entitled to benefit from a particular exemption or abatement, as defendant suggests (*see Ran First Assocs. supra*, 297 AD2d at 508). “A court may not rewrite the terms of a contract in order to reflect the real intention of the parties where to do so would contradict the clearly expressed language of the contract” (*id.*). In the court’s view, taxes payable, in the absence of contractual language to the contrary, means taxes paid or ultimately required to be paid. The gross taxes charged to defendant reflect only a provisional amount which is later decreased by the tax exemptions and abatements defendant’s building receives.

Plaintiff also seeks to dismiss all of defendant’s affirmative defenses. A party may move for dismissal of one or more defenses, on the ground that a defense is not stated or has no merit (*see CPLR 3211(b)*; *see also Vita v. New York Waste Services, LLC*, 34 AD3d 559). “In

pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference” (*Fireman’s Fund Ins. Co. v. Farrell*, 57 AD3d 721). However, “allegations that consist only of bare legal conclusions are not entitled to such consideration” (*Kliebert v. McKoan*, 228 AD2d 232). “Where the moving party properly challenges the factual basis of the defenses it is incumbent on the party asserting the defense to come forward with such evidence as will raise an issue as to the facts pleaded” (*Leonard v. Leonard*, 31 AD2d 620). In reviewing defendant’s affirmative defenses, the court finds them to be boilerplate and non-substantive. Defendant has failed to plead its affirmative defenses with the necessary specificity required.

In light of the court’s determination above, defendant’s cross-motion for summary judgment in its favor is denied.

Accordingly, it is hereby

ORDERED that the branch of plaintiff’s motion seeking a summary judgment in plaintiff’s favor on the first cause of action of the complaint is granted with regard to liability; and it is further

ORDERED that the branch of plaintiff’s motion that seeks summary judgment in plaintiff’s favor on the second cause of action of the complaint and a declaratory judgment with respect to the subject matter of that cause of action is granted; and it is further

ADJUDGED and DECLARED that plaintiff’s “Taxes Payable” for purposes of Article 3, Section 3.1(b) of the Ground Lease must be calculated net of any and all applicable real estate tax abatements and exemptions; and it is further


ORDERED that the branch of plaintiff’s motion that seeks to dismiss defendant’s affirmative defenses is granted, and defendant’s affirmative defenses are hereby dismissed; and it is further

ORDERED that defendant's cross-motion for summary judgment in its favor is denied; and it is further

ORDERED that an immediate trial of the issues regarding damages shall be had; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119) and shall serve and file with said Clerk a note of issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial.

This constitutes the Decision and Order of the court.

<u>10/7/2019</u> DATE	 ROBERT R. REED, J.S.C.			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE	