

**Central Mgt. Corp. v Petco Animal Supplies Stores,
Inc.**

2021 NY Slip Op 32125(U)

November 3, 2021

Supreme Court, New York County

Docket Number: Index No. 650317/2021

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE BLUTH PART 14

Justice

-----X

CENTRAL MANAGEMENT CORP.

Plaintiff,

- v -

PETCO ANIMAL SUPPLIES STORES, INC.,

Defendant.

-----X

INDEX NO. 650317/2021

MOTION DATE 10/28/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for SUMMARY JUDGMENT.

The motion by plaintiff for summary judgment, for an order dismissing defendant's counterclaims and for an inquest to determine the amount of damages is denied.

Background

In this commercial landlord tenant case, plaintiff contends that its predecessor-in-interest entered into a lease with defendant (the tenant) for a ground level retail and basement space located in Manhattan. The lease term was from September 27, 2015 to September 30, 2025. Plaintiff contends that building originally contained four retail units and four residential units. The complaint alleges that defendant breached the lease by not making rent payments through January 2021 (it does not state when the default started or how long it continued).

At some point during the lease term, an additional three stories were added to the building. Now the property contains a single commercial unit and 20 residential units. This, of course, added to the taxes owed by the landlord to the city. In defendant's lease, the tenant must

pay a proportion of the real estate taxes, but that lease was before the landlord added floors which caused the taxes to rise.

Defendant argues that this case is really about purported tax overcharges. It claims it hired an auditor (“Cresa”) to inspect the tax issue and this entity found that plaintiff overcharged defendant by at least \$245,201 from 2015/2016 through 2019/2020 (NYSCEF Doc. No. 33). Defendant also claims that plaintiff overcharged for the base rent because the lease misrepresents the square footage.

The key to this dispute is Section 10 of the lease, which requires that “Following such completion [of construction], the gross leasable square footage of the Future Construction shall be included within the denominators of the fractions used to calculate Tenant's pro rata share of Taxes and any other charges payable by Tenant hereunder based on the leasable square footage of the Premises in proportion to the gross leasable floor area of the Building” (NYSCEF Doc. No. 26, ¶ 10). In other words, the square footage is used to determine the pro rata share of the taxes owed by defendant so a massive increase in the square footage should not result (under the terms of the lease) with the defendant covering the additional tax burden. To be succinct, the tenant’s taxes should not go up because of the result of the landlord’s construction; the tenant need only pay the increase that would be incurred due to the normal year-to-year increases.

Discussion

The Court denies the motion for several reasons. As an initial matter, the Court observes that plaintiff did not submit a statement of material facts as required under 22 NYCRR 202.8-g. While the Court recognizes that these are newly promulgated rules, a statement of material facts is necessary here because plaintiff’s requested relief does not offer enough specifics as to its

prima facie case. The complaint contains a vague allegation that defendant has not paid the Base Rent and additional rent through January 2021 but does not say exactly when the breach occurred.

Of course, a complaint need not contain every detail but the moving papers, and specifically the affidavit of plaintiff's Secretary (NYSCEF Doc. No. 9), do not make clear when the payments stopped. The Court also observes that the moving papers did not include a ledger pointing out the payments (or non payments) from defendant or any correspondence from plaintiff to defendant. Plaintiff simply failed to meet its prima facie burden to establish the exact nature of defendant's purported breach.

Moreover, the Court finds that the instant motion is premature because discovery is necessary. On these papers, it seems that plaintiff admitted (to some extent) that it overcharged defendant with respect to the taxes charged to defendant. It sent a letter to defendant admitting that defendant was entitled to a credit of \$42,063.96 for the five tax years from July 1, 2015 through June 30, 2020 (NYSCEF Doc. No. 35). Defendant disagrees with the amount of the credit it should have received.

The Court recognizes that the parties also disagree about the significance of the square footage representations contained in the lease (it turns out the premises leased by defendant is less than what is represented in the lease). The Court takes no position on this issue as plaintiff did not meet its prima facie burden on the motion.

The Court also declines to dismiss defendant's three counterclaims for fraud, breach of contract and breach of the covenant of good faith and fair dealing. There needs to be discovery about when plaintiff and defendant knew or should have known about this tax overcharge issue.

Although plaintiff claims that certain of these claims are time-barred (based on the lease date of 2012), the Court disagrees at this stage of the litigation.

Certainly, defendant’s burden to demonstrate that plaintiff committed fraud is high but the fact is that it seems (according to defendant) that plaintiff tried to pass some of the increased tax burden on to defendant despite the fact that defendant’s premises had not increased in size. Investigating who knew what and when will help elucidate whether this was an oversight or an intentional scheme. And discovery might also reveal that defendant was on inquiry notice that the building’s size was being drastically increased and it should have questioned its tax bills from plaintiff.

Summary


Plaintiff did not make clear the basis for its breach of contract cause of action in its moving papers and so the Court denies the motion because plaintiff did not meet its prima facie burden. With respect to the merits, as best this Court can tell, plaintiff clearly overcharged defendant for taxes, however the extent of that overcharge remains to be seen and needs to be explored in discovery.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment is denied.

Remote Conference: January 10, 2022.

11/3/2021
DATE


ARLENE BLUTH, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE