Flatbush Ctr. Parking LLC v Kings Theatre Master Tenant, LLC
2022 NY Slip Op 33652(U)
October 24, 2022
Supreme Court, New York County
Docket Number: Index No. 654526/2020
Judge: David B. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART 58**

Justice

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FLATBUSH CENTER PARKING LLC,

Plaintiff,

- v -

KINGS THEATRE MASTER TENANT, LLC,

Defendant.

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INDEX NO. 654526/2020

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 109

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

Plaintiff moves to quash four subpoenas duces tecum served on commercial tenants of its affiliate. For the reasons set forth below, this Court finds that the subpoenas seek potentially relevant evidence and are not unduly burdensome. In fact, materials responsive to one of the four subpoenas were exchanged even before plaintiff filed this motion to quash. Accordingly, this Court denies the motion.

A. Factual and Procedural Background

In this action, plaintiff ("Flatbush Parking") seeks to recover from defendant ("Kings Theatre") for certain parking garage expenses which Kings Theatre allegedly agreed to share. Underlying the dispute is a certain Development and Operating Agreement (the "Development Agreement") dated July 15, 1997 (Klajnbart Aff., Ex. A, docket no. 90). The original agreement was between FC Bedford Associates, L.P., Forest City Tilden Associates, L.P., Sears, Roebuck and Co. ("Sears"), Duryea Associates, L.L.C. and, somewhat indirectly, the City of New York. (the "City"). The said entities entered into the Development Agreement in

order to renovate, maintain and develop a parking deck and related ground-level parking facilities associated with a shopping center located in downtown Brooklyn. The City had acquired the underlying land via tax foreclosure and had leased if for development to the New York City Economic Development Corporation ("EDC"). (Id.)

The Development Agreement provided for Regular, Reimbursement and Special Assessments (Section 1.2) based on each party's Allocable Share (Section 1.1) of the project and based on that year's Budget (Section 1.3). Once the parking facilities were constructed, there was to be an Operator, selected by Sears and the first two entities listed above, which were affiliates of real estate firm Forest City or Forest City Ratner (Sections 1.10 and 1.18). There was a long list of Expenses which the Operator was entitled to charge to the Parcel Owners (Sections 1.14 and 1.19). The Operator was to maintain and repair the parking facilities "in a good and workmanlike manner" (Section 6.1). Article 8, entitled "Assessments," provided that the Operator would bill the Parcel Owners for their pro rata share of Expenses based on an annual approved Budget. If no Budget was submitted for approval, the Operator could bill based on the prior year's Budget until a new Budget was approved. Kings Theatre alleges that it has been several years since a Budget was last properly submitted or approved. (See Amended Answer, Affirmative Defenses and Counterclaims, ¶¶92-105, docket no. 75)

Kings Theatre alleges in a related action, *Kings Theatre Master Tenant LLC v Flatbush Center Parking, LLC, ACHS Management Corp. and ISSM Protective Services Inc.*, New York County Index No. 652892/2021, that it is occupying the space originally occupied by Loew's, built in a grand style in 1929. As times changed, the theatre deteriorated, closed in 1977, and was taken over by the City for back taxes in 1980. In 2009 it was re-opened under Kings'

management and, instead of movies, it hosted concerts, performances and shows, including an inaugural show headlined by Diana Ross.

The Forest City interests were acquired by affiliates of Flatbush Parking, which became the Operator of the parking facilities. (Id., ¶¶81-83). The owners of the parking facilities are now Sears and affiliates of Flatbush Parking and Kings Theatre (Id., ¶¶83-85).

The current dispute arises from two related events, separated in time by approximately 5 years. In 2015-16, Flatbush Parking tendered two proposed amendments to the Development Agreement to Sears and Kings Theatre. At least according to the versions tendered to Kings Theatre, the proposed amendment set the relevant percentages at 37.5% to each of Sears and Flatbush Parking, and 25% to Kings Theatre, representing a significant decrease to Sears and Flatbush Parking and a significant increase for Kings Theatre (Id., ¶¶90-91). Flatbush Parking also sent a proposed budget of $732,000 (Id., ¶¶90-92; see also Amended Compl., ¶¶47-52 in the 652892/2021 action, docket no. 51). According to Kings Theatre, neither the amendment nor the budget was ever approved by all required parties. (Id.)

In 2020, Flatbush Parking, through ACHS Management, sent a bill to Kings Theatre for $1,031,983, consisting of $923,025 in unspecified "Retro CAM Expenses", and $124,522 for unspecified "CAM Expenses", minus a small payment made by Kings Theatre on account (See Compl., Ex. A in the 652892/2021 action, docket no. 3). Kings Theatre refused to pay the invoice, and began to ask questions about it, including invoking its right to audit the statement pursuant to Section 8.8 of the Development Agreement. Kings Theatre alleges that Flatbush Parking refused to permit it to undertake an audit (See Amended Answer, Affirmative Defenses and Counterclaims, ¶¶175-78, docket no. 75).

Flatbush Parking seeks to be reimbursed for expenses it incurred in operating the parking facilities. Kings Theatre is reluctant to pay an invoice with few supporting details. Kings Theatre also alleges a number of specific instances of wrongdoing by Flatbush Parking. First, Kings Theatre alleges that Flatbush Parking told Sears, but not Kings Theatre, that Sears was being charged 50% for Sears' relative share of the parking expenses, effectively decreasing Flatbush Parking's share from 37.5 to 25%. Second, Kings Theatre alleges there was approximately $3 million spent on waterproofing the parking deck (it alleges the expense was $2.4 million to the tenant and $3.2 million in total) (Id., See ¶¶ 147-48), when that was not really for the parking deck but rather for the ceiling of one of the stores in the shopping center beneath the deck, installed to prevent water from leaking into the store where affiliates of Flatbush Parking were responsible for maintaining the store's leased space (Id., ¶¶121-60). Third, and relatedly, Kings Theatre alleges that Flatbush Parking was double billing the parking parcel owners and the shopping center tenants for the same expenses, including the parking deck waterproofing and other common area maintenance, or CAM, expenses. (Id.) Flatbush Parking vehemently denies the allegations.

B. <u>The Subpoenas</u>

In an attempt to prove these allegations, and due to what it says was stonewalling by Flatbush Parking in discovery, Kings Theatre served four subpoenas on tenants of the shopping center that is served by the parking facilities: Staples, Burlington Stores, Old Navy and Shop & Stop (sic).

In response to the subpoenas, Flatbush Parking filed a motion to quash (Docket no. 85). Initially, it argues that the subpoenas seek information irrelevant to the lawsuit. The grounds for the alleged irrelevance is that Kings Theatre is obligated to pay Flatbush Parking for

Kings' share of the expenses of operating the facility, which Flatbush claims is 25%. Flatbush claims that, if it or its affiliates are entitled to charge CAM to shopping center tenants, this is irrelevant to Kings' obligation to pay expenses pursuant to the Development Agreement, as it may or may not have been amended (Pl. Mem. Of Law in Support of Motion to Quash, etc., at pp. 3-4) (docket no. 86). Flatbush Parking maintains:

> Whether the payments made by Flatbush in its role as a Parcel Owner included or did not include Additional Rent payments that it received from certain Tenants, including Common Area Maintenance ("CAM") charges related to the Parking Facility, is irrelevant to the case, as it has no bearing on the amounts due and owing by Kings Theatre as a Parcel Owner under the Development Agreement. There can accordingly be no good faith basis for issuing the Subpoenas. (Id., at p. 4)

Flatbush Parking asserts, in essence, that Kings Theatre is obligated to pay its share of parking facility expenses even if Flatbush itself is using overlapping CAM charges to shopping center tenants to reduce its own 25 or 37.5% share of those expenses.

However, that is not the only way to construe the Development Agreement, which requires each parcel owner to pay a pro rata share of the expenses incurred by the parking facilities (See Article 8 of the Development Agreement, and the definitions of the terms therein utilized). If some of those expenses can be reduced by tenant CAM payments, then those expense savings arguably should also be shared pro rata, instead of Flatbush Parking (or its affiliates) reaping the entire benefit of the reduction. Quantifying that potential reduction is what the subpoenas seem to be designed to clarify. Thus, this Court disagrees with Flatbush Parking's irrelevance argument, at least at this point in the proceedings. The subpoenas seeks information that is at least arguably relevant, and certainly meets the basic standard of "full disclosure of all matters material and necessary to the prosecution or defense of an action" as established by CPLR 3101(a). CPLR 3101(a)(4) specifically provides that disclosure may be obtained from third parties (*See generally*

Jones v. Beckford, 289 AD2d 26 [1st Dept 2001] citing *Allen v. Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *Montgomery v. Taylor*, 275 AD2d 698 [2nd Dep't 2000]).

Indeed, one of Kings Theatre's core arguments is that the expenses allegedly incurred for improving the parking deck were actually required to stop leaking into the store or stores operated by one or more of the tenants and never should have been charged to parking facility owners at all since the expenses were not for the benefit of the parking deck or required to operate it. (Amended Answer, Affirmative Defenses and Counterclaims, ¶¶121-60, docket no. 75) Whether any of the tenants were charged for those same expenses as well would appear to be directly relevant to Kings Theater's arguments. Flatbush Parking cannot claim that it (or its affiliates) is entitled to double recovery of the same expenses, one from the parking facility owners and a second from the tenants.

Second, Flatbush Parking argues that the information sought from tenants is duplicative of disclosure sought by Kings Theatre from Flatbush Parking itself. While that may be true, given that Flatbush Parking has allegedly denied Kings Theatre's right to audit the parking facility's books and records, and the questions Kings Theatre has raised about the completeness of Flatbush Parking's document disclosure to date, seeking corroborating information from third parties is reasonable.

Third, Flatbush Parking argues that the Kings Theatre's subpoenas are overbroad and burdensome and "serve only to harass Flatbush by disrupting its business relationship with its Tenants." (Pl. Mem of Law, at 4, docket no. 86). Flatbush Parking characterizes this as "abusive." CPLR 3103(a) empowers this Court to issue a protective order "denying, limiting, conditioning or regulating the use of any disclosure device...to prevent unreasonable annoyance,

expense, embarrassment, disadvantage, or other prejudice," whether or not the disclosure is sought from parties or third parties (*See Forman v Henkin*, 30 NY3d 656 [2018]).

This Court does not find that the subpoenas are burdensome or designed to harass or abuse such that a protective order is warranted herein. The four subpoenas at issue here are directed to large, well-known retail entities with commercial lease portfolios as part of their businesses. These sophisticated entities can reasonably be expected to have easily accessible databases containing relevant facts about each lease, including rent and other charges, along with any related correspondence. Thus, it should be relatively easy for each of them to download a lease file and produce it electronically.

In fact, prior to the filing of this motion, one of the tenants, Staples, produced such a lease file without any apparent objection or complaint. Kings Theatre asserts that it found evidence in that production that Staples was in fact being charged for some expenses which were also being charged to parking facility parcel owners. The evidence that Kings Theatre proffers from the Staples production, while far from conclusive, seems to at least to support such an argument. For example, some of the documents attached to Kings Theatre's opposing affidavit may show that Flatbush Parking's affiliates did charge Staples for a share of the parking garage waterproofing that Flatbush's affiliates were entitled to charge Staples, but which were also charged to Kings Theatre (Khurana Aff. in Opp., Exhs. A-D). Thus, for at least one of the four tenants, the motion to quash is moot and, on the basis of that production, this Court does not find that the other three subpoenas seek information that is not material or necessary, is unduly burdensome to produce it, or are being utilized for vexatious or harassing purposes.

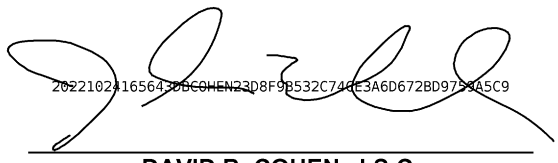
Flatbush Parking asks, at a minimum, that this Court issue a protective order limiting the four subpoenas to CAM charges only. (Pl. Mem. of Law, pp. 9-10, and Pl. Reply Mem., pp. 5-6,

docket nos. 86 and 109) But what is or is not being charged to shopping center tenants, whether it is or is not being characterized as CAM, and whether it is or is not being double-billed to Kings Theatre, goes to the heart of at least some of Kings Theatre's defenses in this action. Thus, the Court also rejects Flatbush Parking's attempt to limit the scope of the subpoenas in this fashion.[1]

Accordingly, it is hereby:

ORDERED that the motion by plaintiff Flatbush Center Parking LLC seeking to quash the subpoena served by defendant Kings Theatre Master Tenant, LLC on Staples is denied as moot; and it is further

ORDERED that the motion by plaintiff Flatbush Center Parking LLC seeking to quash the subpoena served by defendant Kings Theatre Master Tenant, LLC on Burlington Stores, Old Navy, and Stop & Shop is denied.



10/24/2022
DATE

DAVID B. COHEN, 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:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE

[1] Based on the manner in which the Court expects Burlington Stores, Old Navy and Stop & Shop likely maintain commercial lease files, it might be more work to have them segregate their production in this fashion than to simply have them produce the entire lease file.