SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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ATLANTIC CENTER FORT GREENE ASSOCIATES, LLC

Plaintiff,

- v -

THE CITY OF NEW YORK,

Defendant.

INDEX NO. 656207/2021

MOTION DATE 06/15/2023, 06/15/2023

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 99, 100, 101, 102, 103, 104, 105, 114, 115, 116, 117, 118, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137
were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 002) 106, 107, 108, 109, 110, 111, 112, 113, 119, 120, 121, 122, 123, 124, 125, 126, 138, 139, 140, 141
were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Upon the foregoing documents, Atlantic Center For Greene Associates, LLC (the **Tenant**)'s motion for summary judgment is granted and the City of New York (the **Landlord**)'s motion for summary judgment is denied because the Ground Lease (hereinafter defined) **is not ambiguous** and provides that the appraised value is $3,446,168 if the Plaintiff exercised the option before the twenty-fifth anniversary of the "Rent Commencement Date," which the record firmly establishes that it did. Thus, there are no material issues of fact for trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]) and the Tenant is entitled to specific performance requiring the Landlord to close based on the express terms of the Ground Lease (hereinafter defined).

As discussed below, the Mayoral Authorization and Public Notice not executed by the Tenant are not inconsistent with the terms of the Ground Lease. Even if they were (which they are not),

they were not signed by the Tenant and therefore would not pursuant to Section 41 of the Ground Lease serve to modify the terms of the Ground Lease.

The facts of this case are not in dispute. Reference is made to a certain Agreement of Lease dated August 4, 1995 (the **Ground Lease**; NYSCEF Doc. No. 38), by and between the Landlord and Atlantic Center Fort Greene Associates, L.P., the Tenant's predecessor in interest. Pursuant to the terms of the Ground Lease, the parties agreed to a 99-year term and that pursuant to Section 12.2(a) of the Ground Lease, the Tenant could purchase the Landlord's fee interest (the **Purchase Option**) at any time after the 10th anniversary of the Lease's "Rent Commencement Date."

Pursuant to Section 12.2(c) of the Ground Lease, the parties further agreed that the Tenant could exercise the Purchase Option by paying, among certain other amounts, "one hundred fifty (150%) percent of the fair market value of the Land:"

> (c) Consideration for Purchase.
>
> (i) Determination of Consideration for Purchase. The consideration for purchase shall be (A) the sum of (1) the City's Capital Investment, plus a return thereon calculated at the average City cost of borrowing from the Rent Commencement Date to the Closing Date, plus (2) one hundred fifty (150%) percent of the fair market value of the Land, determined as provided below, plus (3) any outstanding amounts due under this Lease, including Deferred Garage Rent, and deferred Additional Garage Rent, if any, less (B) (1) the value of Development Rights retained by the City as provided in Article 2 hereof, (2) any outstanding credits due Tenant by Landlord pursuant to this Lease, and (3) the cumulative sum of Garage Base Rent (excluding interest thereon) previously paid by Tenant. Tenant shall be obligated to continue to make payments on account of Landlord's Surviving Interests in Percentage Rent, Cash Flow Rent, Garage Base Rent, Garage Cash Flow Rent, and Transaction Payments as provided below.

(A) If Tenant shall give the notice referred to in Section 12.2(a) not later than six (6) months after a Reappraisal Date, the fair market value of the Land shall be the Fair Market Value as determined in Section 3.2 hereof.

(B) If Tenant shall give the notice referred to in Section 12.2(a) at any time after the expiration of the six (6) month period referred to in Section 12.2(c)(i)(A) hereof, the purchase price for the Premises shall be an amount equal to the fair market value of the Land, as of the date of Tenant's delivery to Landlord of the notice referred to in Section 26.01(a) hereof, by appraisal in the manner provided in Article 33 hereof. The determination of fair market value shall consider the Land as if vacant and unimproved, assume the highest and best use subject only to use and bulk restrictions imposed by the Urban Renewal Plan, Governmental Authorities or by this Lease, and take into account the Development Rights, as they may be included in or excluded from the sale

(NYSCEF Doc. No. 38, § 12[c][i][A]-[B] [underlining in original]).

Pursuant to Section 3.2(e) of the Ground Lease, **the parties agreed that "fair market value" was equal to $3,446,168 during the first twenty-five years of the Ground Lease**:

(e) Definitions.

(i) "Fair Market Value" shall mean the fair market value of the Land (excluding Fort Greene Place), considered as vacant and unimproved and unencumbered by this Lease, and subject to the use restrictions provided in Article 23 hereof, determined and redetermined from time to time as hereinafter provided. Fair Market Value (including a deemed value for Fort Greene Place of ten dollars which value shall remain constant for the Term), for the period commencing on the date hereof and continuing through the day before the twenty-fifth (25th) anniversary of the Rent Commencement Date has been appraised at $3,446,168.00 (the "Initial Fair Market Value"). The Fair Market Value shall be redetermined as of the twenty-fifth anniversary of the Rent Commencement Date (the "First Appraisal Date") and as of each subsequent tenth anniversary thereafter (each a "Reappraisal Date"). Such redetermination of Fair Market Value shall be by appraisal in the manner provided in Article 33 hereof, unless at least twelve (12) months before the First Appraisal Date or any Reappraisal Date, as the case may be, Landlord and Tenant shall have agreed upon such Fair Market Value. All reappraisals of the Land for periods commencing on or after the twenty-fifth anniversary of the Rent Commencement Date shall be based on the highest and best use of the land, subject to any use and bulk restrictions imposed by the Urban Renewal Plan, by a Governmental Authority or by this Lease. Each such appraisal shall also consider (x) the benefits to and obligations of Tenant arising with

> respect to Fort Greene Place, for which Base Rent shall be one dollar per annum and (y) the value of Development Rights retained by Landlord

(*Id.*, § 3.2[e] [underlining in original]).

It is undisputed that the Tenant gave notice of its intent to exercise the Purchase Option on September 8, 2021, *i.e.*, 53 days before the twenty-fifth anniversary and long before any Reappraisal date (NYSCEF Doc. No. 78). As such, the Tenant delivered its notice "not later than six (6) months after a Reappraisal Date," and the Fair Market Value for the purchase is $3,446,168.00.

To the extent that the Landlord relies on the Mayoral Authorization or the Public Notice to modify the terms of the Ground Lease the parties negotiated, the argument fails. These documents ***executed solely by the Landlord*** to provide the authorization necessary to enter into the Ground Lease (i) do not modify the express terms of the Ground Lease and (ii) are in fact not inconsistent with the terms of the Ground Lease. To wit, Section 41.11 of the Ground Lease provides that

> **[n]o** covenant, agreement, **term** or condition **of this Lease** to be performed or complied with by either party, and no Default thereof by Tenant or Landlord's failure to perform them **shall be changed, modified, altered,** waived or terminated **except by a written instrument of change, modification, alteration, waiver or termination executed by the other party**
>
> (NYSCEF Doc. No. 38, § 41.11 [emphasis added]).

These documents referred to by the Landlord were not signed by the Tenant or its predecessor-in-interest and thus do not change, modify, or alter the terms of the Ground Lease. The Ground Lease by its terms does not incorporate these other documents. Nor does it provide that in the case of inconsistency between the terms of the Ground Lease and these other documents, the

other documents govern. Thus, the Landlord's argument that these documents—never executed by the Tenant— modify the terms of the Ground Lease fails as inconsistent with the express requirements of the Ground Lease and does not create an issue of fact preventing the grant of summary judgment.

To the extent that the Landlord relies on the *Town of Babylon v. N. Racanelli Assoc.*, 171 AD2d 741 (2d Dept 1991) to suggest a different result is required, they are not correct. That case is simply inapposite. In *Town of Bayblon*, the Town sought to invalidate the lease at issue based on the failure to comply with General Municipal Law § 507(2)(d) because the notice and approval did not disclose material terms of the lease. The Court notes that the notice itself is not discussed fully in the decision of that case and it is not clear from the decision what terms were not disclosed.

However, this is immaterial because the Mayoral Authorization and the Public Notice both disclosed the material terms of the Ground Lease and those disclosures are not inconsistent with the terms of the Ground Lease. As relevant, the Mayoral Notice disclosed that:

> After the tenth (10^{th}) anniversary of the Rent Commencement Date, Developer shall have the option to purchase the Phase I Site and Phase I Project at 150% of then fair market value as determined by appraisal… (NYSCEF Doc. No. 11 at 9).

The Public Notice disclosed:

> Developer shall have the option after the 10^{th} anniversary of the Rent Commencement Date to purchase the Premises at 150% of the then fair market value… (NYSCEF Doc. No. 116 at 2).

This is consistent with the Ground Lease because, and as discussed above, the parties agreed that for the first twenty-five years, the then fair market value as determined by appraisal was $3,446,168.00. Thus, the material terms were disclosed in the Mayoral Authorization and the Public Notice and these other documents relied on by the Landlord do not suggest otherwise.

Equally significantly, the Landlord is not seeking to invalidate the Ground Lease. Rather, in this case, the Landlord attempts to modify the terms of the Purchase Option in the Ground Lease that the parties expressly negotiated based on the incorrect suggestion that there was a variation of a term of the Ground Lease that was contained in its own documents – *i.e.*, the Public Notice and Mayoral Authorization ***that the Tenant never signed***. Even if this were true (which as discussed above it is not), this is expressly prohibited by the Ground Lease itself. As discussed above, Article 41.11 of the Ground Lease by its terms requires this to be in a writing signed by the Tenant. This, the parties do not dispute, never happened. Accordingly, the Tenant is granted summary judgment on its first cause of action and the Landlord's first counterclaim is dismissed.

The Tenant has also demonstrated that it was ready, willing, and able to fulfill its closing obligations. As such, the Tenant is entitled to summary judgment on its second cause of action for specific performance of the Purchase Option. The Landlord does not dispute that it was able to convey the premises, that Tenant substantially performed its obligations under the Ground Lease, or that Tenant has no adequate remedy at law (*EMF Gen. Contr. Corp. v. Bisbee*, 6 A.D.3d 45, 51 [1st Dep't 2004]). Thus, the Landlord is further ordered to provide Tenant with all information required to close and is required to close with the Tenant in accordance with this Decision and Order.

Finally, the Landlord is not entitled to a retroactive rent adjustment. Had the Landlord not wrongfully failed to close, the Landlord would never have received this adjusted rent. Thus, they are not entitled to it now.. Accordingly, the Landlord's second counterclaim is dismissed.

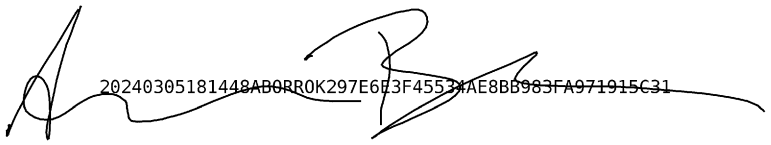
The Court has considered the parties' remaining arguments and finds them unavailing.

Accordingly, it is hereby

ORDERED that Tenant's motion for summary judgment on its first and second causes of action is granted; and it is further

ORDERED that the Landlord's motion for summary judgment is denied and its counterclaims are dismissed; and it is further

ORDERED that the Landlord shall provide the Tenant with all information required to close and shall close with the Tenant in accordance with the terms of this Decision and Order.



3/5/2024
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE