

Marshalls of MA, Inc. v CAC Atl., LLC

2024 NY Slip Op 30723(U)

March 7, 2024

Supreme Court, Kings County

Docket Number: Index No. 500695/2022

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF KINGS ; CIVIL TERM; COMM PART 8

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 MARSHALLS OF MA, INC.,

Plaintiff,

Decision and order

- against -

Index No. 500695/2022

CAC ATLANTIC, LLC,

Defendant,

March 7, 2024

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 PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #5 & #6

The plaintiff and the defendant have moved and cross-moved seeking summary judgment pursuant to CPLR §3212. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in a prior order, on January 31, 2014 the plaintiff leased space from the defendant at 66 Boerum Place in Kings County. A dispute arose concerning the plaintiff's share of taxes that were due and the defendant issued a notice of default on the grounds the plaintiff had failed to pay such taxes. Specifically, pursuant to a commencement date agreement entered into between the parties (see, Commencement Date Agreement [NYSCEF Doc. No. 171]) the lease dated January 31, 2014 became operative on November 17, 2016. At the time the lease was executed the premises only contained a four story building wherein the plaintiff would occupy approximately forty-five percent of the building. Thus, Article VI of the lease required the plaintiff to pay 42.98% of the taxes for the premises (see,

Lease, Article 6.1(D) [NYSCEF Doc. No. 169]). After the lease was executed the defendant built an additional seven residential stories and thus the premises is now an eleven story mixed use building. The defendant has sought 42.98% of the building's total taxes from the plaintiff. The plaintiff has refused to pay anything other than 42.98% of the taxes assessed regarding the commercial space. The defendant asserts the plaintiff is responsible for 42.98% of the entire building and the plaintiff insists they are only responsible for 42.98% of the commercial space, as noted. Both parties now seek summary judgement in this regard.

Conclusions of Law

Where the material facts at issue in a case are in dispute summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury, however, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Marino v. Jamison, 189 AD3d 1021, 136 NYS3d 324 [2d Dept., 2021]).

A tax escalation clause is a clause in a lease which requires a tenant to pay the proportionate share of increases in real estate taxes (Credit Exchange, Inc. v. 461 Eighth Avenue

Associates, 69 NY2d 994, 517 NYS2d 903 [1987]). However, the clause is not intended to impose upon the tenant responsibility for "increases in real estate taxes resulting from improvements on the property redounding solely to the benefit of the landlord" (id). In 223 West Corp., v. Leistner Properties, 21 AD3d 810, 801 NYS2d 28 [1st Dept., 2005] the court held that additional residential floors is an improvement that only benefits the landlord and refused to impose the tax burdens for such residential spaces upon a commercial tenant based upon a tax escalation clause. The defendant acknowledges these cases but insists questions of fact remain because the plaintiff "has submitted no affidavit or other competent evidence of any kind to support an allegation that construction of the Building did not benefit Marshalls and solely benefitted CAC" (see, Memorandum in Opposition, page 16 [NYSCEF Doc. No. 278]). However, the simple truism that additional residential units benefitted the landlord and not the plaintiff are not "allegations" that require evidence to support. Rather, it is a fact, based upon 223 West Corp., v. Leistner Properties, supra) and common sense that the additional residential units solely benefit the landlord. The mere fact the residential units may provide additional customers to the plaintiff does not mean the plaintiff benefitted from them to the extent they must pay their portion of those taxes. Of course, any retail establishment enjoys benefits when more residences are

made available so the customer base may grow thereby. The fortuitous fact the customers live in the same building as opposed to next door or down the block does not mean the plaintiff has benefitted to the point where they reasonably contemplated to pay the taxes for the units where those customers reside. Indeed, Credit Exchange, Inc. v. 461 Eighth Avenue Associates, supra, 223 West Corp., v. Leistner Properties, supra and CAC Atlantic LLC v. Harman Stores, Inc., 2023 WL 2971395 [Supreme Court New York County 2023] implicitly rejected that argument. Thus, any benefit that circuitously and indirectly accrues to the commercial tenant does not mean the tenant is responsible for those taxes. To be sure, any renovation or additional construction or simple improvements (see, Enchantments Inc., v. 424 East 9th Street LLC, 129 AD3d 589, 11 NYS3d 601 [1st Dept., 2015]) always benefit the building as a whole, even those portions not renovated or improved. That is not the sort of benefit contemplated by any tax escalation clause. Therefore, there is no basis upon which to impose the additional taxes upon the plaintiff.

Further, the plain language of the lease yields the unmistakable conclusion the plaintiff is only responsible for 42.98% of the taxes of the commercial portion only. An examination of the lease is therefore necessary. The lease first defines the relevant taxes. The lease defines 'base tax' as "an

amount equal to Forty Five Thousand Six Hundred Sixty Five Dollars and Forty Cents (\$45,665.40), which is the equivalent of One Dollar and Seventy Cents (\$1.70) per square foot in the Demised Premises per year" (see, Lease, Article 6.1(A) [NYSCEF Doc. No. 169]). Schedule A of the lease defines the demised premises as, essentially, the first three floors of the building as well as the cellar (see, Lease, Schedule C-1 [NYSCEF Doc. No. 169]). Further, Schedule A states that "the Demised Premises are situated within a four-story building located at the northwest corner of the intersection of Atlantic Avenue and Boerum Place...in Brooklyn, New York. Moreover, Article 1.1 of the lease states that the premises consists of "approximately twenty six thousand eight hundred sixty two square feet of floor area spread across three floors (the ground level, second floor and third floor) of the building to be developed by Landlord and known by the street address 66 Boerum Place, Brooklyn, New York (see, Lease, ¶1.1 [NYSCEF Doc. No. 169]). Thus, the lease provides the tenant must pay 42.98% of the tax expenses that exceed the base taxes and include "all real (property taxes, government levies, municipal taxes, county taxes, federal, state, county, or local governmental or municipal taxes, fees, charges or other impositions of every kind and nature..." (see, Lease, Article 6.1(E) [NYSCEF Doc. No. 169]). Clearly, the tax requirement placed upon the tenant only concerned the demised

premises, at the time, namely the commercial space secured by plaintiff.

The defendant asserts the plaintiff's request for summary judgement is based upon the fact the plaintiff never knew, when it signed the lease, that the building would be a mixed use building and that evidence establishes that in fact the plaintiff knew of the expansion plans for the building. However, whether the plaintiff was aware of residential units contemplated is not relevant considering the lease itself. Moreover, it does not matter how many floors the plaintiff thought would be built or how many floors were actually built. None of these extraneous beliefs or even actual knowledge on the part of the tenant cannot raise any questions of fact whether there was an understanding regarding paying taxes for the residential portions in light of the clear and unambiguous clauses of the lease which do not impose any such tax liabilities. In fact, it stretches credulity to argue that a lease executed with discrete terms regarding taxes owed by the plaintiff could change based upon the construction whims of the landlord. As the plaintiff argues "had CAC decided to build a fifty-story or hundred-story Residential Condo Unit, or decided to add additional stories, CAC's argument would suggest that Marshalls would have to pay *all of the excess Taxes created by this residential construction*, regardless of how significant or expansive, and regardless of the text of its


Lease" (see, Memorandum in Support, pages 17, 18 [NYSCEF Doc. No. 205]). There are no question of facts supporting that untenable position.

Therefore, based on the foregoing, the defendant's motion seeking summary judgement is denied. The plaintiff's motion seeking summary judgement that they are required to pay 42.98% of the taxes of the commercial space is granted.

So ordered.

ENTER:

DATED: March 7, 2024
Brooklyn, N.Y.



Hon. Leon Ruchelsman
JSC