

New Deal Realty LLC v 684 Owners Corp.

2024 NY Slip Op 31012(U)

March 26, 2024

Supreme Court, New York County

Docket Number: Index No. 652893/2020

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 14

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NEW DEAL REALTY LLC,

Plaintiff,

- v -

684 OWNERS CORP., YANNIS BAKOS, FELIX RUO,
BRIAN GLEASON, ALEXANDRA SCOTT, ROBERTA
GOSS, TONY CURTIS, KLEIMAN & WEINSHANK LLP,
WILKIN & GUTTENPLAN, P.C.

Defendants.
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INDEX NO. 652893/2020

MOTION DATE 03/14/2024

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 1, 25, 28, 32, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 64

were read on this motion to/for

DISCOVERY.

Plaintiff's motion to compel discovery is granted.

Background

In this action, plaintiff, a commercial tenant, claims it was overcharged rent for many years. Plaintiff entered a commercial lease with defendant 684 Owners Corporation ("684 Owners"), a cooperative, on November 15, 1994. Section 4.2 of the lease provides that plaintiff's rent was calculated as follows: "the amount by which (A) 24% of Landlord's Qualified Income for that year (excluding, however, amounts attributable to any period prior to the effective date of this lease) exceeds (B) so much of Landlord's gross income for that year as is neither Qualified Income nor rent under this lease," (NYSCEF Doc. No. 57 at 3 ¶ 4.2). According to the lease, qualified income included all gross income of 684 Owners derived from the tenant

stockholders (*id.* at 7 ¶ 6.2.2). In other words, whatever the tenant stockholders paid toward 684 Owners, 24% of said amount constituted the plaintiff's rental payment.

In paragraph 20 of the complaint (NYSCEF Doc. 1), plaintiff relies on paragraph 6.2.2 of the lease (NYSCEF Doc. 57) to require a carve-out from the qualified income of the coop. That is, plaintiff claims that amounts that the coop collects and spends for capital improvements must be removed from the calculation before plaintiff's 24% charge is calculated. In other words, plaintiff agrees it must pay 24% of the amounts collected to maintain the building – fuel, taxes, salaries, insurance, etc.; however, plaintiff says it is not responsible to pay a percentage of the money collected to pay for projects and capital expenditures and the fees related thereto.

In 2009, 684 Owners increased the monthly assessments to tenant shareholders by 16.4%, thus increasing 684 Owner's gross qualified income. This increase was implemented to "keep up with increasing operational costs such as heating oil and real estate taxes as well as to cover the costs of financing upcoming major projects (e.g., Local Law 11, elevator upgrade.)" (NYSCEF Doc. No. 1 at 5). Due to this increase, the base number used to calculate plaintiff's rent was higher which, in turn, increased plaintiff's monthly rent. Despite various objections, including that these projects constituted capital improvements and were not chargeable under plaintiff's lease, plaintiff paid the higher rent to 684 Owners for the next three years.

In 2011, 684 Owners agreed to give credit to plaintiff in the following formula: all Local Law 11-related expenses would be considered 20% repair and 80% capital improvements up to \$500,000.00, and all Local Law 11-related expenses above \$500,000.00 would be considered capital improvement. This formula decreased the qualified income of 684 Owners and therefore decreased the plaintiff's obligations under the lease (*see id.* at 7). In 2010, 2011, 2012 and 2013,

684 Owners underwent Local Law 11 improvements and returned to plaintiff the agreed-upon credits.

After 2013, no credits were given to plaintiff, although plaintiff alleges that further coop funds for capital improvements were used. As a result of 684 Owners allegedly using these funds for capital improvements and failing to give plaintiff credits, plaintiff filed this action against 684 Owners, the coop Board members, and 684 Owners' accountants. Plaintiff contends it calculated its excess rent payments as at least \$200,000.00.

The current motion

Plaintiff now moves to compel discovery from 684 Owners. Plaintiff served discovery demands on March 19, 2021 for financial documents demonstrating payments made to engineers, architects, and consultants from 2008 to 2019. According to plaintiff, these documents may demonstrate what portion of 684 Owners' income was being used for capital improvements on the coop building and would help determine plaintiff's entitlement to credits.

Plaintiff argues that it has served numerous deficiency letters outlining 684 Owners' failure to produce the requested documents. According to plaintiff, although 684 Owners finally produced some financial records, they are illegible and not from the time frame referenced. Additionally, plaintiff argues that 684 Owners produced documents that are not responsive at all, such as a copy of a rent check paid by plaintiff to 684 Owners. Plaintiff gives some examples of 684's failure to produce legible, relevant documents.

In opposition, 684 Owners contends that plaintiff's grievances should be limited to the few examples cited by plaintiff. According to 684 Owners, one of the checks cited by plaintiff does not match the recorded amount paid because the recorded amount reflects a negotiation

price, not the final price for services. Additionally, 684 Owners argues that other documents produced were given to plaintiff out of an abundance of caution to ensure that plaintiff was receiving all relevant information. 684 Owners contends the motion to compel is moot because it has produced all responsive documents, and plaintiff failed to consult 684 Owners before making this motion, therefore the motion should be denied.

In reply, plaintiff argues that it demanded documents from specific time frames that 684 Owners refused to produce. Plaintiff also contends that the total amount spent on services does not match the total amount that was recorded in document productions. Therefore, plaintiff asserts that there are missing document productions to which it is entitled. Plaintiff further argues that because 684 Owners produced documents from years that plaintiff did not demand, those productions are nonresponsive.

Discussion

“Disclosure in civil actions is generally governed by CPLR 3101 (a), which directs: there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof. We have emphasized that the words, ‘material and necessary’, are . . . to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason. A party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is “material and necessary”—i.e., relevant—regardless of whether discovery is sought from another party or a non party” (*Forman v Henkin*, 30 NY3d 656, 661, 70 NYS3d 157 [2018] [internal quotations and citations omitted]).

The motion is granted. In this case, plaintiff suspects that it is being overcharged because its landlord failed to separate what it collected and paid for capital expenditures from the funds from which plaintiff's rent obligation is calculated. Certainly, plaintiff is allowed to see how the money was spent. For example, suppose the landlord spent \$100,000 to upgrade the elevators and that was considered a capital expenditure (not a repair). Under plaintiff's theory, it would not have to kick in 24 per cent, or \$24,000. Thus, the plaintiff is entitled to see all expenses paid in relation to that project – engineer fees, electricians, materials, mechanics, legal fees, etc.

Put simply, if the parties agreed on a rent formula, then the plaintiff is entitled to an audit of what is going into – and carved out of – the amount upon which that formula is based. If the landlord is including costs that it should not be including – intentionally or unintentionally – then the tenant is entitled to check the numbers. Here, that includes seeing 684 Owners' expenditures and making sure plaintiff is only contributing to what plaintiff claims are its obligations – and not being charged 24% of what it has no obligation to pay.

Plaintiff demands financial documents from 684 Owners that could shed light on whether the rent was calculated correctly. It could show whether plaintiff contributed to capital improvements during the alleged timeframe. An elevator company's bill could be due to a breakdown (which would seemingly be part of plaintiff's obligation) or to plan a new elevator (which, according to plaintiff, would not). Plaintiff's discovery demands are clearly relevant to its claims, and based on the record before this Court, the landlord has failed to open its books and records so plaintiff can see what has gone into the calculation of its rent.

Plaintiff submitted a document demand at least three years ago, to which 684 Owners has repeatedly failed to adequately respond. As part of its response, 684 Owners produced copies of checks that are pixelated and illegible, a copy of a check paid by plaintiff for rent, and several

documents from after 2019. Producing images of documents that are irrelevant or in such bad quality that no information can be extracted by the receiving party is simply not sufficient. And to claim it is plaintiff's fault for not bringing the illegibility to defendants' attention misses the point – it is up to defendant to first review the documents it produces. Certainly, if defendant's position is that it has no obligation to look at the documents it produces, then plaintiff's motion appears to make more sense: it seems defendant is not looking and is not producing what it should produce.

Importantly, 684 Owners never objected to plaintiff's demands and never sought a protective order for these documents, and the time to seek the protective order expired long ago. 684 Owners also does not argue that these documents are palpably improper or irrelevant to plaintiff's claims. 684 Owners only claims that the motion is moot because 684 Owners made some kind of production. 684 Owners attempts to argue that plaintiff has not properly conferred with 684 Owners despite the fact that there are years of discovery stipulations on the record where it agreed to produce documents (NYSCEF Doc. Nos. 25, 28, 32, 42).

These documents are in the exclusive possession of 684 Owners and their relevance is at the heart of plaintiff's theory of the case. Moreover, these records may demonstrate a more precise amount in damages, if any (*see Graphic Offset Co., Inc. v Torre*, 78 AD2d 788, 433 NYS2d 13 [1st Dept 1980] [finding that where damages are unknown and must be calculated, “evidence and records pertaining to the amount of damages caused by the alleged breach are an integral part of the case”]). At this point in litigation, four years after filing the complaint, discovery disputes should be resolved.

Summary

In the lease, the parties did not agree to a flat rate of rent; instead, they agreed to determine the rent based on a calculation, which is necessarily based on various documents. All that plaintiff/tenant wants here is the chance to see how the landlord came up with the amount it charged (and maybe point out errors). No one challenges the right of the tenant to check the landlord's calculations.

In order to check the calculations, the tenant is entitled to see the documents and back-up upon which the landlord already relied to calculate the tenant's rent. Of course, the tenant is entitled to see how the landlord determined the rent – which includes charges included and excluded.

684 Owners must take this seriously and fully comply with this order and timely produce, in legible form, all financial documents demonstrating payments made to engineers, architects, and consultants (“professionals”) from 2008 to 2019; this includes the contracts with the professionals, the invoices from the professionals, proof of payments to the professionals and all other back up to show why each was hired, what each did and how and when each was paid. It should be organized by professional and the sum of each professional's paid bills must equal the amount reportedly paid to professionals each year.

If 684 Owners fails to timely and fully comply and puts plaintiff in the position of having to make another motion, then Court will consider proper penalties. It has been years. Enough is enough.

Accordingly, it is hereby

ORDERED that plaintiff's motion to compel is granted; and it is further

ORDERED that on or before April 16, 2024, defendant 684 Owners must produce, in legible form, all financial documents demonstrating payments made to professionals (engineers, architects, and consultants) from 2008 to 2019; this includes but is not limited to contracts with the professionals, invoices from the professionals, proof of payments to professionals and all other back up to show why each was hired, what each did and how and when each was paid; it should be organized by professional and the sum of each professional's paid bills must equal the amount reportedly paid to professionals each year.

See NYSCEF Doc. No. 63 for further instructions on the next conference.

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| <u>3/26/2024</u> | | | <hr/> | | |
| DATE | | | ARLENE BLUTH, 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"/> | 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 |