

**Flatbush Ctr. Parking LLC v Kings Theatre Master
Tenant, LLC**

2024 NY Slip Op 32904(U)

August 15, 2024

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 DATE 05/06/2024

MOTION SEQ. NO. 006

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 222, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

This is an action involving certain disputed payments and charges related to the operation of a parking facility located in Flatbush, Brooklyn. Plaintiff claims it is the Operator of the facility, pursuant to a certain Development and Operating Agreement (DOA). It seeks recovery on invoices that it rendered to defendant.

Defendant is a Parcel Owner under the DOA, which does not give title ownership over the parking facility but rather certain rights of use, primarily for its patrons attending events at its theater. Defendant disputes that the invoices were accurately calculated, and asserts a counterclaim to set off and recover against prior paid invoices which it now claims were inaccurately calculated.

Following the completion of discovery, defendant moves for partial summary judgment, seeking partial dismissal of plaintiff's claims, and partial summary judgment on its first counterclaim (NYSCEF 123).

Plaintiff cross-moves for partial summary judgment declaring that the First Amendment to the DOA is binding upon both parties, or, alternatively, seeking leave to amend its complaint to add a claim for quantum meruit (NYSCEF 227).

FACTUAL BACKGROUND

The parking facility at issue in this case has two sections. One is a ground-level open-air lot that adjoins what used to be a Sears Roebuck store, while the other is a roof deck across the street, which sits above certain retail stores (NYSCEF 124).

The DOA was entered into on July 15, 1997 (NYSCEF 230), and neither party to this litigation was one of the original parties, which consisted of FC Bedford Associates, L.P., Forest City Tilden Associates, L.P., Sears, Roebuck & Co. and Duryea Associates, L.L.C., along with the City of New York. According to the recitals, the purpose of the DOA was to improve the parking available for store customers. The DOA provided for an Operator (1.18), Parcel Owners (1.19), Parcels (1.20), Parking Areas (1.21) and Parking Facility Improvements (1.22).

Section 1.14 of the DOA defines the expenses that the Operator is entitled to charge Parcel Owners as follows:

“Expenses” means all costs that Operator has reasonably incurred and/or will reasonably incur in performing its duties under Section 6 and Section 7 with respect to the Parking Facility, the Designated Street Areas (hereinafter define) and all Parking Facility Improvements (excluding, in all cases, the improvements comprising the Parking Deck, other than the asphalt or paved surface thereof)...

Over time, the parties to the DOA changed, and by assignment dated August 9, 2004, plaintiff became the Operator (NYSCEF 232), and its affiliate Flatbush Delaware became the owner of the parcel containing the parking deck, which includes the spaces beneath the deck leased to the retail tenants.

At some point, defendant succeeded to ownership of the site formerly occupied by the historic Loews Theatre, and it began to sponsor concerts, shows and other events there. By First Amendment to the DOA arguably entered into by defendant in May of 2016, defendant became a Parcel Owner and agreed to assume a 25% share of the Expenses (subject to adjustment if defendant held more than 140 events in a year) (NYSCEF 233). The First Amendment also provided for plaintiff and Sears each to assume a 37.5% Allocable Share.

Defendant alleges that the First Amendment was never finalized, as Sears never signed it and disputed its share. Sear's successor ultimately terminated plaintiff as the Operator on May 9, 2022, as provided for by Section 2.1 of the DOA (NYSCEF 229, ¶¶ 36-37, and exhibits therein cited).

Following the execution of the First Amendment by defendant, plaintiff rendered bills, but not budgets (NYSCEF 229, ¶¶ 38, 44), which defendant paid for several years without question. Preparation of an annual budget was required by Section 8.2 of the DOA.

In early 2020, defendant demanded an audit, as was its right under Section 8.8 of the DOA (NYSCEF 229, ¶¶ 40-45). Among others, defendant questioned a large assessment made against it for replacement of the roof deck over the retail stores (NYSCEF 229, ¶¶ 47-50), based on its belief that the replacement of the roof deck was for the benefit of the store owners, who were complaining about leaks from above, and not for the parking deck itself.

Rather than agreeing to an audit, plaintiff commenced this action, which defendant claims is an additional breach of the DOA and the First Amendment, assuming it is bound by them as described above.

CONTENTIONS

Defendant contends that it uncovered other impermissible charges, specifically, that plaintiff did not charge itself the assigned 37.5% share of Expenses, it improperly allocated insurance expenses to the parking facility, it double-billed and improperly allocated expenses between defendant and the retail tenants, and it inappropriately charged defendant with 25% of the employee expenses (salary and benefits) of at least two employees who allegedly did almost no work for the parking facility. Moreover, defendant alleges that a 15% administrative fee expressly allowed as an Expense under Section 1.14.2 of the DOA was calculated on an artificially inflated amount, and that it was charged for an unauthorized management fee by an entity known as Adjmi Management and another named ACHS, which may or may not exist.

Defendant further contends that plaintiff was ineligible to become the Operator in the first place, as plaintiff's alleged principal, Alex Adjmi, is a convicted felon, relying on section 1.26 of the DOA, which defines Prohibited Person as follows:

(2) Any Person (A) that has been convicted in a criminal proceeding for a felony or any crime involving moral turpitude or that is an organized crime figure or is reputed to have substantial business or other affiliations with an organized crime figure, or (B) that directly or indirectly controls, is controlled by, or is under common control with a Person that has been convicted in a criminal proceeding for a felony or any crime involving moral turpitude or that is an organized crime figure or is reputed to have substantial business or other affiliations with an organized crime figure;

The record appears to reflect that Adjmi pleaded guilty to money laundering and insurance fraud (NYSCEF 229, ¶¶ 132, and exhibits therein cited), and that he was pardoned by

former President Donald Trump in January 2021. Defendant also contends that Adjmi and plaintiff lacked the experience in running parking facilities as required by Section 2.3 of the DOA, which also bars Prohibited Persons (NYSCEF 229, ¶¶ 133)

Defendant further contends that the termination of the DOA by a successor to Sears, by letter dated May 9, 2022, terminated any right that plaintiff had to assess further charges, citing a lawsuit in Kings County in which plaintiff was held to have been terminated, and to have lost any resulting “easement rights” over the parking facility (*Flatbush Delaware Holding LLC and Flatbush Center Parking LLC v Bedford Beverly Acquisitions LLC*, Index No. 513753/2022 [Sup Ct, Kings County, October 27, 2022, Boddie, J.]).

ANALYSIS

In moving for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). If this prima facie showing is made, the burden shifts to the opposing party to produce evidence in admissible form that there is in fact a triable issue of fact. (*Id.*; see also *Gammons v City of New York*, 24 NY3d 562 [2014]).

Because summary judgment deprives a litigant of his day in court, “evidence should be analyzed in the light most favorable to the party opposing the motion.” (*Martin v Briggs*, 235 AD2d 192 [1st Dept 1997]). However, bare or conclusory allegations or assertions are insufficient to create genuine issues of material fact sufficient to defeat a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Neither party has made a prima facie showing of entitlement to summary judgment, and to the extent it did so, the other side raised triable issues of fact as to many items in dispute, including whether the First Amendment to the DOA ever became effective, whether plaintiff was eligible to be an Operator in the first instance, whether plaintiff breached the DOA by failing to prepare budgets or permit an audit, whether plaintiff properly allocated and charged for numerous expenses, including management fees, and what, if any, are the consequence of the determination against plaintiff in the Kings County action. Such disputes preclude a grant of summary judgment (*see, e.g., 549 LLC v Luna*, 219 AD3d 1209 [1st Dept 2023] [as amount allegedly owed by tenant was in dispute, summary judgment precluded]; *Moon 170 Mercer, Inc. v Vella*, 122 AD3d 544 [1st Dept 2014] [dispute as to amounts owed by tenant precluded summary judgment]).

Further, plaintiff seeks leave to amend its complaint to add a claim for a quantum meruit recovery, on the ground that if defendant is correct in its contention that the First Amendment never came into effect, then plaintiff should be able to recover against defendant in quantum meruit. However, while amendments are freely granted and may be permitted at any time, plaintiff's request to amend, made for the first time post-note of issue and after not only defendant filed its motion for summary judgment but also after plaintiff also sought partial summary judgment on its breach of contract claim, is prohibited (*see On the Level Enter., Inc. v 49 E. Houston LLC*, 104 AD3d 500 [1st Dept 2013] [dismissal of quantum meruit claim was required where plaintiff moved for summary judgment on contract claim; while party is permitted to plead inconsistent theories, it must elect one when it seeks summary judgment]).

