

Executive Workspace LLC v Electrify Am. LLC

2025 NY Slip Op 31044(U)

April 1, 2025

Supreme Court, New York County

Docket Number: Index No. 156174/2024

Judge: Andrea Masley

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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: COMMERCIAL DIVISION PART 48

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EXECUTIVE WORKSPACE LLC,	INDEX NO. <u>156174/2024</u>
Plaintiff,	MOTION DATE <u>--</u>
- v -	MOTION SEQ. NO. <u>001</u>
ELECTRIFY AMERICA LLC,	
Defendant.	DECISION + ORDER ON MOTION
-----X	

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 were read on this motion to/for DISMISS.

This is an action about charging stations for electric vehicles in Manhattan.

In motion sequence 001, defendant Electrify America LLC (Tenant) moves pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint filed by plaintiff Executive Workspace LLC (Landlord). Landlord alleges causes of action for (i) breach of contract based on Tenant’s alleged (a) termination of the November 10, 2022 lease (Lease) without legitimate cause and thus default on all of Tenant’s Lease obligations, (b) deliberate and intentional failure to affirmatively act to “apply for and obtain,” or even to attempt to “apply for and obtain,” all required approvals for Charging Station Permits within the Permit Contingency Period, and (c) failure to invoke the provisions of the Permitted Use Side Letter Agreement to meet and discuss with Landlord how the parties could otherwise proceed, “both acting reasonably and in good faith,” to determine whether agreement could be reached on a course of conduct other than terminating the Lease (NYSCEF Doc. No. [NYSCEF] 2, Complaint ¶46); (ii) declaratory

judgment declaring that Landlord, in accordance with the provisions of section 4.02 of the Lease, is entitled to “draw down the entire Initial Security Deposit/Security Letter” in the event of a default and may “use, apply or retain the whole or any part of the Security ... to damages incurred or suffered by Landlord” (*id.* ¶47); and (iii) attorneys’ fees based on section 35.20 of the Lease. (*Id.* ¶ 49.)

For the reasons stated on the record on March 20, 2025, the motion is granted, in part, to the extent that (i) the breach of contract cause of action is dismissed to the extent it is premised on the alleged breaches specified in items (b) and (c) and sustained to the extent premised on the alleged breach specified in item (a); (ii) the cause of action for declaratory judgment is dismissed; and (iii) the cause of action for attorneys’ fees is dismissed without prejudice to either party to pursue recovery of the attorneys’ fees at the conclusion of the case. This decision supplements the decision made on the record.

Landlord contends that Tenant failed to apply for any permits while Tenant contends it was not required to apply for permits under the termination provision (highlighted in green below). The parties disagree on the meaning of “diligently pursu[ing] the Charging Station Permits.” Whether Tenant’s preparatory work e.g. engaging a contractor from another state who was unfamiliar with New York regulations was sufficient is an issue of fact. This case turns on the following Lease provision:

“(b) The occurrence of the Commencement Date of this Lease shall be contingent on Tenant securing all required approvals and permits (the ‘**Charging Station Permits**’) to install, operate and use the Charging Stations in the Premises (the ‘**Permit Contingency**’) within one hundred eighty (180) days after the execution of this Lease (the ‘**Permit Contingency Period**’). If the Permit Contingency is not satisfied during the Permit Contingency Period, as same may be extended in accordance with this paragraph, either party shall have the right to terminate this Lease as set forth below. Notwithstanding anything to the

contrary contained herein, in the event that Tenant shall fail to secure the Charging Station Permits within the first one hundred eighty (180) days after the execution of this Lease and provided that Tenant has diligently pursued the Charging Station Permits, the Contingency Period shall automatically be extended for another one hundred eighty (180) days, which the parties shall confirm by email notice for their records, but which will happen automatically. **In the event that Tenant has not been able to secure the Charging Station Permits within the Permit Contingency Period including the one hundred eighty (180) day extension, Landlord and Tenant shall each have the right to terminate this Lease upon providing the other party with written notice thereof, setting forth the effective date of termination which shall be no less than thirty(30) days after the notice is given.** (NYSCEF 11, Lease and First Amendment §2.02[b] [emphasis in original and added].)

The Lease automatically renewed after 180 days, without any objection by Landlord as to Tenant's diligence or the lack thereof. (*Id.*) Further, Landlord never emailed to confirm the renewal or to cancel. (NYSCEF 35, Tr Leitman Bailey¹ 23:1-24:12 [oral argument].) Since the Lease automatically renews for 180 days, it appears that the provisions "and provided that Tenant has diligently pursued the Charging Station Permits" and "which the parties shall confirm by email notice for their records, but which will happen automatically" are superfluous. (NYSCEF 11, Lease and First Amendment §2.02[b].) However, all contract provisions must be given meaning. (See *Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42, 46 [1956] ["The rules of construction of contracts require us to adopt an interpretation which gives meaning to every provision of a contract or, in the negative, no provision of a contract should be left without force and effect" (citations omitted)].) This issue must be briefed and resolved.

Further, the court must resolve an ambiguity because section 2.02(b) of the Lease permits more than one reasonable interpretation. A contract is ambiguous if "on its face" it is "reasonably susceptible of more than one interpretation." (*Chimart Assoc.*

¹ Counsel to Landlord.

v Paul, 66 NY2d 570, 573 [1986].) “If a contract is ambiguous, a court may look to extrinsic evidence to resolve the ambiguity.” (*Schulte Roth & Zabel LLP v Metro. 919 3rd Ave. LLC*, 202 AD3d 641, 642 [1st Dept 2022] [citation omitted] [“The parties shall proceed to discovery as extrinsic evidence will be necessary to resolve the ambiguity”])

One possible and literal reading of section 2.02(b), favored by Tenant, is that it provides both parties the unilateral right to terminate the Lease at the expiration of the Permit Contingency Period if Tenant has, for whatever reason, not obtained the requisite permits. A second possible reading, favored by Landlord, is that the termination provision in section 2.02(b), when read in the broader context of the contract provision, preconditions the right to terminate the Lease on Tenant having “diligently pursued” the requisite permits. (NYSCEF 11, Lease and First Amendment §2.02[b].) The fact that the two parties argue different interpretations of the termination language in section 2.02(b) is not itself dispositive evidence that the language is ambiguous. (See *Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 67 [1st Dept 2008], *affd* 13 NY3d 398 [2009].) However, because the two interpretations are both reasonable, the Lease fails to conclusively establish as a matter of law a defense to Landlord’s allegation that Tenant breached its contractual obligation by terminating the Lease without legitimate cause. Therefore, Tenant’s motion to dismiss subsection (a) of Landlord’s first cause of action pursuant to CPLR 3211(a)(1) is denied.

Tenant’s focus on parol evidence is misplaced since Landlord may supplement its complaint with an affidavit on a CPLR 3211(a)(7) motion, but a Tenant may not. On a CPLR 3211(a)(7) motion, “a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint.” (*Leon v Martinez*, 84 NY2d 83, 88

[1994] [citation omitted]; *Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 635 [1976] [“affidavits may be used freely to preserve inartfully pleaded, but potentially meritorious, claims” (citation omitted).] However, the court cannot rely on Tenant’s affidavits which contradict the complaint. (See *GEM Holdco, LLC v Changing World Tech., L.P.*, 127 AD3d 598, 599 [1st Dept 2015].)

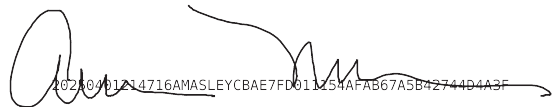
Accordingly, it is

ORDERED that the motion is granted, in part, to the extent that (i) the breach of contract cause of action is dismissed to the extent premised on the alleged breaches specified in items (b) and (c) and sustained to the extent premised on the alleged beach specified in item (a); (ii) the cause of action for declaratory judgment is dismissed; and (iii) the cause of action for attorneys’ fees is dismissed without prejudice to either party to pursue recovery of the attorneys’ fees at the conclusion of the case; and it is further

ORDERED that Electrify America LLC shall answer the complaint by April 11, 2025; and it is further

ORDERED that by April 21, 2025, the parties shall complete the initial disclosure (see Part 48 Procedures ¶16); and it is further

ORDERED that by April 28, 2025, the parties shall e-file and email a proposed preliminary conference order or, if no agreement can be reached, competing proposed orders.



4/1/2025
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE