

11 CIV 8313

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
EL AL ISRAEL AIRLINES, LTD.,

Plaintiff,

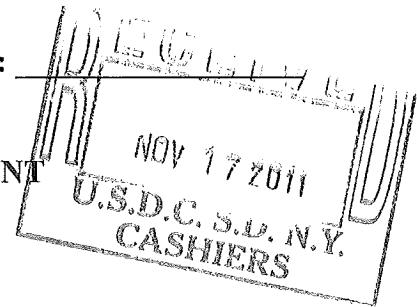
v.

15 E 26 OWNER, L.L.C. and MADISON
PARK OWNER, LLC,

Defendants.
-----X

Docket No.:

COMPLAINT



Plaintiff EL AL ISRAEL AIRLINES, LTD. (hereinafter "El Al"), by and through its attorneys Kaplan, Massamillo & Andrews, LLC, for its Complaint against defendants 15 E 26 OWNER, L.L.C. (hereinafter "Landlord") and MADISON PARK OWNER, LLC (hereinafter "Landlord's Predecessor"), alleges:

STATEMENT

1. This is an action to recover damages resulting from Landlord's and Landlord's Predecessor's breach of lease and for declaratory judgment on the correct interpretation of several provisions within that lease.

THE PARTIES

2. Plaintiff El Al is a foreign corporation incorporated under the laws of, and with its principle place of business in, the State of Israel.

3. Defendant Landlord is a Delaware limited liability company with, upon information and belief, its principal place of business in the City of New York, State of New York.

4. Defendant Landlord's Predecessor is a Delaware limited liability company with, upon information and belief, its principal place of business in the City of New York, State of New York.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a)(2) as the amount in controversy exceeds \$75,000, exclusive of interest and costs, and the action is between a citizens of a State and a citizen or subject of a foreign state.

6. Venue is proper in this Judicial District pursuant to 28 U.S.C. § 1391.

FACTUAL BACKGROUND COMMON TO ALL CLAIMS

7. In or about September 24, 2003, 15 East 26th Street Associates, LLC (hereinafter "Associates") was the owner of the land and improvements commonly known as 15 E. 26th Street, New York, New York (hereinafter "Entire Building").

8. Pursuant to a Lease, dated as of September 24, 2003 (hereinafter "Lease") Associates demised to El Al a portion of Entire Building (hereinafter "Leased Premises"). A copy of the Lease is attached hereto as Exhibit A.

9. At some time prior to January 1, 2006 Landlord's Predecessor became the successor in interest of Associates and the landlord of El Al with respect to the Leased Premises under the Lease.

10. On or about December 10, 2010, Landlord became the successor in interest of Landlord's Predecessor and the landlord of El Al with respect to the Leased Premises under the Lease.

11. Section 37.F of the Lease provides that the Lease terminates on July 31, 2019 and the Lease is currently in full force and effect.

12. Section 38.A(2)(d) of the Lease provides for a "Tax Payment" by El Al equal to El Al's percentage "of the amount by which the Real Estate Taxes payable for a Tax year exceed the Real Estate Taxes payable for the Base Tax Year. . . ."

13. Section 38.A(3) of the Lease provides that the amount of the Tax Payment is specified in a "Tax Statement" that sets "forth the amount of the Real Estate Taxes for [a] Tax Year, the amount of Real Estate Taxes for [that] Tax Year, the amount of Real Estate Taxes for the Base Tax Year and the amount of the Tax Payment for such Tax Year."

14. Section 38.A(2)(a) of the Lease defines Real Estate Taxes as follows:

The term "Real Estate Taxes" shall mean (i) the sum of the real estate taxes and assessments. . . **payable by Landlord during any Tax Year** and (ii) reasonable attorneys' fees, court, or other administrative costs and disbursements incurred by Landlord in connection with any attempt to reduce Real Estate Taxes prior to the date such Real Estate Taxes are payable. . . .

15. Section 37.A of the Lease defines the "Base Tax Year" as the twelve month fiscal period beginning on July 1, 2003 and ending on June 30, 2004. Section 38.A(2)(c) of the Lease defines "Tax Year" to mean "each twelve (12) month fiscal period commencing on July 1 and ending on June 30 of the following year."

16. The Real Estate Taxes for the Base Tax Year are \$1,781,764.00.

17. Upon information and belief, at some point in 2008, Landlord's Predecessor sold portions of the Entire Building as condominiums to other parties while Landlord's Predecessor retained some portion of the building (the "Retained Premises") that includes the Leased Premises under the Lease.

18. As a consequence thereof, the Real Estate Taxes **payable by Landlord during any Tax Year** after the 2008/2009 Tax Year decreased below the amount of Real Estate Taxes payable by the Landlord and/or Landlord's Predecessor during the Base Tax Year.

19. Attached hereto as Exhibit B is a copy of The City of New York Quarterly Statement of Account to the Landlord's Predecessor specifying the Real Estate Taxes for the Tax Year 2009/2010 equal to \$1,305,406.00.

20. Attached hereto as Exhibit C is a copy of The City of New York Quarterly Statement of Account to the Landlord's Predecessor specifying the Real Estate Taxes for the Tax Year 2010/2011 equal to \$1,299,312.00

21. Notwithstanding that decrease, the Landlord and Landlord's Predecessor, their agents, servants and/or employees, sent El Al a Tax Statement for each of the 2009/2010 and 2010/2011 Tax Years claiming that the Real Estate Taxes for each of the 2009/2010 and 2010/2011 Tax Years exceeded the Real Estate Taxes for the Base Tax Year.

22. Attached hereto as Exhibit D is a copy of the Tax Statement for the 2009/2010 Tax Year and the 2010/2011 Tax Year alleging a Tax Payment due from El Al for the 2009/2010 Tax Year in the amount of \$59,922.07 and alleging a Tax Payment due from El Al for the 2010/2011 Tax Year in the amount of \$61,558.23.

23. Rather than calculating the Tax Payment in Exhibit D as the differences between Real Estate Taxes for the Base Tax Year and the Real Estate Taxes payable by Landlord and/or Landlord's Predecessor during the 2009/2010 Tax Year and during the 2010/2011 Tax Year, Landlord and/or Landlord's Predecessor, their agents, servants and/or employees calculated the Tax Payment by determining the real estate taxes payable by Landlord and/or Landlord's Predecessor for the Retained Premises and the real estate taxes payable by owners of the

condominiums, adding those real estate taxes together and, from the resulting amount, subtracting the Real Estate Taxes for the Base Tax Year.

24. Because the Real Estate Taxes payable by Landlord and/or Landlord's Predecessor for the 2009/2010 Tax Year and for the 2010/2011 Tax Year are *below* the Real Estate Taxes payable by Landlord and/or Landlord's Predecessor in the Base Tax Year, El Al's actual Tax Payment liability was \$0.

25. El Al timely objected to the Tax Statement for the 2009/2010 Tax Year and to the Tax Statement for the 2010/2011 Tax Year.

26. El Al paid the Tax Statement for the 2009/2010 Tax Year and the Tax Statement for the 2010/2011 Tax Year over objection.

27. El Al continues to make a payment to Landlord pursuant to the Lease in the amount of \$5,129.87 per month toward an estimate of the Tax Payment due for the 2011/2012 Tax Year.

**AS AND FOR A FIRST CLAIM FOR RELIEF
(BREACH OF CONTRACT)**

28. El Al repeats, reiterates and re-alleges each and every allegation in Paragraphs 1 through 27, inclusive, of this Complaint with the same force and effect as if fully set forth herein.

29. Landlord and/or Landlord's Predecessor, their agents, servants and/or employees miscalculated the amount of the Tax Payment for the 2009/2010 Tax Year and such miscalculation constituted a breach of the Lease.

30. Landlord and/or Landlord's Predecessor, their agents, servants and/or employees miscalculated the amount of the Tax Payment for the 2010/2011 Tax Year and such miscalculation constituted a breach of the Lease.

31. As a result of the miscalculation of the Tax Payment for the 2009/2010 Tax Year, El Al overpaid Landlord and/or Landlord's predecessor the sum of \$59,922.07.

32. As a result of the miscalculation of the Tax Payment for the 2010/2011 Tax Year, El Al overpaid Landlord and/or Landlord's Predecessor the sum of \$61,558.23.

33. As a result of the miscalculation of the Tax Payment for the 2010/2011 Tax Year, El Al continues to overpay Landlord and/or Landlord's Predecessor the sum of \$5,129.87 per month and, to date, has overpaid Landlord and/or Landlord's Predecessor the sum of \$25,649.35 for the 2011/2012 Tax Year.

34. Consequently, El Al has suffered damages to date in the amount of \$141,999.51, plus statutory interest.

35. Therefore, Landlord and/or Landlord's Predecessor are jointly and severally liable to El Al for damages to date as set forth above.

**AND AS FOR A SECOND CLAIM FOR RELIEF
(ATTORNEYS' FEES)**

36. El Al repeats, reiterates and re-alleges each and every allegation in Paragraphs 1 through 35, inclusive, of this Complaint with the same force and effect as if fully set forth herein.

37. Pursuant to Section 19 of the Lease, "In the event of a dispute between the parties which results in litigation or arbitration, the losing party shall pay the prevailing party's reasonable attorneys' fees and litigation costs."

38. Due to Landlord's and/or Landlord's Predecessor's breach of the Lease, El Al has incurred reasonable attorneys' fees and costs and will continue to incur these fees and costs.

39. Therefore, Landlord and/or Landlord's Predecessor are jointly and severally liable to El Al for El Al's attorneys' fees in an amount subject to proof.

**AND AS FOR A THIRD CLAIM FOR RELIEF
(DECLARATORY JUDGMENT)**

40. El Al repeats, reiterates and re-alleges each and every allegation in Paragraphs 1 through 35, inclusive, of this Complaint with the same force and effect as if fully set forth herein.

41. Pursuant to the Lease, El Al contends all future Tax Payments should be calculated based upon the amount of Real Estate Taxes payable by the Landlord for any Tax Year.

42. Landlord contends that future Tax Payments should be calculated on the basis of the property tax assessed on the Entire Building.

43. An actual controversy exists, and El Al has no adequate remedy at law to resolve this controversy.

44. Consequently, this Court should declare the rights of El Al and Landlord under the Lease that future Tax Payments should be calculated on the basis of Real Estate Taxes payable by Landlord in any Tax Year.

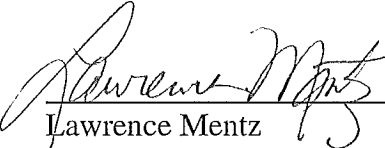
WHEREFORE, Plaintiff EL AL ISRAEL AIRLINES, LTD., demands judgment against Defendants MADISON PARK OWNER, LLC and 15 E 26 OWNER, L.L.C., as follows:

- a) On the First Claim for Relief, jointly and severally against MADISON PARK OWNER, LLC and 15 E 26 OWNER, L.L.C. in amount of \$147,129.65, plus statutory interest;
- b) On the Second Claim for Relief, jointly and severally against MADISON PARK OWNER, LLC and 15 E 26 OWNER, L.L.C. for attorneys' fees in an amount subject to proof;
- c) On the Third Claim for Relief, against Defendant 15 E 26 OWNER, L.L.C. declaratory judgment that the Tax Payment owed by Plaintiff in any Tax Year

shall be calculated based upon the amount of Real Estates Taxes payable by
Landlord for that Tax Year.

Dated: New York, New York
November 16, 2011

KAPLAN, MASSAMILLO & ANDREWS, LLC

By: 
Lawrence Mentz
Daniela Jampel

Attorneys for Plaintiff

EL AL ISRAEL AIRLINES, LTD.

70 E. 55th Street, 25th floor
New York, New York 10022
Tel: (212) 922.0450
Fax: (212) 922.0530