

**AGIP Petroleum, Inc. v 666 Fifth Ave. Ltd.
Partnership**

2001 NY Slip Op 30097(U)

March 1, 2001

Suopreme Court, New York County

Docket Number: 602625/00

Judge: Franklin R. Weissberg

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. FRANKLIN R. WEISSBERG
Justice

PART 62

AGIP PETROLEUM, INC.,

Plaintiff,

- v -

666 FIFTH AVENUE LIMITED PARTNERSHIP and
666 FIFTH, L.P.,

Defendants.

INDEX NO. 602625/00

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that: The plaintiff herein, Agip Petroleum Co., Inc., is a commercial tenant in a building owned by the defendant landlord, 666 Fifth, L.P. The defendant 666 Fifth Avenue Limited Partnership is the previous owner of the building. The plaintiff claims that it is entitled to recover alleged rent overcharges which it paid to the defendants between July, 1994 and June, 2000. The plaintiff has moved for summary judgment in its favor. The defendants have cross-moved for summary judgment dismissing the complaint.

Background

The plaintiff initially signed a rental lease in September, 1979 for portions of the fifth floor of the defendants' building. In March, 1993, the lease was amended. For the purpose of this action, the two leases are identical. Section 28 of the lease provides that "[P]rovisions with respect to increase or decrease in rent resulting from increase or decrease in real estate taxes, operating expenses, wage rates etc., are set forth in the Escalation Rider attached hereto." Under the Escalation Rider, the annual rent originally provided for in the lease, which is referred to as the "Base Annual Rental Rate," would, in any given year, be increased or decreased by the plaintiff's proportionate share of the increase or decrease in operating expenses and real estate taxes for the building from the base year of July 1, 1993 to June 30, 1994. Thus, section B(1) of the Rider provides, *inter alia*, that "[I]f the taxes payable for any tax year....shall represent an increase above or decrease below the Base Taxes [defined as the taxes for the base tax year], then the Base Annual Rental Rate for such Tax Year....shall be increased or decreased, as the case may be, by the Tenant's proportionate percentage of the increase or decrease." Similarly, section B(2) provides that "[I]f the Operating Expenses for any calendar year.....subsequent to the Base Expense Year shall be greater or less than the Base Operating Expenses, then the Base Annual Rental Rate payable under this lease for such calendar yearshall be increased or decreased, as the case may be, by the Tenant's proportionate percentage of the increase or decrease." These provisions are, however, qualified by section E(3), which provides that "[A]ny provision in Section B to the contrary notwithstanding, under no circumstances shall the rental payable under this lease be at a rate less than the Base Annual Rental Rate."

Here, for each of the six years following the Base Expense Year, the building's operating expenses were higher than the Base Operating Expenses. As a result, the Base Annual Rental Rate was increased each year by the difference between the Base Operating Expenses and the higher operating expenses incurred during that particular year. However, for each of the six tax years following the Base Tax Year of 1993-94, the real estate taxes were substantially less than the Base Taxes. The defendant

did not adjust the Base Annual Rental Rate to reflect this decrease.

In this action, the plaintiff alleges that the annual increase in the Base Annual Rental Rate attributable to the annual increase in operating expenses should have been offset by its proportionate share of the annual decrease in real estate taxes. In this respect, the plaintiff's proportionate share of the annual decrease in real estate taxes far exceeded its proportionate share of the annual increase in operating expenses. Since, under section E(3) of the Escalation Rider, the rent plaintiff is required to pay may not fall below the Base Annual Rental Rate, it only seeks to recover the sum of the annual increases which it paid above the Base Annual Rental Rate.

Discussion

The interpretation of an unambiguous contract provision is the responsibility of the court, which may not consider any extrinsic evidence when the intent of the parties is discerned from the language of the instrument. *See Chimart Assoc. v. Paul*, 66 NY2d 570, 572-73 (1986). The interpretation of ambiguous language is a matter which should generally be resolved at trial although a court may do so on a motion for summary judgment where the parties rely only on the four corners of the contract or where parol evidence has been submitted which establishes the parties' intent. *See Ruttenberg v. Davidge Data Systems Corporation*, 215 AD2d 191, 192-93 (1st Dept. 1995). *See Carvel Corp. v. Rait*, 117 AD2d 485, 488 (2nd Dept 1986). *See also Ruttenberg v. Davidge Data Systems Corp.*, 215 AD2d 191, 192-93 (1st Dept. 1995). The question of whether a writing is ambiguous is the exclusive province of the court. *See Sutton v. East Riv. Sav. Bank*, 55 NY2d 550, 554 (1982).

Here, the language contained in the leases between the two parties is unambiguous on the issue of whether the Base Annual Rental Rate must be decreased in any given year where the real property taxes are less than the real property taxes which were payable for the Base Tax Year. As noted previously, the Rent Escalation Rider specifically states that, under such circumstances, the Base Annual Rental Rate shall be decreased by the Tenant's proportionate percentage of any such decrease below the Base Taxes. In opposing the plaintiff's motion, the defendants have not even attempted to suggest an alternative explanation for the inclusion of the word "decrease" under section B(1) of the Rent Escalation Rider. Clearly, the provision does not refer to a decrease from year to year in the amount of the Escalation Expenses attributable to real estate taxes since the decrease is not calculated by comparing the real estate taxes paid from one year to the next but, rather, by comparing the taxes paid in any given tax year to the taxes paid in the Base Tax Year. The provision unambiguously states that if the taxes are less than the Base Taxes, the Base Annual Rental Rate shall be decreased by the difference.

In justifying their refusal to decrease the Base Annual Rental Rate by the annual difference between the taxes paid in the tax year to the taxes paid in the Base Tax Year, the defendants argue that the adjustment to rent which is attributable to increased operating expenses is entirely unrelated to the adjustment to rent which is attributable to a change in real estate taxes. They point out that, under the lease, a comparative statement relating to operating expenses and a comparative statement relating to real estate taxes may be separately sent to the tenant and that each such statement need not take the other into account. According to the defendants, the monies which the plaintiff seeks to recover herein accurately reflected annual increases in operating expenses and were properly set forth in a comparative statement advising the plaintiff that its rent would be increased accordingly. The problem with this argument is that although the comparative statements for operating expenses may have been accurate, the comparative statements for real estate taxes were not since they failed to provide for any decrease in the Base Annual Rental Rate. Ignoring the fact that the Escalation Rider specifically requires a decrease, if applicable, to the Base Annual Rental Rate, the comparative statements for real estate taxes merely address the question of whether an increase was required. They did not calculate the decrease to which the plaintiff was entitled or even suggest that a decrease was available. Under the Rent Escalation Rider, it was incumbent upon the defendants to have done so. To the extent that the Rider prohibits the

plaintiff's annual rent from being lower than the Base Annual Rental Rate, it is the landlord's responsibility to ensure that any decrease in the Base Annual Rental Rate attributable to real estate taxes does not exceed any increase in the Base Annual Rental Rate attributable to operating expenses.

In their opposition to the plaintiff's motion and in their cross-motion for summary judgment dismissing the complaint, the defendants contend that, under the Rent Escalation Rider, the plaintiff is time-barred from challenging the rent which they have charged during the six years in question. This contention is based on section E(2) of the Rent Escalation Rider, which provides that "[A]ny comparative statement sent to Tenant shall be conclusively binding upon Tenant unless, within 60 days after such statement is sent, Tenant shall send a written notice to Landlord objecting to such statement and specifying the respects in which such statement is claimed to be incorrect." The defendants, however, have only attached two comparative statements for real estate taxes which they sent to the plaintiff since 1993. One of these statements is for the 1995-96 tax year and the other is for the 1999-00 tax year. Both of these statements indicated that the plaintiff was not entitled to any rent credit even though the real estate taxes for the particular year were less than the Base Taxes. Since the plaintiff has not claimed that it sent the landlord a written notice disputing the 1995-96 statement within 60 days of its receipt, it is barred under the lease from disputing the landlord's failure to decrease the rent. As to the 1999-00 statement, the plaintiff had, a few months earlier, apprised the defendants of its position that it is entitled to a decrease in the Base Annual Rental Rate when the real estate taxes for a particular year are less than the Base Taxes. Thus, the defendants were already on written notice about the plaintiff's objections to the absence of any credit in a comparative statement which indicates that the real estate taxes for the year were less than the Base Taxes. As to the other four years in question, the plaintiff claims that it never received a comparative statement for real estate taxes. Since the defendants have failed to establish that any such statements were sent, their affirmative defense is unavailable with respect to those four years.

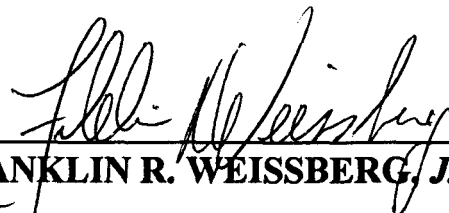
In calculating the amount to which it is entitled, the plaintiff asserts that, for the six years in question, it paid \$97,959.10 in rent increases attributable to increases in operating expenses. The plaintiff also asserts that, for each of these years, its proportionate share of the decrease in real estate taxes from the Base Year Taxes exceeded and therefore offset the increase in operating expenses. The defendants have not disputed the figures which the plaintiff has used or the calculations it has made. Subtracting the 1995-96 rent escalation increase of \$2,593.43 which it is barred from challenging, the plaintiff is entitled to recover \$95,365.67 as overpayment between July, 1994 and June, 2000. Interest should be calculated, pursuant to CPLR 5001(b), from June 30, 1999.

Accordingly, the plaintiff's motion for summary judgment on its first cause of action is granted and the defendants' cross-motion for summary judgment is denied. The Clerk is hereby directed to enter judgment in favor of plaintiff and against the defendants, who are jointly and severally liable, in the amount of \$95,365.67, together with interest from June 30, 1999, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs. The second and third causes of action are dismissed as moot.

The plaintiff is also entitled to a declaratory judgment in its favor, as sought in its fourth cause of action. Accordingly, it is hereby adjudged and declared that the defendants are hereafter obligated under the lease between the parties to provide, in a manner consistent with the decision herein, appropriate payments, reductions and credits to plaintiff for plaintiff's proportionate share of any reductions and/or savings in real estate taxes for the premises which are the subject of this action.

The Clerk Shall Enter Judgment Herein

Dated: 3/1/01


FRANKLIN R. WEISSBERG, J.S.C.
 [] NON-FINAL DISPOSITION

Check one: FINAL DISPOSITION