[* 1]

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

PRESENT: CAHN PART 49M

Justice

609 CORP

-v-

PARK TOWERS SOUTH

INDEX NO. 121510/03

MOTION DATE 6/21/04

MOTION SEQ. NO. 002

MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 11/30/04

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

- -X

609 CORPORATION, Index No. 121510/03

Plaintiff,

-against-

PARK TOWERS SOUTH COMPANY, LLC,

Defendant.

- -X

CAHN, J.:

This is an action by a tenant challenging an allegedly unconscionable tax escalation clause in a commercial lease.

The defendant landlord, Park Towers South Company, LLC moves for summary judgment (CPLR 3212). For the reasons set forth below, the motion is granted.

FACTS

Defendant Park Towers is the owner of the building located at 330 West 58th Street in Manhattan. Pursuant to a written lease dated March 2, 2001, plaintiff 609 Corporation, a medical practice, became the tenant of suite 609 (the "Premises") in the Building. As is relevant here, paragraph 41 of the Lease contains a tax escalation clause. Paragraph 41(e) provides, in pertinent part:

> If the Taxes for any Tax Year shall be greater than the Taxes for the Base Year, then Tenant shall pay to

> Landlord, as additional rent hereunder, an amount equal to Tenant's Proportionate Share of the increase over the taxes for the Base Year.

Paragraph 41(c) defines the Base Year as "the N.Y.C. fiscal Tax Year, July 1st 2000 through June 30th, 2001. Paragraph 41(d) further provides:

> For the purposes of this Article only, "Tenant's Proportionate Share" shall be deemed to be (4.5%). The foregoing shall not be deemed to constitute a representation as to any relationship between precise amount of space in the Demised Premises and the space contained in the building in which the Demised Premises are located.

In July 2001, Park Towers billed 609 Corp. the amount of $7,129.82, for real estate taxes based upon calculations reflecting a $158,400.40 increase in real estate taxes over the base year. 609 Corp. paid the said amount without objection. In November 2001, the parties agreed that 609 Corp. would lease additional space in suite 610 of the Building. Accordingly, the Lease was modified by a Lease Modification Agreement dated November 1, 2001 (the "Modification Agreement"). Paragraph 3 of the Modification Agreement provides as follows:

> The "Tenant's Proportionate Share" of the Real Estate Taxes, as outlined in Article 41(D), shall be increased from 4.5% to 6%. The

> remainder of the Real Estate Tax clause as outlined in Article 41, shall remain unchanged and in full force and effect.

In July 2002, Park Towers billed 609 Corp. the sum of $20,373.36, representing 6% of the real estate tax increase over the base year. By agreement dated July 8, 2002 (the "Extension Agreement"), the parties agreed to a schedule by which 609 Corp. would pay that amount in installments over a period of six months.

In July 2003, the City of New York increased real property taxes by 18.5%. 609 Corp.'s resulting tax bill, was $53,416.92. After unsuccessfully negotiating for a reduction in its "Proportionate Share" under paragraph 41, 609 Corp. paid the bill under protest and commenced the instant action.

The complaint sets forth four causes of action, for breach of contract, fraud, unjust enrichment and unconscionability. Plaintiff seeks a judgment limiting the application of the tax escalation clause, granting it recovery of past increases paid, and punitive damages.

DISCUSSION

The motion to dismiss is granted.

Tax and related escalation clauses are common in commercial leases and are generally enforced according to their terms (see, George Backer Mgt. Corp. v Acme Quilting Co., 46 NY2d

211 [1978]; CBS, Inc. v P.A. Bldg Co., 200 AD2d 527 [1st Dept 1994]; Meyers Parking System, Inc. v 475 Park Avenue So. Co., 186 AD2d 92 [1st Dept 1992]). Paragraph 41 of the Lease sets forth a simple, unambiguous formula for determining the tax increase, which plaintiff agreed to. The court may not rewrite the lease merely "for the purpose of alleviating a hard or oppressive bargain" (Backer, supra at 219; CBS, supra at 527 ["[although the result of this construction of the escalation clause is economically harsh, parties are free to make their own contracts, and courts do not serve as business arbiters between parties in approximately equal stances"]).

In opposing the motion, plaintiff asserts that the tax escalation clause is unconscionable pursuant to Section § 235-c(2) of the Real Property Law. Specifically, the tenant asserts that upon being confronted with the dramatic tax increase in the third year of its occupancy, it retained an architect who determined that the Premises' size represented significantly less than 6% of the "Proportionate Share" of the Building's total area. However, the architect's conclusion is irrelevant here. The parties to a lease may mutually agree, for the purpose of an escalation clause, that the building shall be "deemed" to be a certain number of square feet or a specific percentage, at variance with its true size or percentage (see, S.R. Leon Co.,

Inc. v The Towers, 194 AD2d 600 [2d Dept 1993]). Here, paragraph 41 not only "deemed" the tenant's share to be 6%, but specifically disclaimed that the figure bore "any relationship between [the] precise amount of space in the Demised Premises and the space contained in the building."

Plaintiff further asserts that the disclaimer is misleading because the use of the word "precise" suggests that the percentage might nevertheless be roughly proportional to the size of the Building. More relevant, however, is the express denial of "any relationship" (emphasis supplied). Apart from this representation, plaintiff cannot complain of its ignorance of the actual size of the Building insofar as it was not a matter peculiarly within the landlord's knowledge but readily ascertainable (and ultimately ascertained) by the tenant by the exercise of inquiry and due diligence (see, Wohl v Owen, 153 Misc 2d 282, 286 [Civ Ct Kings Co. 1992], "[Thus the onus for the tenant's dilemma of being required to pay wage escalations based on 660 square feet when he may have had use of only 414 square feet lies in his failure to exercise reasonable vigilance"]).

Similarly, plaintiff cannot assert that its negotiating representative was misled by the landlord's managing agent regarding "the minimal impact of the escalator clause." The precise impact of any future tax increase could be

instantaneously gauged by multiplying the hypothetical increase by 6%.

Finally, plaintiff can sustain no challenge based on the claimed unequal bargaining power of the parties. The Lease was negotiated at arm's length by experienced parties (see, 75 Henry Street Garage, Inc. v Whitman Owner Corp., 79 AD2d 1001 [2d Dept 1981]). Defendant concedes that it was represented by an attorney who, although no longer practicing, had been licensed to practice in New York for many years and was retained specifically as a business advisor with experience in real estate.

Accordingly, it is

ORDERED that the motion to dismiss the complaint is granted, and the complaint is dismissed, with costs and disbursements to defendants as taxed by the Clerk of the Court, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: December 1, 2004

ENTER:

J.S.C.