SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

----------X

JURIST COMPANY, INC., LITHO-ART, INC. and MANHATTAN COLOR, INC.,

Plaintiffs,

-against-

175 VARICK STREET LLC, 175 VARICK STREET HOLDINGS LLC and EXTELL VARICK LLC,

Defendants.

----------X

DECISION/ORDER
Index No. 104701/05
Motion Seq. No. 001

BARBARA R. KAPNICK, J.:

In this action brought by commercial tenants who allege that their landlord is overcharging them for electricity costs, defendants move for summary judgment dismissing the amended complaint, pursuant to CPLR 3212, and for an order severing and continuing their counterclaims. Plaintiffs cross-move for summary judgment as to defendants' liability on the causes of action alleged in the amended complaint, pursuant to CPLR 3212, and for an order dismissing defendants' counterclaims and directing an immediate trial as to the amount of plaintiffs' damages.

FACTUAL ALLEGATIONS

Each of the plaintiffs - Jurist Company, Inc. ("Jurist"), Litho-Art, Inc. ("Litho-Art"), and Manhattan Color, Inc. ("Manhattan Color") entered into a lease with defendant-landlord 175 Varick Street LLC, pursuant to which each plaintiff leased space in the commercial building located at 175 Varick Street in Manhattan. Defendant 175 Varick Street Holding LLC, sued herein as 175 Varick Street Holdings LLC, is the managing member of 175

Varick Street LLC. Defendant Extell Varick LLC (collectively, with the two other defendants, ("Landlord") is the assignee of plaintiffs' leases as of May 20, 2005.

Pursuant to the Leases, each Tenant pays Landlord additional rent which includes two charges relating to the cost of electricity used. One of the charges reimburses Landlord for the cost of the electricity used within the Tenant's own leased premises, while the other relates to electricity costs for the Building's common areas. The parties have no dispute concerning the charges for the electricity used within each Tenant's premises, the amount of which is determined pursuant to section 8.7 of each Lease.[1] However, Tenants assert that the Landlord is overcharging them for the charges which relate to electricity costs for the Building's common areas, the amount of which is prescribed by section 8.8 of each Lease.[2]

Specifically, Section 8.8 (D) of the Leases provides as follows:

> D. During the first Comparison Year, Tenant shall, on the first day of each calendar month, pay to Landlord, on account of this amount due and payable by Tenant pursuant to Paragraph B of this Article, one-twelfth (1/12th) of Tenant's Share of the total of (i) one hundred ten (110%)

---

[1] Each of the Leases is comprised of a Standard Form of Loft Lease and a Rider to the Lease. All references to sections of the Leases used herein are to section numbers used in the Riders to the Leases.

[2] There is no dispute that defendants initially overcharged Manhattan Color for its electrical usage but that the overcharge was corrected when defendants became aware of their error.

> percent of the Electric Cost and (ii) ten (10%) percent of the Base Year Fuel Cost. Such payments shall be deferred until Landlord furnished Tenant with a statement of the Base Year Electric Cost and the Base Year Fuel Cost, whereupon Tenant shall pay promptly all deferred payments and commence such payments. During each succeeding Comparison Year, Tenant shall pay to Landlord, on account of the amount due and payable by Tenant pursuant to Paragraph B of this Article, one-twelfth (1/12th) of Tenant's Share of the total of (i) one hundred ten (110%) percent of the Electric Cost and (ii) ten (10%) percent of the Fuel Cost for the prior Comparison Year. Notwithstanding the foregoing, until the Landlord furnished Tenant with the applicable Utility Statement for the preceding Comparison Year, Tenant shall continue to pay to Landlord the amount of the monthly payment due and payable pursuant to the Paragraph D during the last calendar month of the preceding Comparison Year, plus an additional ten (10%) percent of such amount.[3]

The "Tenant's Share" for each Tenant is a percentage which corresponds roughly to that Tenant's share of the Building's leased or leasable space.[4] The dispute between the parties arises solely from the different meanings which they ascribe to the term "Electric Cost," which is defined in Section 8.8 (A) (ii) of the Leases as follows:

> "Electric Cost" shall mean Landlord's cost for all electricity used in lighting all the public and service areas, and in operating all the service facilities, of the Building (hereinafter the "First Sentence"). ... . If electric current is supplied to Tenant by the public utility corporation serving the Building, Landlord and Tenant agree that the Electric Cost shall be deemed, for the purposes of this Article, to constitute one hundred (100%) percent of Landlord's total cost for electricity consumed at the Building (hereinafter the "Second Sentence"). If electric current is supplied to Tenant by Landlord, Landlord and Tenant agree that the Electric

---

[3] Section 8.8, insofar as it is referred to or quoted herein, is identical in all of the Leases.

[4] "Tenant's Share" is defined in the Leases to be 10% for Jurist, 12.5% for Litho-Art, and 15% for Manhattan Color.

> Cost shall be deemed, for the purposes of this Article, to constitute fifty (50%) percent of Landlord's total cost for electricity consumed at the Building. (hereinafter the "Third Sentence").

The plaintiffs allege that Landlord has overcharged them for electricity costs under section 8.8 because Landlord has improperly calculated the amount of the Electric Cost based upon the cost of all the electricity used in the entire Building, rather than using the cost of electricity only for the Building's common areas, such as the elevator, lobby and other portions of the Building not leased by the Tenants in the building. Tenants have nevertheless continued to pay the charges assessed by Landlord pursuant to section 8.8, in order to avoid Landlord's institution of eviction proceedings against them.

The First Amended Complaint asserts five causes of action. The first cause of action seeks a judgment declaring (a) that the Landlord's Electric Cost for electricity usage in the common space, pursuant to section 8.8 of its Lease, includes only electricity usage in such spaces and excludes electricity usage in the Tenant's premises for which they separately pay the Landlord pursuant to section 8.7 of the Leases, and (b) that any future nonpayment of improper common space electricity overcharges assessed by the Landlord under section 8.8 of the Lease, does not constitute a violation of its Lease. The second, third, and fourth causes of action assert claims on behalf of each Tenant for breach of contract, and seek to recover the amounts allegedly overcharged

pursuant to section 8.8. The fifth cause of action alleges Landlord's breach of the implied covenant of good faith and fair dealing, by reason of the Landlord's purported overcharges.

Defendants' first counterclaim alleges that plaintiffs "commenced this action to interfere, and to cause injury to Defendants in [their] attempt to sell its ground lease to a third party." The second counterclaim alleges that plaintiffs "commenced this action to gain advantage as part of plaintiffs' efforts to renegotiate their respective leases with Defendants."

DISCUSSION

The Leases of Jurist and Litho-Art provide that "[e]lectric current is to be supplied to Tenant by Landlord" (Jurist Lease, § 8.7; Litho Lease, § 8.7). Manhattan Color's Lease provides that it "covenants and agrees to purchase from Landlord ... electric current" (Color Lease, § 8.7 [A]). The parties agree that for purposes of calculating the amount of the Electric Cost under section 8.8 (A) (ii), each Tenant falls within that portion of the section which provides that, "[i]f electric current is supplied to Tenant by Landlord, Landlord and Tenant agree that the Electric Cost shall be deemed, for the purposes of this Article, to constitute fifty (50%) percent of Landlord's total cost for electricity consumed at the Building."

However, the parties' dispute arises from their differing interpretations of the words "Landlord's total cost for electricity consumed at the Building" in that same section.

"[O]n a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and *** circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where *** the intention of the parties can be gathered from the instrument itself" Maysek & Moran, Inc. v S.G. Warburg & Co., 284 A.D.2d 203, 204 (1st Dept 2001), citing Lake Constr. & Dev. Corp. v. City of New York, 211 A.D.2d 514, 515 (1st Dep't 1995). Here, a fair reading of section 8.8 (A) (ii) indicates that the disputed phrase encompasses the cost of all of the electricity consumed in the entire Building, including the Tenants' leased premises.

The parties' use of the words "Landlord's total cost for electricity consumed at the Building" in the last Sentence follows their use of the words (a) "Landlord's cost for all electricity used in lighting all the public and service areas, and in operating all the service facilities, of the Building" in the First Sentence, and (b) "Landlord's total cost for electricity consumed at the Building" in the Second Sentence. The proximity of the different phraseologies indicates the parties' awareness that "the Building" and "the public and service areas ... of the Building" are two different things, and that additional words of qualification or limitation are needed where the intent is to refer only to a

portion of the Building rather than to the Building as a whole. Accordingly, when the parties used the unmodified words "the Building" in the last Sentence, they must have intended those words to mean the entire Building, and not merely some unspecified portion of the Building. The parties' use of the broadly-inclusive words "total cost," without limitation or qualification, also militates against any attempt to imply an exclusion from that cost (i.e., for electricity consumed in the Building's non-public, non-service, and/or non-common areas) which the parties themselves did not choose to express.

Moreover, without further explanation, it would not be clear precisely what the parties intended to be encompassed by the words "the public and service areas, and ... service facilities, of the Building." "Common Areas" is a defined term in the Leases, so that the parties' use of words other than that defined term in the First Sentence can be construed to indicate that they did not intend those words to have the same meaning as the defined term.

Tenants assert that because section 8.7 of the Leases already provides for a charge which reimburses Landlord for the cost of the electricity used within Tenants' premises, the charge provided for in section 8.8 can only be a charge for electricity used in the Building's public, service, and/or common areas, and such a charge must necessarily be calculated based only upon the electricity used in those areas, and not upon all of the electricity used in the entire Building. However, Tenants do not explain why a landlord

and a tenant may not agree that the tenant shall pay two different electricity charges to the landlord, where one charge reimburses the landlord for the cost of the electricity consumed within the tenant's premises, and the other charge is calculated pursuant to a formula that uses, as one of multiple inputs, the cost of all of the electricity consumed in the entire building.

Tenants argue, alternatively, that the words "Landlord's ... cost" in the last Sentence should be construed to mean "the Landlord's actual cost, ***after*** reimbursement by Tenants of the electricity consumed by them in their separately leased space". However, Tenants' attempt to add words to the last Sentence by implication which would reduce the amount of the "Landlord's total cost" runs counter to the intent expressed by the parties in their use of the word "total," that word being generally understood to mean without reduction. "[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing." Vermont Teddy Bear Co. v. 538 Madison Realty Co., 1 N.Y.3d 470, 475 (2004); Reiss v. Financial Performance Corp., 97 N.Y.2d 195, 199 (2001).

Tenants have submitted an Affidavit by Robert H. Beck, a Vice President and principal of Manhattan Color, Inc. which states that:

> [d]uring lease negotiations with Manhattan Color, the Varick Street Defendants represented that electricity consumption in the common areas is minimal. When Manhattan Color protested paying for ***any*** amount of the common space electricity usage, arguing that it should be

> the Landlord's ***entire*** responsibility, the Varick Street Defendants replied that the amount was only a "couple of hundred dollars per month" in addition to the $30,000 monthly rent for Manhattan Color, and therefore not worth further negotiation. (emphasis in the original).

Mr. Beck further claims that the Building's common space is not large, consisting basically of the Building elevators and the "tiny" lobby.

However, paragraph 18.19 of the Leases specifically provides that:

> 18.19. **NO MODIFICATION** This writing is intended by the parties as a final expression of their agreement and as a complete and exclusive statement of the terms thereof, all negotiations, considerations and representations between the parties having been incorporated herein. No course of prior dealings between the parties or their officers, employees, agents or affiliates shall be relevant or admissible to supplement, explain or vary any of the terms of this Lease ... No representations, understandings or agreements have been made or relied upon in the making of this Lease other than those specifically set forth herein. This Lease can be modified only by a writing signed by the party against whom the modification is enforceable.

CONCLUSION

"[W]hen a court resolves the merits of a declaratory [cause of action] against the plaintiff, the proper course is not to dismiss the [claim], but rather to issue a declaration in favor of the defendants" Maurizzio v Lumbermens Mut. Cas. Co., 73 N.Y.2d 951, 954 (1989). Accordingly, the court will issue a declaration that the words "Landlord's total cost for electricity consumed at the Building," as they are used in the final sentence of section 8.8 (A) (ii) of the Leases, mean Landlord's total cost for all of the

electricity consumed at the entire Building, including the electricity consumed in the premises leased by Tenants, and in the Buildings' non-public, non-service, and non-common areas.

The second through fifth causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing are consequently dismissed.

Tenants' cross-motion, insofar as it seeks summary judgment as to Landlord's liability on the causes of action asserted in the complaint, is also denied. However, that branch of Tenants' cross-motion which seeks dismissal of Landlord's two counterclaims is granted, as the defendants did not oppose (or ever discuss) that portion of the cross-motion in their papers. Thus, defendants' motion to sever and continue their counterclaims is denied and the counterclaims are hereby dismissed.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of this Court.

Dated: September 8, 2006

Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK J.S.C.

FILED
SEP 12 2006
NEW YORK
COUNTY CLERK'S OFFICE