Genovese Drug Stores, Inc. v Treeco Ctrs. Ltd. Partnership
2011 NY Slip Op 32207(U)
August 5, 2011
Supreme Court, Nassau County
Docket Number: 601004/10
Judge: Ute W. Lally
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

[* 1]

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 3

Present: HON. UTE WOLFF LALLY
Justice

MOD

GENOVESE DRUG STORES, INC.,

Plaintiff,

-against-

TREECO CENTERS LIMITED PARTNERSHIP,

Defendant.

Motion Sequence #1
Submitted May 31, 2011

INDEX NO: 601004/10

The following papers were read on this motion to dismiss:

Notice of Motion and Affs..1-4
Affs in Support...5&6
Memoranda of Law..7-9

Upon the foregoing papers, it is ordered that this motion by the defendant Treeco Centers Limited Partners for an order pursuant to CPR 3211(a)1. and 5. dismissing the plaintiff's complaint, is disposed of as follows:

In June of 1982, the plaintiff Genovese Drug Stores, Inc. ("Genovese") as tenant, entered into a 20-year, commercial lease with then landlord Woodbury Holding Company ("Woodbury"). Among other provisions, the lease required Genovese to pay a 13.75%, *pro rata* share of the real estate taxes/assessments levied on the portion of the shopping center then owned by the landlord, which as defined by the lease, amounted to some 120,000 square feet.

During the pendency of the lease Genovese paid its *pro rata* share of the real estate taxes due as demanded in annual tax invoices prepared by Woodbury, and then later by Woodbury's successor, the defendant herein, Treeco Centers Limited Partners ("Treeco"). The foregoing invoices, to which underlying tax bills were annexed, generally contain a column of figures listing, *inter alia*, the total adjusted taxes for the shopping center for a given tax year, to which the contract stipulated 13.75% *pro rata* was then applied. The invoices then compute Genovese's total tax obligation for that particular year together, as well as an adjusted, monthly tax payment amount.

Between 1998 and 2010, Genovese paid its *pro rata* share of the taxes, as calculated in the annual real estate tax invoices.

Genovese herein claims that at some point in early 2010, it discovered after performing an audit that the real estate tax amounts paid by other Genovese stores on Long Island were considerably less than the amounts which were being requested by Treeco. Genovese thereafter made inquiries with Treeco relating to its *pro rata* tax payments and ultimately ascertained that: (1) Treeco had apparently acquired additional, or adjacent properties which increased the square footage of the shopping center; and (2) that Treeco, in computing the *pro rata* taxes due, had allegedly utilized a tax "denominator" which, in effect, included in the *pro rata* tax ratio, square footage (and thus tax amounts) attributable to these additionally acquired properties.

According to Genovese, neither the tax bills presented by Treeco as backup for its year-end statements (which apparently identified certain tax lots different from those referenced in the lease), nor any other documents or statements provided by Treeco,

suggested that Treeco had acquired any additional portions of the subject shopping center beyond that which it owned at the inception of the lease.

In response to Genovese's inquiries, Treeco initially agreed that its tax invoices for 2009 (and tax escrow payments for 2010), overcharged Genovese for its *pro rata* tax share resulting in a $58,009.41 credit. A dispute arose, however, when a few months later, Genovese claimed that it had been consistently overcharged since 2004, and that a far larger refund of approximately $541,772.79 was now due and owing.

More particularly, and in response to Genovese's demand letters, Treeco's Chief Financial Officer, Robert Adler, not only rejected Genovese's new refund claims, but also advised that Treeco had only recently re-examined it records and now concluded that Treeco was not, in fact, entitled to the previously offered $58,009.41 refund. Adler further asserted that Genovese was in default under the terms of the lease since tax, rents and common areas charges of some $102,341.40 were then allegedly outstanding. Genovese asserts that it later paid the amounts demanded by Treeco, but only under protest and upon a full reservation of rights.

By summons and complaint dated February of 2011, Genovese commenced the within action as against Treeco to recover the refund amounts allegedly due. Genovese's complaint contains three causes of action, the first, sounding in breach of contract, the second, sounding in breach of the duty of good faith and fair dealing, and the third which demands declaratory relief to the effect that, *inter alia*, that Genovese is obligated to make *pro rata* payments based only upon the buildings and improvements which existed at the time the lease was executed and that, Genovese has no contractual duty to pay taxes

attributable to any improvements made, or portions of the shopping center acquired, subsequent to the execution of the lease.

The defendant Treeco prior to interposing an answer, and pre-joinder of issue, moves to dismiss, pursuant to CPLR 3211(a) 1. and 5. claiming that Genovese's claims are time-barred by the six-year limitations period applicable to breach of contract actions as prescribed by CPLR 213. In support of its claims, Treeco argues that it provided notice of the tax amounts due pursuant to the Lease, through its annual invoices or notices which, according to Treeco, calculated the amounts due in precisely the same fashion "since at least 1998", and that Genovese voluntarily paid the amounts requested (*Citicorp North America, Inc. v Fifth Ave. 58/59 Acquisition Company, LLC*, 70 AD3d 408; *Goldman Copeland Associates, P.C. v Goodstein Bros. & Co., Inc.*, 268 AD2d 370; 74 NY Jur 2d, Landlord & Tenant, *Voluntary payments* § 352).

Moreover, Adler claims that since 1998, no relevant changes have been made to the shopping center, at least none which would have affected the lease formula for assessing the *pro rata* taxes due.

In light of the foregoing facts, and relying on, *inter alia*, *Goldman Copeland Associates, P.C. v Goodstein Bros. & Co., Inc.*, (*supra*), Treeco contends in substance that where a tenant agrees to pay a landlord so-called real estate tax escalation charges, any cause of action for a miscalculation or overpayment accrues when the tenant first receives notice of the tax computation and makes a voluntary payment pursuant thereto and not when the tenant later discovers the miscalculation or overpayment, provided that: (1) the tax formula used by the landlord has remained constant; and (2) the tenant was given

[* 5]

notice of the method used to calculate the taxes demanded and/or possessed all the information it needed to meaningfully challenge the accuracy of the landlord's notices (*Goldman Copeland Associates, P.C. v Goodstein Bros. & Co., Inc., supra,* 268 AD2d at 371; *see also, Citicorp North America, Inc. v Fifth Ave. 58/59 Acquisition Company, LLC, supra*; *Kramer Levin Naftalis & Frankel, LLP v Metropolitan 919 3rd Ave., LLC*, 6 Misc.3d 796, 800 [Supreme Court, New York County 2004]).

Treeco argues that since its notices were consistent with the foregoing requirements and because voluntary payments were thereafter made, the Genovese's claims accrued in 1998, thereby requiring dismissal of the plaintiff's complaint (CPLR 213 *see, Citicorp North America, Inc. v Fifth Ave. 58/59 Acquisition Company, LLC, supra*; *100 William Co. v Aetna Ins. Co.*, 163 AD2d 170, *cf.*, *J.C. Penney Corp. v Carousel Ctr. Co.*, 635 F.Supp.2d 126, 131 [N.D.N.Y. 2008]).

In opposing the application, the plaintiff contends, *inter alia*, that the general rule with respect to annual and/or installment type payment is that "when a contract provides for the payment of money in installments, such as interest installments, the Statute of Limitations runs on each installment from the date it becomes due" (*Vigilant Ins. Co. of America v Housing Authority of City of El Paso, Tex.*, 87 NY2d 36, 45; *Phoenix Acquisition Corp. v Campcore, Inc.*, 81 NY2d 138, 143; *Cadlerock, L.L.C. v Renner*, 72 AD3d 454; *Sce v Ach*, 56 AD3d 457, *see also, Walton v Eastern Analytical Labs, Inc.*, 246 AD2d 532; *Yeshiva University Development Foundation, Inc. v Consultants & Designers, Inc.*, 60 AD2d 525, 527, *cf., Chiu v 1-9 Bond Street Realty, Inc.*, 79 AD3d 416; *Carvel v Franchise Stores Realty Corp.*, ___F.Supp.2d___, 2009 WL 4333652, at 6 [S.D.N.Y. 2009]).

[* 6]

The plaintiff further contends that: (1) the lease contains a non-waiver clause relating to lease violations; and (2) that in any event, and at this pre-discovery juncture of the action, the record does not establish as a matter of law that it was in possession of "all the information it needed to meaningfully challenge the accuracy" of Treeco's annual invoices for the purposes of applying the *Goldman* holding (*J.C. Penney Corp. v Carousel Ctr. Co., supra*). The Court agrees.

On a motion to dismiss on statute of limitations grounds, a movant bears the initial burden of establishing *prima facie* that the time in which to sue has expired (*Savarese v Shatz*, 273 AD2d 219, 220; *see also, Kennedy v Fischer*, 78 AD3d 1016, 1017; *Swift v New York Med. Coll.*, 25 AD3d 686, 687; *Rosenfeld v Schlecker*, 5 AD3d 461, 462; *Gravel v Cicola*, 297 AD2d 620, 621). To make a *prima facie* showing, a movant must establish, *inter alia*, "when the petitioner's causes of action accrued" (*In re Schwartz*, 44 AD3d 779 *see also, Cottone v Selective Surfaces, Inc.*, 68 AD3d 1038, 1040). Where a *prima facie* showing has been made, the opposing party must then set forth "evidentiary facts establishing that the case falls within an exception to the Statute of Limitations" (*Savarese v Shatz, supra*, at 220).

Notably, "[a] CPLR 3211(a)(1) motion to dismiss based on documentary evidence may be appropriately granted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326; *see also, AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582, 591).

In *Goldman*, the First Department held that even though a tenant wage escalation payment may have been due periodically, the statute of limitations still barred all the tenant's overpayment claims, even those based on alleged overpayments made within six years of the date when the tenant commenced its action. This was proper, the Court reasoned, because the defendant/landlord had consistently utilized the same computational formula in its annual billing statements for a period dating back some 12 years prior to the commencement of the action. The Court concluded that based on these facts, the tenant's cause of action accrued when the wage statements were originally issued, some 12 years earlier, since at that point, the plaintiff "had all the information it needed to contest the amounts sought" by the landlord (*Goldman Copeland Associates, P.C. v Goodstein Bros. & Co., Inc., supra,* at 371; *Kramer Levin Naftalis & Frankel, LLP v Metropolitan 919 3rd Ave., LLC, supra,* 6 Misc.3d at 800, *cf., Vigilant Ins. Co. of America v Housing Authority of City of El Paso, Tex., supra*).

With these principles in mind, and construing the facts as alleged in the complaint in the light most favorable to the plaintiff (*Cottone v Selective Surfaces, Inc., supra*; *Cimino v Dembeck*, 61 AD3d 802), the Court agrees that Treeco has failed to establish it entitlement to dismissal of the complaint at this pre-answer, "CPLR 3211 motion stage" of the proceedings (*J.C. Penney Corp., Inc. v Carousel Center Co., L.P., supra; see generally*, *Howish v Perrotta*, ___AD3d___, 923 NYS2d 903; *Kennedy v Fischer, supra*, at 1017).

More specifically, while Treeco's real estate tax invoices were facially uniform in the computational methodology utilized, the plaintiff's claim is not that the basic formula

employed by Treeco was necessarily incorrect; rather, the plaintiff argues in sum that the data utilized in making those calculations was erroneous and that it lacked constructive notice of the error and/or could not have discovered them upon the exercise of due diligence (*J.C. Penney Corp., Inc. v Carousel Center Co., L.P., supra*, at 133).

The plaintiff has asserted in this respect, and the record confirms, that the tax invoices: (1) do not describe or depict the scope and size of the shopping center for each, relevant tax year; (2) omit reference to whether, in fact, the shopping center as it existed when the lease was executed had been altered; and (3) contain no facts which would indicate that the net or adjusted taxes for any given year actually included tax amounts attributable to properties not part of the shopping center when the lease was originally executed. Notably, Treeco's submissions do not establish how Genovese would have known, based on the information contained in the invoices, that the taxes were not being computed in accord with what Genovese has alleged was the proper methodology for doing so, as prescribed by the parties' lease. It also bears noting that Treeco has not claimed that the plaintiff's interpretation of the lease is substantively incorrect; nor does it dispute that it was including tax amounts attributable to post-lease property acquisitions in the invoices provided. Indeed, Treeco originally agreed to refund the plaintiff some $58,000.00, and only withdrew the refund offer after Genovese claimed entitlement to a far greater sum.

In sum, and upon the pre-discovery record presented, whether a reasonable person in the exercise of due diligence should have suspected that Treeco's calculations were improper as alleged in the complaint, cannot be summarily resolved as a matter of

[* 9]

law (*see*, *J.C. Penney Corp., Inc. v. Carousel Center Co., L.P.*, *supra*, at 132). Notably, it is settled that the resolution of disputed factual issues is generally inappropriate on a motion to dismiss (*Sargiss v Magarelli*, 12 NY3d 527, 531).

However, that branch of Treeco's motion which seeks to dismiss the third, declaratory judgment cause of action should be granted. It is well settled that "[a] cause of action for a declaratory judgment is unnecessary and inappropriate" where, as here, "the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract" (*Apple Records, Inc. v Capitol Records, Inc.*, 137 AD2d 50, 54 *see also*, *James v Alderton Dock Yards*, 256 NY 298, 305-306; *Burgdorf v Kasper,* 83 AD3d 1553, 1555; *Niagara Falls Water Bd. v City of Niagara Falls,* 64 AD3d 1142, 1144; *Main Evaluations, Inc. v State*, 296 AD2d 852, 855; *Watson v Sony Music Entertainment, Inc.*, 282 AD2d 222, 223).

The Court has considered the Treeco's remaining contentions and concludes that they are lacking in merit.

So much of this motion by the defendant for an order pursuant to CPR 3211(a)1. and 5., dismissing the plaintiff's complaint is granted to the extent that the declaratory judgment cause of action is dismissed, and the remainder of this motion is otherwise denied.

Dated: AUG 0 5 2011

UTE WOLFF LALLY, J.S.C.

ENTERED

AUG 09 2011

NASSAU COUNTY
COUNTY CLERK'S OFFICE

TO: Herrick, Feinstein LLP
Attorneys for Plaintiff
2 Park Avenue
New York, NY 10016

Wachtel & Masyr, LLP
Attorneys for Defendant
885 Second Avenue, 47th Floor
New York, NY 10017

genovese-treeco,#1/dismiss