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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Index Number : 105147/2011
GERSHWIN PARTNERS, INC.
vs
NEW LATHAM HOTEL CORP.
Sequence Number : 001
DISM ACTION/ INCONVENIENT FORUM

C

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
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 ...	3, 4, 5, 13, 14
Answering Affidavits — Exhibits	8, 9
Replying Affidavits	5, 6

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision and order

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 12/22/11 JUSTICE SHIRLEY WERNER KORNREICH J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 54

----------x

GERSHWIN PARTNERS, INC.,

Plaintiff,

-against-

Index No.: 105147/11
Decision & Order

NEW LATHAM HOTEL CORP.,

Defendant.

----------x

SHIRLEY WERNER KORNREICH, J.:

In this declaratory judgment action, plaintiff, the tenant of a long-term lease, is seeking a declaration regarding a rent escalation clause in the lease, which it asserts is ambiguous. Defendant-landlord, New Latham Hotel Corp. (New Latham) moves for an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing the complaint.

Plaintiff, Gershwin partners, Inc. (Gershwin), is presently negotiating the sale of its business, a hotel, and the assignment of the lease to a third party. During its due diligence, the third party identified the alleged ambiguity in the escalation provisions of the lease. The subject rent-escalation provision does not take effect until year 26 of the 45 year lease, that is in 2017. Plaintiff urges that the lease provides that in 2017, defendant landlord is entitled to receive an escalation in the amount of rent due from tenant tied to the Consumer Price Index (CPI), but that the formula provided in a subsection of the lease for the calculation of the escalation, if interpreted literally would more than double the annual rent because it mistakenly sets the aggregate rent as the sum of the escalated rent and the base rent. This increase, plaintiff argues, would not bear any logical relationship to the CPI or other inflation measurement, and is

inconsistent with the text of the CPI provisions as well as other provisions of the lease.

Defendant contends that this action must be dismissed as premature, because plaintiff is asking the court to render an advisory opinion regarding the escalation provision which would not become effective until 2017. It also argues that the provision is unambiguous and should be enforced as set forth in the formula. Finally, it contends that plaintiff is simply attempting to assert a claim for reformation based on mutual mistake, aq claim barred by the six-year statute of limitations.

Background

On July 1, 1992, plaintiff and defendant entered into a lease regarding the property and improvements known as 7 East 27th Street, New York, New York (the Premises) for an initial term of 45 years (the Lease) (Exhibit 1 to Notice of Motion, Complaint, ¶ 9). Paragraph 2 of the Lease sets forth a base annual rent of $250,000 for the initial year of the term, which rent rises over time to $550,000 for the lease years beginning on July 1, 2011 and ending on June 30, 2017 (Exhibit 2 to Notice of Motion, Lease, ¶ 2). Commencing on July 1, 2017, and thereafter, the base rent is $600,000, which amount is subject to a CPI adjustment as set forth in paragraph 3 of the Lease (Lease, ¶ 2 [xii]). Paragraph 3, entitled "CPI Adjustment," contains the rent escalation provision. First, it sets forth several definitions, including "Base Year," the year beginning July 1, 2017 to June 30, 2018; "Price Index," the CPI; and "Price Index for the Base Year," the monthly average of the CPI for the 12 months of the Base Year. Paragraph 3 then details the inflation escalation provision. Specifically, it provides, in relevant part:

> A. Effective as of each year commencing July 1, 2018 a cost of living adjustment shall be made to the annual fixed rental rate set forth in paragraph 2 hereof (the "CPI Adjustment"). The CPI

> Adjustment shall be based on the percentage difference between (a) the Price Index for the month of July of each year commencing with July 1, 2018, and (b) the Price Index for the Base Year.
>
> B. In the event that the applicable Price Index for July 2018 and each July thereafter for the balance of the term is greater than the Price Index for the Base Year, then the fixed annual rent in the amount of $600,000 shall be increased, but not reduced, commencing with July 2018, by an amount equal to the product of $600,000 multiplied by a fraction, the numerator of which is the Price Index for the applicable year and the denominator of which is the Price Index for the Base Year, which amount shall be added to such fixed annual rent effective as of July of each year . . . Notwithstanding anything to the contrary herein contained, in no event during the term hereof shall the fixed annual rental be less than $600,000.00 per year for any year during the term hereof from and after July 2018, as a result of the CPI Adjustment . . .
>
> E. Notwithstanding anything to the contrary herein contained, in no event shall the fixed annual rent set forth in Paragraph 2 hereof (exclusive of the CPI Adjustment under this Paragraph 3) be reduced by virtue of this Paragraph

(Lease, ¶ 3).

Therefore, Paragraph 3 (A) of the Lease provides that defendant will be entitled to an increase in the rent based on the differential in the CPI for the Base Year and the CPI for the year in which the rent is being calculated, and that this "cost of living adjustment" is to be measured in accordance with the CPI (*id.*). Paragraph 3 (B) sets forth the formula for calculating the "cost of living adjustment." It provides that the adjustment to rent is calculated by multiplying $600,000 by the CPI factor (current year CPI divided by Base Year CPI) and then adding the product of that multiplication to the base rent of $600,000. This calculation, however, results in an adjustment for the cost of living that more than doubles the rent by basically adding the base rent of $600,000 twice.

For the last four years, plaintiff has been trying to sell its business, which would entail assigning the Lease to the buyer (Complaint, ¶ 19). In August 2010, plaintiff notified defendant of a pending offer it had from a third party, EPNY, LLC, to purchase its assets, including the lease assignment, for approximately $20 million (*id.*, ¶ 21). EPNY had conducted due diligence and brought the ambiguity in the CPI adjustment provision to plaintiff's attention. It asked plaintiff to have defendant clarify that the rent does not more than double in July 2018 and that the adjustment provision will be construed so that the rent only increases by the inflation factor, not by an additional $600,000 (*see* Affidavit of Suzanne Tremblay in Opposition, dated June 29, 2011, ¶ 7-8). In the Spring of 2011, plaintiff contacted defendant to request that defendant confirm plaintiff's understanding that the CPI adjustment provides that the rent will only increase by the inflation factor, and not by an additional $600,000 (*id.*, ¶ 9). In April 2011, defendant responded that it was not making any changes in the Lease, nor was it offering any interpretation of its terms (Exhibit C to Tremblay Aff.).

On April 29, 2011, plaintiff commenced this action seeking a declaratory judgment, declaring that the annual cost of living adjustment to which defendant is entitled under the Lease beginning on July 1, 2017, shall be calculated by multiplying $600,000 by a fraction the numerator of which is the Price Index for the applicable year and the denominator of which is the Price Index for the Base Year, and then subtracting $600,000 (not adding $600,000). It contends that: Paragraphs 2 and 3 of the Lease are ambiguous as a matter of law, because they are internally inconsistent; the true intention of the parties was to provide defendant, beginning in July 2017, with a cost of living adjustment only, not to double the rent; and the formula set out in Paragraph 3 (B) does not accurately reflect the intention of the parties. Plaintiff further alleges

that defendant was aware that plaintiff was trying to sell its business and offered to repurchase the Lease for $15 million. Plaintiff rejected the offer and entered into the contract with EPNY for $20 million (Complaint, ¶¶ 22-25).

Plaintiff submits the affidavit of Suzanne Tremblay, an officer and shareholder of plaintiff, who explains that the ambiguity in the CPI provision was brought to plaintiff's attention by EPNY during its due diligence, which asked for clarification of the provision, that plaintiff asked defendant to confirm that the rent will not double when the CPI adjustment becomes effective, and that defendant refused. Ms. Tremblay further attests that EPNY has demanded that plaintiff obtain a resolution of this issue, has reserved the right to cancel the pending sale if a resolution is not obtained, and in the event the sale proceeds, up to $1.5 million of the purchase price will be escrowed pending a court ruling regarding the construction of Paragraph 3 of the Lease (Tremblay Aff., ¶¶ 14-16). Plaintiff also submits the affidavit of Jeffrey Wilder, a nonparty who acted as defendant's broker in connection with the Lease in 1992, to support its interpretation of the rent escalation provision.

In moving for dismissal, defendant contends that the gravamen of the complaint is a claim for reformation of the Lease based on mutual mistake, which claim is untimely. Even if this is a proper claim for declaratory relief, defendant urges that there is no ripe, justiciable controversy between the parties. It asserts that there is no current dispute between the parties regarding any provision of the Lease that presently is applicable. It argues that plaintiff seeks a determination relating to a future and conditional event. Defendant further argues that plaintiff has already signed an assignment and assumption agreement with EPNY, which it delivered to defendant, and it has negotiated a conditional pricing adjustment with EPNY pending the outcome of this

action to account for the 2017 rent escalation. Thus, defendant maintains that there is no need for a judicial determination. Additionally, defendant contends that the rent escalation provision is not ambiguous or inconsistent. It asserts that the escalation formula in Paragraph 3 (B) is clear. It argues that plaintiff concedes that the formula doubles the base rent in 2017. Defendant argues that Paragraph 3 (A), which does not provide for such doubling, does not restrict, curtail, or conflict with the mathematical formula in Paragraph 3 (B). It maintains that Paragraph 3 (B) provides for both a rent increase of $600,000, which is the entire base rent, and a CPI Adjustment. Defendant urges that there is no inconsistency with other Lease provisions, because Paragraph 2 relates to base rent and Paragraph 3 relates to rent escalation and the rental floor provisions of Paragraphs 3 (B) and 3 (E) do not restrict the rent escalation formula of Paragraph 3 (B).

Discussion

The motion to dismiss is denied. Granting the declaratory relief requested by plaintiff would not be the equivalent of rendering an advisory opinion. A justiciable controversy has been presented. In addition, the court finds an ambiguity in the Lease, warranting denial of the motion to dismiss.

A declaratory judgment may be rendered with respect to the rights and legal relations of the parties where they have a justiciable controversy (*see* CPLR 3001; *Krieger v Krieger*, 25 NY2d 364, 366 [1969]). Generally, justiciability refers to matters that are resolvable by the judicial branch, as opposed to the legislative or executive branches (*see New York County Lawyers' Assn. v State of New York*, 294 AD2d 69, 72 [1st Dept 2002]). A primary purpose of a declaratory judgment is to adjudicate the parties' rights before a "wrong" actually occurs in the

hope of heading off litigation later on (*Klostermann v Cuomo*, 61 NY2d 525, 538 [1984]).

> While it is true that a request for a declaratory judgment is ordinarily premature where a future event affecting the obligations of the contracting parties is contemplated, yet uncertain of occurrence and beyond the parties' control, such relief is available where the declaration will have the immediate and practical effect of influencing the parties' current conduct

(*Buller v Goldberg*, 40 AD3d 333, 333 [1st Dept 2007] [citations omitted]; *see 40-56 Tenth Ave. LLC v 450 West 14th St. Corp.*, 22 AD3d 416 [1st Dept 2005]; *M & A Oasis v MTM Assoc.*, 307 AD2d 872, 872 [1st Dept 2003]). For example, a plaintiff may seek a declaratory judgment regarding the enforceability of an option agreement, which the defendants believed, and informed plaintiff, was not binding, because the dispute had a direct and present impact upon the parties' ability to dispose of their shares under the cooperative shareholders' agreement (*Buller v Goldberg*, 40 AD3d at 333). Declaratory relief also is available where the probability of the occurrence of the future event is great (*see Remsen Apts. v Nayman*, 89 AD2d 1014, 1015 [2d Dept 1982], *affd* 58 NY2d 1083 [1983] [declaratory relief appropriate and not premature even where payment would only be required, if at all, as result of acceptance of conversion plan and actual subsequent sales of cooperative units]).

Here, the assignment of this lease and the application of these conflicting rent escalation provisions are not a future event beyond the control of the parties which may never occur. While a third party's, such as EPNY's, actions in continuing to rent the Premises under an assignment of the Lease is beyond the parties' control, defendant's interpretation and enforcement of the escalation provisions are not. Defendant's present response regarding these escalation provisions creates doubt as to what its response will be, potentially devaluing the Lease in connection with

the pending sale to EPNY. Consequently, a declaration will have an immediate and practical effect of influencing the parties' conduct (*see M & A Oasis v MTM Assoc.*, 307 AD2d 872, *supra* [where fee owner's conduct created cloud on plaintiff's right of first refusal, controversy was ripe even though there was no present offer to buy property by third party]; *Remsen Apts. v Nayman*, 89 AD2d 1014, *supra* [claim ripe regarding competing claims to certain proceeds of cooperative conversion even though conversion plan was not yet approved by State or elected by tenants]).

In addition, plaintiff's objective of selling the Lease with the rent escalation provisions to a buyer is not beyond plaintiff's control. Indeed, it has a great probability of occurring through the transaction with EPNY. Further, plaintiff's current conduct will be directly influenced by the declaration sought, as it has alleged that EPNY has reserved the right to cancel the proposed sale if a resolution is not obtained from this court, or the purchase price of that sale will be changed. This clearly is a controversy that is definite and concrete and touches upon the legal relationships of the parties (*see State of New York v Myers*, 22 Misc 3d 809, 818 [Sup Ct, Albany County 2008]). Moreover, the ambiguities in this Lease, as discussed below, are sufficient to require court intervention.

Defendant's argument that plaintiff's claim is actually for reformation, which is untimely, is unpersuasive. Plaintiff is not simply claiming that the parties made a mutual mistake and that the court should reform the Lease. Rather, it has pointed out ambiguities in the provisions regarding the rent escalation, which may be challenged and determined in a declaratory judgment claim (*1414 APF, LLC v Deer Stags, Inc.*, 39 AD3d 329, 330-331 [1st Dept 2007]). Whether a contract is ambiguous or not is a question of law for the court (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). The agreement should be read as a whole to determine its purpose and

intent, and it should be construed to give effect and meaning to all provisions (*id.*; *see also American Express Bank v Uniroyal, Inc.*, 164 AD2d 275, 277 [1st Dept 1990], lv *denied* 77 NY2d 807 [1991]). "A contract is ambiguous if 'on its face [it] is reasonably susceptible of more than one interpretation'" (*Telerep, LLC v U. S. Intl. Media, LLC*, 74 AD3d 401, 402 [1st Dept 2010], quoting *Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]). If the contract is found ambiguous, it cannot be construed as a matter of law, and dismissal for failure to state a claim, CPLR 3211 (a) (7), is not appropriate (*id.*). A contract is ambiguous if it contains internally inconsistent provisions (*id.* at 402-403).

First, as plaintiff conceded, Paragraph 3 (B) appears to set forth a clear formula for calculating the rent escalation amount, which results in doubling the rent in addition to the CPI-based inflation escalation. However, this formula is at odds with the text in the immediately preceding paragraph, Paragraph 3 (A). That paragraph provides that the escalation was to be a cost of living adjustment calculated by comparing the CPI in the given rent year to the CPI for the designated base year. This language does not provide that the adjustment would involve doubling the base rent. It states only that "[t]he CPI Adjustment shall be based on the percentage difference between (a) the Price Index for the month of July of each year commencing with July 1, 2018, and (b) the Price Index for the Base Year" (Lease, ¶ 3 [A]).

Also, defendant's proposed construction, based only on the formula in Paragraph 3 (B), appears to be at odds with the seeming purpose of Paragraph 3 as a whole -- to provide defendant with a "cost of living adjustment" to the annual fixed rental rate in year 26 and onward. Moreover, the Lease prohibits reductions in the fixed rent below $600,000 in Paragraphs 3 (B) and 3 (E). If defendant's proposed lease construction were adopted, the base rent could never

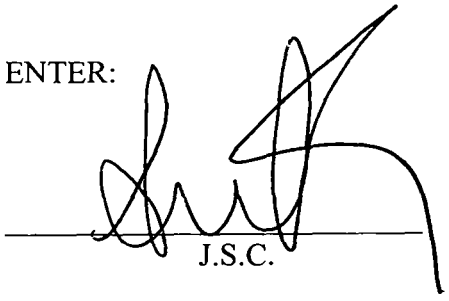
fall below $600,000. The court should not interpret a contract in such a way as to render a provision meaningless.

In sum, the court finds that the Lease is reasonably susceptible of more than one interpretation and, thus, is ambiguous. Hence, a pre-answer dismissal is inappropriate (*Telerep, LLC v U. S. Intl. Media, LLC*, 74 AD3d at 402; *see also 1414 APF, LLC v Deer Stags, Inc.*, 39 AD3d at 330-331 [where agreement contains irreconcilable ambiguities that would lead to an absurd result, motion to dismiss is denied]). The parties must fully develop the factual record regarding their intent as to the rent escalation provisions in the Lease. Accordingly, it is

ORDERED that the motion to dismiss is denied.

Dated: December 22, 2011

ENTER:



J.S.C.