

**Bally Total Fitness of Greater N.Y., Inc. v Prestige
Bay Plaza Dev. Corp.**

2015 NY Slip Op 31805(U)

September 14, 2015

Supreme Court, New York County

Docket Number: 104747/2008

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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BALLY TOTAL FITNESS OF GREATER NEW YORK, INC.,
f/k/a JACK LA LANNE FITNESS CENTERS, INC.

Index No.
104747/2008

Plaintiffs,

-against-

PRESTIGE BAY PLAZA DEVELOPMENT CORP.,
COMMUNITY CENTER INTERIOR, LLC, PRESTIGE
PROPERTIES & DEVELOPMENT CO., INC., and
DOES 1-100, Inclusive.

Defendants

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Hon. Charles E. Ramos, J.S.C.:

This action arises out of a disputed term in a lease agreement between the parties. The parties disagree as to the meaning of "Common Areas" as set forth in the lease.

In motion sequence 005, the plaintiff Bally Totally Fitness of Greater New York, Inc. (Bally) moves pursuant to CPLR 3212 for partial summary judgment on its third cause of action for declaratory judgment, seeking a declaration that the definition of "Common Areas," as set forth in the lease, does not include the atrium, public restrooms, elevator, lobbies, and corridors located within the office building (the Disputed Areas), and that Bally has no obligation under the lease to pay any portion of the operating costs (the CAM Charges) associated with maintaining the Disputed Areas.

Furthermore, the defendants Prestige Bay Plaza Development Corp., Community Center Interior, LLC, Prestige Properties &

Development Co., Inc. (collectively, Prestige) cross-move pursuant to CPLR 3212 for partial summary judgment, seeking a declaration that "Common Areas," as defined in the lease, does include the Disputed Areas and thus, Bally is obligated to pay for the associated CAM Charges.

Background

The facts set forth herein are taken from the parties' submissions and Rule 19-A Statements, which are undisputed except where noted.

On October 21, 1993, Bally, under the name of Jack La Lanne Fitness Centers, Inc., and Prestige entered into a written 20-year commercial lease agreement for commercial space in the Bay Plaza Shopping Center (the Lease), located at 2100 Bartow Avenue, Bronx, New York (the Shopping Center) (Bally's Rule 19-A, § 1).

Pursuant to the Lease, Bally's premises are "primarily located on the second floor of the office building portion of the Shopping Center; containing approximately 22,000 square feet of Gross Leaseable Area including 800 square feet on the first floor as the entrance of the Leased Premises" (Siegel Aff., Exhibit A, §1.01 [d]). Two emergency exit doors from Bally's premises lead to the second floor corridor of the office building portion of the Shopping Center and one emergency exit door from Bally's premises leads to the elevator lobby on the second floor of the

office building portion of the Shopping Center (Luchese Aff., ¶¶ 2, 3, 7-9).

Pursuant to the Lease, Bally agreed to pay monthly CAM Charges as its pro-rata share of the operating expenses for the maintenance of the areas defined in the Lease as "Common Areas" (Siegel Aff., Exhibit A, § 6.4 [a]).

On April 2, 2008, Bally commenced this action after an audit revealed that Prestige had been purportedly overcharging Bally for its CAM Charges by including charges for the Disputed Areas. Bally's complaint asserts causes of action for breach of contract, fraud, and declaratory judgment.

In the instant motion, both parties move for partial summary judgment on the third cause of action seeking a declaration as to whether the definition of "Common Areas" as set forth in the Lease includes the Disputed Areas.

Discussion

A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant has made this showing, the burden shifts to the opposing party to present evidence to establish that material issues of fact do exist (*id.*). General allegations, not supported by adequate evidence, are insufficient to defeat an

opponent's summary judgment motion (*id.* at 325).

The question of whether a writing is ambiguous is one of law to be resolved by the courts (*Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995]). It is generally accepted that "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162 [1990]).

Evidence independent of the "four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing" (*id.*). This rule imparts "stability to commercial transactions by safeguarding against fraudulent claims, perjury...infirmity of memory...[and] the fear that the jury will improperly evaluate the extrinsic evidence" (*id.*).

Bally argues that the Disputed Areas cannot constitute Common Areas, under the definition contained in the Lease because the Disputed Areas are not made "available for the general use, convenience and benefit of Tenant, other tenants, and their Permittees" (*id.*).

Pursuant to Section 2 of the Lease, "Common Areas" is defined as:

"All portions of the Shopping Center which Landlord may from time to time make available for the general use, convenience and benefit of Tenant, other tenants, and their Permittees. The Common Areas shall include, without limitation the following to the

extent the same serve more than one occupant: truck ramps, roof, down sports, fire corridors, service corridors, loading facilities and docks, all automobile parking areas, access roads, sidewalks, traffic lanes, bus stations, taxi stations, parcel pick areas, entrances and exits from and to public roads, landscaping, rest rooms, and Utility Facilities" (Brown Aff., Ex. C, Ex. A, § 2).

Furthermore, Bally argues that its customers do not have a "non-exclusive license to use" the Disputed Areas as required by Section 6.2 of the Lease (Brown Aff., Ex. C, Ex. A, § 6.2). Consequently, Bally should not be obligated to pay the CAM Charges associated with the Disputed Areas.

Bally is essentially arguing that the provisions in the Lease provide that it only has to pay the CAM Charges for the areas within the premises that it actually has general use of.

This Court disagrees. The usage of the term "Common Areas," as defined in the Lease, is clear and unambiguous.

The plain language of the Lease clearly provides that Common Areas are defined as "[a]ll portions of the Shopping Center which Landlord may from time to time make available for the general use, convenience and benefit of Tenant, other tenants and their Permittees" (Brown Aff., Ex. C, Ex. A, § 2).

Bally's theory that "Common Areas" only includes the areas that it has general use of completely ignores the preceding qualifying language that expressly provides that the Common Areas are the areas the "[Prestige] may from time to time make

available for general use..." (Brown Aff., Ex. C, Ex. A, § 2 [emphasis added]).

Thus, the Lease does not define Common Areas as areas that only Bally's has the general use of, rather, the definition merely includes all areas that the landlord may make available for general use.

Furthermore, the Lease clearly provides that Prestige "may do such other acts in and to the Common Areas, as in [Prestige's] reasonable judgment may be desirable provided that the same do not adversely affect [Bally's] use and operation of the Leased Premises" (*id.* at § 6.2). Bally has not alleged any adverse effects from its alleged preclusion from the Disputed Areas. In fact, it is undisputed that Bally never requested access or objected to its inability to use the Disputed Areas prior to the commencement of this action.

Moreover, the fact that the Lease does not specifically itemize all of the Disputed Areas is not dispositive because the definition references the broad term Common Areas, which already includes the Disputed Areas (*id.* at §§ 2, 6.4). Additionally, the specific lists within §§ 2 and 6.4 of the Lease are listed "without limitation" to account for items not specifically listed (*id.*).

However, this Court does agree with Bally that pursuant to the Lease, Bally is not obligated to pay for any CAM Charges that

are services or areas that are exclusively used by another tenant.

Bally alleges that it is being improperly charged for electrical service that is being used exclusively by the tenants in the office building. Specifically, Bally contends that the medical providers tenants use diagnostic equipment that consumes a large amounts of electricity, which is being charged to Bally.

The Lease clearly excludes "charges related to an individual tenant or tenant space" from the CAM Charges (*id.* at §6.4 [a] [iv]). As a result, the individual offices in the Shopping Center that are used exclusively by other tenants are not be included in the Lease's definition of CAM Charges. Logically, any electrical services that are being exclusively used by another tenant would also not be Bally's responsibility. This was also confirmed by Prestige during oral argument (Trans., 6/11/2014, 12:23-13:1 [individual tenant expenses are not included in CAM Charges]).

Accordingly, it is

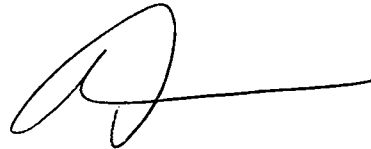
ORDERED that the plaintiff Bally Total Fitness of Greater New York Inc.'s motion for partial summary judgment is denied, and it is further

ORDERED that the defendants Prestige Bay Plaza Development Corp., Community Center Interior, LLC, Prestige Properties & Development Co., Inc.'s cross-motion for partial summary judgment is granted, and it is further

ORDERED AND DECLARED that the plaintiff Bally Total Fitness of Greater New York Inc. is not entitled to a declaration that no part of the subject office building is a Common Area pursuant to the Lease, and thus, Bally Total Fitness of Greater New York Inc. is not obligated to pay for the common area charges related thereto, and it is further

ORDERED AND DECLARED that the defendants Prestige Bay Plaza Development Corp., Community Center Interior, LLC, Prestige Properties & Development Co., Inc. are entitled to a declaration that the "Common Areas" pursuant to the Lease includes the atrium, public restrooms, elevator, lobbies, and corridors located within the office building.

Dated: September 14, 2015



J.S.C.

HON. CHARLES E. RAMOS