121 W. 42nd St. Assoc., L.P. v One Bryant Park, LLC
2020 NY Slip Op 32371(U)
July 20, 2020
Supreme Court, New York County
Docket Number: 650237/2015
Judge: Saliann Scarpulla

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA **PART** IAS MOTION 39EFM

Justice

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121 WEST 42ND STREET ASSOCIATES, L.P.

Plaintiff,

- v -

ONE BRYANT PARK, LLC,

Defendant.

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INDEX NO. 650237/2015

MOTION DATE 12/09/2019, 12/09/2019

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 190, 193, 194, 195, 196, 197, 198, 199, 200, 208, 209, 210, 211, 212, 216

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

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were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Upon the foregoing documents, it is

In this declaratory judgment action arising out of a dispute concerning the parties' rights and obligations pursuant to a lease agreement, defendant One Bryant Park, LLC ("OBP") moves, pursuant to CPLR 3212, for summary judgment on its counterclaims. Plaintiff 121 West 42nd Street Associates, L.P. ("121 West") moves, pursuant to CPLR 3212, for summary judgment on its complaint.

In 2000, the Durst Organization LP ("Durst") began to plan development of a 55-story building (the "Project") known as "One Bryant Park," New York, NY (the

"Building"). 121 West, an affiliate of The Brandt Organization, Inc. ("Brandt"), owned 121 West 42nd Street and 118-122 West 43rd Street (the "Brandt Parcels"), which were in the middle of Durst's contemplated development site for the construction of the Building. The Building's primary tenant would be Bank of America. Ultimately, the Project incorporated a combination of multiple parcels, including the Brandt Parcels.

Durst and Brandt extensively negotiated terms that would facilitate the development of the Project. On or about September 25, 2000, 121 West, as landlord, and One Bryant Park Development Partners LLC [1] (a Durst affiliate), as tenant, entered a long-term ground lease for rental of the Brandt Parcels (the "2000 Lease").

The 2000 Lease contained provisions for the resetting of future rent. Specifically, Article 3.2 (a) of the 2000 Lease resets the annual fixed rent to commence in 2029 and states in pertinent part:

> As of the first day of the 21st Stabilization Year, and on the date occurring on each ten-year anniversary thereof (each such date a 'Reset Date'), the Fixed Annual Rent shall be redetermined as follows:
>
> (a) The parties, on each Recalculation Date, shall calculate the sum of (i) the total square feet of floor area (as defined in the New York City Zoning Resolution) ('Zoning Floor Area') permitted 'as-of-right' for the [Brandt Parcels] as of the Commencement Date, which Landlord and Tenant agree is 107,546 (the 'DP As of Right ZFA') and (ii) the product of (A) seventy-five percent (75%) of the Zoning Floor Area of all bonuses obtained and utilized in the Project as it exists as of the applicable Recalculation Date (as hereinafter defined) (whether arising out of transfers of development rights, creation of a theater, subway improvements, or otherwise) times (B) a fraction, the numerator of which is the 'DP As of Right ZFA' (as calculated in (i) above) and the denominator

[1] One Bryant Park Development Partners LLC was OBP's predecessor.

> of which is the total 'as-of-right' Zoning Floor Area used in the Project.

Section 3.2 further provided that 121 West and OBP agreed that "Exhibit H accurately portrays the applicable zoning, as of the Commencement Date, of all parcels that may be included within the Project Site." Exhibit H, in turn, identified the "as of right" ZFA for the Project as 1,246,422 square feet, which is the denominator to be used in section "(B)" of the Rent Reset Square Footage Calculation.

When the 2000 Lease was executed, it had not yet been determined if the Project would be developed pursuant to a Zoning Resolution of the City of New York or under the auspices of New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC"). If the Project were to be developed under ESDC, the parties understood that ESDC would acquire title to the entire project site, including the Brandt Parcels, through ESDC's condemnation power, or power of eminent domain. Both scenarios (the governance of the Project under the Zoning Resolution, or under ESDC) were contemplated by the parties when they drafted the 2000 Lease (see Article 14A of the 2000 Lease, entitled "ESDC Condemnation").

On February 27, 2004, the New York Public Authorities Control Board authorized ESDC's acquisition of the Project site by condemnation. In connection with ESDC's condemnation, OBP, as a tenant, and ESDC, as the landlord, executed a 99-year ground lease dated August 12, 2004 (the "Ground Lease") wherein ESDC conveyed possession of the entire Project site, including the Brandt Parcels, to OBP.

By its terms, the 2000 Lease terminated once ESDC acquired title to the Project site. However, in exchange for 121 West's waiver of its right to object to an ESDC taking, Article 14A.2 (b) of the 2000 Lease provided that, in the event of an ESDC condemnation, 121 West and OBP would enter into a Sandwich Lease. Pursuant to the Sandwich Lease, the Brandt Parcels, now in possession of OBP by way of the Ground Lease with ESDC, would be leased to 121 West, and a new net lease would be executed with 121 West, as a "sub-sublandlord" leasing the Brandt Parcels back to OBP, as "sub-subtenant," "on all the same terms and conditions set forth in" the 2000 Lease. On May 2, 2005, in compliance with Article 14A.2 (b) of the 2000 Lease, 121 West and OBP executed the new net lease (the "2005 Lease").

The dispute that is the subject of this action arose during the 2005 Lease negotiations. The parties disagreed on a step of the rent reset formula under Article 3.2, namely, determination of the Zoning Floor Area ("ZFA") to be included in the calculation. To preserve the parties' dispute respecting the applicability of bonus ZFA obtained and utilized in the Project to calculate the reset of the annual fixed rent, the parties added the following language to Section 3.2 (a) of the 2005 Lease's Rent Reset Square Footage Calculation[2]:

> Notwithstanding anything to the contrary contained herein, for so long as the Project, as in existence on any Recalculation Date, was built as an ESDC Project, neither party may submit any disagreement regarding the amount of Zoning Floor Area of all bonuses obtained and utilized in the Project to arbitration, it being agreed that the method for determining any such dispute has been set forth in a

[2] Article 3.2(a) of the 2005 Lease was otherwise identical to Article 3.2(a) of the 2000 Lease.

> separate agreement entered into between [OBP and 121 West] as of the date hereof, the terms of which are hereby incorporated herein as if fully set forth herein.

The Separate Agreement, executed on May 2, 2005 - the same date as the 2005 Lease - stated,

> Notwithstanding the inclusion in the New Net Lease of the Rent Re-Set Provisions, the parties have a present dispute (the "Dispute") as to the interpretation of the Rent Re-Set Provisions relating to the calculation of the Zoning Floor Area of all bonuses obtained and utilized in the Project for purposes of computing Fixed Annual Rent (and whether bonuses have been obtained and utilized in the Project), and have agreed to commence, at this time in the Supreme Court of the State of New York, County of New York, an action for a declaratory judgment… to determine the proper interpretation and application of such calculation.

On or about January 2015, in accordance with the Separate Agreement, 121 West commenced this action seeking a declaration that: (1) future rent for the Brandt Parcels be calculated using 75% of the ZFA of all bonuses obtained and utilized in the Project in excess of the "as of right" square feet of ZFA; and (2) disclosure of the exact ZFA of the Project is needed in order to determine the Rent Reset Square Footage Calculation pursuant to Section 3.2 (a) of the 2005 Lease as 121 West cannot determine the computation of the square footage calculation based upon the different ZFA figures OBP has provided for the Project.[3]

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[3] 121 West asserts that the figures vary in different documents: the 2000 Lease states the Project would have 2,125,497 square feet of office and retail space, plus about 78,000 square feet of additional space in a theater; a January 27, 2004 memorandum claims it has 1,650,000 zoning square feet; a Final Environmental Impact Statement (the FEIS) adopted by ESDC asserts it has 1.65 million zoning square feet, with Table S-1 to the FEIS claiming it is 1,772,325 square feet of zoning; the Durst Organization's website

In its answer, OBP generally denied the allegations in the complaint, and asserted counterclaims for a declaration that: (1) OBP did not obtain and utilize any bonuses in connection with the Project; (2) under Article 3.2 (a) of the 2005 Lease, the ZFA of all bonuses obtained and utilized in the Project equals zero; and (3) under Article 3.2 (a) of the 2005 Lease, the only sum to be utilized to determine the Rent Reset Square Footage Calculation is the Brandt Parcel's "as of right" 107,546 square feet of ZFA.

Following discovery, both parties now move for summary judgment. In its motion, OBP contends that it is entitled to summary judgment because the 2000 Lease sets forth the parties' intentions – it was extensively negotiated by sophisticated real estate industry parties with the benefit of counsel and therefore the "four corners" rule should be applied with greater force; the Rent Reset Square Footage Calculation Article 3.2 (a) of the 2000 Lease is clear, complete and unambiguous and must be enforced according to its terms; the Rent Reset Square Footage Calculation's reference to the ZFA of all bonuses are "bonuses" obtained under Zoning Resolution; and because the Project was developed under ESDC, there were no "bonuses" offered to OBP.

In contrast, 121 West argues that its motion for summary judgment must be granted because there is no evidence to show that the parties intended and understood that "bonus zoning floor area," in the Rent Reset Square Footage Calculation, would only be applied if the Project was built pursuant to the Zoning Resolution, and would be excluded

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lists 2,354,000 square feet of space for the Project; and the New York City Department of City Planning indicated it has 2,245,112 square feet.

if the Project were built under ESDC's authority; nothing in the 2000 Lease states that bonus ZFA would be applied to the Rent Reset Square Footage Calculation only if the Project were built under the Zoning Resolution, or that the bonus square footage referenced in the provision was dependent on the nature or identity of the regulatory agency that authorized the Project's development.

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 eliminate any material issues of fact from the case." *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985) (citations omitted).

Written agreements that are "complete, clear and unambiguous" on their face, must "be enforced according to the plain meaning of [their] terms." *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002). "However, when the meaning of the contract is ambiguous and the intent of the parties becomes a matter of inquiry, a question of fact is presented which cannot be resolved on a motion for summary judgment." *Ruttenberg v. Davidge Data Sys. Corp.*, 215 A.D.2d 191, 193 (1st Dept. 1995) (citation and quotation marks omitted).

Here, 121 West and OBP, two sophisticated real estate entities, extensively renegotiated the terms of the 2000 Lease with representation by counsel. It is undisputed that the term "bonus" was not defined in either the 2000 Lease or the 2005 Lease. OBP argues that Article 3.2 is clear and unambiguous. Citing to the report of its expert Carol

E. Rosenthal ("Rosenthal"), OBP states that the term "bonuses" as used in the leases "refers to those provisions under the [Zoning Resolution] which allow a site to have some amount of additional floor area in excess of the basic 'as-of-right' ZFA in exchange for the provision of a public amenity or fulfillment of a public need that has been identified in the [Zoning Resolution]."

121 West contends that OBP cannot rely on industry custom or usage to interpret the disputed words in the parties' contract. In support, 121 West points to the report by its expert, Caroline Harris ("Harris"), which stated that the term "bonuses" lacks a fixed meaning in the real estate industry. According to 121 West, OPB's interpretation of the leases is merely an attempt to re-negotiate the parties' deal to gain a windfall for Durst at Brandt's expense.[4]

In addition, both parties believe that the deposition of non-party zoning specialist, Edith Hsu-Chen ("Hsu-Chen"), the Director of the Manhattan Borough Office of the New York City Department of City Planning ("DCP"), supports their view of the contract. I disagree. Hsu-Chen's deposition transcript fails to establish that either party's understanding of Article 3.2 is correct as a matter of law.

Moreover, I find that interpretation of Article 3.2 is a matter of contract interpretation, and the parties cannot rely on expert opinions about "the legal obligations of parties under a contract [because] that is an issue to be determined by the trial court."

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[4] 121 West states that removing more than 400,000 square feet of "bonus" floor area from the rent calculations permits OBP to "diminish by more than 20% the annual rent that plaintiff receives over a 71-year period."

Good Hill Master Fund L.P. v. Deutsche Bank AG, 146 A.D.3d 632, 637 (1st Dept. 2017).

OBP next argues that 121 West's position, that Section 3.2 should be interpreted to include "all" ZFA in the Project "as built" regardless of how the ZFA was obtained, is "contrary to the manner [in] which the parties used those terms," and thus should be rejected and the Court should find that OBP did not obtain or utilize any bonuses. 121 West counters that nothing submitted by OBP supports its view that the more than 400,000 square feet of "bonus" ZFA in the Project would be included in the formula for rent recalculations if the Project was built pursuant to the New York City Zoning Resolution, but would be excluded if the Project was built pursuant to ESDC authorization. Further, 121 West argues that the language in Article 3.2 does not reflect the distinction urged by OBP. None of the documents produced by the parties conclusively establishes that its interpretation of Article 3.2 is the correct one.

Finally, the parties also argue that the words "or otherwise" illustrate that each is correct in its interpretation of Article 3.2. On the one hand, OBP claims that the words "or otherwise" do not expand the definition of "bonuses." Instead, OBP posits that "or otherwise" means other items that are similar to the ones listed which precede the clause. OBP contends that because "transfers of development rights," "creation of a theater" and "subway improvements" are ways for a developer to acquire bonus square footage under the Zoning Resolution, "or otherwise" must also then refer to ways to obtain bonus square footage under the Zoning Resolution. On the other hand, 121 West asserts that the

"or otherwise" language at the end of Article 3.2 (a) confirms the "all-encompassing" nature of the term "bonuses" as used in that section.

Again, nothing submitted by either 121 West or OBP supports their arguments pertaining to the words "or otherwise" and thus both parties fail to establish that they are correctly interpreting Article 3.2 as a matter of law.

In fact, the arguments advanced by 121 West and OBP highlight the inappropriateness of granting summary judgment. Review of the voluminous record submitted on these motions – consisting of approximately 118 exhibits including contracts, emails, expert reports and depositions – plainly shows that a question exists as to the meaning of "bonuses" as used in Article 3.2 of the 2000 Lease. It cannot be determined, as a matter of law, that either 121 West's or OBP's interpretation of the undefined term in Article 3.2 is correct. As a result, a trial is necessary to determine the parties' intent in drafting that provision. *Berkeley Research Group, LLC v. FTI Consulting, Inc.*, 157 A.D.3d 486, 489 (1st Dept. 2018) (holding that if "a contract's provisions are subject to more than one or conflicting reasonable interpretations, the agreement will be considered ambiguous, requiring a trial on the parties' intent") (internal citations omitted).

In accordance with the foregoing, it is hereby

ORDERED that defendant One Bryant Park, LLC motion for summary judgment on its counterclaims is denied; and it is further

ORDERED that plaintiff 121 West 42nd Street Associates, L.P's motion for summary judgment on the complaint is denied; and it further

ORDERED that counsel are directed to appear for a pre-trial conference on September 2, 2020 at 2:15 p.m., or at such later date and time as may be rescheduled.

This constitutes the decision and order of the Court.

7/20/2020
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE