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

PRESENT: HON. ANIL C. SINGH SUPREME COURT JUSTICE Justice

PART 61

ENCHANTMENTS DNC

- v -

424 EAST 9TH

INDEX NO. 650023/14

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 3 were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum opinion.

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

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

Dated: SEP 11 2014

HON. ANIL C. SINGH SUPREME COURT JUSTICE J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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ENCHANTMENTS INC.,

Plaintiff,

-against-

424 EAST 9TH LLC,

Defendant.

----------X

DECISION AND ORDER

Index No. 650073/14

HON. ANIL C. SINGH, J.:

Plaintiff moves by order to show cause for an order pursuant to CPLR 602(b) and 2201: 1) staying the non-payment proceeding pending between the parties in the non-housing landlord-tenant part of the Civil Court of New York City; 2) removing the non-payment proceeding to this Court and consolidating it with the instant action; and 3) granting plaintiff's motion for summary judgment, declaring that plaintiff's tax liability is not more than 3-6% of any real estate tax increase, and declaring that plaintiff's real estate tax obligation does not include tax escalation increases based on increase in assessed value of the building that redound solely to the benefit of defendant building owner. Defendant opposes the motion and cross-moves pursuant to CPLR 3212 for summary judgment dismissing the complaint.

The undisputed material facts are as follows.

Defendant 424 East 9th LLC is the owner/landlord of the building located at

424 East Ninth Street in Manhattan. Early in October 2008, plaintiff Enchantments Inc., approached defendant to negotiate a commercial lease for premises in the building. Plaintiff was represented by counsel during the lease negotiations. Harvey Bojarsky, defendant's manager at the time, negotiated the lease terms on behalf of defendant.

Defendant, as landlord, and plaintiff, as tenant, entered into a commercial lease agreement dated October 12, 2008. The lease is for a ten-year term.

Article 42(b) of the lease agreement is a tax escalation clause, which states in part as follows:

> If the taxes for any tax year shall be greater than the taxes for the base tax year, tenant shall pay to landlord, as additional rent for each tax year a sum equal to forty percent (40%) of the difference between taxes for such tax year and the taxes for the base tax year....

(Affidavit of William V. Rapp, exhibit C, p. 3).

Article 42(a) of the lease agreement defines "taxes" for purposes of the tax escalation clause as follows:

> "Taxes" shall mean all real estate taxes, any general assessments and special assessments, water charges and sewer rents (metered or otherwise), governmental levies, municipal taxes, county taxes, business improvement charges and taxes, vault taxes, or any other governmental charge, general or special, ordinary or extraordinary, unforeseen as well as foreseen, of any kind whatsoever, which are or may be assessed, levied or imposed upon all or part of the land and/or the landlord and/or the demised premises and/or the building currently comprising Block 436, Lot 20, and levied against the land and/or the

> landlord and/or the demised premises and/or the building currently comprising Block 436, Lot 20, under the laws of the United States, the City or State of New York, or any political subdivision thereof.

(Affidavit of William V. Rapp, exhibit C, p. 2).

The landlord commenced a non-payment proceeding in Civil Court on October 18, 2012. The landlord seeks an award of rent and additional rent as follows: legal fees in the sum of $275.00; real estate taxes billed in August 2011 in the sum of $5,296.14; and real estate taxes billed in July 2012 in the sum of $4,275.00, for a total amount of $9,846.14.

Plaintiff commenced the instant action on January 10, 2014, seeking relief in the form of a declaratory judgment. The complaint alleges that there is a dispute between the parties as to how much the tenant owes for real estate taxes from 2009 to the present based on a disagreement as to how to interpret the tax escalation clause in the lease agreement. Specifically, the tenant asserts that, at the time the lease agreement was negotiated, plaintiff understood the terms of the lease to provide that plaintiff pay only 3-5% of any annual real estate tax increase. By contrast, the landlord asserts that the tenant owes 40% of the difference between the tax increase for any given tax year and the average increase between the years 2008 and 2009.

The sole cause of action seeks a judgment against defendant: a) declaring

plaintiff's tax liability to be no more than 3-6% of any annual real estate increase; b) declaring the plaintiff's real estate tax obligation does not include tax escalation increases based on increase in assessed value of the building that redound solely to the benefit of the defendant building owner; and c) attorneys' fees and costs incurred by plaintiff in connection with prosecuting this action.

Defendant interposed a verified answer, asserting eight affirmative defenses as well as a counterclaim for reasonable attorneys' fees and disbursements pursuant to article 72.1(c) of the lease agreement.

Discussion

The standards for summary judgment are well settled. "The proponent of a summary judgment motion 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 University Medical Center, 64 N.Y.2d 851, 853 [1985]). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion (see id.) Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law (see Alvarez v. Propect Hosp., 68 N.Y.2d 320, 324 [1986]). Moreover, summary judgment motions should be denied if the opposing party presents admissible evidence

establishing that there is a genuine issue of fact remaining (see Zuckerman v. City of New York, 49 N.Y.2d 557, 560 [1980]). "In determining whether summary judgment is appropriate, the motion could should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (Garcia v. J.C. Duggan, Inc., 180 A.D.2d 579, 580 [1st Dept., 1992], citing Assaf v. Ropog Cab Corp., 153 A.D.2d 520, 521 [1st Dept., 1989]). The court's role is "issue-finding, rather than issue-determination" (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 [1957] (internal quotations omitted)).

"Because the parties are presumed to intend what is ordinarily and reasonably implied by their agreement, the best evidence of what parties to a written contract intend is what they say in their writing" (22 N.Y.Jur.2d Contracts, section 223). "Whether a contract is ambiguous is a question of law to be resolved by the court" (239 East 79th Owners Corp. v. Lamb 79 & 2 Corp., 30 A.D.3d 167, 168 [1st Dept., 2006] (internal citation omitted). "Such ambiguity exists only where the provision in controversy is reasonably or fairly susceptible of different interpretations or may have two or more different meanings, although the mere assertion by a party that contract language means something other than what it clearly says is not sufficient to raise a triable issue of fact" (id.)

Plaintiff exhibits the sworn affidavit of William V. Rapp, who states that he

is the sole shareholder and principal of the plaintiff/tenant. He contends that the calculations the landlord has been using to bill the tenant for real estate taxes involve and include increases in the assessed value of the subject building stemming from improvements to the "residential aspect of the building and redound solely to the benefit of the owner." According to Rapp, including such amounts in such calculations is improper, for the law does not allow landlords to pass tax obligations to commercial tenants where the benefits giving rise to such tax increase inure solely to the benefit of the landlord.

Further, Rapp asserts that during the lease negotiations, it was his understanding and the understanding of his attorney at that time, Arthur Morrison, that plaintiff's tax obligations would be somewhere in the area of 3-6% of any given annual increase. During the negotiations, he believed any real estate tax increases would be made to the assessed value of the building at the time of lease signing with the building's assessed value as it was at that time.

In opposition, the landlord asserts that discovery is unnecessary in this case because the issue for the Court to decide involves clear interpretation of contract law, and the language of the lease is clear and unambiguous on its face. Because the lease is unambiguous, the landlord asserts that parol evidence is not admissible. Finally, the landlord asserts that Article 20 of the lease agreement has a merger

clause that prevents any modification unless in writing signed by the party charged.

In short, the Court finds that the language of the tax escalation clause is completely clear and unambiguous. On its face, the provision states that the "tenant shall pay ... a sum equal to forty percent (40%) of the difference between taxes for such tax year and the taxes for the base tax year." In this regard, the Court notes that article 42(a) of the lease agreement defines "taxes" in broad terms "general or special, ordinary or extraordinary, unforeseen as well as foreseen, of any kind whatsoever." Contrary to the tenant's assertion, there is nothing in the lease agreement that would prohibit the landlord from collecting additional rent from the tenant even for increases based on increase in assessed value of the building that redound solely to the benefit of the landlord.

Tenant relies on Credit Exchange, Inc. v. 461 Eighth Avenue Associates, 69 N.Y.2d 994 [1987]). However, that case is clearly distinguishable. There, the Court wrote:

> It is not the aim of such a [tax escalation] clause, ordinarily, to impose upon the tenant responsibility for increases in real estate taxes resulting from improvements on the property redounding solely to the benefit of the landlord, such as the addition of two floors as was the case here.

(Credit Exchange, 69 N.Y.2d at 997).

It is important to note that two floors were added to the building in Credit Exchange. By contrast, the improvement alleged in the instant matter –

specifically, a gut renovation – is completely different.

Here, it is undisputed that the subject building was not enlarged vertically or horizontally, and this is a fundamental distinction (see also 223 West Corp. v. B & D Leistner Props., 21 A.D.3d 810 [1st Dept., 2005] (landlord added new floors to the building and converted building to a residential condominium)).

For the above reasons, it is

ORDERED that plaintiff's motion is denied in its entirety; and it is further

ORDERED that the stay on the Civil Court proceeding is lifted; and it is further

ORDERED that defendant's cross-motion for summary judgment is granted; and it is further

ADJUDGED and DECLARED that plaintiff is obligated to pay 40% of the increase of the real estate taxes of the 2009 base tax years pursuant to Article 42 of the lease.

Date: SEP 1 1 2014
New York, New York

Anil C. Singh

HON. ANIL C. SINGH
SUPREME COURT JUSTICE