CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 64/BU52

GEREL CORPORATION,
Petitioner-Landlord,

against

Index No. 078323/03
DECISION AFTER TRIAL

PRECIOUS FIBERS LTD.
Respondent-Tenant,

"JOHN DOE" , "JANE DOE,"
Respondent-Undertenants.

RAKOWER, J.

Trial of this non-payment summary proceeding was held before this Court on April 19, 2004. The Court has considered the testimony and evidence adduced at trial, and makes the following findings of fact and conclusions of law:

Petitioner Gerel Corporation commenced this action for rent and additional rent allegedly due and owing from April 2003. A predicate three day notice was served by petitioner on May 30, 2003. The Notice of Petition and Petition were served by petitioner on or about June 19, 2003.

The subject premises is in a building with retail stores on the ground floor, located on Madison Avenue between 82nd and 83rd Streets. Respondent operates a retail store that sells primarily cashmere items.

Petitioner established its *prima facie* case, showing that respondent was and continues to be in possession of the subject premises pursuant to a written lease (Pet. 3 in evidence). The lease demonstrates that respondent is required to pay a monthly base rent and additional rent from September 1995 through August 2005. In addition to the monthly rent, and according to paragraph 62 of the parties' lease, respondent is required to pay additional rent that includes a tax escalation charge based on the 1995-1996 base tax year. The parties agree that the rental history admitted into evidence accurately reflects amounts paid and due and owing by respondent for the subject

premises (Pet. 5 in evidence).

With respect to the tax escalation charge, evidence demonstrated that petitioner routinely provided to respondent a copy of the actual tax bill from the City of New York. Along with that bill, petitioner provided a breakdown showing its current tax amount, the difference between that amount and the base year tax amount, and the amount owed by respondent after applying the 15% escalation according to the provision in the parties' lease. Respondent paid petitioner those amounts billed without objection for a period of years.

Respondent's defense to this action rests upon its claim that the real estate tax escalation amount now due and owing is inherently unfair. Respondent proceeds on a theory of unjust enrichment, and urges this Court to look beyond the terms of the parties' written agreement to find the tax escalation calculation found in paragraph 62 to yield petitioner a windfall. Additionally, respondent urges the Court to find that the parties' written agreement was based on a mistake, namely that respondent did not understand that the base real estate taxes from which the escalation is calculated reflects taxes for the entire building and not just the retail part of the building.

Respondent's president, Peter Dictenberg, testified on behalf of respondent. He stated that he "carefully negotiated the terms of the lease" with the petitioner, and "negotiated in great detail." He acknowledged receipt of bills for additional rent that included the tax escalation amounts as indicated above, and that respondent paid these bills. He testified however that it was only when the bill for the 15% escalation calculation nearly doubled that he began to challenge this provision of the parties' lease. Mr. Dictenberg explained that the provision "stuck out like a sore thumb" at that point.

"Lease interpretation is subject to the same rules of construction as are applicable to other agreements. The parties' intention should be determined from the language employed, and where the language is clear and unambiguous, interpretation is a matter of law to be determined solely by the court. In such circumstances resort cannot be had to extrinsic evidence to contradict the express terms of the writing (citations omitted)." *1009 Second Ave. v. N.Y.C. Off-Trk. Betting*, 248 A.D.2d 106 (1st Dept. 1998) "If a lease and its modifications are straightforward and unambiguous, the interpretation of the entire contract is a question of law for the court to make without resort to extrinsic evidence (Ruttenberg v. Davidge Data Sys. Corp., 215 A.D.2d 191, 626 N.Y.S.2d 174). Moreover, a contract as a whole should not be

interpreted in a way that would leave one of its provisions without force or effect (Westview Assoc. v. Guaranty National Ins. Co., 264 A.D.2d 307, 693 N.Y.S.2d 138, revd on other grounds, 95 N.Y.2d 334, 717 N.Y.S.2d 75, 740 N.E.2d 220; 85th Street Restaurant Corp. v. Sanders, 194 A.D.2d 324, 600 N.Y.S.2d 1)." *350 East 30th Parking, Ltd. v. Board of Managers of 350 Condominium*, 280 A.D.2d 284 (A.D. 1st Dept. 2001)

Paragraph 62(B) of the parties' lease states that,

> "in each and every tax year during the term of this lease Tenant shall pay to Owner as Additional Rent a sum equal to fifteen (15%) percent of any increase in the Taxes above the Taxes payable in the Base Year. The aforesaid Additional Rent shall be due and payable by Tenant upon Owner's giving to Tenant a bill therefore all such bills shall be accompanied by a statement from the owner which demonstrates how any increase was calculated and copies of the tax bills issued by the governmental entity..."

Paragraph 62(A)(i) defines taxes to include "all real estate taxes...unforseen as well as foreseen...which are or may be assessed or imposed upon the Building in which the Demised Premises are located..."

Finally, the lease also contains a clause that specifically prohibits oral modification of its terms, as well as a recitation that petitioner makes no other representations with respect to the subject premises other than those contained in the lease.

Here there is no ambiguity as to respondent's obligation to pay a 15% tax escalation amount as additional rent. That the amounts of the escalation increased substantially in recent years is not a 'mistake' as respondent would have this Court find. Indeed, the lease speaks specifically to taxes that are "unforeseen", and no guarantees were made by petitioner that tax increases passed onto respondent would somehow be capped. The Court will not upset the terms of the parties' lease in this circumstance.

Based on the foregoing, it is hereby,

ORDERED that a judgment of possession is awarded to petitioner with

monetary judgment in the amount of $47,898.61 as all rent due and owing through the date of trial, and it is further

ORDERED, that petitioner's application for attorney's fees is granted. A hearing shall be held before this Court on April 23, 2004, at 9:30 a.m..

All other relief requested herein is denied. This constitutes the decision and order of the Court.

Dated: April 20, 2002

Eileen A. Rakower
J.C.C.