SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 39EFM

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AEROTEK, INC.,TEKSYSTEMS, INC.

Plaintiffs,

- v -

MEPT 757 THIRD AVENUE, LLC,757 3RD AVENUE ASSOCIATES, LLC,

Defendants.

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INDEX NO. 654294/2016

MOTION DATE 02/26/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 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, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 125, 126, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150

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

In this action for breach of lease, defendant 757 3rd Avenue Associates, LLC ("757") moves for summary judgment dismissing the complaint. Plaintiffs, Aerotek, Inc ("Aerotek") and TEKSystems, Inc. ("TEKSystems") (collectively, "Plaintiffs") oppose the motion and cross-move for summary judgment on their first and second causes of action and to dismiss 757's counterclaims.

Background

In May 2013, 757, as landlord, executed a lease with TEKSystems, as tenant, for a portion of the 12th floor ("TEKSystems Lease") of a building located at 757 Third Avenue, New York, New York (the "Building"). At that time 757 also entered into a lease with Aerotek, as tenant, for a portion of the 8th floor of the Building (the "Aerotek Lease," and collectively, the "Leases").

Pursuant to Section 6.5(A) of the Leases, 757 was required to reimburse Plaintiffs for all improvements made by the Plaintiffs to the premises through a Tenant Improvement Allowance ("TIA"). To receive a TIA, Plaintiffs were required to request reimbursement and submit documentation to 757 within 18 months of the commencement of the Leases – *i.e.*, by January 1, 2015[1] – and 757 was required to pay Plaintiffs the TIA within 30 days after their submission of the required documentation. Section 6.5(B).

On August 13, 2014, Peter Eyring ("Eyring"), a former project manager for Allegis Group, Inc. (Plaintiffs' indirect parent corporation), submitted a combined TIA reimbursement request for both Leases, totaling $1,971,356.23 (the "First Reimbursement Request"). On the same day, Joseph McFadden ("McFadden"), the portfolio manager for RFR Realty LLC and 757's managing agent, informed Eyring that: (i) Plaintiffs' TIA reimbursement request must be separated because the tenant improvements related to two separate leases; (ii) the request was required to be on company letterhead; (iii) the amount requested appeared to exceed the combined amount for the Leases' TIA; and (iv) soft costs could not exceed 20% of the requested payment.

For several months, Plaintiffs did not send additional documentation or object to 757's demand that the First Reimbursement Request be separated for the TEKSystems Lease and the Aerotek Lease. On December 3, 2014, McFadden emailed Eyring and

[1] By separate agreement, the parties agreed that the Leases' term started on July 1, 2013.

informed him that "if [Plaintiffs] anticipate submitting a request for [TIA] then [757] would need to receive by this Friday in order to submit for payment in 2014."

On December 4 and 5, 2014, Eyring purported to submit separate Aerotek and TEKSystems reimbursement requests (the "Second Reimbursement Requests"). On December 8, 2014, McFadden, informed Eyring that the Second Reimbursement Requests were still not in compliance with Section 6.5(B). Plaintiffs did not make any further TIA reimbursement requests prior to January 1, 2015.

On February 6, 2015, 757 entered into an agreement to sell the Building to MEPT 757 Third Avenue ("MEPT") and assigned to MEPT all of its rights, duties and obligations under the Leases, except the TIA reimbursements. On February 11, 2015, 757 and MEPT amended their contract of sale to state that Plaintiffs "have either (x) failed to timely exercise their right or (y) are otherwise no longer entitled to receive the tenant improvement allowances described on Schedule A attached hereto (the 'Expired TI Allowances') in accordance with the terms of their leases."

On April 22, 2015, 757 informed the Plaintiffs that the Building was sold to MEPT and that 757's "interest in [the] lease[s] has been assigned to [MEPT]." The next day, Eyring submitted a third reimbursement request to 757 ("Third Reimbursement Request") and emailed McFadden stating "I am preparing to try again with the reimbursements. I have separated the invoices by floor and prepared separate requests which will be printed on company letterhead. The final Lien Waivers are also attached. Do you need anything else before I send it to get the 90% of reimbursements?"

On April 24, 2015, McFadden informed Eyring that 757 no longer owned the Building and forwarded him the new manager's information. Thereafter, Plaintiffs unsuccessfully attempted to recover the TIA reimbursements from MEPT.

Plaintiffs then commenced this action against both 757 and MEPT for breach of the Leases. As to 757, Plaintiffs alleged that it failed timely to pay the TIA reimbursements despite Plaintiffs' fulfillment of their obligations pursuant to the Leases. 757 and MEPT moved to dismiss the complaint based on the Tenant Estoppel Certificates. By order dated October 20, 2017, I dismissed the complaint as to MEPT, but denied dismissal against 757, finding that Plaintiffs had not shown as a matter of law that 757 accepted their Tenant Estoppel Certificates without knowledge of the contrary state of facts, *i.e.,* that Plaintiffs still were seeking TIA reimbursements for the Leases.

757 answered the complaint, denied all material allegations, and asserted counterclaims: (i) seeking a declaration that the Plaintiffs are barred from seeking TIA reimbursement because they signed the Tenant Estoppel Certificates; (ii) for breach of the Leases; and (iii) for promissory estoppel based on the Tenant Estoppel Certificates.

757 now moves for summary judgment dismissing the complaint. In support of its motion, 757 argues that Plaintiffs failed, as a matter of law, to provide 757 with TIA reimbursement requests in compliance with the terms of the Leases. Specifically, 757 argues that the First and Second Reimbursement Requests were properly rejected, and thereafter, Plaintiffs failed timely to submit a proper TIA request by January 1, 2015. 757 also argues that, because the Third Reimbursement Request was untimely and submitted after 757 sold the Building, it was not obligated to issue a TIA for this request.

Plaintiffs argue that Section 6.5(b) does not contain an express provision requiring separate TIA reimbursement requests to be submitted for each premises as a condition precedent to 757's obligations to pay TIA reimbursement requests. Plaintiffs claim that, by July 19, 2013, 757 was put on notice that Plaintiffs were treating tenant improvements in connection with the Leases as a single project. Plaintiffs argue that 757's silence as to any expectation it held regarding Plaintiffs' submission of TIA reimbursement requests would frustrate the purpose of any implied condition precedent, and 757 cannot rely on the non-occurrence of the implied condition, which it frustrated, to excuse its own breach.

Next, Plaintiffs argue that any non-conformance with the documentation requirements for TIA reimbursement is merely technical in nature, not material. In reply, 757 argues that separate documentation was not a technical requirement; rather, it was necessary to submit to 757's lenders for the TIA reimbursement. Finally, Plaintiffs argue that requiring Plaintiffs to submit separate TIA reimbursement requests for the Leases would result in an unjust, multi-million-dollar windfall to 757 and forfeiture by Plaintiffs.

Discussion

Here, there is no dispute that, while the Leases may have been negotiated jointly, two separate leases were executed by the parties for separate areas of the Building: the tenant and amount of square footage differ for each lease. The Leases do not contain any cross-default provisions, nor are there any provisions that indicate that the two leased premises were to be treated as one leasehold.

It is also undisputed that Plaintiffs did not submit a separate TIA reimbursement request for the TEKSystems Lease and the Aerotek Lease prior to the January 1, 2015

cutoff date, and that, immediately after Plaintiffs' submitted the First Reimbursement Request, 757 clearly stated that the TIA reimbursement requests must be submitted separately for each lease. Plaintiffs nevertheless argue that I should ignore that there are two separate leases and find that their combined First Reimbursement Request and Second Reimbursement Requests were sufficient under the Leases to require 757 to pay these TIA reimbursement request.

Section 6.5(b) of the Leases provides, in pertinent part, that:

> The Landlord [757] shall pay Tenant [Plaintiffs respectively] the TIA within 30 days after:
>
> (i) Landlord [757] receives from Tenant [Plaintiffs] proper receipts and original unconditional lien waivers for that portion of Initial Alterations then the subject of the reimbursement, evidencing that Tenant has incurred authorized hard cost improvements to the Premises for the amount claimed;
>
> (ii) Landlord [757] receives from Tenant [Plaintiffs] an executed certificate from the respective Plaintiff's independent licensed architect stating that, in his or her opinion, the portion of the Initial Alterations completed and for which the disbursement is requested was performed in accordance with the respective Plaintiff's plans and specifications; and
>
> (iii) (iii) Landlord [757] receives from Tenant [Plaintiffs] a written signed statement or request from an authorized representative of the respective Plaintiff stating the amount then being requested in such installment, along with a statement by the respective Plaintiff that the amount claimed is for payment to or reimbursement to the listed parties.

The Leases each separately required Aerotek and TekSystems to provide certain documentation pertaining to the respective lease's alteration work for that premises. I

note that each lease had a different TIA maximum allowance, and nothing in either of the Leases permitted Plaintiffs to submit a combined TIA reimbursement request.

The TEKSystems Lease and the Aerotek Lease are separate, clear, unambiguous contracts. Section 6.5(b) of each lease makes clear that the tenant of the specified premises was required to submit to 757 certain documents relating to alterations to the premises governed by that lease. Where, as here, "a written agreement . . . is complete, clear and unambiguous on its face [, it] must be enforced according the plain meaning of its terms." *Beinstein v Navani*, 131 AD3d 401, 405 (1st Dept 2015) (citations and quotation marks omitted). Plaintiffs' failure to comply with the plain terms of the Leases is fatal to their breach of contract causes of action.

Plaintiffs' argument – that because the Leases do not contain a separate TIA reimbursement request requirement, requiring Plaintiffs to submit separate TIA requests for each premises would amount to an implied condition precedent, the imposition of which must be excused – is unpersuasive. Indeed, the TEKSystems Lease and the Aerotek Lease each contained express provisions under which the Plaintiffs were required to submit TIA reimbursement request documentation *for each lease*.

Also, Plaintiffs' contention, that their failure to provide separate TIA reimbursement requests for each leased premises was a *de minimus* default, is without any support in the record. In fact, 757 consistently demanded that Plaintiffs treat TIA reimbursement requests separately since August 2014, when Plaintiffs submitted the First Reimbursement Request.

Similarly, Plaintiffs' argument, that 757's failure to object in 2013 to Plaintiffs combining their architect plans and various applications waived the plain terms of the Leases, is unpersuasive. Plaintiffs may not rely upon 757's alleged failure to object to their own actions of combining plans or applications to vary or alter the Leases' unambiguous terms, which require each tenant thereunder to submit a TIA reimbursement request for each premise.[2]

Finally, Plaintiffs' point out that strictly enforcing the terms of the Leases will result in an unfair loss of their bargained-for TIA reimbursements. However, from August 2014 forward, 757 made clear that the Leases were separate, and therefore the TIA reimbursement requests were required to be separate. Nevertheless, TEKSystems and Aerotek failed timely to submit separate TIA reimbursement requests for each lease by the January 1, 2015 deadline. Under these circumstances Plaintiffs were not unfairly denied the opportunity to receive their TIA reimbursements.

For the foregoing reasons, 757 is entitled to summary judgment dismissing the remainder of Plaintiffs' complaint. For these same reasons, I deny Plaintiffs' cross-motion for summary judgment granting the complaint's causes of action and dismissing 757's counterclaims. Finally, upon a search of the record submitted on these cross-motions for summary judgment, *see* CPLR 3212(b), I dismiss 757's first and third

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[2] To support their argument that 757 was "on notice" of their intent to submit a combined TIA reimbursement request, Plaintiffs cite a July 19, 2013 email. This email related only to Plaintiffs' treatment of the alteration plans for the 8th and 12th Floor as a single project to reduce filing fees and paperwork, and it was silent as to Plaintiffs submitting a combined TIA reimbursement request.

counterclaims as moot, and grant 757 summary judgment on its second counterclaim for attorneys' fees as the prevailing party in this litigation and in accordance with Section 25.2 of the Leases.

In accordance with the foregoing, it is hereby

ORDERED that the motion of defendant 757 3rd Avenue Associates, LLC to dismiss the remainder of the complaint as against it is granted, and the complaint is now dismissed in its entirety; and it is further

ORDERED that the cross-motion of plaintiffs Aerotek, Inc. and TEKSystems, Inc. for summary judgment on the complaint and dismissal of defendant 757 3rd Avenue Associates, LLC's counterclaims is denied; and it is further

ORDERED that, upon a search of the record, defendant 757 3rd Avenue Associates, LLC is granted summary judgment on its second counterclaim for attorneys' fees as the prevailing party in this litigation, and the first and third counterclaim are dismissed as moot; and it is further

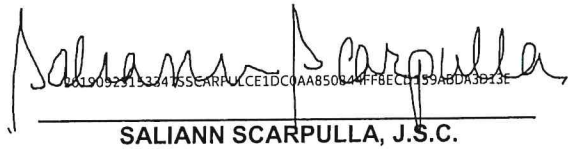
ORDERED that the Clerk of the Court is directed to enter judgment dismissing the complaint and severing the third counterclaim, which shall be set down for a hearing as to reasonable attorneys' fees: and it is further

ORDERED that that the issue of reasonable attorneys' fees is referred to a Special Referee to hear and report. The Special Referee is to report on this issue as soon as possible, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR § 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the attorneys' fees and costs; and it is further

ORDERED that counsel for defendant 757 3rd Avenue Associates, LLC shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that such service upon the Special Referee Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the " E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.



9/25/2019
DATE

SALIANN SCARPULLA, J.S.C.

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