

A&B Deli Inc. v 251 Sixth Ave., LLC
2020 NY Slip Op 30650(U)
February 28, 2020
Supreme Court, New York County
Docket Number: 451990/2018
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 53EFM

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A&B DELI INC.

Plaintiff,

- v -

251 SIXTH AVE., LLC,

Defendant.

INDEX NO. 451990/2018

MOTION DATE 02/27/2020

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, and for the reasons set forth below, A&B Deli Inc.'s (**A&B Deli**) motion for summary judgment pursuant to CPLR § 3212 against 251 Sixth Ave., LLC (**251 Sixth Ave**) is denied and the complaint is dismissed in its entirety.

A&B Deli was a tenant of the storefront premises of the building owned by 251 Sixth Ave located at 251 Sixth Avenue, New York, New York, pursuant to a certain Lease Agreement (the **Lease**), dated September 8, 2011, by and between A&B Deli and 251 Sixth Ave. A&B Deli alleges that from 2011 through 2016, 251 Sixth Ave overbilled A&B Deli for real estate tax payments due under the Lease by billing A&B Deli for 50% of the entire real estate tax bill for the property instead of 50% of the increase over the taxes for the calendar year commencing July 1, 2011 and ending June 30, 2012 (the **Base Tax Year**).

A&B Deli commenced this action against 251 Sixth Ave for breach of contract, unjust enrichment, and money had and received, seeking to recover \$52,892.72 in overpayments. 251 Sixth Ave moved to dismiss the complaint pursuant to CPLR §§ 3211 (a) (1), (3), and (7). The court dismissed the first cause of action for breach of contract but otherwise denied the motion. A&B Deli now moves for summary judgment pursuant to CPLR § 3212 as to its remaining claims.

Summary judgment will be granted only when the movant presents evidentiary proof in admissible form that there are no triable issues of material fact and that there is either no defense to the cause of action or that the cause of action or defense has no merit (CPLR § 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The proponent of a summary judgment motion carries the initial burden to make a *prima facie* showing of entitlement to judgment as a matter of law (*id.*). Failure to make such a showing requires denial of the motion (*id.*, citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing is made, the burden shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a triable issue of fact (*Alvarez*, 68 NY2d at 324).

In support of its motion, A&B Deli submits a copy of the Lease (NYSCEF Doc. No. 36), 251 Sixth Ave's tax records (NYSCEF Doc. No. 37), 251 Sixth Ave's tax invoices to A&B Deli (NYSCEF Doc. No. 48), and A&B Deli's billing statements with checks showing proof of the overpayments (NYSCEF Doc. No. 40). A&B Deli argues that it has established its entitlement to judgment as a matter of law on its unjust enrichment and money had and received claims. In its opposition papers, 251 Sixth Ave does not dispute that it overbilled A&B Deli for real estate

taxes from 2011 through 2016 and that A&B Deli made such overpayments. But 251 Sixth Ave argues that A&B Deli's motion for summary judgment should be denied because its claims are barred by the voluntary payment doctrine.

The common-law voluntary payment doctrine "bars recovery of payments made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law" (*Dillon v U-A Columbia Cablevision of Westchester, Inc.*, 100 NY2d 525, 526 [2003]). Where a party pays overcharges without protest or inquiry, was not acting under a mistake of fact, and the overpayment was the result of the party's lack of diligence, the payments are deemed voluntary and cannot be recovered (*Eighty Eight Bleecker Co., LLC v 88 Bleecker Street Owners, Inc.*, 34 AD3d 244, 246 [1st Dept 2006]).

The First Department's decision in *Eighty Eight Bleecker* is instructive. In *Eighty Eight Bleecker*, the plaintiff tenant sued the defendant landlord alleging, among other things, that the defendant had overcharged the plaintiff for real estate tax escalation charges (i.e., the very same claim made in this case) as additional rent over the course of the lease term (*id.*, at 245-246).

The First Department held that the voluntary payment doctrine precluded the plaintiff from recovering for its overpayments because the plaintiff failed to make any inquiry during the term of the lease and a review of the tax bills, which the plaintiff was entitled to receive under the lease, would have revealed the proper amount of the tax escalation payments (*id.*, at 247).

In this case, like in *Eighty Eight Bleecker*, A&B Deli made real estate tax escalation payments to 251 Sixth Ave in excess of the amounts due under the lease over the course of several years

without making any inquiry. In addition, as in *Eighty Eight Bleecker*, A&B Deli was entitled to receive copies of the tax bills for each year of the lease term, but failed to request them. And, just like in *Eighty Eight Bleecker*, a simple review of the tax bill in this case would have allowed A&B Deli to ascertain the proper amount of the real estate tax escalation payments that it was obligated to pay as additional rent. Therefore, the voluntary payment doctrine bars A&B Deli from recovering for its overpayments (*see also Citicorp N. Am., Inc. v Fifth Ave. 58/59 Acquisition Co., LLC* (70 AD3d 408 [1st Dept 2010] [holding that voluntary payment doctrine barred recovery where tenant made overpayments of rent without protest or inquiry for approximately nine years and demonstrated a lack of diligence])).

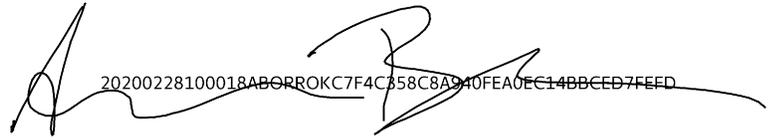
For the foregoing reasons, and pursuant to the court's authority pursuant to CPLR § 3212 (b), A&B Deli's motion for summary judgment is denied and the court grants summary judgment dismissal of the complaint in favor of 251 Sixth Ave.

Accordingly, it is

ORDERED that A&B Deli Inc.'s motion for summary judgment is denied; and it is further

ORDERED that summary judgment is granted in favor of 251 Sixth Avenue and the complaint is dismissed in its entirety as against such defendant; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of the defendant dismissing all claims against it in this action.


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2/28/2020

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE