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N.Y.Sup., October 4, 2022

**202 A.D.3d 641, 164 N.Y.S.3d
104, 2022 N.Y. Slip Op. 01261**

****1** Schulte Roth & Zabel LLP, Respondent,

v

Metropolitan 919 3rd Avenue LLC, in its
Individual Capacity and as Successor in Interest
to 919 Third Avenue Associates L.P., Appellant.

Supreme Court, Appellate Division,
First Department, New York
15386, 2021-02115, 655632/20
February 24, 2022

CITE TITLE AS: Schulte Roth & Zabel
LLP v Metropolitan 919 3rd Ave. LLC

HEADNOTE

**Landlord and Tenant
Lease**

Ambiguous Provision—Rent Abatement

Fried, Frank, Harris, Shriver & Jacobson LLP, New York
(Janice Mac Avoy of counsel), for appellant.
Foley & Lardner LLP, New York (Peter N. Wang of counsel),
for respondent.

Order, Supreme Court, New York County (Andrea Masley,
J.), entered on or about May 20, 2021, which denied
defendant's motion to dismiss the complaint, unanimously
affirmed, without costs.

Plaintiff tenant seeks a rent abatement for a period of time
during the Covid-19 pandemic in which the great majority
of its employees worked remotely and not at the leased
premises. Plaintiff relies on section 5.4 of the parties' lease,
which provides for a rent abatement in the event that certain
conditions are met.

The motion court properly denied defendant's motion to
dismiss the complaint on the ground that section 5.4 of
the parties' lease agreement is ambiguous. A contract is
ambiguous if “on its face” it is “reasonably susceptible of
more than one interpretation” (*Chimart Assoc. v Paul*, 66
NY2d 570, 573 [1986]; accord *Chen v Yan*, 109 AD3d 727,
729 [1st Dept 2013]; see also *New York City Off-Track Betting
Corp. v Safe Factory Outlet, Inc.*, 28 AD3d 175, 177 [1st
Dept 2006]). If a contract is ambiguous, a court may look to
extrinsic evidence to resolve the ambiguity ***642** (see *Chen*,
109 AD3d at 729; *Hambrecht & Quist Guar. Fin., LLC v El
Coronado Holdings, LLC*, 27 AD3d 204 [1st Dept 2006]).

Section 5.4 of the parties' lease is ambiguous because on
its face, it is reasonably susceptible of more than one
interpretation. Section 5.4 provides that plaintiff is entitled to
a rent abatement if “Tenant is unable to use the Premises, . . .
due to Landlord's breach of an obligation under this Lease
to provide services, perform repairs, or comply with Legal
Requirements . . . other than as a result of Unavoidable
Delays or Tenant Delays (or, if Tenant's inability to use the
Premises . . . results, in whole or in part, from Unavoidable
Delays and such condition continues for a period in excess of
fifteen (15) consecutive Business Days).”

On the one hand, section 5.4 can be reasonably interpreted
to mean that plaintiff will be entitled to a rent abatement
only if plaintiff's inability to use the premises is a result of
defendant's breach of its obligations under the lease. Pursuant
to this interpretation, the condition within the parentheses
is directly connected to the condition that comes before the
parenthesis and means that the plaintiff would be entitled to
a rent abatement if the plaintiff is unable to use the leased
premises because the landlord breached an obligation under
the lease, and the breach is caused, in whole or in part, by an
Unavoidable Delay, as defined in the lease, if the Unavoidable
Delay continues for more than 15 business days.

On the other hand, section 5.4 can also be reasonably
interpreted to mean that plaintiff will be entitled to a rent
abatement if one of two conditions occur. Specifically, the
plaintiff would be entitled to a rent abatement if it is unable
to use the leased premises, which is caused by either (i)
landlord's breach of an obligation under the lease, or (ii)
Unavoidable Delays that continue for more than 15 business
days. ****2** Pursuant to this interpretation, the use of the
disjunctive “or” at the beginning of the parenthetical clause
distinguishes the second condition within the parenthetical
as a separate and alternative condition to the first condition,

which comes before the parenthesis. Moreover, as a separate condition, it does not require that the landlord breach an obligation under the lease in order for the plaintiff to be entitled to a rent abatement.

proceed to discovery as extrinsic evidence will be necessary to resolve the ambiguity. Concur—Webber, J.P., Kern, Moulton, González, Mendez, JJ.

Because section 5.4 of the lease is ambiguous, defendant's motion to dismiss was properly denied. The parties shall

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