

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPARTMENT

C.A. No. 23-2266

<p>NUTTER, MCCLENNEN & FISH, LLP Plaintiff, v. WEST OFFICE OPERATING LIMITED PARTNERSHIP, Defendant.</p>

SUFFOLK SUPERIOR COURT
CIVIL CLERK'S OFFICE
2023 OCT -6 A 9:02
JOHN F. POWERS III
ACTING CLERK/MAGISTRATE

COMPLAINT

PARTIES

1. Plaintiff Nutter, McClennen & Fish, LLP (“Nutter”) is a Boston-based law firm and limited liability partnership with a principal place of business at Seaport West, 155 Seaport Boulevard, Boston, Massachusetts, 02210.

2. Defendant West Office Operating Limited Partnership (“Landlord”) is a limited partnership organized and existing under the laws of the Commonwealth of Massachusetts, with a principal place of business at c/o Pembroke Real Estate, Inc., 255 State Street, Boston, Massachusetts, 02109.

FACTS

3. On or about December 22, 2000, Nutter, as tenant, executed a written Lease (the “Lease”) with Landlord for approximately 111,000 square feet of Rentable Area, as defined therein, located on the 4th, 5th, 6th, and 7th floors of the building currently known as Seaport West (f/k/a World Trade Center West), located at 155 Seaport Boulevard (f/k/a 151 Northern Avenue) in Boston, Massachusetts. A copy of the Lease is attached as Exhibit A.

4. The Lease provides for an original term of 10 years, with two additional 5-year options to extend the term of the Lease, as specified in Article 2.6.

5. Article 4 of the Lease provides that in addition to the Fixed Rent stated in the Lease, Nutter will also pay certain "Additional Rent."

6. Section 4.2.1 of the Lease provides that the Additional Rent includes a "Tax Excess," which is Nutter's proportional share (as defined in Article 1.1 as "Tenant's Tax Percentage") of Landlord's "6A Contract" payment obligations (which 6A Contract payments were Landlord's contractual obligations to the City of Boston in lieu of real estate taxes) to the extent those 6A Contract Obligations exceed "Base Taxes."

7. Base Taxes are defined in Article 1.1 of the Lease to be "[a]n amount equal to \$3.47 times the total Rentable Area of the Complex."

8. Section 4.2.3 of the Lease provides that Additional Rent to be paid by Nutter will also include an "Operating Costs Excess" which is defined as Nutter's proportional share (with such proportion defined in Article 1.1 as "Tenant's Office Percentage") of the annual Operating Costs incurred by Landlord in excess of the "Base Operating Costs."

9. Base Operating Costs are defined in Article 1.1 to be "[a]n amount equal to the greater of (a) \$8.20 times the Rentable Area of the Office Area, or (b) the Operating Costs incurred for the first Lease Year."

10. Section 2.6 of the Lease granted Nutter the right to extend the term of the Lease, creating "Extension Terms," "for two additional periods of 5 years each." For the two 5-year options to extend the term of the Lease, Article 2.6(c)(2) of the Lease states that the Base Operating Costs and Base Taxes are to be calculated as follows:

- (2) Notwithstanding anything to the contrary herein contained, the parties hereby agree that in connection with any determination of Fair Rental Value hereunder, Landlord shall:

- (A) Change Base Operating Costs from the amount stated in Section 1.1. to an amount equal to the Operating Costs for the immediately preceding Lease Year; and
- (B) Change the Base Taxes from the amount stated in Section 1.1. to an amount equal to the 6A Payment or Taxes for the immediately preceding fiscal/tax year.

Such new base amounts shall then apply for the Extension Term (or to any Expansion Space) and shall be taken into account in determining the Fair Rental Value.

(Emphasis added).

11. On or about July 22, 2002, Nutter and Landlord executed a First Amendment to Lease (the "First Amendment") relating to Nutter's exercise of an initial expansion option specified in the Lease for its leasing of an additional 19,607 square feet of rentable area on the 4th Floor of the Building, increasing the total square footage of the leased premises to 130,607 square feet. A copy of the First Amendment is attached as Exhibit B.

12. The First Amendment modified the Tenant's Tax Percentage and Tenant's Office Percentage, but did not modify, redefine, alter, or mention the Base Operating Costs and Base Taxes set forth in the Lease. Instead, the parties reaffirmed the definitions of Base Operating Costs and Base Taxes included in the Lease.

Except as expressly and specifically set forth herein, the Lease is hereby ratified and confirmed, and all of the terms, covenants, agreements and provisions of the Lease shall remain unaltered and unmodified and in full force and effect throughout the balance of the term of the Lease, as extended hereby. Except as expressly set forth herein, all of the covenants, representations and warranties made by the Tenant contained in the Lease are hereby remade, reaffirmed and ratified as of the date hereof.

First Amendment, § 16.

13. On or about November 4, 2010, Nutter and Landlord executed a Second Amendment to Lease (the "Second Amendment"), which, inter alia, extended the term of the

Lease from July 31, 2012 to June 30, 2022. The Second Amendment defined the period from January 1, 2010 to June 30, 2022 as the "First Extension Term." A copy of the Second Amendment is attached as Exhibit C.

14. Article 4 of the Second Amendment provided that during the First Extension Term the Base Tax and the Base Operating Costs were to be calculated as follows:

Tax Excess and Operating Costs Excess for First Extension Term.

(a) Real Estate Taxes. For purposes of determining the Tax Excess payable by the Tenant during the First Extension Term, the Base Taxes shall mean \$4.27 times the Rentable Area of the Complex; provided, however, from and after the expiration of the 6A Contract the Base Taxes shall mean \$8.60 times the Rentable Area of the Complex.

(b) Operating Costs. For purposes of determining the Operating Costs Excess payable by the Tenant during the First Extension Term, the Base Operating Costs shall mean the actual amount of Operating Costs incurred with respect to calendar year 2010, which shall be extrapolated in accordance with Section 4.2.3(e) of the Lease, if applicable.

15. The First Extension Term ran from January 1, 2010 to June 30, 2022.

16. Article 14 of the Second Amendment separately modified Section 2.6(a) of the Lease, governing Nutter's Lease extension options, and provided that following the First Extension Term, Nutter shall have two consecutive five-year options to extend the term of the Lease, referred to respectively as the "Second Extension Term" and "Third Extension Term," each at a new Fixed Rent determined as provided in the Lease.

17. The Second Amendment did not modify Article 2.6(c) of the Lease, which set out the means of calculating the Base Operating Costs and Base Taxes for these Article 2.6(a) extension terms.

18. The parties again agreed that:

Except as expressly and specifically set forth herein, the Lease is hereby ratified and confirmed, and all of the terms, covenants, agreements and provisions of the Lease shall remain unaltered and unmodified and in full force and effect

throughout the term of the Lease, as extended hereby. Except as expressly set forth herein, all of the covenants, representations and warranties made by Landlord and Tenant contained in the Lease are hereby remade, reaffirmed and ratified as of the date hereof.

Second Amendment, § 22(b).

19. As a result, the Lease, as amended, expressly provides that the “new base amounts shall then apply for the Extension Term” (Lease, § 2(c)) (including the Second Extension Term from July 1, 2022 to June 30, 2027) so that: (a) the Base Operating Costs for the Second Extension Term will be an amount equal to the Operating Costs for the immediately preceding Lease Year (*i.e.*, calendar year 2021); and (b) the Base Taxes for the Second Extension Term will be an amount equal to the Taxes for the immediately preceding fiscal/tax year (*i.e.* fiscal/tax year 2020-2021).

20. On or about December 28, 2020, Nutter timely provided valid notice to Landlord of Nutter’s exercise of its option to extend the term of the Lease for the entire premises for the Second Extension Term (“Extension Notice”), beginning on July 1, 2022 and ending on June 30, 2027. A copy of the Extension Notice is attached as Exhibit D.

21. By letter dated January 19, 2021, Landlord responded in writing to the Extension Notice, acknowledging Nutter’s exercise of its option to extend the term of the Lease for the Second Extension Term and purporting to identify the Annual Fixed Rent Rate, the Base Operating Costs, and the Base Taxes for the Second Extension Term (the “Landlord Response Letter”). A copy of the Landlord Response Letter is attached as Exhibit E.

22. As to the Base Operating Costs and Base Taxes, Landlord stated in its Response Letter:

[T]he Base Operating Costs shall be the actual amount of Operating Costs incurred with respect to calendar year 2010, which shall be extrapolated in accordance with Section

4.2.3(e) of the Lease, if applicable, and...the Base Taxes shall mean \$8.60 times the Rentable Area of the Complex.

23. The Landlord calculated the amounts for Base Operating Costs and the Base Taxes pursuant to Article 4 of the Second Amendment, a formula that applied only apply to the First Extension Term, which ran from January 1, 2010 to June 30, 2022.

24. Article 2.6(c)(2) of the Lease, however, which was not modified either by the First Amendment or the Second Amendment, expressly states that the Base Operating Costs for the Second Extension Term shall be an “amount equal to the Operating Costs for the immediately preceding Lease Year” and the Base Taxes shall be an “amount equal to the 6A Payment or Taxes for the immediately preceding fiscal/tax year.”

25. By ignoring the plain language of the Lease, as amended, and seeking to force Nutter to pay taxes and operating costs measured against taxes and costs incurred more than ten years ago, rather than against the immediately prior year’s taxes and costs, Landlord improperly attempted substantially to increase Nutter’s financial payments to Landlord during the Second Extension Term and thereby to receive a financial benefit for which it never bargained.

26. On or about February 12, 2021, Nutter provided written objection to Landlord’s intention to apply the 2010 Base Operating Costs and the Base Taxes, noting Landlord’s obligations under Article 2.6(c) to apply amounts from the “immediately preceding” year. A copy of Nutter’s objection is attached as Exhibit F.

27. Notwithstanding Nutter’s written objection and its subsequent discussions with Landlord seeking to resolve this dispute, Landlord refuses to apply the amounts for Base Operating Costs and Base Taxes specified in Article 2.6(c)(2) of the Lease and continues to

claim that the Base Operating Costs and the Base Taxes are as set forth in the Landlord Response Letter, in violation of the express language of the Lease as Amended.

28. On or about August 18, 2022, Landlord served on Nutter a letter purporting to provide formal notice of default under Article 8.1 of the Lease of Nutter's alleged failure to pay \$217,677.94 relating to the Tax Excess and Operating Costs Excess. A copy of Landlord's August 18, 2022 letter is attached as Exhibit G. (This letter also stated that additional amounts were due for other items, but Landlord has since confirmed that such other amounts have been paid).

29. The alleged outstanding balance is due to Landlord's claims that the Base Operating Costs and Base Taxes for the Second Extension Term are as stated in the Landlord Response Letter.

30. On August 25, 2022, Nutter, under written protest and subject to an express reservation of rights, notified Landlord that it would pay these disputed amounts. A copy of Nutter's August 25, 2022 Letter is attached as Exhibit H.

31. Nutter has continued pay these disputed amounts under written protest and subject to an express reservation of rights, which amounts currently total \$1,546,111.41.

Count I – Declaratory Judgment

32. Nutter realleges and incorporates herein the allegations of paragraphs 1 through 31.

33. Under the Lease, Nutter is obligated to pay to Landlord the Tax Excess and Operating Costs Excess, as those terms are defined in the Lease, as amended, which are determined based on the Base Tax and Base Operating Costs.

34. An actual and substantial controversy exists between the parties concerning the amounts owed by Nutter under the Lease for the Tax Excess and Operating Costs Excess during the Second Extension Term. Specifically, the parties dispute whether whether Article 2.6(c)(2) of the Lease requires Landlord to use the amounts from the “immediately preceding” Lease and fiscal/tax year to calculate the Tax Excess and Operating Costs Excess.

35. These real and immediate controversies over present rights have caused, and will continue to cause, substantial, actual, or threatened loss to Nutter.

36. Nutter therefore seeks a declaration that in determining the Tax Excess and Operating Costs Excess for the Second Extension Term, Landlord is required under Article 2.6(c)(2) of the Lease to utilize the Operating Costs for the immediately preceding Lease year—2021—and the Taxes for the immediately preceding fiscal/tax year—the 2020-21 fiscal tax year.

Count II – Breach of Lease Agreement

37. Nutter realleges and incorporates herein the allegations of paragraphs 1 through 36.

38. The Lease is a valid and binding commercial lease contract between Landlord and Nutter.

39. Pursuant to the Lease, Nutter is obligated to pay to Landlord the Tax Excess and Operating Costs Excess, as those terms are defined in the Lease.

40. As stated in Article 2.6(c)(2) of the Lease, the Landlord is required to determine the Tax Excess and Operating Costs Excess for the Second Extension Term based on the Operating Costs for the immediately preceding Lease year—2021—and the Taxes for the immediately preceding fiscal/tax year—the 2020-21 fiscal tax year.

41. Under the threat of terminating Nutter's Lease, Landlord has breached, and continues to breach, the Lease by failing to calculate the Tax Excess and Operating Costs Excess for the Second Extension Term in accordance with Article 2.6(c)(2) and demanding, under the threat of termination of the Lease, that Nutter pay the additional amounts stated in the Landlord Response Letter.

42. The Lease provides in part that "Landlord shall pay on demand Tenant's expenses, including reasonable attorneys' fees, incurred in successfully enforcing any obligation of Landlord under this Lease."

43. As a result of Landlord's breach of the Lease, Nutter has suffered, and will continue to suffer, substantial damages.

Prayer for Relief

WHEREFORE, Nutter prays that this Court:

- A. Issue a declaratory judgment under G.L. c. 231A, § 1 declaring that:
 - (i) In determining the Tax Excess and Operating Costs Excess for the Second Extension Term, Landlord is required under Article 2.6(c)(2) of the Lease to utilize the Operating Costs for the immediately preceding Lease year—the 2021 Lease year—and the Taxes for the immediately preceding fiscal/tax year—the 2020-21 fiscal tax year.
- B. Award damages against Landlord in favor of Nutter on Count II in an amount to be determined at trial, and award Nutter its reasonable attorneys' fees; and

C. Provide such other and further relief as the Court deems appropriate in the circumstances.

NUTTER MCCLENNEN & FISH LLP
By its attorneys,



Joseph F. Shea (BBO#555473)
FisherBroyles, LLP
75 State St., Suite 100, PMB 4418
Boston, MA 02109
617-418-1704
Joseph.Shea@FisherBroyles.com

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