SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MELVIN L. SCHOEITZER Justice PART 45

CHELSEA PIERS LP

- v -

HUDSON RIVER PARK TRUST

INDEX NO. 653143/2011

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion by defendant to dismiss plaintiff's complaint is DENIED per the attached Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: April 17, 2012

Melvin L. Schoeitzer J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

CHELSEA PIERS L.P.,	:	
	:	
Plaintiff,	:	Index No. 653143/11
	:	
-against-	:	DECISION AND ORDER
	:	
HUDSON RIVER PARK TRUST,	:	Sequence No. 001
	:	
Defendant.	:	

MELVIN L. SCHWEITZER, J.:

Statement of Facts

This is a motion by defendant to dismiss plaintiff's complaint alleging a breach of contract and seeking a declaratory judgment pertaining to defendant's alleged responsibilities to repair underwater pilings beneath plaintiff's piers on their timber piles below the waterline.

Plaintiff, Chelsea Piers L.P. (Chelsea Piers), is a New York, for-profit business that leases piers 59, 60, and 61 (Piers) on the Hudson River from 17th Street to 22nd Street on the west side of Manhattan. Defendant, Hudson River Park Trust (HRPT), is a public benefit corporation, established by the Hudson River Park Act (Act) in September 1998 to control the planning, design, construction, operation and maintenance of a park (Park) on the west side of Manhattan, along the Hudson River waterfront. Act § 6 (a).

In June 1994, Chelsea Piers and New York State (State), acting through the Commissioner of the State Department of Transportation, entered into a twenty-year lease (Lease) for the Piers.[1] The Piers are owned by the State, and are now administered and managed

1 The Lease was originally for Piers 59, 60, 61, and 62. In 2006, HRPT reclaimed Pier 62 pursuant to a Lease provision allowing for reclamation on six months' notice for the construction of "State Facilities," with a proportional reduction in rent. HRPT has conducted repair and maintenance work on Pier 62, and Pier 62 is not at issue here.

on behalf of the State, pursuant to the Act, by HRPT. HRPT is the successor in interest to the State, as lessor under the Lease with Chelsea Piers. In June 1996, the parties amended the Lease to increase the term to forty-nine years, renewable in ten-year increments. The Lease provides, in pertinent part, that:

> Lessee shall take good care of the Premises, including, without limitation, the Improvements, roofs, piers, supports, pilings, bulkheads, foundations and appurtenances thereto, above or below the surface of the water, all sidewalks, vaults (other than vaults which are under the control of, or are maintained or repaired by, a utility company), sidewalk hoists, water, sewer and gas connections, pipes and mains that are located on or service the Premises . . . , and all Equipment and shall put, keep and maintain or repair the same in good and safe order, condition, and make all repairs therein and thereon, interior and exterior, structural and nonstructural, foreseen and unforeseen, necessary or appropriate to allow Lessee its use of the Premises, and whether or not necessitated by wear, tear, obsolescence or defects, latent or otherwise. . . .

Lease § 10.1 (a)

> Notwithstanding anything to the contrary contained in this Article 10, in the event a comprehensive, public maintenance plan for Hudson River waterfront piers in New York City (as opposed to a limited plan for certain designated piers) is adopted and becomes effective during the term of this Lease, then Lessor shall, or if Lessor is not the entity establishing such plan, it shall use its best efforts to (i) include the Premises in such plan, and (ii) assure that Lessee's obligations to maintain the piers within the Premises pursuant to subsection (a) above is not relied upon to exclude the Premises from such plan or to reduce the amount of maintenance activity or funding applied to the Premises under such plan.

Lease § 10.1 (b).

The Park encompasses the area from 59th Street on the north to Battery Place on the south. Act § 3 (e). The legislature, in creating the Park, found that:

> The planning and development of the Hudson River Park as a public park is a matter of state concern and in the interest of the people of the state. It will enhance the ability of New Yorkers to enjoy the Hudson River, one of the State's great natural resources; protect the Hudson River, including its role as an aquatic habitat; promote

> the health, safety and welfare of the people of the state; increase the quality of life in the adjoining community and the state as a whole; help alleviate the blighted, unhealthy, unsanitary and dangerous conditions that characterize much of the area; and boost tourism and stimulate the economy.

Act § 2.

The Act sets out different uses of the Park. Section 3 of the Act states that permitted uses are park uses and park/commercial uses. Park use is defined as:

> public park uses, including passive and active public open space uses . . . public recreation and entertainment, including the arts and performing arts, on open spaces . . . [and] within enclosed structures . . . small-scale boating for recreational and educational purposes . . . environmental education and research . . . historic or cultural preservation . . . wildlife and habitat protection . . . and facilities incidental to public access to, and use and enjoyment of park uses. . . .

Act § 3 (h).

Park/commercial use is defined as "a use that is not-a-prohibited use and is compatible with park use," (Act § 3 (g)) and, at Chelsea Piers, includes "sports and studio facilities." Act § 3 (g) (iv).

The predecessor of HRPT, the Empire State Development Corporation, through its subsidiary, Hudson River Park Conservancy, developed a Park Plan (Park Plan) in the summer of 1998. Chelsea Piers was excluded from the maintenance and rehabilitation work included in the Conservancy's Park Plan. After its formation, HRPT submitted the Park Plan and the Final Environmental Impact Statement to the State Department of Environmental Conservation and Army Corps of Engineers (the Army Corps). The Army Corps issued a public notice that described HRPT's proposal for the Park and sought public comment. In May 2002, the Army Corps issued a permit to HRPT authorizing the construction of the Park. HRPT then began construction in Greenwich Village, consistent with the Park Plan. At no time in this planning

and development process were the Chelsea Piers' structures ever included for purposes of undergoing maintenance and rehabilitation.

The Piers are threatened by marine borer (Teredinidae and Limnoria Lignarum), infestation on their timber piles below the waterline. According to the Chelsea Piers Condition Report prepared by HRPT's marine engineers, Han-Padron Associates (HPA), dated February 2003, marine borer activity was observed on ninety percent of the piles on the Piers. The Piers, construction of which was completed in 1910, have been under marine borer assault for decades, and it is undisputed that the State and Chelsea Piers were aware of the problem when negotiating the Lease. It is also undisputed that repair of the damage to the Piers will be expensive.

Between 1997 and 2001, Chelsea Piers issued frequent demands to be included in the Park Plan, which it claims HRPT largely ignored. Then, in 2003, HRPT agreed to provide Chelsea Piers a rent credit of $500,000 per year for the years 2004–08 to offset the cost of repair of the Piers. The parties dispute whether this amount was intended to cover the entirety of the repair costs. As it turned out, the amount was insufficient for complete repair. Chelsea Piers claims that this is because the degree of marine borer damage was not known until later inspection and maintenance work revealed previously unknown interior damage to the piles. Chelsea Piers has, from 2008 to date, contracted to expend at least $16 million in emergency maintenance and repair costs, and it estimates that an additional $21 million in substructural pile repair expenditures must be made by 2014.

Procedural History and Standard of Review

Chelsea Piers filed this litigation against HRPT in November 2011. Chelsea Piers seeks a declaration that the Park Plan is a "comprehensive, public maintenance plan for Hudson River

waterfront piers in New York City (as opposed to a limited plan for certain designated plans)" and that HRPT is thus obligated pursuant to the Lease to provide for the repair of the underwater pilings beneath Chelsea Piers and to pay such costs going forward. Chelsea Piers also seeks damages for previous, current and future repair costs, currently estimated to be $37.5 million (plus interest) for the years 2008-2014, approximately $16 million of which has already been expended or is contracted for necessary emergency repair work that is well underway and that was scheduled to be substantially completed by December 2011.

HRPT's motion to dismiss the complaint with prejudice is pursuant to CPLR 3211 (a) (1) (5) and (7).

On such a motion to dismiss, the court must determine whether "from the [complaint's] four comers[,] 'factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319, 319 (1st Dept 2005) (quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). "Although . . . the facts pleaded are presumed to be true" for purposes of a CPLR 3211 motion, "allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration." *Kliebert v McKoan*, 228 AD2d 232, 232 (1st Dept 1996). The court "is not required to accept factual allegations that are plainly contradicted by the documentary evidence." *Water St. Leasehold, LLC v Deloitte & Touche, LLP*, 19 AD3d 183, 185 (1st Dept 2005) (quoting *Robinson v Robinson*, 303 AD2d 234, 235 (1st Dept 2003)). If "documentary proof submitted in support of (a CPLR 3211 (a) (1)) motion disproves a material allegation of the complaint, a determination in the defendant's favor is warranted." *Snyder v Voris, Martini & Moore, LLC*, 52 AD3d 811, 812 (2d Dept 2008) (granting

motion to dismiss pursuant to CPLR 3211 (a) (1) because documentary evidence submitted by defendant resolved all factual issues in its favor). Moreover, pursuant to CPLR 3211 (a) (7), when evidentiary material submitted on a motion to dismiss can "conclusively establish that plaintiff has no cause of action, dismissal is warranted." *Allen v Gordon*, 86 AD2d 514, 514 (1st Dept 1982); *see also Grant v Aurora Loan Servs.*, 88 AD3d 949, 950 (2d Dept 2011) (same).

Discussion

HRPT, in its motion to dismiss Chelsea Piers' claim, argues that, on its face, the Lease requires Chelsea Piers, as lessee, to "take good care of the premises, including the . . . piers . . . and . . . put, keep and maintain or repair the same in good and safe order . . . and make all repairs . . . necessary or appropriate to allow lessee its use of the Premises. . . ." Lease § 10.1 (a). It contends that, at the time of negotiation of the Lease, both parties were aware of the borer infestation, and that Chelsea Piers admits to having sought to have the State be fully responsible for the repair and maintenance of the substructural support and pilings of the Piers. This negotiating strategy failed, and Chelsea Piers accepted, as a compromise, the provision that "in the event of a comprehensive, public maintenance plan for Hudson River waterfront piers in New York (as opposed to a limited plan for certain designated piers) is adopted . . . then lessor shall . . . include the Premises in such plan . . . ." Lease § 10.1 (b). HRPT posits that no such comprehensive, public maintenance plan for the Hudson River waterfront piers in New York has been adopted. This, it submits, settles the issue. Chelsea Piers counters, however, that since the Act gives HRPT the task of developing, operating and maintaining the Park, and the Park Plan excluded Chelsea Piers from the maintenance and rehabilitation work slated for the Park, this exclusion constitutes an alleged breach of the Lease.

Statute of Limitations

In connection with its claim that the Lease requires HRPT to include it in the Park Plan, which was first developed in 1998, Chelsea Piers was in contact with HRPT as early as 1997 to urge this inclusion, and continued to request it until 2001, and yet did not file this suit until 2011. The statute of limitations in New York for a breach of contract claim is six years. CPLR 213 (2). At first blush, it appears that Chelsea Piers' claim is time-barred. But there is more.

The issue becomes obfuscated as the parties change their arguments to address it. Chelsea Piers claims that HRPT breached the Lease by not including the Piers in the Park Plan in 1998; but when addressing the statute of limitations, it claims the breach occurred when HRPT failed to pay repair expenses in 2008. HRPT claims that it has no obligation to include Chelsea Piers in the Park Plan because it is not a comprehensive plan; but when addressing the statute of limitations, it posits that the plan was so comprehensive in 1998 that any breach must have occurred at that time.

The issue is further confused by Chelsea Piers' insistence on conflating HRPT's obligation to "include the Premises in" the Park Plan, Lease § 10.1 (b), with a separate obligation to pay for the cost of repairs conducted by Chelsea Piers. Under the terms of Section 10.1 (b) of the Lease, only a failure to include Chelsea Piers in the Park Plan, not a failure to reimburse repair expenses incurred by Chelsea Piers, constitutes a breach.

Despite these sources of confusion, three alternate theories are posited by which Chelsea Piers' claim might survive. First, Chelsea Piers uses the concepts of repudiation or damages to claim that the limitations period did not begin to run until 2009. In cases where a party attempts to sue for breach of contract before the actual breach, there must be a repudiation, meaning "a

definite and final communication of the intention to forego performance before the anticipated breach may be the subject of legal action." *Rachmani Corp. v. 9 E. 96th St. Apartment Corp.*, 211 AD2d 262, 267 (1st Dept 1995). Chelsea Piers argues this situation in reverse, claiming that while the breach may have occurred with the Park Plan's creation in 1998, HRPT's definitive repudiation of its contractual duties did not occur until it refused to pay for repairs in 2009. Under this theory, repudiation in 2009 created possibility for legal action and commenced the running of the limitations period. Alternatively, the lack of any monetary damages to Chelsea Piers delayed the commencement of the limitations period until 2009.

However, repudiation is an alternative to breach, not a necessary element of it. A breach of contract claim accrues when the breach occurs, whether or not the breaching party has definitively communicated a repudiation, and the statute of limitations begins to run at that time. *See Ely-Cruikshank Co., Inc. v Bank of Montreal*, 81 NY2d 399, 402 (1993). Similarly, the fact that Chelsea Piers did not incur any damages until 2009 does not delay the running of the limitations period. "Since nominal damages are always available in breach of contract actions, all of the elements necessary to maintain a lawsuit and obtain relief in court" are present from the time of breach, and so the cause of action accrues even in the absence of damges. *Id.* at 402.

Second, the Piers' inclusion in the Park Plan should be viewed as a continuing obligation. Under the doctrine of continuing breach, "where a contract provides for continuing performance over a period of time, . . . accrual occurs continuously and plaintiffs may assert claims for damages occuring up to six years prior to filing of the suit." *Airco Alloys Div. v Niagara Mohawk Power Corp.*, 76 AD2d 68, 80 (4th Dept 1980). Chelsea Piers argues that "[a] contract to build and maintain a [structure] is said to be a 'continuing' contract," *Corbin on Contracts* § 956

(2011), and so Lease § 10.1 (b) must be a continuing contract. This "misconstrues the plaintiff's cause of action," *Ely-Cruikshank*, 81 NY2d at 402, by framing Lease § 10.1 (b) as a contract to pay for repairs rather than a contract to include Chelsea Piers in the Park Plan. The obligation of Lease § 10.1 (b) is triggered "*in the event* a comprehensive, public maintenance plan . . . is adopted" (emphasis added), indicating a specific moment of adoption. Because "the continuing claims doctrine does not apply to a claim based on a single distinct event," it can not be applied here. *Ariadne Fin. Services Pty. Ltd. v. United States*, 133 F3d 874, 879 (Fed. Cir. 1998).

In an argument closely related to the continuing obligation argument, Chelsea Piers points out that the Park Plan has changed several times since its inception. These changes to the Park Plan should, it contends, be construed as adoptions of a new plan, discrete events that would once again begin running the limitations period. HRPT argues that the Lease does not contemplate a succession of plans, but only a singular plan. However, the Lease defines "Waterfront Plan" as "the principles, plan and guidelines as set forth in the publication '*A Vision for the Hudson River Waterfront*,' dated November 1, 1990 (or any successor plan thereto)." Lease Article 1. This encompasses the possibility of multiple plans in succession, an outcome which was highly probable at the time of execution of the Lease, given the political nature of urban redevelopment and the large sums of money and spans of time which would be involved. The questions of whether the plan described in the Lease must be singular and whether the alterations to the Park Plan were significant enough to constitute the implementation of new plans are both highly fact-specific.

Finally, the rent credit for the years 2004–08 could be interpreted as if HRPT constructively included Chelsea Piers in the Park Plan, by relieving Chelsea Piers of the financial

burden of maintenance. This theory is implied by Chelsea Piers' focus on the rent credit agreement. On this theory, HRPT cured its breach at the time of the 2003 agreement and breached the contract anew in 2009, when the burden of paying repair costs again devolved to Chelsea Piers. This theory turns on a contested question of fact, for if the 2003 agreement was not intended to cover 100% of the requisite repair costs, then it makes no sense to treat it as a constructive inclusion of Chelsea Piers in the Park Plan. Chelsea Piers claims that the agreement was intended to cover the entirety of the repair costs; HRPT disagrees. This motion to dismiss is not an appropriate point at which to decide this factual dispute.

Of the many theories articulated or implied by Chelsea Piers, the theories related to repudiation and damages are legally insupportable. However, the viability of the theories based on the alterations to the Park Plan and the rent credit agreement both turn on questions of fact. In a motion to dismiss the court must accord the plaintiff "the benefit of every possible favorable inference," *Nonnon v City of New York*, 9 N.Y.3d 825, 827 (2007). Here, there are two alternate plausible factual inferences that would support Chelsea Piers' contention that its complaint is timely, and so the motion to dismiss on this ground is denied.

Construction of the Lease

In order to determine whether or not the Lease has been breached by HRPT's refusal to include Chelsea Piers in the maintenance and rehabilitation plan for the Park, the court must interpret "comprehensive, public maintenance plan for waterfront piers in New York (as opposed to a limited plan for certain designated piers)" in Section 10.1 (b) of the Lease.

HRPT points out that, at the date of the Lease's execution, 57 piers lined the Hudson River waterfront in New York City, and that when the Act created the Park in 1998, it excluded

21.5 Hudson River piers from its scope either by geographic limitation or express provision. HRPT was left with the discretion of determining which of the remaining 35.5 piers would be included in the Park. The Piers were excluded, along with 12 other piers which were put to other uses (commercial or public) or demolished into "pile fields." Thus, HRPT asserts, of the 35.5 piers located within the Park's north-south geographical boundaries—59th Street to Battery Park—only 20.5 piers are included in the Park Plan and slated for construction work.

With the exception of two piers, one of which houses HRPT's offices, and the other of which will become a public marketplace, all of the 20.5 piers in the Park Plan are designated as Park Use piers. Of the remaining 15 piers within the Park, 11 of them are designated for park/commercial use or are occupied by public tenants or other third parties. With one exception, a pier where HRPT was scheduled to be a tenant, no provision was made in the Act for repairs to piers designated for park/commercial use. The other four piers excluded from the Park Plan are classified as "pile fields," where piers are to be demolished, but not maintained.

HRPT says these statistics underscore the strength of its position that the Park Plan is not "a comprehensive, public maintenance plan for the Hudson River waterfront piers in New York City (as opposed to a limited plan for certain designated piers)." To further its position, it turns to the common dictionary definition of "comprehensive." It cites *Mirriam-Webster's Collegiate Dictionary* 237 (10th ed. 1993) for the definition of comprehensive as "covering completely or broadly" and *Webster's Int'l Dictionary* 467 (3rd ed. 1993) for the definition of comprehensive as "accounting for or comprehending all or virtually all pertinent considerations." It says that the Park Plan to redevelop fewer than 21 of Manhattan's 57

westside piers, extant in 1994, into a public park within a limited geographic area, cannot be considered the comprehensive plan referred to in the Lease.

Furthermore, HRPT turns to the defintion of "maintenance," meaning "to keep in an existing state (as of repair, efficiency, or validity)." *Mirriam-Webster's Collegiate Dictionary* 702 (10th ed. 1993). Pile fields are created by stripping the pier decks off of the wooden piles and leaving them in the water to provide a habitat for wildlife, causing the structure to cease to exist as a pier. Thus, at least four piers that have been converted into pile fields have not been "maintained," leading HRPT to argue that they also were not part of a "comprehensive . . . maintenance plan," reducing the scope of the plan even further.

Chelsea Piers sees things differently. It examines what work has been and is being performed. This, it says, is a massive $500+ million, 550 acre, several mile-long renovation and restoration program. It posits this is a comprehensive, public maintenance plan within the meaning of Section 10.1 (b) of the Lease. To support this contention, it points to the definition of "Waterfront Plan" as defined in the Lease. As noted above, the Lease provides that "'Waterfront Plan' shall mean the principles, plan and guidelines as set forth in the publication '*A Vision for the Hudson River Waterfront*,' dated November 1, 1990 (or any successor plan thereto)." Lease Article 1. Such publication contains no discussion of northern Manhattan. Thus, to Chelsea Piers, it is clear that Section 10.1 (b) of the Lease was never intended to refer to a geographical area north of 59th Street.

Chelsea Piers' point is supported by the rules of contractual construction that "[p]articular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby." *William C. Atwater & Co. v*

Panama R. Co., 246 NY 519, 524 (1927), and that while New York courts will look to the dictionary in some cases to determine the plain meaning of a word in a contract, they will not do so if the word or term is defined in the contract. *See British Ins. Div. Corp. v Fay's Drug Co.*, 178 AD2d 801 (3d Dept 1991).

Chelsea Piers argues that HRPT has undertaken to renovate or rehabilitate virtually every pier between Battery Park and 59th Street. It claims that other than the Piers, the only piers HRPT did not undertake to renovate are those it was prohibited by statute from renovating, those recently renovated by another governmental agency and two piers subject to pre-existing leases whose original terms are unknown. Based on this, it derides HRPT's reliance on the bare dictionary definition of comprehensive. Chelsea Piers thus deconstructs HRPT's argument that to be comprehensive a plan must address everything.

Chelsea Piers points to New York State zoning cases that use similar phrasing. Citing *Town of Bedford v Village of Mount Kisco*, 33 NY2d 178, 188 (1973), Chelsea Piers articulates the proper standard as "what is mandated is that there be comprehensiveness of planning, rather than special interest, irrational ad hocery." Thus, a comprehensive plan can, in Chelsea Piers' view, be found by an examination of all the facts and circumstances and the existence of a total planning strategy. It argues that HRPT's unified plan and vision for the waterfront from Battery Park to 59th Street—including the rehabilitation (involving turning some piers into "pile fields" for ecological and wildlife purposes) of all the piers in that area—represents a master plan and thus a comprehensive plan for the waterfront. It states that HRPT's assertion that its massive public works project should be considered a "limited plan for certain designated piers" is not

rational and certainly does not come close to being the essentially undeniable fact that would support a motion to dismiss.

The court is faced with two colorable arguments with respect to the meaning of "comprehensive, public maintenance plan for the Hudson River waterfront piers in New York City." According to HRPT, Chelsea Piers does not even contest that only 20.5 piers or 36% of the total piers extant in 1989 along the Hudson River waterfront in New York City were included in the Park Plan to be repaired and maintained. This set of facts, it says, dictates that it is only a "limited plan for certain designated piers."

Chelsea Piers argues that the only piers referenced in Section 10.1 (a) of the Lease are those below 59th Street. These, they point out, are the piers which were under discussion before, and at the time of, execution of the Lease. This radically changes the calculation, particularly if the court agrees with Chelsea Piers reasoning as to those piers below 59th Street which were excluded from renovation. It is undeniable that the Park Plan envisages a massive public works program relating to the Hudson River waterfront piers. From a qualitative standpoint, the Park Plan has many of the indicia of a comprehensive, not a limited plan.

The court's opinion is that the meaning of Sections 10.1 (a) and 10.1 (b) of the Lease is not clear, but ambiguous, and will require factual findings to determine their meaning. It would not be correct in the circumstances to grant HRPT's motion to dismiss based on its interpretation of the Lease, and it is denied.

Waiver

On October 15, 2003, Chelsea Piers entered into a Letter Agreement (Letter Agreement) with HRPT in which it obtained from HRPT an annual rent credit of up to $500,000 per year for

the years 2004–08 to offset an alleged anticipated $2.5 million cost of Pier repair and replacement work over this period.

The Letter Agreement provides in relevant part:

> This is in furtherance of our discussions over the past year regarding needed maintenance and repairs to the pier structures and pilings at your Premises. As we have discussed, our marine engineering consultant, Han Padron Associates ("HPA"), inspected the piers at your facility as part of the inspection and evaluation work they are undertaking for the Trust of all piers within Hudson River Park. The results of their inspection of the Chelsea Piers structures have been previously provided to you.
>
> According to HPA's recent inspections, certain maintenance, repair and/or replacement work is needed at Chelsea Piers. As we discussed, we are willing to provide Chelsea Piers LP an annual rent credit of up to $500,000 for the next five years for costs incurred in connection with undertaking the needed pier repair and replacement work identified by HPA (the "Work"). Please note that our agreement to do so should not be viewed as a waiver, modification or concession by the Trust with respect to any of the terms and conditions of your Lease, including Section 10.

HRPT asserts that whatever contract claim Chelsea Piers might otherwise have had, it was waived upon entering the Letter Agreement.

The court's analysis of this contention starts with an incisive comment on the common law notion of waiver.

> A waiver, which may be express or implied, is generally defined as a voluntary and intentional relinquishment of a known right. . . . [T]here are few, if any, more erroneous definitions known to the law. For one thing, waiver is far more multifaceted than this definition would allow for. Moreover, even as far as it goes, it is totally misleading. It strongly implies that the waiving party intends to give up a right. In reality, many, if not most waivers are unintentional and frequently do not involve a 'right' that the party is aware of. Finally, contractual rights are not waivable, conditions are. . . .
>
> A waiver after failure of condition is often referred to as an election. Waiver is ordinarily a question of fact.

Calamari & Perillo on Contracts, § 11.29 (Fifth Ed. 2003) (citations omitted) (emphasis in original). Put another way, where a contracting party, with knowledge of the failure of a condition by the other party, receives or accepts payment or other performance of the contract, he or she will be held to have waived the condition. 23 Williston on Contracts, § 63:9 (4th Ed. 2002).

It is uncontroverted that Chelsea Piers was aware of the marine borer infestation, and the necessity for remedial maintenance prior to execution of the Lease, that it objected to being excluded from the Park Plan's rehabilitation initiative from 1998 through 2001, and that it entered into the Letter Agreement, pursuant to which it received the up to $2.5 million rent credit to fund repairs to the Piers. Chelsea Piers asserts that this amount was expected by the parties to be sufficient to offset all of the Piers' repair costs that HRPT was required to bear. HRPT posits otherwise, saying Chelsea Piers was aware of the HPA report which was sent to them on October 2, 2003, which estimated repair costs between $3.4 and $12 million. HRPT argues that the 2003 Letter Agreement is a fully voluntary and intentional abandonment of Chelsea Piers' alleged right to be included in the Park Plan, in exchange for $2.5 million.

Chelsea Piers counters this claim of abandonment, waiver or election by arguing that Section 19.3 of the Lease precludes these points by its crystal clear non-waiver provisions. Section 19.3 of the Lease reads that:

> If Lessor is at any time in default of any of its covenants hereunder then, after thirty days' notice from Lessee to Lessor notifying Lessor of such default, Lessee, without waiving or releasing Lessor from any obligation of Lessor contained in this Agreement may, but shall be under no obligation to, perform such obligation on Lessor's behalf. Lessee shall be entitled to take as credit against the Base Rent all reasonable sums paid by Lessee and all reasonable costs and expenses incurred by Lessee in connection with its performance of any obligation of Lessor pursuant to the

> preceding sentence. The taking of any such credit shall be accompanied by a statement, in reasonable detail, substantiating the amount taken.

Chelsea Piers argues that all parties were aware of Lessor's breach of its covenant to include Chelsea Piers in the Park Plan and that the Letter Agreement simply implemented Section 19.3.

Chelsea Piers also contends that Section 22.9 of the Lease independently precludes HRPT's waiver position. It provides in relevant part: "No covenant, agreement, term or condition of this lease to be performed or complied with by either party, and no breach thereof, shall be waived or modified except by a written instrument executed by the other party." Chelsea Piers point is that since the Letter Agreement never recognized a breach by HRPT, the Letter Agreement certainly could not be construed as a written instrument waiving a breach, executed by Chelsea Piers.

HRPT counters that the Letter Agreement did not simply implement Section 19.3, as HRPT was not in default, and Chelsea Piers did not allege it satisfied the conditions precedent to its alleged right to take a rent credit under Section 19.3.

The court's opinion is in line with the thinking of Calamari & Perillo and Williston: waiver (election) is ordinarily a question of fact. Here, a virtual thicket of factual issues needs to be reviewed prior to any determination with respect to the ambiguities imbedded in the question of election or waiver in Sections 19.3 and 22.9 of the Lease and the Letter Agreement. These issues include, but are not limited to, (i) whether the parties viewed the $2.5 million as the entire cost of repair to the Piers, (ii) whether the parties recognized HRPT as being in breach, and (iii) the interpretation of Sections 19.3 and 22.9 of the Lease and the Letter Agreement. As these

issues cannot be decided at this stage of this proceeding, and ambiguities remain prominent in the Lease and the Letter Agreement, defendants' motion to dismiss on this ground is denied.

Equitable Estoppel

Defendant also argues that taking into account plaintiffs' long-standing course of conduct, its claim is barred by the doctrine of equitable estoppel. Defendant asserts that Chelsea Piers' inaction necessarily manifests an acceptance of its exclusion from HRPT's Park Plan for rehabilitation work, and HRPT was justified in moving forward with the implementation of its Park Plan in 1998, based upon Chelsea Piers' course of conduct. This assertion also raises multiple questions of fact, including the nature of the objections to the Park Plan that Chelsea Piers claims it made repeatedly, that cannot be decided at this stage of the proceedings, and defendant's motion to dismiss on this ground is denied.

Declaratory Judgment Claim

The court sees no reason to decide at this point in the proceedings whether the declaratory judgment claim should be dismissed as legally and factually duplicative of the contract claim. This decision can wait until a later date when the record is fully developed without unreasonable burden on the parties. The motion to dismiss the declaratory judgment claim is denied.

Accordingly, it is hereby

ORDERED that defendant HRPT's motion to dismiss is denied.

Dated: April 17, 2012

ENTER:

J.S.C.

MELVIN L. SCHWEITZER
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