SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH **PART** 54
Justice

Index Number : 651662/2014
HIGH LINE DEVELOPMENT LLC
vs
450 WEST 14TH STREET CORP.
Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 9/30/15
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** 73-103
Answering Affidavits — Exhibits _____ **No(s).** 104-111
Replying Affidavits _____ **No(s).** 117-118

Upon the foregoing papers, it is ordered that this motion is

decided in accordance with the decision on Motion Seq. 2.

FILED
FEB – 1 2016
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 11/19/15

_____, J.S.C.
SHIRLEY WERNER KORNREICH
J.S.C.

1. **CHECK ONE:** ..... ☒ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☒ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 651662/2014
HIGH LINE DEVELOPMENT LLC
vs
450 WEST 14TH STREET CORP.
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 9/30/15
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 37-60
Answering Affidavits — Exhibits _____ | No(s). 112-113
Replying Affidavits _____ | No(s). 115-116

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

FILED
FEB – 1 2016
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 11/19/15

SHIRLEY WERNER KORNREICH, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SHIRLEY WERNER KORNREICH
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

HIGH LINE DEVELOPMENT LLC,

Index No.: 651662/2014

Plaintiff,

DECISION & ORDER

-against-

450 WEST 14TH STREET CORP.,

Defendant.

----------X

SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 002 and 003 are consolidated for disposition.

Plaintiff High Line Development LLC (Tenant) moves, pursuant to CPLR 3212, for partial summary judgment on liability on all causes of action in its Amended Complaint and dismissal of the affirmative defenses and counterclaim of defendant 450 West 14th Street Corp. (Landlord). Seq. 002. Landlord opposes, and separately moves, pursuant to CPLR 3212, for summary judgment against Tenant. Seq. 003.

I. Procedural History & Factual Background

This action concerns Landlord's refusal to issue an estoppel certificate in connection with a proposed refinancing of Tenant's construction loan. Unless otherwise indicated, the following facts are undisputed. Moreover, the court is granting summary judgment on all claims, some in favor of Tenant and the remainder in favor of Landlord. Each summary judgment ruling is based on the undisputed facts as construed in the light most favorable to the party opposing summary judgment.

A. The Lease

450 West 14th Street in Manhattan (the Property or the Premises) was leased, pursuant to a June 1, 2004 net lease (the Lease), for 49 years. *See* Dkt. 43. The Lease was heavily

negotiated between the parties' sophisticated real estate counsel and disclaims the rule of *contra proferentem* – interpretation against the drafter. *See id.* at 37. The Lease is governed by New York law, contains a merger clause, and requires amendments to be in writing. *See id.* at 37-38.

Tenant was to gut renovate the existing building and add ten new floors. Pursuant to section 8.01 of the Lease, Tenant was to bear the cost of the renovation and construction [*see* Dkt. 43 at 9 ("[a]ll Improvements shall be made at Tenant's sole expense"], along with all other costs of maintaining the Property. *See id.* at 12 ("Tenant, at its sole cost and expense, will take good care of the Premises, will keep the same in good order and condition, and make all necessary maintenance and repairs thereto"; "Landlord shall not be required to furnish any services or facilities or to make any repairs or alterations in or to the Premises"; "Tenant hereby assumes the full and sole responsibility for the condition, operation, repair, replacement, maintenance and management of the Premises.").

To finance the building Improvements, section 25.05(B)(d) provides:

> Tenant represents and warrants to Landlord and Landlord acknowledges that Tenant will obtain leasehold construction financing and permanent leasehold financing **only in connection with the financing of Improvements and for no other purpose.** Tenant further acknowledges and understands that the amount of any permanent Leasehold Mortgage **will not exceed the amount of the construction loan obtained in connection with the construction of Improvements to the Premises**, plus such **additional reasonable amount for the construction of additional improvements** to the Premises (provided the same shall be approved by Landlord) **that are to be made promptly after the receipt of such financing proceeds** and the actual costs of obtaining the financing (excluding legal, accounting fees **and other such soft costs**). Landlord agrees to enter into a modification of this Lease to incorporate reasonable and customary terms and provisions required by any proposed holder of a Leasehold Mortgage, provided that such terms and provisions do not increase any of Landlord's obligations under this Lease or diminish any of Landlord's rights under this Lease.

See id. at 29-30 (emphasis added).

Since the leasehold encompassed 49 years, a term which would exceed any construction mortgage, further refinancing was contemplated. Section 25.05(A) provides:

> Without the consent of Landlord, Tenant shall have the right, at any time and from time to time, but at all times subject to the provisions of this Section 25.05, to mortgage this Lease and the leasehold estate created hereby (a "Leasehold Mortgage") to an **Institutional Lender** and to collaterally assign leases and rents to an Institutional Lender and such Leasehold Mortgage shall not be deemed to constitute an assignment or transfer of this Lease, nor shall the holder of any Leasehold Mortgage, as such, be deemed an assignee of this Lease so as to require such holder to assume the performance of any of the covenants or agreements on the part of the Tenant to be performed hereunder.

See id. at 28-29 (emphasis added). Institutional Lender is defined in section 1.08 to mean:

> (a) any commercial bank, savings bank, private banker, or trust company (whether acting individually or in a fiduciary capacity), savings and loan association, credit union **or similar banking institution, whether foreign or domestic**, (b) an insurance company, (c) a real estate investment trust or an investment bank, (d) a trustee or issuer of collateralized mortgage obligations, or other similar investment entity which is either (i) listed on the New York or American Stock Exchange or other recognized exchange (or their respective successors), or (ii) sponsored by any other entity qualifying as an Institutional Lender, or (e) a federal, state, municipal or secular employee's welfare, benefit, pension or retirement fund, provided that each of the foregoing entities shall have assets of in excess of One Hundred Million Dollars ($100,000,000), or (f) **any combination of the foregoing entities**; provided that each of the above entities shall qualify as an Institutional Lender within the provisions of this definition only if it (x) **shall be subject to the jurisdiction of the courts of the State of New York**, and (y) except for any entity listed in clause (a) of this paragraph, at the time of the initial determination of its status as an Institutional Lender shall have assets of not less than One Hundred Million Dollars ($100,000,000).

See id. at 3 (emphasis added).

Importantly, section 25(C) provides that "[i]n no event shall any Leasehold Mortgage constitute an encumbrance on the fee title to the Premises **but shall only constitute an encumbrance on the Lease.**" *See id.* at 30 (emphasis added).

Further, the Lease, in section 33.01(B), provides:

Landlord shall, without charge, at any time or from time to time, but no more than once in any twelve month period, within ten (10) days after request by Tenant, execute, acknowledge and deliver to Tenant a written instrument certifying (a) (if such is the case) the Term has commenced, setting forth the date of such commencement and termination; (b) that this Lease is unmodified and in full force and effect (or, if there have been modifications; that the Lease is in full force and effect, as modified, and stating the modification(s)); (c) whether to its knowledge (without independent investigation) there are then existing any offsets or defenses against the enforcement of any of such party's covenants hereunder (and, if so, specifying them); (d) the dates to which the Net Rent, Additional Rent and all other amounts to be paid by Tenant hereunder have been paid in advance, if at all; (e) whether or not Tenant has acquired any interest in the Premises, except for its interest under this Lease; (f) whether, to its knowledge, there are any uncured defaults by Tenant and, if defaults are claimed, stating the facts giving rise thereto; and (g) such other factual statements as may be reasonably requested.

Any such statement given by a party may be relied upon by the other party, by a prospective purchaser or assignee (as the case may be) of the other party's interest in the Premises, by any existing or prospective mortgagee, assignee, or subtenant...

See id. at 34-35 (emphasis added).

Section 33.03 addresses Landlord's consent and approval obligations:

A. Whenever Landlord's consent or approval is required in this Lease, Landlord shall not unreasonably delay notifying Tenant whether its approval shall be granted or withheld.

B. When in this Lease Landlord's **consent or approval** is required and this Lease provides that Landlord's consent or approval shall not be unreasonably withheld and Landlord shall refuse such consent or approval, or in any instance in which Landlord shall delay its consent or approval, Tenant in no event shall be entitled to make, nor shall Tenant make, any claim, and **Tenant hereby waives any claim, for money damages** (nor shall Tenant claim any money damages by way of set-off, counterclaim or defense) based upon any claim or assertion by Tenant that Landlord unreasonably withheld or unreasonably delayed its consent, or approval. Tenant's sole remedy shall be an action or proceeding to enforce any such provision, for specific performance, injunction or declaratory judgment.

C. Whenever Landlord's consent or approval is required in this Lease and this Lease does not provide that such approval or consent shall not be unreasonably withheld, Landlord may determine in its sole discretion whether to grant such consent or approval, regardless of whether such refusal to consent or approve may be deemed arbitrary.

See id. at 33 (emphasis added).

Finally, section 22.02 addresses Landlord's right to recover certain costs and attorneys' fees from Tenant:

> If Landlord employs an attorney or collection agent to collect all or any Net Rent, Additional Rent, Deposits or Security due to Landlord hereunder, or to enforce any other provision hereof, or to respond to any inquiry made or question raised by Tenant concerning the applicability or interpretation of any provision of this Lease, or to seek summary proceedings or other remedies to which Landlord may be entitled, or in connection with any proposed Lease Transfer or any Other matter for which Tenant may request Landlord's consent or other action by Landlord, the Landlord, in addition to all other costs and fees allowed according to law, shall be reimbursed by Tenant immediately for all costs, attorneys fees, and collection agent charges incurred by Landlord, and the same shall be paid as Additional Rent.

See id. at 26-27.

B. The Loans and Proposed Refinancing

On August 15, 2007, Tenant obtained a $53,982,000 construction loan from non-party UBS Real Estate Services, Inc. (UBS) secured by a mortgage on Tenant's leasehold (the UBS Loan). The UBS Loan, which has since been assigned to CIT Bank, matures on May 9, 2016. As a condition of the UBS Loan (and as typical in the industry), UBS insisted on Tenant procuring an estoppel certificate from Landlord. Prior to the UBS Loan, Landlord executed and furnished to UBS a Ground Lessor Estoppel Certificate dated August 12, 2007 (the UBS Estoppel Certificate). *See* Dkt. 44. The UBS Estoppel Certificate is robust, containing 25 provisions, many of which contain terms beyond those required by section 33.01(B) of the Lease. Tenant utilized the UBS Loan proceeds, along with $20 million of its own money, for the renovation of the Property.

Approximately two years later, another $18 million was required to complete the renovations. Tenant was willing to fund these renovations itself, but only on condition that Landlord consent to extend certain promises in the UBS Estoppel Certificate to a future leasehold mortgagee. In a letter agreement dated August 14, 2009 (the Letter Agreement), Landlord promised to "extend to a future leasehold mortgagee the benefits of paragraphs 10 through 25 of [the UBS Estoppel Certificate]." *See* Dkt. 45. Tenant then invested the $18 million to complete the renovations.

By email dated March 12, 2014, Tenant notified Landlord that it intended to refinance the UBS Loan with a new $55.25 million loan (the Aareal Loan) from non-party Aareal Capital Corporation (Aareal Capital). *See* Dkt. 46.[1] Tenant stated that the proceeds from the Aareal Loan would be used to refinance the UBS Loan, cover closing expenses, and serve as "reserves for additional tenant improvement and leasing costs." *See id.* Tenant further informed Landlord that it wanted an estoppel certificate similar to the UBS Estoppel Certificate. *See id.*

On April 9, 2014, Tenant again emailed Landlord:

> In furtherance of my email to you on March 12, 2014, attached is the Ground Lessor Estoppel Certificate that the lender is requesting. I have attached a blackline version as well showing the changes from the [the UBS Estoppel Certificate] previously executed by your client. As you will see, the only changes are to factual information relevant to the amendments to the ground lease, to update dates and the new loan.

See Dkt. 47 at 1. The attached blackline is as represented by Tenant. *See id.* at 11-18. The only change of note is that the proposed refinancing would be provided by three lenders: (1) Aareal Capital; (2) Aareal Bank AG (ABAG); and (3) Aozora Bank, Ltd. (Aozora). *See id.* at 11.

[1] Unless otherwise indicated, the emails discussed herein were written by counsel, and the parties' principals are copied on many of them.

ABAG is a German bank; Aareal Capital is its U.S. subsidiary.[2] Aozora is a Japanese bank. As discussed further below, Aareal Capital and ABAG qualify as Institutional Lenders under the Lease. The bulk of the blacklined changes merely alter the grammar to reflect three lenders. *See, e.g., id.* at 12.

Landlord's counsel responded on April 18, 2014:

> I received your e-mail of April 9 regarding the Ground Lessor Estoppel Certificate (the "Certificate") and have now had an opportunity to discuss the matter with my client. Before proceeding or agreeing to provide the new lender with a Certificate, my client needs further information concerning the new lender and the refinancing transaction. In particular:
>
> 1. Please provide the current principal balance on the loans. It appears from the last statement that the debt is approximately $51.5 million.
>
> 2. Your March 12 e-mail indicated that the new loan will be for $55,250,000, which is approximately $4 million more than the existing loan. My client needs a detailed breakdown of what the additional proceeds will be used for since the Lease is specific as to how the proceeds can be applied. Please also provide a copy of the commitment letter from the lender.
>
> 3. If the actual lender is [Aareal Capital], please explain the relationship of the other three entities and their role in the transaction. My client is reluctant to have four separate lender parties and needs more definitive information regarding the transaction. Also, while your e-mail stated that the lender is an "Institutional Lender" as defined in the Lease, we do not currently have sufficient information to verify this fact. As such, whatever additional information can be provided regarding the lender's qualifications should be sent to me.
>
> 4. The Lease specifies that the lender must have assets of at least $100 million, which is a very small sum considering the size of the loan. Your lender is asking for a waiver of this requirement, which was granted only to UBS previously based on a specific set of circumstances. Please provide financial information for the lender and explain why it needs a waiver of this requirement, particularly since it is going to lend $55 million, which is more than half the asset requirement.

[2] As Tenant correctly explains, other German banks, such as Deutsche Bank, operate in the U.S. through a "Capital Corporation", a wholly owned subsidiary of the German parent entity (the Aktiengesellschaft, i.e., the "AG").

> 5. Please provide a copy of the lender's current appraisal of the property.
>
> Also, once again we have not received the monthly loan statement, which is a continuing problem and my client is not happy that I have to constantly chase parties for this, which is an obligation of the lender under the existing Certificate. The last statement we received was for February of this year and the statement before that was for November, 2013. My client has indicated to me that if it decides to grant the new lender a Certificate, there will be much stronger consequences for failing to provide the monthly statements. In the meantime, please have the lender send to me the missing statements.
>
> As soon as I am furnished with the above information/documents, I will review and discuss with my client and will communicate further with you.
>
> Please note that my client will also require a current estoppel certificate from the tenant.

See Dkt. 48.

> Tenant responded on April 22, 2014:
>
> My client asked me to forward to you the email below in response to your recent email requesting additional information with respect to the refinancing. As a reminder and as is noted in the term sheet, we had required the new lender to accept an estoppel certificate from your client that is substantively the same as the estoppel provided in the most recent financing.

See Dkt. 49 at 1. The "email below" referred to in the April 22 response was written by Tenant's principal; it instructs Tenant's counsel to forward two attachments to Landlord: (1) a copy of Tenant's term sheet with Aareal Capital (the Term Sheet); and (2) answers to Landlord's questions. *See id.* at 1-2. Moreover, Tenant noted that it was "anxious to finalize our loan and the lender will not fund until we can deliver the required estoppel." *See id.* at 1.

The Term Sheet is dated March 31, 2014, and provides, *inter alia*, that the Aareal Loan would be for $55,250,000 at Libor plus 375 basis points, would have a five year term, would be secured by Tenant's leasehold, would be governed by New York law, and **"[e]ach of the parties shall ... submit to New York jurisdiction."** *See* Dkt. 51 (emphasis added). The Term sheet

also provides that the parties shall use good faith efforts to close by May 15, 2014 and that the Term sheet will expire after that time. *See id.* at 7.

Tenant also answered Landlord's questions. *See* Dkt. 49 at 3-4 (providing the outstanding loan balance, a breakdown of how the proceeds would be applied, and an explanation of Aareal's and Aozora's corporate structure along with financial disclosures showing their total assets).[3] Most importantly for the purposes of this decision, Tenant provided the following explanation and breakdown of the loan proceeds:

> Below is the breakdown of the $55.2M, the borrower is not taking any cash out of the property on the financing. Also, although the current balance on the loan is $51.6m, the amount of the loan obtained in connection with the construction of the improvements was actually $53.982M, which would permit the leasehold mortgage to be approximately $1.3M more than the amount to be borrowed.

Payoff – [the UBS Loan]		$51,636,942
Broker Fee – Meridian	0.50%	$276,250
Origination Fee – Aareal	1.00%	$552,500
Legal/3rd Party Costs – Est.		$275,000
Lender Reserve for Retail Leasing		$1,000,000
Construction costs to White Box Retail		$500,000
Unpaid TI Costs due on Executed Leases		$551,036
Hedge Cost (2-yr term; 250 bps strike)		$425,000
Other		$33,272
Total Uses		**$55,250,000**

See Dkt. 49 at 3 (bold in original).

Landlord responded on May 2, 2014:

> My client and I have reviewed the information that you recently sent to me and I have now had an opportunity to discuss the matter further with my client. As I am sure you can appreciate, it is sometimes difficult to arrange a call among the principals who are located in three different states (and with different time zones) and have different schedules.

[3] Tenant did note that the appraisal requested by Landlord was commissioned by the lender and was not in Tenant's possession.

While my client is prepared to execute an agreement with the new lender similar to the one previously executed with [UBS], the conditions upon which my client is prepared to sign such a document are as follows:

1. There can be only one lender, [Aareal Capital], who will be a party to the agreement.[4] [Aareal Capital] is a Delaware corporation and the only entity authorized to do business in New York. Neither of the other entities appears to be subject to jurisdiction in the United States.[5]

Moreover, even if those entities were authorized in New York, they do not appear to be approved mortgage lenders in New York. Furthermore, my client does not want to have to deal with more than one lending entity. The fact that [Aareal Capital] "may elect to sell the debt to the parent" is not a sufficient basis for my client to extend the benefits of the agreement to those unauthorized entities and assume the burden of dealing with multiple lending parties.

2. The amount of the refinanced debt cannot exceed the amount to pay off the existing leasehold mortgage debt plus the origination fee as per the terms of the lease.

3. The lender will have to agree that in the event the monthly loan statements are not provided to the owner more than twice in any twelve month period, without demand, then such failure will constitute a material default under the agreement and void all obligations of the owner thereunder.

4. The tenant must execute a current estoppel certificate in the form required by the lease.

5. The lender must provide a copy of the property appraisal to the owner.

---

[4] As discussed herein, this decision turns strictly on whether Tenant's proposal comports with the Lease. As such, it bears mentioning that many of Landlord's demands are not required by the Lease and, to the extent certain objections are grounded in the Lease, many were frivolous. For instance, Landlord's jurisdictional objection was frivolous given the consent to jurisdiction provided in the Term Sheet. Indeed, even if the Aareal Loan were to be transferred to another entity not otherwise subject to jurisdiction in New York, such entity would nonetheless be bound by the submission to jurisdiction clause. Furthermore, to the extent Landlord argues that ABAG might not be subject to general jurisdiction in New York on all conceivable extra-contractual claims, the Lease provides for no such requirement. In any event, the loan agreement surely could contain the typical clauses consenting to jurisdiction on all claims relating to the loan, i.e., any attendant tort or quasi contract claims. The Lease does not require a broader consent to jurisdiction than this.

[5] In this email, Landlord appears to be consenting to Aareal Capital as the lender and is taking issue with ABAG due to jurisdictional concerns. Landlord makes no mention of the $100 million requirement. ABAG, as noted, was consenting to jurisdiction.

> 6. The owner's professional fees incurred in connection with this matter will be required to be paid before any agreement is executed by the owner.
>
> If the foregoing conditions are acceptable to the lender, I will prepare a draft of the new agreement for the lender's review.

See Dkt. 55.

Tenant responded on May 8, 2014. *See* Dkt. 56. Tenant first correctly took the position that section 1.08 of the Lease does not limit the numbers of lenders. *See id.* at 1. On the contrary, section 1.08(f) contemplates multiple lenders by providing that its requirements may be collectively met by "any combination of the foregoing entities." *See id.* Nonetheless, Tenant agreed that Aozora would not participate and that Aareal would be the only lending bank. *See id.* Tenant then addressed Landlord's contention that the loan amount was in excess of that permitted by the Lease:

> SECTION 25.05A(d) states that "....the amount of any permanent Leasehold Mortgage will not exceed the amount of the construction loan obtained in connection with the construction of the Improvements to the Premises...", this section does NOT say anything about the current balance at the time of the refinancing as that was never the intent of this provision. Additionally, the lease provides the ability to finance "....additional reasonable amount for the construction of additional improvements to the Premises..." The original construction loan was for $53,982,000. The Tenant will be utilizing the additional financing amount to fund the lease up and improvement of the retail portion of the property and fund the cost of tenant improvements relating to already approved and executed leases. Furthermore, Tenant is borrowing less than it is actually entitled to borrow per the lease.

See Dkt. 56 at 1; *see id.* at 2 (more detailed breakdown of the proceeds). Tenant refused Landlord's demand to deem a failure to timely provide loan balance statements as a material default because "the loan is serviced by a third party servicer and [Tenant] will not subject all of its rights to a potential oversight which does not have a material effect on the lease, loan or

property. That being said they will agree to provide statements." *See id.* at 2. Finally, Tenant agreed to provide the required estoppel certificate and appraisal (upon receipt from the lender), and asked for an estimate of Landlord's fees. *See id.*

As noted earlier, and as Landlord was informed, the Term Sheet was set to expire on May 15, 2014. Nonetheless, Landlord did not respond to Tenant's May 8 email until May 16, in which he wrote:

> 1. My client does not agree with your interpretation of Section 1.08(f) of the lease. In any event, my client will not sign any agreement with a new lender that has more than one lender. [Aareal Capital] is the only lender my client will recognize.[6]
>
> 2. My client's position regarding the amount of the refinancing has not changed. My client believes the lease is clear with respect to the permitted amount of any leasehold financing and disagrees with your interpretation.
>
> 3. If the lender will not agree to the default with respect to the failure to provide monthly loan statements, the lender must propose a solution to the problem of my having to chase the tenant and the lender virtually every month for a copy of the statements. My client will not simply accept the lender's good faith obligation.
>
> 4. We do not understand the comment about delivery of a copy of the appraisal upon receipt of same. Receipt by who? Presumably, the lender has already obtained an appraisal.
>
> 5. An estimate of the fees will be provided if we are able to resolve the open matters.
>
> Please note that entering into an agreement with the tenant's lender by the owner is purely voluntary and would be done as a courtesy **as there is no obligation under the lease for the owner to enter into any agreement with the tenant's lender.**[7] In fact, Section 25.05 of the lease does not require the consent of the

[6] Again, Landlord is expressing a preference for Aareal Capital over ABAG, and there is no mention of the $100 million requirement as a condition to agreeing to the Term Sheet.

[7] This assertion is wrong. As Tenant correctly contends, and as discussed further herein, the Letter Agreement amended the Lease to the extent it required Landlord to execute an estoppel certificate not only with the provisions required by section 33.01(B), but also with the terms set forth in paragraphs 10 through 25 of the UBS Estoppel Certificate.

> owner to leasehold financing but merely sets forth conditions relating to that financing. As such, the tenant can certainly enter into a leasehold financing arrangement without the involvement of the owner as long as the terms of such financing comply with the requirements of the lease. If the owner's position as outlined in this and the prior e-mails is not satisfactory to the tenant or the lender, then perhaps the tenant should proceed without the owner's involvement.[8]

See Dkt. 57 (emphasis added).

> Tenant responded by letter dated May 20, 2014:
>
> As discussed on our call earlier today, my client [] disagrees with your points 1-3 in your May 16, 2014 email to me (the "May Email"). Further, your closing paragraph in the May Email which provides that the ground lessor estoppel is an accommodation to my client contradicts the terms of the [Letter Agreement]. Specifically, the [Letter Agreement] Amendment provides "[t]his will confirm to [Tenant] that [Landlord] will extend to a future leasehold mortgagee the benefits of paragraphs 10 through 25 of the [UBS Estoppel Certificate]."
>
> As you know, the Ground Lessor Estoppel certificate requested in the current financing is, in substance, identical to that of [the UBS Estoppel Certificate]. As such, the request is not an accommodation but an agreed upon requirement. Further, your request in paragraph 3 of the May Email is negated by the terms of the Letter Agreement as the provision relating to the obligation of the lender to provide loan statements that is set forth in paragraph 24 of the currently requested ground lessor estoppel is identical to paragraph 24 of [the UBS Estoppel Certificate].
>
> With respect to your point in paragraph 1 of the May Email, as provided in my May 8, 2014 email to you, both lenders will agree to be subject to the jurisdiction of New York courts as required by the definition of "Institutional Lender" in the [] Lease. Further, as stated in my May 8, 2014 email to you, the lenders will agree that [Aareal Capital] will be the notice party for all lenders, thereby negating the concern that your client has to deal with multiple lenders. Accordingly, as both lenders otherwise meet the requirements of an "Institutional Lender" (as defined in the [] Lease) and clause (f) of the Institutional Lender definition clearly contemplates multiple lenders, we disagree with your assertion in paragraph 1 of the May Email.

---

[8] As Landlord knew, this was never a possibility, since no reasonable commercial real estate lender would have loaned Tenant approximately $55 million without a sufficient estoppel certificate. Indeed, Landlord was putting Tenant in the position of seeking refinancing with an estoppel certificate less robust than the certificate issued on the very loan being refinanced, a red flag for a lender.

Finally, your assertion that the maximum amount that can be borrowed by [Tenant] is the current outstanding principal balance also contradicts the express terms of the [] Lease. Section [25.05(B)(d)] of the [] Lease sets forth the amount that the [Tenant] is permitted to borrow. Such amount, at a minimum, is the amount of the original construction loan plus additional improvements to the premises (subject to [Landlord's] approval) plus the actual costs of obtaining the financing. As I mentioned in my May 8, 2014 email and, for that matter my March 12, 2014 email alerting you to the refinancing, that is precisely what is being borrowed. No amounts are being paid out to [Tenant] and the amount being borrowed does not exceed the amounts permitted under Section 25.05(B)(d) of the [] Lease.

In view of the above, I suggest your client reconsider its position.

See Dkt. 58.

Landlord responded by email on May 23, 2014:

1. My client disagrees with your interpretation of the [Letter Agreement]. That letter stated that the owner would extend "to a future leasehold mortgagee" the benefits of certain provisions of [the UBS Estoppel Certificate]. That provision does not state that it applies to all future leasehold mortgagees but only to "a future leasehold mortgagee." The singular was used and not the plural (as you have argued with respect to your interpretation of certain provisions of the Lease) and the agreement by the landlord was only intended to benefit a leasehold mortgage who acquired the interest from [UBS]. Indeed, that letter agreement was executed at the time that UBS transferred its interest in the building construction loan to StabFund because of a concern that StabFund would not be entitled to the benefits of [the UBS Estoppel Certificate]. This position is consistent with the position that the owner took when the loan was subsequently transferred last year to CIT Bank.

2. Nevertheless, as I previously stated, the owner is prepared to accommodate the tenant's new lender with a similar Certificate, provided the new lender is an Institutional Lender and the other requirements of the Lease are satisfied. This accommodation by the owner is for this refinancing only and is not intended to constitute a waiver of any of the owner's rights under the Lease or the [Letter Agreement]. With respect to the lender, there is nothing in the Lease that mandates that my client recognize [ABAG] as an Institutional Lender. That entity is clearly not an Institutional Lender as defined in the Lease. Your offer to have that entity consent to jurisdiction in New York does not change that fact. If [Aareal Capital] meets the requirements of an Institutional Lender, my client will recognize [Aareal Capital] as the lender. While you also offer to have [Aareal Capital] consent to jurisdiction in New York, that offer is of no import since [Aareal Capital] is already subject to jurisdiction in New York by virtue of its

qualification to conduct business in New York filed with the New York Department of State. Regarding your assertion that [Aareal Capital] qualifies as an Institutional Lender, the only information you provided regarding [Aareal Capital] was a one sentence statement in a foreign entity's Annual Report that indicates that [Aareal Capital] is a subsidiary of [ABAG]. As such, please explain the basis on which [Aareal Capital] qualifies as an Institutional Lender within the meaning of the Lease. Assuming the information indicates that [Aareal Capital] is an Institutional Lender, my client has no issue recognizing [Aareal Capital] as the lender.[9]

3. Regarding the maximum amount that can be borrowed under the Lease, the Lease is quite clear as to the amount that can be borrowed and the owner disagrees with your interpretation.[10] You were not a party to the original negotiation so I am not sure how that the amount of any leasehold financing can only be for construction of improvements on the property and the Lease expressly so states ("and for no other purpose"). Moreover, Section [25.05(B)(d)] of the Lease is quite specific as to what can be borrowed. The permanent financing cannot exceed the amount of the original construction loan. The original construction loan was replaced by permanent financing several years ago. The fact that the permanent financing has amortized so that a portion of the principal has been repaid does not entitle the tenant to refinance in an amount that exceeds the current principal balance and use such proceeds for any purpose. That is not what was intended nor what the Lease states. The Lease is clear that the tenant can only borrow an "additional reasonable amount for the construction of additional Improvements to the Premises (provided that same shall be approved by Landlord) that are to be made promptly after receipt of such financing proceeds and the actual costs of obtaining the financing (excluding legal, accounting fees and other such soft costs)." The information you submitted to the owner includes costs that are clearly prohibited by the terms of the Lease. The tenant is certainly entitled to borrow in excess of the original construction loan amount and even in excess of the current principal balance on the original loan provided that (a) the additional amount is used for the construction of additional improvements on the property, (b) such improvements have been approved by the owner and (c) such improvements are to be made promptly after receipt of the proceeds. As far as I am aware, the tenant has neither requested nor received any approval from the owner for the construction of additional improvements to the property. No plans or other documentation has been submitted to the owner with respect to any proposed construction of additional improvements to the property.

[9] Landlord now seems to be backtracking and raising issues as to whether Aareal Capital is suitable. Of course, by this point, the Term Sheet had expired, so even if Landlord agreed to provide an estoppel certificate, Tenant had to hope Aareal would still issue the loan at the originally agreed-upon terms. Simply put, Landlord's offer was too little too late. This litigation is the result.

[10] As discussed below, Landlord is correct with respect to this issue.

> If you are claiming that such plans and a request for approval have been submitted, please send copies to me. With respect to the issue of delivery of the monthly loan statements, since the owner does not agree that it is required to grant every future mortgagee a Certificate, this issue still needs to be addressed and the owner is prepared to consider any reasonable solution to the problem.
>
> 4. In summary, the owner has absolutely no objection to the tenant borrowing in excess of the current loan balance, in whatever amount the tenant desires, provided that the requirements of the Lease are met, including that the additional amounts are used only for constructing additional improvements on the property and costs of financing (excluding soft costs). The owner is prepared to execute a new Certificate on the basis of the matters set forth in this e-mail (and subject to the execution by the tenant of a tenant estoppel certificate and the payment of the owner's fees).

See Dkt. 59.

Landlord and Tenant did not reach an agreement, nor did Tenant close on the proposed Aareal Loan.

C. Procedural History and Claims Asserted

Tenant commenced this action on May 30, 2014. Tenant filed an amended complaint (the AC) on July 3, 2014. *See* Dkt. 11. The AC asserts four causes of action for declaratory judgments that certain provisions in the Lease and Letter Agreement have the meaning ascribed by Tenant and, therefore, Landlord was obligated to provide Tenant with an estoppel certificate in conformity with the Letter Agreement in connection with the proposed Aareal Loan. The four disputed issues are whether: (1) "a future leasehold mortgagee" only applies to the one specific mortgagee that acquired the UBS Loan or all future leasehold mortgagees; (2) such language applies to one mortgage or multiple mortgages; (3) Aareal and ABAG qualify as "Institutional Lenders"; and (4) the amount and allocation of the proposed Aareal Loan exceeded the amount permitted by the Lease. Tenant also asserts a fifth cause of action for specific performance, seeking an order compelling Landlord to deliver an estoppel certificate. Finally, Tenant asserts a

sixth cause of action for damages caused by Landlord's refusal to issue the estoppel certificate, which Tenant claims is a breach of the Lease and the Letter Agreement. On July 23, 2014, Landlord filed an answer with a counterclaim to recover its attorneys' fees in this action under section 22.02 of the Lease. *See* Dkt. 19.

By order dated October 20, 2014, the court stayed discovery pending determination of the instant summary judgment motions. *See* Dkt. 32. The motions were filed on March 4, 2015. Oral argument was held on August 27, 2015.[11] *See* Dkt. 119 (8/27/15 Tr.). The court did not decide the motions at that time because the parties, after extensive negotiations, appeared to reach a settlement agreement. The parties, ultimately, did not settle, as negotiations broke down as they tried to reduce their agreement to writing. The parties proffer competing explanations for this unfortunate failure. *See* Dkt. 120 & 121. Whatever the true reason these parties, who are stuck with each other for another 37 years (with an impending refinancing deadline approaching next May), could not reach a reasonable compromise to buy peace, failure to settle and the reasons for such failure have no bearing on this decision.

That said, with one exception, Tenant is correct on every material dispute. Indeed, many of Landlord's positions appear to be the product of bad faith and some are downright frivolous. Nonetheless, as Landlord correctly avers, Landlord need only prevail on a single issue to avoid liability in this action. Landlord prevails on the fourth cause of action regarding the permissible amount of the loan and how its proceeds may be used. This, however, is merely a short term, hollow victory, since this issue can surely be addressed by Tenant to enable a refinancing prior to the maturity next May. Tenant may refinance in the amount of the UBS Loan balance, as well as

[11] The transcript erroneously indicates that argument was held on August 20.

the costs of construction of additional improvements. The resolution of the other disputed issues should make that possible.

II. Legal Standard

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman,* 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

III. Discussion

Tenant's first four causes of action are for declaratory judgments. CPLR 3001 provides that courts "may render a declaratory judgment having the effect of a final judgment as to the

rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." "The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations." *Thome v Alexander & Louisa Calder Foundation*, 70 AD3d 88, 99 (1st Dept 2009) (citation omitted). Hence, declaratory judgments should only be issued when there is a "justiciable controversy", that is, "one involving a present, rather than hypothetical, contingent or remote prejudice to the plaintiff." *Ovitz v Bloomberg L.P.*, 18 NY3d 753, 763 (2012). If a controversy is rendered moot, there is no justiciable controversy. *Baines v Berlin*, 125 AD3d 439, 440 (1st Dept 2015). Nonetheless, even though courts may not issue advisory opinions on moot controversies, an exception exists where the "controversy or issue [] is likely to recur, typically evades review, and raises a substantial and novel question." *Id.*, citing *Hearst Corp. v Clyne*, 50 NY2d 707, 714-15 (1980); *see Big Four LLC v Bond St. Lofts Condo.*, 94 AD3d 401, 402-03 (1st Dept 2012).

The purpose of the declaratory judgments sought by Tenant is to adjudge whether Landlord was justified in refusing to issue an estoppel certificate in connection with the proposed Aareal Loan. While there is no guaranty that a future proposed refinancing will involve the same terms, the parties' competing interpretations of the applicable provisions of the Lease and Letter Agreement will most certainly be the source of future dispute if the court does not declare their meaning. That is particularly the case here where the Lease has another 37 years to run and the mortgage term ends next year. Tenant's claims, therefore, present a justiciable controversy. That controversy, simply put, is whether the Aareal Loan was in conformity with the Lease. If it was not, for any of the reasons proffered by Landlord, Landlord was justified in its refusal to

issue the estoppel certificate. Nonetheless, since Tenant may correct nonconformities when putting together a future term sheet, even a ruling in Landlord's favor serves to stabilize the parties' relations by clarifying the circumstances under which Landlord is obligated to issue an estoppel certificate.

To resolve the subject disputes, the court must interpret the parties' written agreements, which were heavily negotiated by experienced real estate counsel. The Lease and the Letter Agreement, like all contracts, must be "construed in accord with the parties' intent." *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 (2002). "The best evidence of what parties to a written agreement intend is what they say in their writing. Therefore, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Id.* (citations omitted). "A contract is unambiguous if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion." *Id.*, quoting *Breed v Ins. Co. of N. Am.*, 46 NY2d 351, 355 (1978). "Thus, if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity." *Greenfield*, 98 NY2d at 569-70. Moreover, "a contract should be 'read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose.'" *Beal Sav. Bank v Sommer*, 8 NY3d 318, 324-25 (2007), quoting *Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 (2003). Finally, "a contract should not be interpreted to produce an absurd result, one that is commercially unreasonable, or one that is contrary to the intent of the parties." *Cole v Macklowe*, 99 AD3d 595, 596 (1st Dept 2012), citing *In re Lipper*

Holdings, LLC, 1 AD3d 170, 171 (1st Dept 2003) (citations omitted); *see generally Macy's Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 54 (1st Dept 2015).

The first, threshold dispute concerns the scope of Landlord's promise in the Letter Agreement to "**extend to a future leasehold mortgagee** the benefits of paragraphs 10 through 25 of [the UBS Estoppel Certificate]." *See* Dkt. 45 (emphasis added). This is the core obligation at issue. The warranties in paragraphs 10 through 25 of the UBS Estoppel Certificate are broader than those in section 33.01(B) of the Lease. Hence, for Tenant to compel Landlord to provide it the robust warranties in the UBS Estoppel Certificate, as opposed to the more narrow warranties in the Lease, Tenant must establish that the Letter Agreement applies to the proposed Aareal Loan.

Landlord claims it does not. Landlord interprets the Letter Agreement to only extend to a single future assignee of the UBS Loan, arguing that use of the singular (i.e., "**a** future leasehold mortgagee), instead of the plural (e.g., future leasehold **mortgagees**), indicates that the obligation only applies to a single, future assignee. Landlord avers that since the UBS Loan was already assigned, it no longer has any estoppel certificate obligations under the Letter Agreement.

Landlord is wrong. As Tenant correctly contends, Landlord's reading contravenes section 39.04 of the Lease, which states that "[a]ll terms and words used in this Lease, regardless of the number or gender in which they are used, shall be deemed to include any other number and any other gender as the context may require." *See* Dkt. 43 at 38. Landlord is ignoring the context. Had the parties only intended on applying the Letter Agreement to a single, specific UBS Loan assignment, they could have so provided by naming the assignee. They did not do so.

The UBS Loan was a short term loan that matures approximately 37 years before the Lease expires. The fact that a refinancing would be necessary when the UBS Loan matured was understood and anticipated by the parties. Tenant will not be able to secure refinancing without an estoppel certificate tantamount to the UBS Estoppel Certificate. For this reason, Tenant insisted on the terms of the Letter Agreement before it was willing to further spend $18 million on renovations, the benefits of which, along with all Improvements paid for by Tenant, will eventually inure to Landlord, a good reason for Landlord to have agreed to the estoppel letter.

Summary judgment is granted to Tenant on the issue of whether Landlord has a continuing obligation under the Letter Agreement to provide the required estoppel certificate in connection with a proposed refinancing for the duration of the Lease so long as the proposed loan does not otherwise violate the Lease. Aareal Capital and ABAG qualified as proposed future leasehold mortgagees under the Letter Agreement. Landlord's refusal to issue an estoppel certificate based on there being two lenders was wrongful unless the Term Sheet contravened the Lease. Landlord claims it did.

Landlord's first objection is that Tenant was proposing the participation of multiple lenders. This objection is frivolous because it has no basis in the Lease. Section 1.08 the Lease expressly permits multiple lenders so long as they meet the definition of Institutional Lender. *See* Dkt. 43 at 3 ("any combination of the foregoing entities; provided that each of the above entities shall qualify as an Institutional Lender"). Landlord's insistence that there only be one lender was improper.

Nor is there merit in Landlord's contention that the Aareal entities do not qualify as Institutional Lenders. ABAG's operative financial disclosures at the time of the Term Sheet

demonstrates it had far more than $100 million of assets. *See* Dkt. 50 (ABAG's 2013 Annual Report, showing total assets of approximately $59 billion). Landlord does not proffer proof to the contrary or any nonspeculative suggestion that that ABAG's regulatory mandated disclosures are inaccurate.[12] Aareal Capital is ABAG's U.S. subsidiary. It is incorporated in Delaware, registered as a California "Finance Lender", and conducts a commercial lending business out of a New York office. Since both ABAG (a commercial bank) and Aareal Capital ("a similar banking institution") are institutions listed in section 1.08(a), the $100 million requirement does not apply to them pursuant to subsection (y). Section 1.08(a) makes clear that this is true regardless of whether the bank is foreign or domestic. Moreover, to the extent ABAG may not otherwise be subject to jurisdiction in New York courts, it expressly consented to jurisdiction in the Term Sheet. Hence, there is no question that Aareal Capital and ABAG are Institutional Lenders.

Nonetheless, Tenant was not entitled to an estoppel certificate for the proposed Aareal Loan because the amount and proposed usage contravene section 25.05(B)(d) of the Lease. The proposed loan amount of $55.25 million exceeds both the original principal amount and the then outstanding balance on the UBS Loan; a portion of the loan amount was impermissibly earmarked to pay soft costs;[13] and the "Lender Reserve for Retail Leasing" is an unpermitted use.

Again, section 25.05(B)(d) provides:

> Tenant represents and warrants to Landlord and Landlord acknowledges that Tenant will obtain leasehold construction financing and permanent leasehold financing **only in connection with the financing of Improvements and for no other purpose.** Tenant further acknowledges and understands that the amount of

[12] ABAG is publicly traded on a German stock exchange.

[13] While the hundreds of thousands of dollars earmarked for soft costs are relatively insubstantial relative to the amount of the loan, there is no question of fact that the Aareal Loan improperly was to be used to fund these soft costs.

> any permanent Leasehold Mortgage **will not exceed the amount of the construction loan obtained in connection with the construction of Improvements to the Premises**, plus such **additional reasonable amount for the construction of additional improvements** to the Premises (provided the same shall be approved by Landlord) **that are to be made promptly after the receipt of such financing proceeds** and the actual costs of obtaining the financing (excluding legal, accounting fees and other such soft costs).

See Dkt. 43 at 29-30 (emphasis added).

This section clearly prohibits financing for uses other than Improvements. This restriction has two implications. First, and with respect to Tenant's hypothetical, had Tenant paid off $30 million of the original $54 million loan, Tenant could not refinance by taking out a new loan up to the full $54 million amount because the extra $24 million would not be for the purpose of financing of Improvements. So long as the Improvements were already paid for, and Tenant does not, as here, claim that $24 million in further Improvements are needed or forthcoming, the refinancing is prohibited. The maximum permitted amount of financing – "the amount of the construction loan obtained in connection with the construction of Improvements to the Premises" – must be read in context, which makes clear it is subject to the restriction that financing is permitted "only in connection with the financing of Improvements and for no other purpose." Consequently, refinancing amounts in excess of the loan balance is prohibited.

The only exception is when the excess amounts are "for the construction of additional improvements." Such improvements, however, "are to be made promptly after the receipt of such financing proceeds." Tenant proffers no explanation for how it meets this requirement. Likewise, Tenant has not explained what improvements are needed or when they will occur. Therefore, the $1 million fund for "Lender Reserve for Retail Leasing" is improper. To be sure, the Lease does not expressly prohibit establishing a fund for improvements. However, absent a

showing that the fund was actually needed for imminent improvements, the fund does not comply with the Lease.

In sum, Landlord was entitled to refuse to issue the requested estoppel certificate. That said, it should again be noted that as of April 2014, the payoff amount on the UBS Loan was approximately $51.5 million, merely $3.75 million less than the proposed Aareal Loan. Landlord, nonetheless, is entitled to strictly enforce the Lease's refinancing restrictions. Since the Term Sheet did not comply with the Lease, Landlord is entitled to summary judgment on Tenant's fifth cause of action for specific performance. Tenant will only be entitled to compel Landlord to provide an estoppel certificate if Tenant proffers a new term sheet that addresses the issues set forth herein and does not otherwise contravene the Lease. However, Landlord has no right to refuse to issue an estoppel certificate including all of the benefits of paragraphs 10 through 25 of the UBS Estoppel Certificate if Tenant proffers a new term sheet that does not violate the Lease.

Indeed, a refusal by Landlord to do so would give rise to a claim for damages. Contrary to Landlord's contentions, section 30.01 does not preclude damages in the event Landlord refuses to fulfill its affirmative contractual obligations. Section 30.01(B) merely precludes Tenant from seeking damages when Landlord fails to provide a required "consent or approval." The issue here is not failure to consent or approve. In fact, pursuant to section 25.05(A), Tenant is permitted to refinance without Landlord's consent. The issue here is Landlord's obligation to provide the required estoppel certificate under the Letter Agreement. The Letter Agreement describes this as something Landlord "will" do. Similarly, section 33.01 states that Landlord "shall" issue estoppel certificates as required.

Finally, Landlord asserts a counterclaim for attorneys' fees, which is governed by section 22.02 of the Lease:

> If Landlord employs an attorney or collection agent **to collect** all or any Net Rent, Additional Rent, Deposits or Security due to Landlord hereunder, or **to enforce** any other provision hereof, or **to respond** to any inquiry made or question raised by Tenant concerning the applicability or interpretation of any provision of this Lease, or **to seek summary proceedings or other remedies** to which Landlord may be entitled, or **in connection with any proposed Lease Transfer or any other matter for which Tenant may request Landlord's consent or other action by Landlord**, the Landlord, in addition to all other costs and fees allowed according to law, shall be reimbursed by Tenant immediately for all costs, attorneys fees, and collection agent charges incurred by Landlord, and the same shall be paid as Additional Rent.

See id. at 26-27.

None of these bolded scenarios clearly apply. This is not an action to collect rent. Landlord is not seeking enforcement of the Lease; Tenant is. Landlord is not responding to a Tenant inquiry. The parties negotiated, and are now litigating. Nor is this a summary proceeding. The only arguable applicable scenario is the final bolded portion, i.e., a situation where Landlord employs an attorney "in connection with ... any other matter for which Tenant may request ... other action by Landlord." This provision, however, does not expressly state that *litigation* over a Tenant's request is covered. The earlier portions of section 22.02 distinguish between litigation (summary proceedings) and extra-litigation services (responding to tenant inquiries).

Fee shifting provisions must be strictly construed and are only enforced if they are "unmistakably clear". *Gotham Partners, L.P. v High River Ltd. P'ship*, 76 AD3d 203, 204 (2010), citing *Hooper Assocs., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 492 (1989); *see U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 597 (2004). Section 22.02 does not

expressly state, as it could have, that Tenant must reimburse Landlord for its legal fees in all litigation arising from Lease disputes, and is unclear about whether "other action[s] by Landlord" encompasses litigation or merely extra-litigation matters. The parties' correspondence reflect their understanding that Landlord's transactional counsel's fees in connection with the refinancing must be paid by Tenant. *See* Dkt. 55-57. Hence, the attorneys' fees clause might only have been intended to apply in the transactional context, and not in litigation. While it is conceivable that section 22.02 might have been intended to apply to this type of litigation, section 22.02 does not make this purported intention unmistakably clear. The court, therefore, will not award Landlord its legal fees under section 22.02.[14]

Finally, while the court is declaring the meaning of the disputed contractual provisions, the court, of course, cannot render an advisory opinion on terms of a future proposed loan that may differ from the proposed Aareal Loan. For instance, while the court is ruling that a foreign bank's consent to jurisdiction is sufficient, the court cannot rule on whether the proposed lender otherwise qualifies as an Institutional Lender without knowing its identity. Thus, to the extent there are disputes, the parties must attempt to resolve them in good faith. Demanding concessions not provided for in the contacts, such as objecting to multiple lenders or new

[14] Given this result, the court need not reach the issue of whether a fee shifting provision such as this is enforceable where the party claiming a right to attorneys' fees acted in bad faith and where the bulk of attorneys' fees may have been spent on frivolous claims. To wit, had Landlord merely pressed the only issue on which it is in the right (i.e., section 25.05), Tenant may well have consented to decreasing the loan amount. Landlord's assertion of myriad unreasonable, clearly erroneous positions made it impossible to reach an agreement, thus resulting in this unfortunate, costly litigation. Bad faith clearly is arguable. Landlord deserves to incur the financial burden of paying its own attorneys' fees. That said, the court finds no fault in Landlord's litigation counsel, whose papers and representation before the court was exemplary, especially given the positions to be defended. However, the court would be remiss if it did not convey that it is deeply troubled by Landlord's transaction counsel's negotiating posture, and particularly his undue delay (the excuses for which the court finds utterly uncompelling) in responding to Tenant's counsel. The intent appears to be the frustration of Tenant's ability to refinance.

conditions of material default, is not good faith. The refinancing must conform to the Lease, but need not be subject to terms beyond that which the Lease requires. Accordingly, it is

ORDERED that the parties' summary judgement motions are decided as follows: (1) summary judgment is granted to Tenant on its first, second, and third causes of action; (2) summary judgement is granted to Landlord on Tenant's fourth, fifth, and sixth causes of action; (3) summary judgment is granted to Tenant on Landlord's counterclaim; and (4) the motions are otherwise denied; and it is further

ORDERED, ADJUDGED, and DECLARED that (1) Landlord is obligated under the Letter Agreement to provide Tenant with an estoppel certificate with the benefits of paragraphs 10 through 25 of the UBS Estoppel Certificate if Tenant proffers a term sheet for a refinancing in conformance with the Lease; (2) Landlord has this obligation for the entire duration of the Lease; (3) if Landlord breaches this obligation, section 30.01 of the Lease does not preclude Tenant from seeking monetary damages; (4) the Lease and Letter Agreement do not prohibit multiple lenders so long as they are Institutional Lenders as defined by section 1.08 of the Lease; (5) Aareal Capital and ABAG qualified as Institutional Lenders at the time the Term Sheet was proposed; (6) a lender consenting to jurisdiction in New York for all claims related to the loan conforms with the jurisdictional requirements of section 1.08; (7) the maximum amount of a refinancing loan is the outstanding loan balance plus any amounts Tenant can demonstrate are to be used for the construction of additional improvements promptly after the receipt of such financing proceeds; and (8) section 22.02 does not obligate Tenant to pay for Landlord's costs and attorneys' fees incurred in litigation commenced by Tenant to declare the parties' rights under the Lease; and it is further

ORDERED that the Clerk is directed to enter this judgment.

Dated: November 19, 2015

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.

Milton A. Tingling
Clerk of the Court

FILED
FEB - 1 2016
COUNTY CLERK'S OFFICE
NEW YORK

Index No. 651662/14

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

High Line Development

Plaintiff,

-against-

450 West 14th Street

Defendants.

Order and Judgment

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