MGR Resources Mgt, Inc. v Barranca Family Trust
2017 NY Slip Op 32544(U)
December 5, 2017
Supreme Court, Kings County
Docket Number: 512741/16
Judge: Debra Silber

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9

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MGR RESOURCES MANAGEMENT, INC.,

Plaintiff -Tenant,

-against-

BARRANCA FAMILY TRUST
c/o STEVE BARRANCA,

Defendant - Landlord.

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DECISION/ORDER

Index No. 512741/16

Submitted: 11/9/17

Mot. Seq. # 3 & 4

HON. DEBRA SILBER, J.S.C.:

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant's motion for summary judgment on its counterclaims and for dismissal of the complaint and plaintiff's cross motion for partial summary judgment and related relief.

Papers	Numbered
Notice of Motion, Affirmation and Exhibits Annexed.....	1-28
Notice of Cross Motion, Affirmation and Exhibits Annexed.....	29-47
Affirmation in Opposition to Cross Motion	48
Affirmation in Reply.....	49
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Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

Defendant-Landlord Steve Barranca, as Trustee of the Barranca Family Trust, moves for summary judgment on its counterclaims and for an order dismissing plaintiff MGR Resources Management, Inc.'s complaint. Plaintiff cross-moves for partial summary judgment and for an order permanently enjoining defendant from terminating plaintiff's tenancy on the basis of the items in the Landlord's Notices of Default dated July 8, 2016.

Background

This is an action brought by a commercial tenant of real property located at 99 19th Street, Brooklyn, New York. The relationship between the parties has been contentious since approximately February 2016 when the Landlord's Trustee's son moved into the premises to operate his insurance business. On March 16, 2016, a notice of default was sent to the Tenant when the Landlord did not timely receive the rent for March 2016. A non-payment proceeding was then commenced in the commercial landlord and tenant Part 52 of Kings County Civil Court. That special proceeding was later discontinued, presumably when the Tenant paid the rent.

At about the same time, a Notice of Violation was served on the Landlord by the NYC Department of Buildings, which states that the rooftop billboard structure, which the Department refers to as an "arterial double faced roof sign structure," had been vacant for more than two years, and, as a result, as it was in violation of the applicable laws and regulations for a billboard in an M3-1 zone, as it was both too big and too high and too close to the Gowanus Expressway, and had to be removed or legalized. The Notice references Zoning Resolution Sections 42-55 and 42-543 as being violated. Section 42-55 states [in relevant part] that a sign within 200 feet of an arterial highway cannot be an advertising sign and cannot be more than 500 square feet of surface area in size. Section 42-543 solely concerns billboard height requirements.

On July 8, 2016, the Landlord, through its representative, attorney Alex Leibson, sent two Notices of Default to Tenant. The first, with regard to the billboard, claims to be both a Notice of Default and a Notice of Termination, and states that it provides the permitted thirty-day notice to terminate the Tenant's use of the billboard, pursuant to the terms of the Additional Rider, because the Tenant caused the Landlord to receive the

Notice of Violation from the DOB, either because the Tenant kept the billboard vacant or displayed advertising (defined as a sign for a non-tenant of the premises) on it for a period of two years. The second Notice of Default states that the Tenant has breached the Lease in nine different ways. This Notice included claims that the Tenant "eliminated the parking spaces required for the second floor office and used the space as a metal recycling facility, constructed an office in the parking area, removed partitions, removed a door and replaced it with a new door that doesn't comply with the law, painted the sprinkler system a color not permitted by the law, failed to allow the Landlord access to the Premises, and "improperly assigned the lease to another entity without the proper notice/consent of the landlord." This Notice concludes that Tenant has thirty days to cure or the Tenancy will be terminated.

Within the thirty-day cure period, on July 25, 2016, the Tenant commenced this action and simultaneously brought an Order to Show Cause seeking, *inter alia,* a *Yellowstone* injunction. It was signed by the Ex Parte justice of the day, contained a stay of the Notices of Default and was returnable on August 11, 2016 before the undersigned. There is no dispute that it was timely filed, that is, before the cure period expired.

On August 11, 2016, this court granted the *Yellowstone* Injunction in favor of plaintiff Tenant, and preliminarily enjoined the Landlord from terminating the Lease on the grounds in the Notices of Default and tolled the expiration of the two Notices dated July 8, 2016. Plaintiff was ordered to pay the monthly rent reserved in the lease and any other additional rent due under the lease pending the determination of the matter. The Order also amended the caption to reflect that the Tenant's name is MGR Resources Management, Inc., not MGR Management Resources, Inc., set a deadline for

defendant to answer the complaint and set the matter down for a preliminary conference on September 29, 2016. It is noted that the Landlord did not request that the Tenant post a bond, and thus the order does not require any undertaking.

On August 29, 2016, defendant filed his Answer, with Counterclaims. Plaintiff replied to the counterclaims.

Defendant served plaintiff with another Notice of Default on January 13, 2017. It alleged that the Tenant installed a stereo system without the Landlord's approval and it was making excessive noise by playing music too loudly. Plaintiff filed another Order to Show Cause on February 15, 2017, which was resolved by a so-ordered stipulation on March 9, 2017. Therein, Landlord agreed to withdraw the January 13, 2017 Notice of Default, and Tenant agreed to move their stereo speakers and turn down the volume so their music would not disturb the second floor tenants.

Depositions have been conducted. A Note of Issue was filed on July 18, 2017. The case is on for a non-jury trial on December 6, 2017, or, if not a trial, a pre-trial conference.

Defendant served the instant motion on or about September 14, 2017, and plaintiff cross-moved about a month later. The motions were argued on November 9, 2017 and decision was reserved.

The Lease

The Lease and Riders are dated June 20, 2013. The Lease is a standard Real Estate Board of New York office lease form. It is a five-year lease for the "warehouse" which is described as the entire two-story building and grounds, with options to renew, and states at Paragraph 2 that the Tenant shall use the Premises for "any and all uses of recycling scrap metal, aluminum, plastic and other permissible recycling materials,

storage, and for no other purpose." [1] The first rider has additional provisions with regard to insurance, additional rent, Tenant's renovation work [minor work], utilities and other items, but nothing with regard to the Tenant's use of the premises other than a provision that the Tenant will not make excessive noise or odors or fumes or in any way interfere with the offices on the second floor of the premises. It is not known if there were any occupants in the second floor offices at the time the Lease was executed. There is no mention in the Lease of parking spaces, except that the "grounds" were included in the Lease.

The second rider, denominated "Additional Rider" is addressed to the use of the billboard on the roof of the premises. This rider allows Tenant to use the billboard. It states that the law restricts the use of the billboard to advertising for occupants of the Premises only, that Tenant will apply for any necessary permits before putting up any signs, and that if the law changes to allow advertising by other than businesses occupying the Premises, the Landlord has the right to give Tenant thirty days' notice and "take back" the right to use the billboard. There is no separate amount of rent provided for in the Additional Rider for use of the billboard, nor is there any reference to a rent reduction if the Landlord "took back" the billboard.

In February 2016, the parties entered into an amendment to the Lease, called "First Amendment to Agreement of Lease." This document changes the leased Premises to exclude a part of the second floor, as indicated in an Exhibit not attached

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[1]The property is zoned M3-1. M3 districts are designated for heavy industries that generate noise, traffic, or pollutants. Typical uses include power plants, solid waste transfer facilities and recycling plants, and fuel supply depots. Even in M3 districts, uses with potential nuisance effects are required to conform to minimum performance standards. Like M2 districts, M3 districts are usually located near the waterfront and buffered from residential areas. Zone M3-1 requires parking spaces, while M3-2 does not.

to the copy of the Amendment in the motion, and reduced the rent accordingly. The reason for the amendment, Mr. Barranca testified at his EBT, was so his son could use one of the offices for his insurance business. There are provisions in the Amendment about utilities, security, garbage removal and other items concerning the second floor which are not relevant to these motions.

The Pleadings

The complaint has four causes of action. The First is for a *Yellowstone* injunction tolling the thirty-day cure period set forth in the Notices of Default. The Second is for a declaratory judgment that the Tenant has not defaulted under the Lease and that the Lease therefore is in full force and effect. The Third is for a declaration by the court that the Notices of Default are void and of no force or effect because they were signed by an attorney for the Landlord, and thus they cannot be the basis of a Notice of Termination. The Fourth cause of action seeks damages caused by Landlord's "acts, omissions and failure to act" which resulted in the Tenant being unable to "install a sign on the exterior wall."

Defendant's Answer contains two counterclaims. The first seeks a declaration that the Tenant has breached the lease, and a trial for the determination of its damages. The second counterclaim seeks a declaration that the Tenant has breached the Additional Rider with regard to the billboard, entitling Landlord to terminate the Tenant's permission to use the billboard and a trial to determine the amount of the Landlord's damages.

Defendant's Motion

In support of its motion for summary judgment dismissing the complaint and for summary judgment on the issue of liability on its counterclaims, defendant submits an

attorney's affirmation, an affidavit from Steve Barranca, the Trustee for the Trust which is the Landlord, the EBT transcript of Ms. Chang, the Tenant's witness, copies of the Lease and riders and the pleadings, the Notices of Default, two notices of violation from the DOB, photographs, a copy of an affidavit from Tenant's President from a prior motion[2], and copies of several documents in the court file.

Mr. Barranca states in his affidavit that plaintiff entered into possession of the premises pursuant to a lease and riders dated June 20, 2013 (Annexed to motion papers as Exhibits A and B). Plaintiff was precluded by the Lease from assigning the lease without the Landlord's prior permission. The parties also executed an Additional Rider with regards to the use of the billboard (annexed to the motion papers as Exhibit C), because plaintiff requested use of the billboard affixed to the roof. Under the Additional Rider, plaintiff was required to secure any permits necessary to use the billboard and to comply with all applicable laws and regulations.

On February 29, 2016, defendant received a Notice of Violation from the NYC Department of Buildings (DOB) for improper use, or lack thereof, of the billboard (Exhibit E). The billboard had been left vacant for more than two years. The violation, as he understands it, resulted in the loss of the billboard's "grandfathered" status as it does not conform to the current laws. The Notice of Violation requires the billboard to be removed or legalized. Barranca characterizes this as an irreparable harm to the Landlord, which cannot be cured or corrected by the plaintiff.

Barranca then avers that once the Landlord received this Notice of Violation, he visited and examined the premises for other potential defaults by the Tenant. Barranca

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[2]It appears this was included to prove that the same affidavit was provided in plaintiff Tenant's current motion.

states that the inspection revealed many breaches of the Lease, the riders thereto and the amendment thereof, as is described above and discussed in detail below. Upon discovering these defaults, defendant Landlord served two Notices of Default upon the plaintiff, one for the billboard and one for the remainder of the property leased by Tenant. Barranca avers that several of these breaches are incurable.

Barranca claims that as a result of a renovation plaintiff performed in 2013, without proper notice to or approval by the Landlord, several of the items in his list of defaults arose. He states that, although these improper renovations were finished in 2013, DOB has not yet signed off on them because the use of the building is no longer in conformity with the Certificate of Occupancy, itself an incurable breach under the lease.

Barranca claims (incorrectly, as is discussed below) that every attempt plaintiff has made to obtain a new Certificate of Occupancy following the 2013 renovations has been unsuccessful. A DOB printout annexed as Exhibit G reflects that on August 18, 2015, a request for a "Letter of No Objection" for "Scrap Metal Recycling" was denied, with the comment "The current C/O doesn't show metal sorting. Have to apply for new C/O." The printout reflects that four additional attempts to obtain a "Letter of No Objection" were denied. The court notes that defendant's Exhibit U consists of photos of what appears to be a scrap metal operation, with a prominently placed sign which says "Scrap King."

Barranca states that, on May 12, 2017, subsequent to the issuance of the Notices of Default, DOB issued a Notice of Violation to the Landlord, citing "Occupancy contrary to that allowed by the Certificate of Occupancy" and "1st floor should be occupied as accessory attendant parking for 20 cars." [Exhibit H]. The summons set a

hearing date at the Brooklyn office of the Office of Administrative Tribunals and Hearings (OATH) on June 26, 2017. Barranca states that he forwarded the summons to his attorney, who, he was advised, forwarded it to counsel for plaintiff. Barranca states that plaintiff made no effort to cure the violation, nor did it appear at the hearing.

Barranca states that he attended the OATH hearing on June 26, 2017 with the Trust's attorney and an architect. On June 30, 2017, OATH issued a decision (Exhibit I) which found that the occupancy was "contrary to that allowed by the certificate of occupancy," and imposed a fine of $1,200 against the Landlord. Barranca avers that the defendant Landlord paid the fine, even though the Lease makes compliance with the Certificate of Occupancy the responsibility of plaintiff.

In addition, defendant cites the affidavit of plaintiff's President, Yi Lu Teng, submitted in support of its request for a *Yellowstone* injunction. Specifically, defendant points out Teng's admission that there is no first floor partition, that he did remove a partition and a door on the second floor and on the second floor stairwell, with the consent of the Landlord, but defendant claims that there was no written consent to the alternations, as is required in the Lease. Mr. Barranca points out that Mr. Teng admits that plaintiff leases half of the second floor, and admits that the billboard exists in the same exact (unused) condition as when the Additional Rider was signed in 2013.

Defendant also cites the testimony of Michelle Chang at her EBT on behalf of plaintiff. Ms Chang is the human resources person for plaintiff and the comptroller of Scrap King USA, Inc. She testified that Scrap King USA, Inc. is the tenant at the premises and that MGR operates out of an office in New Jersey. She admitted that Scrap King was formed by MGR to operate the business. She said Scrap King USA, Inc. was a corporation formed by MGR after it signed the lease, and is a "daughter"

corporation. Presumably she meant a subsidiary. In all of its business locations, MGR rents the premises, and then, after the rental, a new corporation is formed to do the work at the premises. The officers and directors of all of the corporations are the same, although the employees are different. She testified that the violations caused by MGR's renovations have not been dismissed as yet because "they had not gotten around to it" [EBT Page 34].

Defendant also annexes printouts (Exhibit V) from the NYS Department of State showing MGR and Scrap King are two separate and distinct corporate entities. The printout of the entity information for MGR Resources Management, Inc. reflects an initial filing date of October 28, 2010. Its home county is listed as Suffolk County. Its address for process is in Kearney, New Jersey. Its Chief Executive Officer is listed as Mr. Teng. The printout of the entity information for Scrap King USA Inc. reflects an initial filing date of May 13, 2013. Its home county is listed as Kings. Its address for process is listed as the subject premises. There is no Chief Executive Officer or Registered Agent listed.

Plaintiff's Cross Motion

Plaintiff supports its motion with an attorney's affirmation and the same papers as defendant includes in its motion, including the pleadings and various documents from the court file, and copies of the Building Permits they obtained, printouts from the DOB web site and the EBT transcript of Steve Barranca.

Plaintiff annexes the deposition transcript of its witness, Michelle Chang. Ms. Chang testified at her EBT that the billboard was never used by plaintiff and that the right to use one side of the billboard was "given back" to defendant prior to the issuance of the Notice of Violation. She insisted that plaintiff never did anything to cause a

violation to be placed by DOB for the billboard.

Ms. Chang testified that the second floor partitions were removed with the landlord's consent. She noted that the second floor was surrendered back to the landlord for use by the landlord's son as an insurance office and thus the area is no longer in the plaintiff's possession. She testified that the Landlord's son did some additional renovations to his part of the second floor.

The court notes that Ms. Chang had a great deal of difficulty with the questions as English is not her native language and she did not have an interpreter at the EBT. Thus, her responses may not be accurate.

Plaintiff also annexes the affidavit of plaintiff's President, Yi Ling Teng, initially submitted in support of the original *Yellowstone* motion, in which he states that any problem with the billboard occurred prior to MGR taking occupancy. He avers, however, that MGR remains ready willing and able to get a permit to correct this violation if they have to do so.

Mr. Teng also avers that MGR could not have eliminated any parking spaces as is alleged in the Notice of Violation, because there is no on-premises parking, as the building is built full to the lot and there is only on-street parking. Mr. Teng avers that plaintiff has not built any metal recycling facility on any parking lot. Nor did they do anything else which was alleged to have occurred in the parking area, since there was no parking area at the premises when they rented it.

Mr. Teng states that there were no partitions on the first floor. Plaintiff did remove partitions and doors which separated two sets of stairs on the second floor and installed a floor-to-ceiling glass partition, but this was done with the knowledge and consent of the landlord. He says they obtained a permit from the City to install the

partition and DOB signed off on it and the landlord consented. At any rate, he states that the alterations the Landlord complains about in the Notice of Default are now in the area occupied by the Landlord's son's insurance company and were performed by the insurance company, not by MGR. He states that the Tenant never painted the sprinkler system as is claimed. They had a DOB permit for the little work they did on the second floor and all the work was done to Code. The landlord also did work on the second floor after it took back half of it. Mr. Teng avers that there has been no assignment of the Lease. Mr. Teng stated that they've always given the Landlord access to make repairs. He states that the Tenant is ready and willing to do anything short of vacating the premises to remedy the problems, and that the Tenant has expended hundreds of thousands of dollars on its work at the premises.

Plaintiff also annexes the permits issued to plaintiff by the DOB for work and what they claim is proof of compliance with the permits (Exhibit 16) and an email exchange between Ms. Chang and Mr. Barranca concerning proposed renovations.

Discussion

The Summary Judgment Standard

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, therefore, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). However, a motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party, as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Summary

judgment should be granted where the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman*, 49 NY2d 557, 562).

"The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez*, 68 NY2d 320, 324; *see also Zuckerman*, 49 NY2d 557, 562; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]; *see also Zuckerman,* 49 NY2d 557, 562).

In determining whether to grant summary judgment, the court must evaluate whether the issues of fact raised by the opposing party are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [2d Dept 1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [2d Dept 1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [2d Dept 1985], *affd* 66 NY2d 701 [1985]). Mere conclusory statements, expressions of hope, or unsubstantiated allegations are insufficient to defeat a motion for summary judgment (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Spodek v Park Prop. Dev. Assoc.*, 263 AD2d 478 [2d Dept 1999]). "[A]verments merely stating conclusions, of fact or of law, are insufficient to defeat summary judgment" (*Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 383-384 [2004],

quoting *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]). Finally, if there is no genuine issue of fact, the case should be summarily determined (*Andre v Pomeroy*, 35 NY2d 361, 364).

Analysis

It is the contention of both parties that there are no genuine issues of material fact which would stand in the way of its being granted summary judgment.

Procedural Issues

The court first wants to address a few procedural objections raised by counsel for the parties.

First, the plaintiff's cross motion was not too late to be considered. It is well-settled that "an untimely cross motion for summary judgment may be considered by the court where . . . a timely motion for summary judgment was made on nearly identical grounds" (*Snolis v Clare*, 81 AD3d 923, 925 [2011]; *see also Lennard v Khan*, 69 AD3d 812, 814 [2010]).

Second, defendant has included Ms. Chang's EBT transcript in its motion and then complains that the identical copy plaintiff includes it in its cross motion cannot be considered as it is not in admissible form. By including Ms. Chang's transcript with its motion, the moving defendant has adopted it as accurate. Further, plaintiff, which has also included a copy of Ms. Chang's deposition transcript with its motion papers, has not challenged the transcript's accuracy. Accordingly, Ms. Chang's deposition transcript is admissible (*see Carey v Five Bros., Inc.*, 106 AD3d 938, 939-940 [2d Dept 2013]; *see also Rosenblatt v St. George Health & Racquetball Assoc., LLC*, 119 AD3d 45, 51 [2d Dept 2014]).

Third, plaintiff claims the Notice of Default should be declared to be invalid and

void because it was signed by the Landlord's attorney and not by the landlord, as is required by *Siegel v Kentucky Fried Chicken, Inc.*, 67 NY2d 792 [1986]. Counsel is incorrect. In that case, the lease specified who could give notice, and indicated a specific person, and the notice challenged was not from the person who was specified in the lease. (*Matter of QPII-143-45 Sanford Ave., LLC v Spinner*, 108 AD3d 558 [2nd Dept 2013].) To the extent that this is the basis of plaintiff's Third Cause of Action, that cause of action is dismissed. (See *Equator Intern, Inc. v* NH Investors, Inc., 43 Misc3d 251).

The *Yellowstone* Injunction

A tenant seeking a *Yellowstone* injunction "must demonstrate that: (1) it holds a commercial lease; (2) it received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease; (3) it requested injunctive relief prior to both the termination of the lease and the expiration of the cure period set forth in the lease and the landlord's notice to cure; and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises." (*see Reisenburger Properties LLLP v Pi Associates, LLC*, 2017 NY Slip Op 08294 [2d Dept]; *Zona, Inc. v Soho Centrale LLC*, 270 AD2d 12, 13-14, quoting *225 E. 36th St. Garage Corp. v 221 E. 36th Owners Corp.*, 211 AD2d 420, 421; see also *Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assocs.*, 93 NY2d 508, 514).

It is undisputed that plaintiff holds a commercial lease and received a notice of default and a threat of termination and that it requested injunctive relief prior to the end of the cure period and prior to the termination of the lease. On the return date before the court of the motion for the *Yellowstone*, the issue was whether plaintiff was prepared to cure the alleged defaults by any means short of vacating the premises. At

that juncture, based upon the Tenant's representations, the court issued a preliminary injunction. Now, the Tenant seeks a permanent injunction enjoining the Landlord from terminating its tenancy based upon the defaults which are alleged in the Notices of Default dated July 8, 2016. The Landlord asks that the injunction be lifted and the plaintiff's action dismissed. The alleged defaults must be addressed one at a time. The law is clear that if any of the alleged defaults cannot be cured, a permanent injunction should not be issued.

There are three alleged breaches which defendant maintains are incurable. The remainder of the items in the Notices of Default are conceded by the Landlord to be curable, such as the color the Tenant allegedly painted the sprinklers, which clearly can be repainted. Therefore, the court will not address the items which Landlord concedes are curable. Defendant first maintains that plaintiff breached the lease by assigning it to Scrap King without proper consent from defendant in violation of the specific terms of the Lease, and that this breach is incurable. Defendant maintains that plaintiff's failure to comply with the Certificate of Occupancy is a breach of the Lease and riders, which is incurable. In addition, defendant avers that plaintiff's use, or rather its lack of use thereof, of the billboard, breached the terms of the Additional Rider and resulted in a Notice of Violation from the DOB which states that the billboard must be removed or legalized, which is incurable.

The Assigment of the Lease

Pursuant to ¶ 11 of the Lease and ¶ 43(a) of the rider, any assignment of the Lease by MGR was required to be consented to in writing by Landlord unless the assignment is to "a controlled subsidiary company or to a parent company of Tenant (existing or future) or a company into which Tenant may be merged, or to an affiliated

company." An affiliated company is expressly defined as, *inter alia*, one having common controlling shareholders. However, ¶ 43(a) also requires Tenant to notify Landlord of a permitted assignment and to provide a written agreement "whereunder such assignee assumes liability and performance . . . "

Plaintiff's President stated in his affidavit filed in support of the original Order to Show Cause seeking a *Yellowstone* Injunction that there was no assignment of the Lease. Further, plaintiff's witness, Ms. Chang, testified at her EBT that Scrap King USA Inc. is the tenant at the premises. She testified that Scrap King was formed by MGR after it signed the lease, and that MGR forms a separate corporation for each of its locations, which she described as a "daughter corporation." She testified that the officers and directors were the same as MGR's but the employees at the location were employed by Scrap King. A subsidiary corporation or an alter ego corporation is not the kind of assignment that is forbidden by the Lease, and in any event, has not been held to be incurable, as long as it can be undone. Here, the Tenant avers not only that it will do what needs to be done to avoid forfeiting the lease (See *Zona v Soho Centrale*, 270 AD2d 12 [1st Dept 2000]), but that the creation of a subsidiary or affiliated corporation is expressly permitted by the Lease.

However, other than their witness's testimony and the affidavit of the company President, plaintiff has submitted no evidence confirming what plaintiff's counsel also calls a "father/daughter relationship" between the two corporations. Thus, while this alleged default cannot be considered incurable on the facts alleged, and in fact, there may be no default at all, neither party has established that it is entitled to summary judgment. The court cannot grant the Tenant's request that the court declare that it is not in default, or summary judgment on the Landlord's claim that the Tenant has

breached the Lease by assigning the Lease.

Further, as the Tenant has demonstrated a willingness to cure the alleged breach, an injunction may be granted herein. (See *Confidence Beauty Salon v 299 Third SA,* 148 AD3d 439-440 [1st Dept 2017]; *Rappa v Palmieri,* 203 AD2d 270-271 [2d Dept 1994]; *Linmont Realty v Vitocari,* 147 AD2d 681 [2d Dept 1989]). Tenant shall provide the documentation and agreement required by ¶ 43(a) of the Lease to Landlord promptly.

The Certificate of Occupancy (C of O)

The Landlord claims in its motion that the Tenant's non-conformity with the Certificate of Occupancy is an incurable breach under ¶ 3 and ¶15 of the Lease and ¶ 53(i) of the rider. However, the Notice of Default sent to the Tenant dated July 8, 2016 does not make this claim, and instead states that the Tenant "eliminated the parking spaces required for the second floor office space and instead has used the space as a metal recycling facility." The Notice did not really give the Tenant proper notice of what the problem was or how to cure it. The Tenant responded, in Mr. Teng's affidavit in support of the preliminary injunction, that the building covers the whole lot and there is no parking lot. Clearly, the Tenant did not understand the issue when it received the Notice of Default, and it is not clear to the court that the Tenant understands the issue now.

After a half dozen calls by someone to 311, as reflected on the DOB website, the DOB issued a violation in May of 2017, which is annexed to the Landlord's motion papers, but that was well after the *Yellowstone* injunction was issued. There is nothing in the Notice of Default that claims the Tenant's use does not conform to the C of O, and the court was not made aware of this issue when the first motion, for a *Yellowstone*

injunction, was argued in the summer of 2016. In that motion, it seemed that the Tenant had somehow interfered with the use of some of the parking spaces which were supposed to be available for the Landlord's son, who is a tenant on the second floor.

The property is in an M3 zone, so the Tenant's use does not appear to be a zoning violation, but there is no expert's opinion on this point. The problem is that, according to Mr. Barranca's testimony, he himself oversaw the construction of the building, a new building, in 2005, and sought and obtained a Certificate of Occupancy in 2006, for offices on the second floor, with 20 spaces for parking on the ground floor and an entrance lobby on the ground floor.

In 2013, Mr. Barranca leased the premises to Tenant herein for use as a metal and plastic recycling facility, which use is specifically described on Page one of the Lease, and the Lease does not say a word about the Tenant (or the Landlord) needing to apply to amend the Certificate of Occupancy to obtain one that permits the intended use. Further, the court has not been provided with any information in the motion papers to determine what would be necessary, or at what cost, to change the Certificate of Occupancy to one for a scrap metal recycling facility. Neither side has provided an expert's affidavit. This failure of proof prevents the court from granting summary judgment on the basis of this alleged default to either party.

The Tenant is granted permission in the Lease to perform minor renovations, and proceeded to obtain a Permit from the NYC Department of Buildings in August 2013 for "ALTERATION TYPE 2 - CONSTRUCTION EQUIPMENT - FENCE INTERIOR RENOVATION OF EXISTING COMMERCIAL SPACE AT 1ST & 2ND FLOOR AS PLAN FILLED HEREWITH. NO CHANGE OF USE, EGRESS OR CERTIFICATE OF OCCUPANCY." A copy of the permit is in the Tenant's motion papers. The application

was submitted in June 2013 and lists "Scrap King USA, Inc." as Tenant and was signed by Mr. Teng. It does not appear that the Landlord signed the application, and Landlord claims it did not, but this application for a permit does not in any way relate to the problem at hand, which is that the use of the space for the purpose described in the Lease is not permitted by the current Certificate of Occupancy.

The court must note that all of plaintiff's efforts to obtain a "Letter of No Objection" have been unsuccessful, and the applications were seemingly pointless, as the Building Code requirements for a parking lot would probably be quite different from the requirements for a metal recycling facility. It is thus no surprise to the court that the DOB printout annexed by defendant as Exhibit G to its motion demonstrates that, on August 18, 2015, a request for a "Letter of No Objection" for "Scrap Metal Recycling" was denied, with the comment "The current C/O doesn't show metal sorting. Have to apply for new C/O." The printout further reflects that on September 15, 2015, a request for a "Letter of No Objection" for "Scrap Metal Processing" was denied, with the comment "Apply for a change of Certificate of Occupancy." The printout reflects several more applications for a Letter of No Objection, which were all denied for the same reason. It is not clear why the Tenant continued to apply for permission to do something that clearly could not be granted. The court wonders if Tenant, at this late date, understands what needs to be done to make its use of the premises legal.

Moreover, without more evidence, viewing the evidence available, such as it is, the equities weigh on the Tenant's side. As the Appellate Division states in *Prakhin v Fulton Towers Realty Corp.*, 122 AD3d 601, 602 (2d Dept 2014):

> A court's fundamental objective in interpreting a contract is to determine the parties' intent from the language employed and to fulfill their reasonable expectations (see *St. John's Univ., N.Y. v Butler Rogers Baskett Architects, P.C.*, 92 AD3d 761, 764, 938 NYS2d 578 [2012]; 131

> *Heartland Blvd. Corp. v C.J. Jon Corp.*, 82 AD3d 1188, 1189, 921 NYS2d 94 [2011]). "[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569, 780 NE2d 166, 750 NYS2d 565 [2002]; see *NML Capital v Republic of Argentina*, 17 NY3d 250, 259, 952 NE2d 482, 928 NYS2d 666 [2011]; *St. John's Univ., N.Y. v Butler Rogers Baskett Architects, P.C.*, 92 AD3d at 765). Thus, "[i]t is the role of the courts to enforce the agreement made by the parties—not to add, excise or distort the meaning of the terms they chose to include, thereby creating a new contract under the guise of construction." [citations omitted] Moreover, "[i]mplicit in every contract is a covenant of good faith and fair dealing, which encompasses any promise that a reasonable promisee would understand to be included" (*Michaan v Gazebo Hort., Inc.*, 117 AD3d 692, 693, 985 NYS2d 601 [2014]; see *Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 68-69, 385 NE2d 566, 412 NYS2d 827 [1978]; *Atlas El. Corp. v United El. Group, Inc.*, 77 AD3d 859, 861, 910 NYS2d 476 [2010]). "The implied covenant of good faith and fair dealing is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement" (*Atlas El. Corp. v United El. Group, Inc.*, 77 AD3d at 861.

Here, if it is possible to amend the C of O and Tenant is willing to do so, at its own expense, the violation is not incurable. Further, as the Appellate Division states in *Frank Brunckhorst Co., LLC v JPKJ Realty, LLC*, 129 AD3d 1019, 1020 (2d Dept 2015):

> In opposition, the defendant raised a triable issue of fact as to whether the plaintiff's conduct caused the defendant's failure to obtain a permanent certificate of occupancy. "[U]nder the doctrine of prevention, when a party to a contract causes the failure of the performance of the obligation due, it cannot in any way take advantage of that failure" (13 Richard A. Lord, Williston on Contracts § 39:3 [4th ed May 2015]; see *Kooleraire Serv. & Installation Corp. v Board of Educ. of City of N.Y.*, 28 NY2d 101, 106, 268 NE2d 782, 320 NYS2d 46 [1971]; *Lager Assoc. v City of New York*, 304 AD2d 718, 719, 759 NYS2d 116 [2003]; *A-1 Gen. Contr. v River Mkt. Commodities*, 212 AD2d 897, 900, 622 NYS2d 378 [1995]).

As the Tenant was not sent a Notice of Default that states that the use of the premises is in violation of the Certificate of Occupancy, and the Lease specifically provides that the premises may be used for a metal and/or plastic recycling facility, and the Lease does not require the Tenant to obtain a new Certificate of Occupancy for the

intended use, coupled with the absence of any expert affidavit as to whether the Certificate of Occupancy can be changed without tearing down the entire building, and whether the office which Landlord retained can continue to exist above a recycling facility, the court must conclude that neither party has demonstrated that the actual breach can be cured, nor has either party demonstrated that it cannot be cured. The actual breach, a use not in conformity with the C of O, not the mere "elimination of parking spaces," is only clear now that the City's Notice of Violation has been issued and the Landlord's lawyer and architect went to the OATH hearing. The Tenant has not demonstrated that it would be willing to cure, if the violation is curable, as it has not been informed of what would be required to cure by the Landlord or by its own expert.

The court notes that the Lease expires on May 31, 2018. If the cost of amending the C of O is too high, the Tenant can decide not to renew the Lease.

The Billboard

The billboard is a large metal structure on the roof of the building. It provides space for two signs, one facing the front of the building and one facing the back. In his affidavit, Mr. Barranca states that when the lease was executed in 2013, the plaintiff requested use and possession of the billboard. The parties executed an Additional Rider with regard to the billboard, making plaintiff Tenant responsible for "erection, installation and operation" of the billboard. Under the rider, annexed to defendant's motion as Exhibit C, the plaintiff was required to secure any permits necessary for the use of the billboard and to comply with all applicable regulations. On February 29, 2016, Barranca says he received a Notice of Violation from the NYC Department of Buildings for improper use, or rather, lack thereof, of the billboard. The violation is annexed to the motion as Exhibit E. The Notice of Violation indicates that the billboard had been left

vacant for more than two years. The violation, Landlord alleges, resulted in the loss of the billboard's "grandfathered" status. DOB, in the Notice, orders that the billboard be taken down or legalized.

In opposition, the affidavit of Mr. Teng, plaintiff MGR's President, avers that any problems with the billboard occurred prior to MGR taking occupancy and that the billboard remains in the exact same condition as it was in when the Additional Rider was signed. There is also the testimony of Ms. Chang at her EBT that the billboard was never used by plaintiff; in fact, she stated regarding the billboard, that "we just don't have time to plan anything." She then states that the right to use one side of the billboard was given back to defendant Landlord prior to the issuance of the Notice of Violation. She indicated that this agreement was made through emails, and was asked at her EBT to produce those emails. It is noted that none of these alleged emails are annexed as exhibits to plaintiff's papers. It is also noted that Teng's affidavit, which was originally submitted in support of plaintiff's original motion seeking a *Yellowstone* Injunction, makes no mention of plaintiff's giving up any portion of its right to use the billboard. If that is the intent of the parties, the Additional Rider should be modified in writing.

Essentially, Chang and Teng admit that plaintiff took no action whatsoever to put a sign for their business on the billboard, but they assert that their failure to put up a sign is not a failure to comply with the terms of the Additional Rider. While the Landlord claims otherwise, the Lease and Rider do not require the Tenant to use the billboard, and do not say that the Tenant would forfeit the right to use it if they did not use it by a date certain, nor does it provide for liquidated damages, or anything which addresses the unusual regulations which apply to the billboard.

Landlord Barranca states that the DOB's violation means that the billboard lost its "grandfathered" status and now has to be removed. That is not exactly accurate. First, it is a new billboard, built by Barranca in 2005, so, again, without an expert's opinion, the court cannot understand how it was somehow entitled to be "grandfathered." The Zoning Resolution requires that it not be used for advertising, but only for a sign for a business actually at the location, and requires that the billboard be a certain size. The Landlord seems to have built a billboard in 2005 that exceeds the legal size limit, which subjected it to the "use it or lose it" provision of the Zoning Resolution. It would seem that it could be made smaller if it is too large, and does not have to be removed entirely, but, again, there is no affidavit from an expert on this point. Nor is there any evidence as to how big and how high the billboard is, and how much it would have to be reduced to legalize it.

Neither the Lease nor the Additional Rider mentions the fact that the billboard structure was "grandfathered" and was otherwise non-compliant with the New York City Zoning Law, nor is there any requirement that the Tenant use the billboard by a date certain, as opposed to keeping it empty, or that the Tenant must clean any graffiti from it, or any reference to the Restrictive Declaration recorded against the property (Doc ID 2003110700589001) which Barranca as Landlord signed in 2003, acknowledging the billboard's status as non-compliant and that only non-advertising signs are permitted on it. [3] Neither the Restrictive Declaration nor the Lease states that if the billboard structure is vacant for two years, the "grandfathering" would terminate and it would have

[3] An "advertising sign" is defined in the Zoning Resolution as "a sign that directs attention to a business, profession, commodity, service or entertainment conducted, sold, or offered elsewhere than upon the same zoning lot and is not accessory to a use located on the zoning lot."

to be removed or legalized.

The Zoning Resolution, placed on the internet by the City of New York for all to read, states (Section 52-61) that "If, for a continuous period of two years, either the . . . active operation of substantially all the non-conforming uses in any building or other structure is discontinued, such land or building or other structure shall thereafter be used only for a conforming use." Further, Section 52-81 states "A non-conforming sign shall be subject to all the provisions of this Chapter relating to non-conforming uses . . ."

Therefore, the court concludes that the Tenant did not breach the Lease by failing to put a sign on the billboard. The Notice of Default and Termination is void, and may not be the basis of the Termination of the Lease. The parties may wish to modify the Additional Rider to reflect who is going to pay to legalize the billboard, and whether each party can use one side of it or something else. The Landlord's Second Counterclaim, which seeks damages for its claimed loss of the billboard, is dismissed. Neither party may recover from the other any damages which result from the party's failure to know the applicable law and regulations.

Conclusion

For the reasons stated herein, plaintiff's Third Cause of Action (with regard to the signatory to the Notices of Default) is dismissed, and defendant's Second Counterclaim (for damages with regard to the billboard) is dismissed.

The court finds that the Landlord has failed to establish, with any admissible evidence from an architect, engineer or other qualified expert, that any of the items of default listed in its Notices of Default dated July 8, 2016 are incurable, and concludes that the Tenant has indicated that it is ready, willing and able to cure any defaults. The *Yellowstone* injunction issued on August 11, 2016 is therefore continued, however, the

court elects to modify it in two ways. First, the court has determined that an undertaking must be posted by plaintiff with the Clerk of the Court, pursuant to CPLR 6312, for "any damages and costs which may be sustained by defendant by reason of the injunction," should it later be determined that the injunction was erroneously granted, in the sum One Hundred Thousand Dollars ($100,000), on or before January 22, 2018, with proof thereof sent to defendant's counsel, and the Order dated August 11, 2016 is amended accordingly. Thus, the continuation of the *Yellowstone* injunction is now contingent upon plaintiff posting the undertaking, in addition to remaining current in its rent, as is required in the August 11, 2016 Order. Second, the preliminary *Yellowstone* injunction shall terminate, without any further order of the court, on June 1, 2018. By then, if the parties have not worked out the issues herein, the Tenant must, if it does not elect to terminate the lease when the first five-year period expires on May 31, 2018, return to court and seek an extension of the *Yellowstone* injunction, which must include evidence of its efforts to cure the alleged defaults, particularly with regard to the alleged assignment of the Lease and the alleged use of the premises in a manner that is not in compliance with the Certificate of Occupancy.

Further, the court hereby grants Landlord permission to amend the Notice of Default dated July 8, 2016, *nunc pro tunc*, solely to include the violation the Landlord received in May 2017 from the NYC Department of Buildings. However, the *Yellowstone* injunction issued on August 11, 2016, and amended herein to include a requirement that the Tenant post an undertaking, shall similarly be deemed to cover any and all defaults alleged in the Amended Notice of Default.

Finally, the court finds that both parties have failed to meet their burden of proof with regard to the remainder of the relief requested in their motions for summary

judgment. Thus, any relief requested by either party and not granted in the paragraphs in this section entitled "conclusion" is hereby denied.

In addition, in the interest of judicial economy, the court grants both parties leave to renew these motions with appropriate experts' affidavits, leave to move to strike the note of issue, despite such a motion being untimely, and leave to move to amend the pleadings, if desired.

The foregoing constitutes the decision and order of the court.

Dated: Brooklyn, New York
December 5, 2017

ENTER:

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court