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

PRESENT: BARBARA JAFFE J.S.C. Justice

PART 59 5

City of New York

INDEX NO. 401932/11

MOTION DATE

- v -

MOTION SEQ. NO. 001

Red River Partners, LLC

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
DEC 12 2011
COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

Dated: 12/8/11
DEC 08 2011

BARBARA JAFFE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

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THE CITY OF NEW YORK,

Plaintiff,

-against-

RED RIVER PARTNERS, LLC,

Defendant.

----------x

Index No. 401932/11

Motion Subm.: 9/13/11
Motion Seq. No.: 001

DECISION & ORDER

BARBARA JAFFE, JSC:

For plaintiff:
Warren Shaw, Esq.
Michael A. Cardozo
Corporation Counsel
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212-788-1154

For defendant:
Marc Aronson, Esq.
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Brooklyn, NY 11201
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By order to show cause dated July 22, 2011, plaintiff moves pursuant to CPLR 6301 for an order, pending the determination of the action, enjoining the termination of its lease of premises located at 425-427 East 38th Street in Manhattan (the premises). Defendant opposes.

I. BACKGROUND

On or about July 13, 1987, plaintiff and defendant's predecessor entered into a 99-year lease for the premises. (Affidavit of Rebecca Clough, ACC, dated July 20, 2011 [Clough Affid.], Exh. C). Sometime in 2007, defendant obtained title to the premises and subsequently constructed a residential building next door. (*Id.*).

Pursuant to article 4 of the lease, plaintiff's Department of Environmental Protection (DEP) utilizes the premises as a garage and maintenance facility with auxiliary office and storage space. (*Id.*). Article 9 provides that:

> (a) [Plaintiff], at its sole cost and expense, shall have the right to renovate or alter the Premises in such manner as [plaintiff] may, in its reasonable discretion, deem advisable ("Capital Improvements"), except that all such renovations or alterations shall be made in conformance with the then-current zoning resolution and Certificate of Occupancy for the Premises and shall not increase the height or bulk of the Premises except as otherwise provided in Article 8(f) hereof . . . [defendant] shall cooperate with [plaintiff] in obtaining [governmental] permits or authorizations upon [plaintiff's] request . . .
>
> (b) [Plaintiff] agrees that all Capital Improvements shall be performed (i) in such manner as not to unreasonably interfere with the access to, or use and enjoyment of the Adjacent Building by tenants thereof or [defendant] and (ii) in such manner as will not materially adversely affect the physical structure of any portion of the Adjacent Building other than the Premises unless specifically permitted by [defendant].

Pursuant to article 23, the parties agreed that no default by plaintiff of any of its lease obligations entitles defendant to terminate the lease; rather, defendant could commence an action for specific performance or breach of contract. (*Id.*).

By notice of termination dated January 25, 2011 (Notice), defendant notified plaintiff that it had elected to terminate plaintiff's tenancy as of February 28, 2011 on the grounds that plaintiff had created a nuisance and dangerous conditions in the premises, committed fraud and forgery in the operation of the tenancy and thereby violated the Penal Law, harassed the owner and other tenants of the premises by interfering with their comfort or safety, and created dangerous conditions to the adjoining building. Specifically, defendant stated that the following facts support the termination notice:

(1) Plaintiff submitted plans to the Department of Buildings (DOB) and applied for permits on or about June 25, 2007, July 20, 2007, and February 4, 2008, by fraudulently providing a landlord's name and forging the name on the applications;
(2) The plans were never submitted to defendant for examination;
(3) The plans created a dangerous condition to the structure of the premises and adjoining building; and
(4) Plaintiff caused DOB violations on the premises in February 2009, June 2010, and October 2010.

(*Id.*, Exh. A).

The three DOB violations referenced in the notice relate to the elevators in the premises. (*Id.*, Exh. H). Plaintiff's three DOB permit applications from July 2007, August 2007, and February 2008 reflect that the owner of the premises is Vinod Devgan, an employee of plaintiff's Department of Design and Construction. (*Id.*).

By letter dated October 18, 2010, plaintiff advised defendant of its intent to commence capital improvements on November 1, 2010, that the improvements would be made to the interior of the building only, and that it would comply with article 9 of the lease. (*Id.*, Exh. F).

By letter dated December 13, 2010, defendant rejected plaintiff's letter on the grounds that it failed to specify the work to be performed and had refused to provide documentation of the work. (*Id.*, Exh. G).

By facsimile transmission dated January 21, 2011, plaintiff sent to defendant work applications for defendant's signature along with a complete set of the construction documents. (*Id.*, Exh. E).

On or about July 18, 2011, plaintiff commenced the instant action seeking declaratory and injunctive relief to clarify the parties' rights and obligations pursuant to the lease. (*Id.*, Exh. B).

By affidavit dated July 21, 2011, Patricia Turner, DEP's deputy director of facilities management and construction, states that defendant knew of plaintiff's plans for the work since at least February 2008, that in February, April and July 2008 and November 2009, plaintiff met with defendant and discussed the planned work and defendant expressed no objection, that in November 2009 plaintiff delivered to defendant a complete set of construction documents with no objection by defendant, and that in January 2011 plaintiff delivered a copy of the amended

construction documents.

II. CONTENTIONS

Plaintiff denies the allegations set forth in the notice of termination, arguing that it amended the permit applications by listing defendant as the owner of the premises before the notice was issued, that it submitted the construction documents to defendant in 2008, 2009, and 2011, that the lease does not require it submit work plans to defendant, that it has not yet commenced any work and thus could not have created a dangerous condition at the premises, and that the three DOB violations have no relation to any work or proposed work. It moreover maintains that it is ready, willing, and able to cure any alleged defaults. (Clough Affid.).

Defendant contends that plaintiff's request for a preliminary injunction is procedurally improper, having been served with the notice of termination rather than a notice to cure or notice of default and that therefore, whether it can cure its defaults is irrelevant, observing that the notice is not only based on plaintiff's defaults but also on its illegal and fraudulent acts. It thus argues that it has not violated article 23 of the lease, and denies waiving its right to object to plaintiff's construction plans. It also maintains that it is irrelevant whether the DOB violations relate to plaintiff's proposed work and observes that plaintiff does not argue that it would cure the elevator violations. (Affirmation of Marc Aronson, Esq., dated Sept. 8, 2011).

III. ANALYSIS

A preliminary injunction may be granted upon a showing by the movant of a likelihood of success, a danger of irreparable injury, and that the balance of equities is in its favor. (*Jones v Park Front Apts., LLC*, 73 AD3d 612 [1st Dept 2010]). As plaintiff sought a preliminary injunction pursuant to CPLR 6301 as imposed to Yellowstone injunction, it is irrelevant that

defendant did not provide it with a notice to cure or notice of default. (*See eg Weinberg v Norson Realty Corp.*, 132 Misc 2d 1055 [Sup Ct, New York County 1986] [as termination notice provided no cure period, plaintiff had to seek preliminary injunction rather than Yellowstone injunction]).

As the lease does not permit defendant to terminate plaintiff's tenancy based on any defaults, and absent any lease provision permitting it to terminate based on illegal and fraudulent acts, plaintiff has established that defendant's notice may have been improperly issued. (*See Empire State Bldg. Assocs. v Trump Empire State Partners,* 245 AD2d 225 [1st Dept 1997] [even if tenant defaulted under lease by filing application with DOB containing false information, there was little likelihood of finding that tenant's actions constituted material violation of lease]).

Moreover, as it is undisputed that plaintiff has not commenced its work, it could not have created a dangerous condition at the premises, and the DOB violations at issue relate to elevator maintenance, not plaintiff's proposed work. Plaintiff has thus demonstrated a likelihood of success on the merits. (*See eg Oriburger, Inc. v B.W.H.N.V. Assocs.*, 305 AD2d 275 [1st Dept 2003] [tenant entitled to preliminary injunction pending determination of action seeking declaration as to termination of lease as its contention regarding defective notice had merit given lease language]).

Plaintiff has also established that it faces irreparable injury without an injunction, as the lease, which still has many years remaining on it, may be terminated and it may be evicted from the premises. (*See Jones*, 73 AD3d at 612-613 [tenant established irreparable harm if evicted from home]; *Concourse Rehabilitation & Nursing Ctr., Inc. v Gracon Assoc.*, 64 AD3d 405 [1st Dept 2009] ["If defendants were permitted to treat the lease as terminated, plaintiffs would lose

their substantial interest in real property"]; *Empire State Bldg. Assocs.*, 245 AD2d at 230 [irreparable harm shown as damages would not likely compensate tenant for value of approximately 79 years remaining on lease]).

For the same reason, the balance of equities weighs in plaintiff's favor and defendant will suffer no harm by reason of the stay as plaintiff has not commenced work at the premises and it is undisputed that it continues to pay rent. (*See Grand Manor Health Related Facility, Inc. v Hamilton Equities, Inc.*, 85 AD3d 695 [1st Dept 2011] [absent injunction, tenant would be at risk of losing valuable leasehold]; *Oriburger*, 305 AD2d at 739 [tenant would suffer irreparable harm if lease terminated as it had developed site-specific restaurant on premises for more than 22 years, and defendant was not prejudiced by injunction pending determination of action]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's application for a preliminary injunction is granted, and the termination of plaintiff's lease to the property located at 425-427 East 38th Street, New York, New York, is hereby enjoined pending the determination of this action.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: December 8, 2011
New York, New York