Islip Theaters LLC v Landmark Plaza Props. Corp.
2017 NY Slip Op 33213(U)
June 20, 2017
Supreme Court, Suffolk County
Docket Number: 606246-2017
Judge: John H. Rouse
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INDEX NO. 606246-2017
012315-2015

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. John H. Rouse
Acting Supreme Court Justice

Index 012315-2015
MOTION DATE: 05/03/2017
ADJ. DATE:
Mot. Seq. 005-MG

Index 606246-2017
MOTION DATE: 05/03/2017
ADJ. DATE:
Mot. Seq. 001-MG

Index 606246-2017
MOTION DATE: 05/03/2017
ADJ. DATE:
Mot. Seq. 002-MG

Index 606246-2017
MOTION DATE: 05/03/2017
ADJ. DATE:
Mot. Seq. 003-MG

Court continues to retain jurisdiction for Index 012315-2015, paper case.

Index 606246-2017
e-filed full participation

ISLIP THEATERS LLC,

Plaintiff

-against-

LANDMARK PLAZA PROPERTIES CORP,

Defendant

ROSEMARY PERRY, JOHN FICKLING, and MURRAY CYMBLER

Additional Parties

DECISION & ORDER

TO:

WILLIAM R. GARBARINO, ESQ.
40 MAIN STREET - P.O. BOX 717
SAYVILLE, NY 11782
631-563-4411

LAW OFFICES GLENN T. NUGENT, ESQ.
31 GREENE AVE.
AMITYVILLE, NY 11701

The decision and order addresses four motions, the firs under Suffolk County Index 12315-2015 and the remaining three motions under Suffolk County Index 606246-2017.

Suffolk County Index 12315-2015 Motion Sequence #005

Upon the reading and filing of the following papers in this matter: (1) Order to Show Cause granted on March 6, 2017 by the Hon. Joseph A. Santorelli for Rosemary Perry; John Fickling; Murray Cymbler; and the Defendant, Lankmark Plaza Properties, Inc. show cause why Lankmark Plaza Properties, Inc. should not be held in contempt of the so ordered stipulation that had been granted on November 2, 2016 and filed in the Office of the Suffolk County Clerk on November 10, 2017 and awarding Plaintiff the sum of $52,000.00 together with the attorney's fees and reasonable costs and expenses incurred in proving such contempt and the damages incurred; (2) Affirmation in Support by Donald R. Hammil, Esq. affirmed on March 6, 2017 with Exhibits A-Z and AA- EE attached thereto and the Affidavits of Service by Frank Greenfield upon Rosemary Perry, Murray Cymbler and John Fickling, each sworn to on March 24, 2017, Memorandum of Law by Donald R. Hamill, Esq. dated March6, 2017; (3) Affirmation in Opposition for Murray Cymbler by James V. Fallon, Jr. affirmed on April 25, 2017 with Exhibits A-E attached thereto; (3) Affirmation in Opposition for Landmark Plaza Properties, Inc. and Rosemary Perry by Glenn T. Nugent, Esq. affirmed on April 28, 2017 with Exhibits A-D and the Affidavit of Rosemary Perry sworn to on April 20, 2017 attached thereto; (4) A Second Affirmation in Opposition for for Landmark Plaza Properties, Inc. and Rosemary Perry by Glenn T. Nugent, Esq. affirmed on April 28, 2017 with only Exhibit A (an affidavit of service) attached therto; a collection of separately stapled papers submitted by John Fickling, Pro Se, consisting of a cover letter dated April 28, 2016 for submissions under Index 12315-2015, Brief of John Fickling, a Page identifying Attachments numbered One through Fourteen, Attachment #1 Stipulation Agreement, Attachment # 2 Roof Tech Quote, Attachment # 3 Carlisle Guaranty; Attachment # 4 November 2, 2016 Transcript, Attachment #5 Photographs on January 18, 2017, Attachment #6 H2M Report, Attachment #7 Allied Building Products Invoice, Attachment #8 January 23, 2017 H2M Rockensies Report, Attachment #9 February 2017 H2M Mark Liegy drain report, Attachment #10 H2M Rockensies Report, Attachment # 11 JR Home Repairs Receipt; and Affidavit of Service by Barbar Lien sworn to on May 1, 2017 (4) Affirmation in Reply by Donald R. Hamill, Esq. in Reply to the Nugent and Perry Affidavits; Affirmation in Reply by Donald R. Hamill, Esq. in Reply to John Fickling's opposition; and Affirmation in Reply by Donald R. Hamill, Esq. in Reply to opposition by James V. Fallon, Jr., Esq. and Murray Cymbler. Unsworn "Affirmation in Reply" by John Fickling dated May 17, 2017 filed with Supplemental Affidavit of Christopher McCarthy sworn on May 9, 2017; Supplemental Briefing of John Fickling sworn on May 9, 2017 with cover page "One Ramirez" attached to "Affidavit John Fickling" dated May 6, 2017 and sworn to on May 9, 2017, and "Two Vericlaim"

reservation of rights letter by Richard J. Palmieri with an enclosed Rimkus Report; and a Draft Property Condition Report by AEI Consultants dated February 2, 2017 filed by Glenn T. Nugent, Esq. Counsel for Defendant, Landmark Plaza Properties Corp.

Suffolk County Index 606246-2017. Motion Sequence #001

Upon the reading and filing of the following papers in this matter: (1) Motion (Seq 001) for a *Yellowstone* injunctionby Order to Show Cause granted on April 6, 2017 by the Hon. W. Gerard Asher, J.S.C.; (2) Affirmation in Opposition filed on May 1, 2017; (3) Affirmation in Reply by Donald R. Hamill, Esq.; (4) Affidavit of Ken Weeks, the Building Inspector in and for the Town of Islip; and (5) All e-filed documents number 1-64.; and

Suffolk County Index 606246-2017. Motion Sequence #002
(6) Mot. Seq. 002, brought be notice of motion dated May 19, 2017 for a protective order pursuant to CPLR § 3103(a) to vacate the Defendant's Amended Notice of Deposition dated May 18, 2017 for the deposition of Matthew Latten; (7) Affirmation in Opposition by Glenn T. Nugent, Esq. Affirmed on June 6, 2017; and (8) All e-filed documents number 1-64.; and

Suffolk County Index 606246-2017. Motion Sequence #003
(9) Mot. Seq. 003, for a *Yellowstone* injunction brought by Order to Show Cause granted May 26, 2017 by the Hon. Gerard Asher; (10) The Affirmation in Opposition by Glenn T. Nugent, Esq. Affirmed on June 6, 2017; and (11) All e-filed documents number 1-64.

The Court Proceedings on May 3, 2017 and on June 14, 2017

Upon consideration of the forgoing, it is

ORDERED that the Case under Suffolk County Index 606246-2017 is adjourned to Wednesday, September 13, 2017 at 2:00 o'clock p.m. for inquest as provided below, and for conference before the court for the purpose of assessing the parties progress in complying with the orders of the court, *infra*, and such other matters as will advance the speedy, complete and final resolution of all disputes between the parties; and it is further

ORDERED that the Plaintiff's motion (Seq. 005, Index 012315-2015) to hold the Defendant-Landlord, LANDMARK PLAZA PROPERTIES CORP., in contempt is granted; and it is further

ORDERED that LANDMARK PLAZA PROPERTIES CORP. and GLEN T. NUGENT, ESQ., as escrow agent, no later than five business days after a copy of this decision and order has been served with notice of entry, shall pay over the $32,500.00 held in escrow to ISLIP THEATERS LLC; and it is further

ORDERED that the Court will conduct an inquest upon costs, disbursements and attorneys fees incurred by ISLIP THEATERS LLC as a result of the contempt of the So Ordered Stipulation by

LANDMARK PLAZA PROPERTIES CORP. and will determine the total of any sums paid as rent by ISLIP THEATERS, LLC that were unnecessarily paid by ISLIP THEATERS, LLC upon LANDMARK PLAZA PROPERTIES CORP. refusal to give the monthly credit to the tenant of $6,500.00, if any, and further if such money was paid to undertake to calculate the fair imposition of interest at the statutory rate; and it is further

ORDERED that the Court will conduct an Inquest on the question of damages at 2:00 o'clock p.m. on Wednesday, September 13, 2017 at 2:00 o'clock p.m., in Part 12 of the Supreme Court located at 1 Court Street Riverhead, NY on the second floor of the Courthouse Annex whereupon the Court will receive proof of damages and the date such damages were incurred; and it is further

ORDERED that Plaintiff's motion (Seq. 001, Index 606246-2017) for a preliminary *Yellowstone* injunction is granted. LANDMARK PLAZA PROPERTIES CORP. is preliminarily: enjoined from terminating or canceling Plaintiff-Tenant's leasehold interest, or the Lease, based upon the Notice of Lease Default, dated March 29, 2017, for the purported default alleged therein; and from interfering with Plaintiff-Tenant's right of possession of the Premises; and from commencing a summary holdover or other proceeding to recover possession of the premises; and from commencing any action to declare Plaintiff-Tenant's leasehold interests in the Premises canceled or terminated; and from taking any other action to terminate or cancel Plaintiff-Tenant's leasehold interest based upon said Notice of Lease Default dated March 29, 2017; and from terminating Plaintiff-Tenant's use and the right of possession of the Premises under said Lease based upon the Notice of Lease Default dated March 29, 2017; and it is further

ORDERED that ISLIP THEATERS LLC's motion (Mot. 002, Index 606246-2017) for protective order is granted and the notice of deposition of Matthew Latten dated May 18, 2017 is vacated and shall constitute a nullity with $45.00 costs to the Plaintiff; and it is further

ORDERED that ISLIP THEATERS LLC's motion (Mot. 003, Index 606246-2017) for a preliminary injunction under Suffolk County Index Number 606246-2017 is granted in every respect; and it is further

ORDERED that Defendant on or before **July 19, 2017** is directed to serve upon the Plaintiff a schedule of any repairs / maintenance and lease defaults that it continues to assert must be cured after having made the careful consideration of such claims as required in the Decision below (Hereinafter **"Landlord's Second Schedule of Claimed Defaults Under the Lease "**); and it is further

ORDERED that Plaintiff is directed to serve upon the Defendant on or before **August 2, 2017** a list of those Defaults that it acknowledges it has a duty to cure, and a date by which such cure can be effected (Hereinafter **"Tenant's Second Schedule of Repairs and Curable Defaults")** ; and it is further

ORDERED that Plaintiff is granted leave to move this court for relief from any one or more claimed defaults that it contends are not based in fact, are contemptuous of the prior so ordered settlement, are a breach of the duty of good faith and fair dealing under the lease and/or are frivolous and should be sanctioned; and it is further

ORDERED that, under the terms of the lease LANDMARK PLAZA PROPERTIES CORP. is to have reasonable access to the premises; under all of the circumstances, reasonable access shall consist of a thirty-minute opportunity to inspect the premises on one business day in each quarter as specified by the tenant, the next quarter beginning on September 15th, the next quarter January 15th, the following quarter April 15th and continuing in like manner again with September 15th until the termination of the lease; and it is further

ORDERED that Islip Theaters, LLC is directed to promptly serve a copy of this decision and order together with notice of entry upon: LANDMARK PLAZA PROPERTIES CORP, ROSEMARY PERRY, JOHN FICKLING, and MURRAY CYMBLER.

DECISION

(Mot. Seq. #005 under Index 012315-2015)

This action, Suffolk County Index 012315-2015, was settled after a great investment of court resources, including court visits to the property subject leasehold estate upon which the Sayville movie theater is situated. This settlement as agreed upon by the parties was So Ordered by the Court. To place the present application in context the genesis of the dispute between the parties is highly relevant.

In the beginning, Plaintiff-tenant alleged that it had discovered the Defendant-landlord had obtained a reduction in the property assessment; an associated reduction in property taxes; and the Defendant-landlord did not reduce the rent as required by the lease. The Defendant-landlord had no good faith claim of right to require the tenant to pay property taxes at the old rate after the reduction in property taxes went into effect. The allegations supported not only a breach of the lease, but would support a charge of larceny as well. *See Penal Law 155.05, 155.15, 155.40 and 70.00(2)(c).* Once Plaintiff-tenant discovered that it was owed $85,588.85 for rent overcharges and Defendant-landlord refused to immediately repay the money wrongfully taken, the Plaintiff-Tenant commenced an action under *Suffolk County Index Number 005631/2015* to recover the rent overcharge.

The Defendant-Landlord then served a ten day notice of default and demand to cure for various alleged breaches of the twenty-year lease. Plaintiff-tenant commenced this action under *Suffolk County Index 012315-2015* and sought a *Yellowstone* injunction. The Court, after first hearing the respective claims of counsel, made several trips to the premises to personally examine the respective claims of the parties. Among the Defendant-Landlord claims was that the Plaintiff-Tenant had failed to maintain an asphalt parking lot, and that the Plaintiff-Tenant had simply used fill to remediate potholes and restore the lot to a usable condition. Whether this allegation

was the product of feeble-minded error or intentional misrepresentations to the court, it was met with proof provided by counsel for the Plaintiff-tenant and an examination by the court that demonstrated the allegation was baseless and that there had *never* been an asphalt parking lot as claimed by the Defendant-Landlord. Throughout the course of litigation Defendant-Landlord presented numerous frivolous claims that required no cure by Plaintiff-tenant, or were easily cured and done expeditiously. During this unnecessarily protracted time taken to resolve the case Defendant-Landlord's prior counsel withdrew from the case.

Glenn T. Nugent, Esq. took over the case for the Defendant-landlord and by undertaking a fair and reasonable approach was successful in finally resolving the case by Stipulation of Settlement executed by Rosemary Perry as President of Landmark Plaza Properties Corp., its attorney, Glenn T. Nugent, Esq.; and by James Kern, a member, on behalf of Islip Theaters, LLC and William R. Garbarino, Esq., its attorney. This stipulation was So Ordered by the Court on November 2, 2016. *See Exhibit A, Plaintiff-tenant's motion by Order to Show Cause to hold Landmark Plaza Properties Corp. in contempt of the so ordered settlement.*

As provided in the So Ordered Stipulation of Settlement at paragraph 2, Defendant-landlord was to pay Plaintiff-tenant $84,588.85 to be effected through a monthly credit $6,500.00 towards each succeeding month beginning with the months of November 2016 and continuing thereafter until such rent credits had setoff the $84,588.85.

Further, under the settlement agreement Plaintiff-tenant was to install a new roof as provided in paragraph 7 of the settlement agreement.[1] Under the agreement the Plaintiff-tenant had the right to select the contractor and roofing material for the new roof and would use the existing rain drains provided they were in working order and the Defendant-landlord would pay the first $32,500.00 in costs of this work, said amount being held in escrow.

Upon completion of the work Plaintiff-tenant was to obtain a certification from H2M Architects and Engineers that the installation of the roof had been accomplished in accordance with the terms of paragraph 7 of the settlement agreement and was to obtain a "standard 20 year guarantee as provided by the roof manufacturer." Once Plaintiff-tenant forwarded the certification by H2M and the guarantee by the roofing manufacturer the Defendant-landlord was to consent to the release of $32,500.00 being held in escrow by its attorney Glenn T. Nugent, Esq.

The work was performed under the regular supervision of H2M which provided regular progress reports replete with color photographs of the roof work and materials used. Plaintiff-tenant forwarded both the certification by H2M Architects and Engineers and the warranty from Carlisle Syntec Systems that provided the required 20 year material warranty. However, Defendant-landlord, thereafter endeavored to change the terms of the settlement agreement by insisting that

[1] *The lease, at paragraph 7, provides: Landlord shall make all necessary structural repairs to the exterior walls, roof and foundation of the premises, except structural repairs required as a result of the acts of negligence of Tenant...*

the warranty must be a "Gold Seal" warranty. Such a specification was never made a part of the agreement.

Defendant-Landlord, by its counsel, acknowledged it was engaged in a *"tedious letter writing campaign"* but suggested to Plaintiff-tenant that there was a mutuality or responsibility for the difficulties, and proposed that thereafter the parties engage in a battle of experts as Defendant-landlord had engaged the services of AEI consultants to dispute the determinations made by H2M Architects and Engineers, the firm selected by both parties in the settlement agreement to certify the work.[2]

It is beyond cavil that once the new roof membrane was installed in accordance with manufacturer's specifications as certified by H2M Architects and Engineers and a *"standard 20 year guarantee provided by the roof manufacturer"* the Plaintiff-tenant had fully performed its obligations under the settlement agreement and the Defendant-landlord was obligated to perform by crediting the Plaintiff-landlord $6,500.00 for each month of rent as provided in the settlement agreement and by releasing the $32,000.00 held in escrow.

Nonetheless, the Defendant-Landlord did not perform its obligations under the So Ordered Settlement Agreement, and instead, served a Ten Day Notice of Lease Default dated March 29, 2017 that has become the subject of yet another action under 606246-2017 as addressed *infra*.

Application of the Law to the Undisputable Facts.

Upon a review of all of the submissions of the parties and the arguments made on May 3, 2017 the court concludes that the Plaintiff-tenant has presented clear and convincing documentary evidence and has proven to a reasonable certainty that:

> (1) The So Ordered Stipulation of Settlement was a lawful order of the court was in effect, clearly expressing an unequivocal mandate provided in the settlement, an executory accord, that provided for the terms of settlement of the case;
>
> (2) That once the certification had been provided by H2M Architects and Engineers had been provided together with the twenty-year manufacturer's warranty as provided to LANDMARK PLAZA PROPERTIES CORP by Carlisle Gentech Systems in the March 3, 2017 e-mail to John Fickling, it was clear to a reasonable certainty to the court and to LANDMARK PLAZA PROPERTIES CORP.'s that ISLIP THEATERS LLC had performed its obligations under the so ordered settlement agreement, and that LANDMARK PLAZA PROPERTIES CORP.'s obligation to completely perform under the agreement was beyond all doubt.

[2] *Plaintiff-tenant's Exhibit W, letter dated February 6, 2017.*

(3) LANDMARK PLAZA PROPERTIES CORP.'s was a signatory to the So Ordered Stipulation and was aware the stipulation had been So Ordered by the Court and was aware that ISLIP THEATERS LLC had performed its obligations under the so ordered settlement agreement and was aware of its own Court Ordered obligations under the agreement which it had a then present and now present ability to perform and, nonetheless, refused to perform.

(4) As a consequence of LANDMARK PLAZA PROPERTIES CORP.'s contemptuous refusal, and continued refusal to perform its obligations under the settlement agreement has been damaged in that LANDMARK PLAZA PROPERTIES CORP. has refused to credit ISLIP THEATERS LLC with payment of $6,500.00 towards its rent in January, February and March of 2017 (for a sum of $19,500.00) and LANDMARK PLAZA PROPERTIES CORP. has objected, without basis in fact or law, to the release of $32,500.00 from escrow as required under the settlement agreement; and ISLIP THEATERS LLC has been further damaged to the extent that it incurred those attorney's fees on and after March 3, 2017 in all its efforts, both formal and informal, to obtain enforcement of the So Ordered Stipulation including all costs, disbursements and attorney's fees necessary to bring this motion for contempt before this court.

LANDMARK PLAZA PROPERTIES CORP. principally through the acts and urging of John Fickling has acted contemptuously of the Court's order, it has violated its duty of good faith and fair dealing in its contractual obligations with ISLIP THEATERS, LLC as animated in the first instance by cupidity and then, once lawfully challenged, was motivated by a completely unwarranted desire for retribution.

Nonetheless, the Court declines to hold John Fickling, Rosemary Perry or Murray Cymbler personally in contempt of the So Ordered Stipulation of Settlement. However, Plaintiff ISLIP THEATERS LLC may serve each of these individuals with a copy of the So Ordered Stipulation of Settlement and this Decision and Order so that each is on notice of the order of this Court and will remain, in the future, subject to contempt proceedings personally.

The Court does find that LANDMARK PLAZA PROPERTIES CORP. is in contempt of the So Ordered Stipulation of Settlement.

(Mot.Seq. 001, Index 606246-2017)

By Notice of Lease Default executed by Rosemary Perry as President and its counsel, dated March 29, 2017, Landlord - LANDMARK PLAZA PROPERTIES CORP., once again, advised ISLIP THEATERS LLC that it had ten days to cure alleged lease violations. In this case the alleged violations consist of "failing to obtain a building permit prior to the installation of a roof and related appurtenances (roof crickets, etc.) failing to obtain approval of such installation by the Town of Islip after an inspection thereof as required under the lease paragraph 10(a) and (ii)

filing to permit LANDMARK PLAZA PROPERTIES CORP. or its agents to enter for inspection as required under lease paragraph 17.

Plaintiff-Tenant commenced a second action under Index 606246-2017 and on April 6, 2017, was granted a temporary retraining order by the Hon. W Gerard Asher pending the return date of the Plaintiff-Tenant's application for a *Yellowstone* Injunction. This court, after consideration of the alleged violations extended the TRO pending a determination on the application for a preliminary injunction. In support of its motion for a Preliminary Injunction Plaintiff-Tenant has demonstrated 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 to and maintains the ability to cure the alleged default by any means short of vacating the premises, or in the alternative, that the claimed defaults are without merit. Accordingly, ISLIP THEATERS LLC's motion for a preliminary injunction is granted pending a final determination of the action. The action is adjourned to permit the parties to ascertain whether there is a violation of the lease, and if so when it will be cured.

(Mot. Seq. 002, Index 606246-2017)

Defendant-Landlord, Landmark Plaza Properties Corp., served upon the Plaintiff-Tenant, Islip Theaters, LLC, an Amended Notice to Take a Deposition Upon Oral Examination of Matthew Latten, a member officer, agent or employee of Islip Theaters, LLC and directed that he was to produce at that deposition:

> *"All records concerning the leasehold premises maintained by Plaintiff in connection with the Stipulation of Settlement between the parties entered into in an action in the Supreme Court under Index # 15-12315 and repairs, installations, replacements and or improvements made by or on behalf of Islip Theaters, LLC to the premises at 103 Railroad Avenue, Sayville, New York, including all bills, invoices, receipts, contracts, work orders, telephone logs and notations, statements, reports, correspondence, books, records and all other documents and information relevant to the lease with [Landmark Plaza Properties Corp.]"*

Plaintiff-Tenant, Islip Theaters, LLC has moved for a protective order on the ground that the demanded materials have no relevance to this action. Defendant-Landmark Plaza Properties Corp. argues that the distinction between the case brought under Index 606246-2017 is an outgrowth of the case brought under Index 012315-2015 and that Plaintiff is offering an arbitrary division that should not be honored.

Plaintiff-Tenant, Islip Theaters, LLC has made its point. The matters under consideration in the contempt motion under Index 012315-2015 are not advanced by the notice of deposition served in this action. As noted above, the parties designated H2M as the arbiter of the complete and

proper roof replacement which H2M determined was satisfactorily completed. This deposition and the records subject to production would only bear upon a roof replacement that was supervised and mediated by H2M the efficacy of which is no longer subject to dispute. Accordingly, the motion for a protective order is granted.

(Mot. Seq.003, Index 606246-2017)

Defendant-Landlord, Landmark Plaza Properties Corp. served upon Plaintiff-Tenant, Islip Theaters, LLC a Notice of Default and Cure dated May 18, 2017 which provides:

> *PLEASE TAKE NOTICE that there are multiple violations of Paragraphs 7 and 10 of the Lease are identified in the **draft Property Condition Report of AEI Consultants Environmental & Engineering Services, dated February 2, 2017** (copy provided herewith), which include but are not limited to (references are to the lease paragraph and nature of default):*
>
> *Lease Paragraph 7-Failure to maintain exterior grade steps, concrete sidewalk, curbing and grade, stair railing and handrail. Failing to seal foundation walls. Failing to maintain marquee soffit which requires repair or replacement of damaged sections. Failing to maintain HVAC systems and exhaust fan.*
>
> *Lease Paragraph 10-Failure to have fire alarm properly inspected and failure to provide commercial fire extinguisher in boiler room.*
>
> *PLEASE TAKE FURTHER NOTICE, that pursuant to Paragraph 21 of the Lease, any expense incurred by landlord due to the above details and failures, including reasonable attorney fees, shall be deemed additional rent payable by you.*
>
> *PLEASE TAKE FURTHER NOTICE, that pursuant to to Paragraph 32 of the Lease, this notice shall be deemed delivered when deposited in a United States general or branch post office, enclosed in a certified, prepaid wrapper, addressed to you at the address you have used for mailing notices and documents and notices to landlord, and that your time to remedy or cure your defaults shall commence from the date of deposit of this notice in a United States general or branch office.*

Plaintiff-tenant, Islip Theaters, LLC has moved (Mot. Seq. 003) by Order to Show Cause for a Temporary Restraining Order granted by the Hon. W. Gerard Asher a preliminary injunction and a *Yellowstone* injunction. On the return date of the motion, June 14, 2017 this court extended the TRO pending this Court's determination on this motion for a preliminary injunction and heard

argument on this application. The Defendant-Landlord, in its Notice of Default and Cure has made a general reference to a report it obtained that is in excess of 450 pages in length; as such incorporation by reference does not reasonably put the Plaintiff-tenant, Islip Theaters, LLC on notice of claimed defaults other than those expressly described in the two page notice.

Defendant-Landlord, served a Notice of Default and cure that was the subject of the original action brought under Suffolk County Index 012315-2015, that resulted in a Settlement on terms in the greater part favorable to the tenant that was So Ordered by this Court. The post settlement actions of the Defendant-Landlord are most concerning to the Court. This is particularly so to the extent Defendant-Landlord now calls upon the Plaintiff-tenant to cure defects that, if they existed at the time the previous alleged defaults under the lease were resolved by the Stipulation of Settlement, they could have and should have been addressed. The parties are directed to the Court's Decision and Order dated September 23, 2015 under Index 012315-2015 which directed both the Tenant and the Landlord to provide a complete schedule of repairs to the Court no later than October 28, 2015. In addition to such claims that this Court directed previously be identified to the court are other alleged defaults that appear may fall within the ambit of the Defendant-Landlord's own contractual obligations. Based upon all of the foregoing circumstances, and the history of these cases before this court, the Plaintiff-tenant, Islip Theaters, LLC's motion for a preliminary injunction is granted.

Case Under Index Number 606246-2017 is Adjourned

This case is adjourned so that the parties can make a cautious assessment of their respective claims with an understanding that: under the terms of the lease, there is an implied covenant of good faith and fair dealing, *see Prakhin v. Fulton Towers Realty Corp., 122 A.D.3d 601 (2nd Dept., 2014);* the extent to which claims have already been settled by the parties; each party *and each counsel* has a legal obligation *not* to engage in frivolous conduct as defined in 22 NYCRR Part 130:

> Conduct is frivolous if:
>
> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false.
>
> Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct

> took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of counsel or the party.

Then, after a cautious and serious minded assessment to determine whether there are any specifically identifiable outstanding defaults under the lease that are to be asserted, counsel are to advise opposing counsel of such alleged defaults specifically in writing, and, if necessary, negotiate in good faith time schedule to permit the cure of such defaults. This court reserves the right to examine whether any one or more claims is contemptuous of the settlement already reached, whether the assertion of any one or more claims constitutes and violation of good faith and fair dealing under the lease and/or whether the assertion of any one or more claims is frivolous and subject to sanctions.

The foregoing shall constitute the decision and order of the court.

Dated: June 20, 2017

JOHN H. ROUSE, Acting J.S.C.

NON-FINAL DISPOSITION