360 E. 72nd St. Owners. Inc.. v Emerald & White Holding LLC
2018 NY Slip Op 30331(U)
February 14, 2018
Supreme Court, New York County
Docket Number: 650670/2017
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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360 EAST 72ND STREET OWNERS, INC.,

Plaintiff,

-against-

EMERALD & WHITE HOLDING LLC D/B/A MORTON WILLIAMS SUPERMARKETS,

Defendant,

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Index No.: **650670/2017**

DECISION & ORDER ON MOT. SEQ. NO. 002

INTERIM ORDER ON MOT. SEQ. NO. 003

SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 002 and 003 are consolidated for disposition.

Defendant Emerald & White Holding LLC, d/b/a, Morton Williams Supermarkets (Tenant) moves, by order to show cause, for a preliminary injunction requiring plaintiff 360 East 72nd Street Owners, Inc. (Owner) to approve and cooperate with Tenant's plans to install a gas-fueled boiler in the basement of premises leased from Owner. Seq. 002 (Boiler Motion). Defendant also moves, by order to show cause, for a preliminary injunction requiring plaintiff to permit Tenant to inspect, repair, and utilize a gas-run space heater on the roof of the Premises. Seq. 003 (Space Heater Motion). For the reasons that follow, the court denies the Boiler Motion (Seq. 002) and reserves decision on the Space Heater Motion (Seq. 003) pending a further hearing.

I. Factual Background & Procedural History

The facts below are from the amended complaint (AC, Dkt. 57), amended answer and counterclaims (Answer, Dkt. 58), reply to counterclaims (Reply, Dkt. 63), and documentary evidence and hearing testimony submitted by the parties, as indicated herein.

Tenant, a New York LLC, is a commercial tenant in a building located at 360 East 72nd Street in Manhattan (Building). Owner is a 456-unit cooperative housing corporation (co-op) governed by a board of directors. Tenant operates a supermarket (the Supermarket) on the ground floor and basement of the Building (the Premises). The Supermarket storefront is on First Avenue. AC ¶¶ 1-2, 17; Answer ¶ 2.

The setback roof of the Supermarket, which is one-story, is surrounded on three sides by residential apartment towers: two 16-story tower wings—one to the north and one to the south of the setback roof—and one 35-story building east of the setback roof. AC ¶¶ 2, 16; *id.* at 48-50 (images); Answer ¶ 2 (referring to AC's images). The wing towers include open-air terraces located approximately 15 stories above the setback roof. AC ¶ 16; *id.* at 49 (aerial image). Some of the Building apartments facing First Avenue have open-air balconies that overlook the setback roof. AC ¶ 16; *id.* at 48-50, 52 (images). The co-op lobby's fresh air intake is on the setback roof, as are various Supermarket chimneys, vents, and exhausts. AC ¶ 20; *id.* at 53 (images).

The Premises have been operated as a supermarket for more than 20 years. Prior to Tenant's lease, the Food Emporium occupied the Premises. The Food Emporium was a subsidiary of The Great Atlantic & Pacific Tea Company, Inc. (A&P), which executed a lease dated January 1, 1995 (the Original Lease, as amended, the Lease). AC ¶¶ 3, 21, 29, 31; Answer ¶¶ 3, 21, 29, 31. On October 21, 2015, Tenant assumed the Lease as a successful bidder during A&P's bankruptcy proceedings.

The Original Lease set forth, among other things, certain obligations of Tenant with respect to changes and renovations to the Premises. For example, paragraph 47(A) of the Original Lease provides:

> All renovations, additions, installations, improvements and\or alterations of any kind or nature in the Demised Premises (herein

> "Tenant's Changes") shall require the ***prior written consent of Owner thereto, which consent will not be unreasonably withheld, conditioned, or delayed***. ... ***In granting its consent to any Tenant Changes, Owner may impose such conditions (as to*** aesthetics affecting the exterior of the Building or ***quality of work affecting the Demised Premises, the Building, and its plumbing, heating and electrical systems***, guarantee of completion, payment, and restoration) ***as Owner may in its sole and reasonable judgment require.*** ... ***In no event shall Owner be required to consent to any Tenant changes which*** would physically affect the structural integrity of the Building or ***would adversely affect the proper functioning of the mechanical, electrical, sanitary or other service systems, of the Building or be inconsistent with a first-class supermarket operation***. At the time Tenant requests Owner's written consent to any Tenant Changes .... ***Tenant shall deliver to owner reasonably detailed plans and specifications therefor***. Owner's approval of any plans or specifications does not relieve Tenant from the responsibility for the legal sufficiency and technical competency thereof. ***Tenant before commencement of any Tenant Changes shall: (i) Obtain and promptly deliver duplicates of all the necessary consents, authorizations, permits and licenses*** from all federal, state and/or municipal authorities or quasi-governmental bodies having jurisdiction over such work and upon completion obtain certificates of final approval thereof. ...

Dkt. 113 at 25-26 (emphasis added).

Thereafter, paragraph 47(B) states:

> ***Tenant agrees to reimburse Owner for all reasonable fees and expenses incurred by Owner in reviewing and approving Tenant's plans for which consent is required***, as well as in filing or amending owner's filings or contemplated filings with the Department of Buildings. ***Owner agrees to execute any forms reasonably required by Tenant in connection with any approved Tenant Changes*** ... or in connection with any sign-offs from any governmental agency.

Dkt. 113 at 26 (emphasis added).

Finally, ¶ 45 of the Original Lease absolves Owner of the obligation to provide services to the Premises, such as heat:

> ***Owner shall have no duty or obligation to furnish any services whatsoever to the Demised Premises including***, but not limited to,

> air conditioning, ***heat***, water, steam, gas, electricity, light and power. ***Any such services shall be obtained by Tenant, at its sole cost and expense.*** Owner makes no warranty or representation that the plumbing, heating, electrical, air conditioning, or any other system or equipment, if currently installed, are adequate for Tenant's purposes or uses. Owner shall not be responsible or liable for any damage or injury to any property, fixture, merchandise, equipment or decoration at any time because of the failure of any such systems, unless such damage or injury is caused by Owner or Owner's agents, servants or employees negligent acts. ***Tenant must install any*** electrical service, ***additional heating***, air conditioning or other systems ***which it may require or desire. Any such installation shall be subject to the terms of Paragraph 47 hereof***.

Dkt. 113 at 24 (emphasis added). The Original Lease awards reasonable attorneys' fees to the prevailing party (Tenant or Owner) in adjudicated disputes. Dkt. 113 at 46-47 (¶ 71).

Following Tenant's assumption of the lease, the parties entered an agreement dated January 1, 2016 (the Third Amendment,[1] Dkt. 77) extending the Lease by twelve years. Under the Third Amendment, Tenant agreed to renovate the Premises. Dkt. 77 (Third Amendment) at 4-5. Paragraph 4(A) of the Third Amendment specifies, *inter alia*, additional restrictions on Tenant's renovations, as follows:

> ***Prior to the commencement of the Renovations, Tenant shall submit to Landlord for its reasonable approval Tenant's plans and specifications*** showing that the Renovations comply with the Supermarket Finish Standard[2] and are consistent with all municipal codes. ***If in Landlord's judgment, the Renovations affect the Building's mechanical systems, its plumbing, heating*** or electrical systems, its structural components, its storefronts ***or the exterior of the Building*** (the "Building's Systems"), ***Landlord may withhold Landlord's consent for any reason***. ...

[1] The Lease was twice amended by the parties' predecessors-in-interest, pursuant to agreements dated November 1, 1996 and May 20, 2010. Answer ¶ 153; Reply ¶ 3.

[2] *See* Dkt. 77 (Third Amendment) at 4 ("Upon completion of the Renovations, the level of finish will be equal to the level of finish of a first class supermarket in the vicinity of the Building but in no event less than the level of finish of the Morton Williams store located at 1211 Madison Avenue, New York, New York (such finish level, the 'Supermarket Finish Standard') ... .")

> The plans and specifications for the Renovations ***shall include detailed drawings clearly identifying all demolition work, the level of finish of fixtures and equipment, the mechanical and electrical work, ceiling work, partition layout and all other drawings and plans*** which may be appropriate for the work. If after receipt of the plans and specifications, Landlord timely requests ***any reasonable revisions (or any revisions for the Building Systems),*** Tenant shall make any such revisions and resubmit the plans and specifications to Landlord for approval. ...

Dkt. 77 (Third Amendment) at 4 (footnote and emphasis added). The Third Amendment further gives Owner 30 days to object to Tenant's plans and 10 days to object to revised plans. *Id.* An attorney with the firm that represented Tenant during contract negotiations attests that Owner drafted the provision allowing it to withhold consent "for any reason." Dkt. 76 (Ellison Aff.) ¶ 4.

In mid-2016, disputes arose between Tenant and Owner over Tenant's renovations, including plans to operate a new commercial kitchen. Of primary relevance to the instant motion, Owner contends that Tenant filed a building permit application with the New York City Department of Buildings (the DOB) with construction plans materially different from the ones approved by the Owner in the Summer of 2016, including the installation of an unapproved gas-fueled boiler. AC ¶¶ 63-65.

In January 2017, Owner discovered Tenant's installation of a gas-fueled boiler in the basement of the Premises; neither Owner nor the DOB had approved it. AC ¶¶ 77-83; Dkt 104 (Weiner Aff.) ¶ 50; Dkt. 125 (Perez 2/6/2017 Aff.) ¶¶ 4-9. Experts retained by Owner determined that the installation lacked necessary safeguards and opined that the boiler's fumes would endanger Building occupants. AC ¶¶ 80-81; Dkt. 110 (Accardo 2/6/2017 Aff.) ¶¶ 5-8, 22-23; Dkt. 111 (Knief 2/6/2017 Aff.) ¶¶ 2-6. Following an on-site DOB inspection, the DOB issued

a partial stop work order on January 27, 2017 for all plumbing work in the Supermarket.[3] AC ¶ 83; Dkt. 118 (DOB violation display) at 8. Tenant's plumbing permit was revoked. Dkt. 118 (DOB violation display) at 9.

Owner filed the instant suit on February 6, 2017, asserting causes of action for breach of contract, declaratory judgment, injunctive relief, ejectment, and attorneys' fees. Following attempts to mediate, the parties entered a written agreement dated March 21, 2017 (Interim Agreement). AC ¶¶ 91-95; Answer ¶ 91. Thereafter, Tenant submitted new plans (the March Plans). AC ¶¶ 96-97. An Owner-hired consultant issued a report alleging the incompleteness of and problems caused by the March Plans, which included the proposed, gas boiler. AC ¶¶ 96-98. Owner rejected the March Plans. AC ¶ 99; Answer ¶ 99.

On June 27, 2017, Owner amended its complaint to plead the following causes of action, numbered here as in the AC: (1) breach of the Lease (¶¶ 110-119); (2) breach of the Interim Agreement (¶¶ 120-123); (3) declaratory judgment that Tenant breached the lease, that Owner properly exercised its rights under the Lease to refuse permission for the kitchen plans and the gas-fueled boiler, and that Owner is entitled to reasonable attorney and other professional fees, as well as compensatory damages, under the Lease (AC ¶¶ 124-130); (4) injunctive relief (AC ¶¶ 131-134); (5) nuisance relating to Tenant's refrigeration system (AC ¶¶ 135-140); and (6) attorneys' and professional fees pursuant to the Lease (AC ¶¶141-148).

Tenant asserts the following counterclaims, numbered here as in the Answer: (1) breach of the Lease in connection with Owner's refusal to approve Tenant's kitchen plans (¶¶ 151-170); (2) breach of the implied covenant of good faith and fair dealing with respect to, *inter alia*,

[3] Defendant alleges that the two violations were dismissed due to petitioner New York City's failure to make out a *prima facie* case. AC ¶ 83; Answer ¶ 83.

Owner's refusal to approve Tenant's plans to install a gas-fueled boiler to heat the Supermarket (¶¶ 171-177); (3) for prevailing party attorneys' fees under the Lease; and (4) for a *Yellowstone* Injunction with respect to a notice to cure dated July 6, 2017 (Notice to Cure), issued by Owner (¶¶ 183-189). Tenant seeks a monetary judgment of at least $1.5 million for each of its First and Second Counterclaims. Answer at 21. The Answer does not seek injunctive relief other than the *Yellowstone* Injunction.

In a November 9, 2017 letter, while outlining safety concerns regarding emissions, Owner stated that "the Co-op will not permit a boiler to be installed in the Supermarket space," asserting that Owner had a right to "withhold ... consent for any reason" under the Third Amendment and that Owner therefore "does not need a reason to withhold its consent." Dkt. 78 (November Letter) at 2-3. The letter informed Tenant that Owner's board of directors would not approve a boiler installation in its "business judgment," as advised by Owner's experts. *Id.* at 3. The letter also noted that the Supermarket had other options for heating the Supermarket, including steam and electricity. *Id.*

On December 15, 2017, Tenant moved, by order to show cause, for a preliminary injunction requiring Owner to cooperate with Tenant to install a gas-fueled boiler (the Proposed Boiler) in the Supermarket basement, including approving and executing plans and permit applications for such installation. Seq. 002 (Boiler Motion).

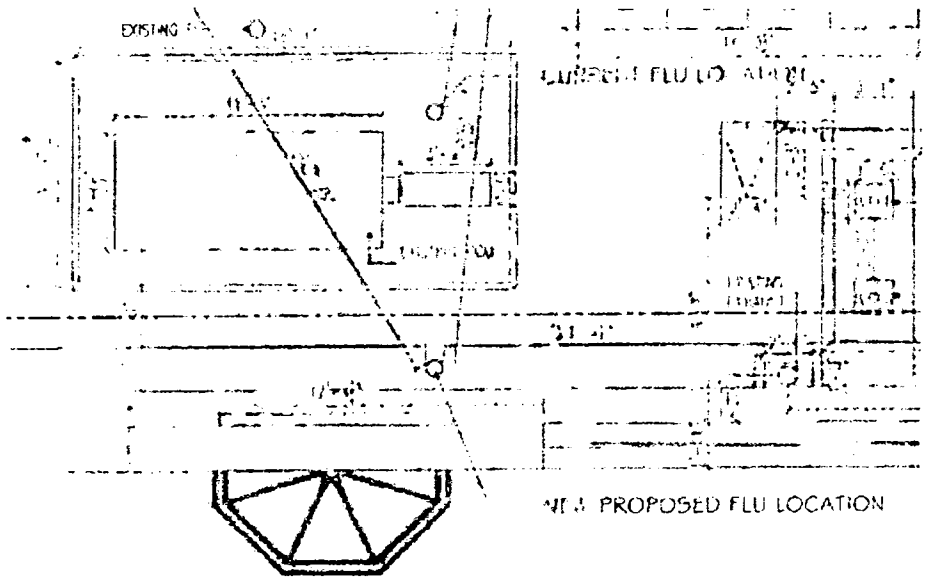
In support of its Boiler Motion, Tenant submits an affidavit by Abraham Kaner, a member of Tenant. Dkt. 73 (Kaner Aff.). Kaner attests that the Supermarket was forced to resort to temporary space heaters ***last*** winter, which were so inadequate that employees were forced to wear winter gear indoors and inventory was lost due to the cold. *Id.* ¶ 3. He further attests that Landlord refused Tenant access to inspect the Building's steam connection (as an alternative to

gas heat) unless Tenant agreed to a confidentiality stipulation that would prevent Tenant from raising in court anything seen or said during the inspection. *Id.* ¶ 18; *see also* Dkt. 149 (1/22/18 Hr'g Tr.) at 12. Kaner avers that steam heat would take "several months" to implement due to the need to build a steam line. *Id.* ¶ 19. He states that Tenant is prepared to install an air-quality monitoring system near the Proposed Boiler vent, at a one-year cost of $17,166.20, to be split equally with Owner. *Id.* ¶ 23; *see also* Dkt. 81 (monitoring proposal). Tenant further asserts, and Owner does not contest, that the Supermarket cannot simply use the heating elements used by the prior tenant due to power and electricity limitations following renovations. Dkt. 149 (1/22/18 Hr'g Tr.) at 15-16.

Regarding electric heat, Tenant submits an affidavit by Frank Turano, a licensed electrician since 1985. Dkt. 75 (Turano Aff.). Turano attests to the lengthy, expensive, and disruptive process—including "months" of maintenance and repair to existing Building electrical systems—required to provide electric heat to the Supermarket. *Id.* ¶¶ 5-18. Turano believes it would take additional months to obtain the necessary approvals from the DOB, the New York City Advisory Board (NYCAB), and Con Edison. *Id.* ¶ 13. The work, according to Turano, would cost Tenant anywhere from $120,000 to $160,000, plus additional costs (and risks) to ensure uninterrupted power to Building residents and other commercial tenants. *Id.* ¶¶ 17-18. Operation of an electric boiler could cost approximately $32,832.00 per year; by contrast, the Proposed Boiler will cost $4,400 per year. *Id.* ¶ 19.

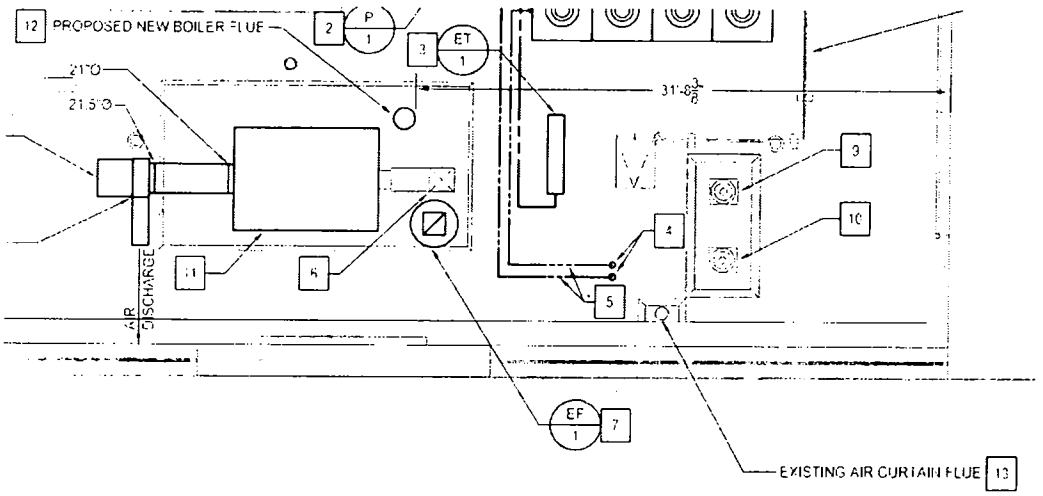
As to the safety of the Proposed Boiler, Tenant submits an affidavit by Joseph Zinman, a professional engineer since 1976, who states that he has installed and operated over 200 gas-fueled boilers. Dkt. 74 (Zinman Aff.) ¶ 1. Zinman assumes the Proposed Boiler will be at "full fire" five hours per day on average for seven months of the year, and concludes that its operation

will be safe, efficient, and less expensive and resource-intensive than using steam heat or electrical power. *Id.* at 3-5. Zinman relies on a report from Tenant's retained air quality consulting firm, Rowan Williams Davies & Irwin (RWDI). Dkt. 80 (RWDI report). RWDI's modeling assumes the Proposed Boiler would operate at "full fire" for ***eight*** hours per day, seven months out of the year, reportedly accounts for the "wake region" (i.e., the disturbed wind flow) created by the adjacent residential towers, and utilizes maximum theoretical emissions data. RWDI's model assumes a 25-foot distance between the flue and the lobby fresh air intake and a distance of 30 feet between the flue and the nearest working residential window, specifying the "new proposed flu[e] location" as follows:



Dkt 80 (RWDI report) at 9; *see also id.* at 1 ("The received roof plan with the ***proposed boiler flue location*** and measurements to nearby air sensitive locations is attached as Figure 1." (emphasis added)). RWDI concludes that the Proposed Boiler meets applicable air quality standards for four pollutants, including carbon monoxide. Dkt. 80 at 7.

Tenant's submitted plans for the Proposed Boiler include the location for a "proposed new boiler flue" as shown below:



Dkt. 82 at 14 (defendant's plans).[4]

In opposition, Owner submits an affidavit by Robert Weiner, Owner's co-op president. Dkt. 104 (Weiner Aff.). Weiner attests that Tenant ***never provided the plans*** for the Proposed Boiler that were submitted with the Boiler Motion ***until the day that the motion was filed***. *Id.* ¶¶ 5, 46-48. Additionally, Owner submits a January 12, 2018 letter rejecting the plans on grounds that toxic fumes present a health threat and the proposed chimney violates Section 503.5.4(1) of the 2014 NYC Fuel Gas Code (FGC) or Section 501.2.1 of the 2014 NYC Mechanical Code (MC). Dkt. 104 (Weiner Aff.) ¶ 7; Dkt. 124 (1/12/2018 Owner letter to Tenant).

Moreover, Owner submits expert testimony, including an affidavit by Andrew Collins, a professional engineer for over 38 years who professes experience with major commercial and residential boiler installations, including similar ones to the Proposed Boiler. Dkt. 140 (Corrected

[4] As certain pages of Dkt. 82 are illegible due to small print, this excerpt is taken from the USB flash drive submitted to the court by Tenant.

Collins Aff.) ¶¶ 1-2. According to Collins, RWDI's numerical model fails to account for swirling winds observed directly above the setback roof. *Id.* ¶¶ 17-19, 27-30.[5] Further, Collins argues that RWDI failed to account for the operation of the Proposed Boiler (at "part load" or otherwise less than "full fire") for 24 hours per day, as required to heat the Supermarket, which is open 24/7—but fails to analyze the quantitative effect of this purported failure on RWDI's conclusions. *Id.* ¶¶ 21-23. Collins attests that continuous emissions will create long-term health and safety risks for Building occupants due to the constant exposure. *Id.* ¶¶ 25, 33. Finally, Collins testifies that the lengthy regulatory approval process required would delay operation of the Proposed Boiler until after the beginning of ***next*** winter, whereas steam heat could be completed in 60 days. *Id.* ¶ 48. Collins identifies two additional heating options for the Supermarket: a Variable Refrigerant Flow (VRF) heat pump system and an electric fueled-boiler. *Id.* ¶¶ 49-51. Collins states that none of the proposed alternatives emit toxic fumes. *Id.* ¶ 52.

Owner then submits an affidavit by John Knief, a petroleum industry expert who professes over 30 years' experience with industrial and commercial heating systems, including personal experience with the specific model of the Proposed Boiler. Dkt. 107 (Knief 1/12/2018 Aff.) ¶¶ 1-2, 11. Knief confirms Collins' assessment that the Proposed Boiler will emit carbon monoxide and trace amounts of harmful chemicals and expose the residents of apartments overlooking the setback roof to toxic fumes. *Id.* ¶¶ 12-13. Knief also states that installation of a steam over water system costs $75,000 (less than the Proposed Boiler), could be completed in 60

[5] Collins proposes a hands-on "smoke test" as specified by FGC ¶ 503.5.6.5.1(3) to more accurately measure dispersal of fumes. Dkt. 140 (Collins Aff.) ¶ 18. That test is intended to "determine the tightness of chimney construction," rather than the direction of smoke exiting the ***top*** of the chimney. FGC ¶ 503.5.6.5.1(2). Accordingly, the "method of test" specifies that the chimney stack opening is to be held tightly ***closed***, which appears to diverge from normal operating conditions. *Id.* ¶ 503.5.6.5.1(3).

days, and that the Building's steam connection has no problematic issues. *Id.* ¶ 16. Knief attests that Turano overstates the cost of installing an electric boiler, including obtaining needed, additional electricity. *Id.* ¶¶ 28-29.

On January 3, 2018, Tenant submitted a letter to the court alleging that the subfreezing temperatures then-existing in New York City had caused pipes to freeze and burst in and near the Supermarket delivery area on January 29, 2017. Dkt. 90 (1/3/2018 Tenant letter). Tenant requested a hearing to address Owner's alleged refusal to allow Tenant to access the setback roof to inspect the flue leading to a gas-powered air curtain that had heated the delivery area (the Space Heater). *Id.* In response, Owner blamed the burst pipes on Tenant's failure to take preventative steps—such as insulating the pipes—rather than emergent circumstances. Dkt. 91 (1/2/2018 Owner letter). According to Owner, the Space Heater had ***never*** been operable, its flue was located less than 20 feet from the closest balcony of the Building, in violation of the New York City Building Code, and that its noxious fumes would cause serious health and safety issues. *Id.* at 3.

On January 4, 2018, the court held an emergency hearing to address Tenant's thwarted efforts to inspect and operate the Space Heater. Dkt. 141 (1/4/18 hearing transcript). The court heard testimony by Ryan Brower, general store manager of Tenant and previously general store manager of the Food Emporium. Mr. Brower testified that the Space Heater had been present when he began to work for the Food Emporium in July 2014 and was operational through the end of 2016. *Id.* at 27-29, 31. Brower also testified regarding the frigid conditions (between 33 and 36 degrees Farenheit) in areas (including an office) abutting the delivery area, the circumstances of the pipe bursting—including burst pipes above a handicap bathroom and the produce sales floor, and freezing pipes in the fire suppression sprinkler system—and Owner's

refusal, on January 1, 2018, to allow Tenant immediate access to the setback roof to fix the Space Heater. *Id.* at 30, 37-40. At the close of the hearing, the court ordered a temporary restraining order (TRO) to allow Tenant to access and fix the Space Heater, noting that the issue would be heard at a hearing scheduled for January 19th. *Id.* at 43-44; Dkt. 92 (TRO). The Space Heater, as the court understands, is presently in operation. *See* Dkt. 149 (1/22/18 Hr'g Tr.) at 2-3.

On January 8, 2018, Tenant moved, by order to show cause, for a preliminary injunction, *nunc pro tunc*, mandating that Owner allow Tenant to access the setback roof to allow Tenant to inspect, repair, and utilize the Space Heater. Seq. 003 (Space Heater Motion).[6] Tenant submitted another expert affidavit by Zinman, highlighting his experience in heating systems, chimneys, flues, and installation protocols for domestic water and sprinkler systems. Dkt. 95 (1/8/18 Zinman Aff.). Zinman stated that the cold temperatures in effect and lack of heat caused the pipes to burst. *Id.* ¶ 4. Zinman also stated that inadequate heat risks damaging the fire sprinkler system. *Id.* ¶ 5. Zinman attested that the Space Heater, which would provide sufficient heat, is nearly 16 feet from the nearest residential apartment, and approximately 27 feet from the Building's nearest fresh air intake. *Id.* ¶¶ 4, 11. Owner does not contest these measurements.

In opposing the Space Heater Motion, Weiner attested that neither Owner nor the DOB approved of installation of the Space Heater by the previous tenant, the Food Emporium. Dkt. 104 (Weiner Aff.) ¶ 71. Weiner further explains that Owner lost access to and control of the setback roof during the Food Emporium's renovation of the Premises. *Id.* ¶¶ 72-73. Luis Perez, the resident manager for the Building, whose apartment has a direct view of the Space Heater's chimney and who conducted inspections of the Food Emporium, attested that he never before

[6] According to testimony submitted by Tenant, the Proposed Boiler will render the Space Heater unnecessary. Dkt. 142 (Kaner Reply Aff.) ¶ 18.

observed the Space Heater in operation. Dkt. 105 (Perez Aff.) ¶ 11. Moreover, Owner submitted a video recording purporting to show emissions from the chimney of the Space Heater—which points upward—being blown by wind currents toward nearby residential areas of the Building. Dkt. 130 (placeholder exhibit for Space Heater video).[7] Collins stated that the video demonstrates that the chimney is approximately one foot tall. Dkt. 106 (Collins Aff.) ¶ 41. In his reply affidavit in support of the Space Heater Motion, Zinman averred that the visible "smoke" is simply water vapor rather than harmful fumes, which have a different weight and are carried differently by the wind. Dkt. 143 (Zinman Reply Aff.) ¶ 17.

The court held oral argument on both motions on January 22, 2018. At the hearing, Owner stated that it would allow Tenant to inspect the steam connection to evaluate the cost and feasibility of using steam heat. Dkt. 149 (1/22/18 Hr'g Tr.) at 14-15. As a result, the court ordered Owner and Tenant to do so. *Id.* at 16-17. The court reserved decision and extended the TRO as to the Space Heater pending a decision. *Id.* On February 5, 2018, the parties informed Chambers that Tenant's inspection of the steam connection had been completed.

I. Discussion

A. Legal Standard

Under CPLR 6301, in an action where a litigant has not demanded permanent injunctive relief, a preliminary injunction may nonetheless be granted "where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual." CPLR 6301. "Injunctive relief may only be awarded if the movant makes a clear

[7] Owner submitted to the court a video of the Space Heater chimney in operation, in addition to a video of snow swirling in the winds atop the setback roof (Dkt. 126), on a USB flash drive.

showing of a probability of success on the merits, a danger of irreparable injury in the absence of an injunction, and that the balancing of the equities weighs in its favor." *Goldstone v Grade Terrace Apt. Corp.*, 110 AD3d 101, 104-05 (1st Dept 2013), citing *Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY3d 839 (2005); *accord Doe v Axelrod*, 73 NY2d 748 (1988). Injunctive relief is not ordinarily awarded when the claim asserted is "compensable in money and capable of calculation." *See Schottenstein v Windsor Tov, LLC*, 85 AD3d 546, 547 (1st Dept 2011), citing *Credit Index, L.L.C. v Riskwise Int'l L.L.C.*, 282 AD2d 246, 247 (1st Dept 2001); *see also Lombard v Station Square Inn Apts. Corp.*, 94 AD3d 717, 721 (2d Dept 2012) ("Where a plaintiff can be fully compensated by a monetary award, an injunction will not issue because no irreparable harm will be sustained in the absence of such relief.").

Ordinarily, a mandatory preliminary injunction tantamount to the ultimate relief sought in the lawsuit may not be granted prior to the joinder of issue. *See Northern Funding, LLC v 244 Madison Realty Corp.*, 41 AD3d 182, 183 (1st Dept 2007), citing *St. Paul Fire & Marine Ins. Co. v York Claims Serv., Inc.*, 308 AD2d 347, 349 (1st Dept 2003). Granting this type of injunctive relief is "unusual" and only done when such "relief is essential to maintain the *status quo* pending trial." *See Jones v Park Front Apts., LLC*, 73 AD3d 612 (1st Dept 2010), quoting *Second on Second Cafe, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255, 264 (1st Dept 2009).

B. The Space Heater Motion (Seq. 003)

Tenant seeks a preliminary injunction, *nunc pro tunc*, ordering Owner to permit Tenant to inspect and operate the Space Heater. Tenant submits expert testimony attesting to the safety and legality of the Space Heater, in addition to Brower's fact testimony regarding the Space Heater's existence and use during the Food Emporium's tenancy. Brower also testified that the lack of heat had caused insulated and/or interior pipes to burst, including fire sprinkler pipes, which

cannot be subject to automatic shut-off. Given the extreme cold in Manhattan this winter, the likelihood that frigid temperatures may soon return, the property damage caused by the burst pipes, and the danger presented by the freezing of fire sprinkler pipes, the court was convinced of the urgency of Tenant's motion and the irreparable harm threatened absent an injunction. Indeed, it is commercially reasonable for a business in New York City to expect its lease to permit it to heat its premises in a legal manner. Owner failed to present convincing evidence of any danger presented by operating the Space Heater, particularly since the Food Emporium had done so before Tenant took possession, with no ill effects or protest by Owner. Moreover, while Owner claims Tenant should have taken more precautions to prevent certain pipes from freezing, such precautions—short of implementing a comprehensive heating solution for the Supermarket space, here a hotly contested issue—would not alleviate the frigid work conditions in the delivery area and adjoining spaces and the freezing sprinkler pipes.

The court, however, will order a further hearing on the legality of the space heater. The parties agree that the Space Heater flue is located greater than 10 feet but less than 30 feet from operable Building windows. Collins (Owner's expert) identifies as relevant Mechanical Code (MC) ¶ 501.2.1(1), which provides as follows, *inter alia*:

> The termination point of exhaust outlets and ducts discharging to the outdoors shall be located within the following ***minimum distances***: 1. For ducts conveying noxious, toxic, explosive or flammable vapors, fumes or dusts ...: ... ***10 feet*** (3048 mm) ***from operable openings into buildings***; 6 feet (1829 mm) from exterior walls and roofs; ***30 feet*** (9144 mm) ***from*** combustible walls and ***operable openings*** into buildings which are ***in the direction of the exhaust discharge*** ....

On the other hand, Tenant's expert, Zinman, propounds, as controlling, MC ¶ 401.4(3), which provides:

> ***Mechanical and gravity outdoor air intake openings shall be located not less than 10 feet*** (3048 mm) ***horizontally from any hazardous or noxious contaminant source, such as vents, exhausts*** (including but not limited to exhaust from dry cleaning establishments, spray booths, and cooling towers), streets, alleys, parking lots and loading docks ...

Zinman Aff. ¶ 10. Zinman points out that the Fuel Gas Code, not the Mechanical Code, governs installation of the Space Heater.[8] Moreover, the court notes that, even if MC ¶ 501.2.1(1) ***did*** govern the Space Heater, that the ***wind*** can blow smoke toward Building windows does not automatically render those windows "in the direction of the exhaust discharge," a phrase which appears to refer to the direction of the exhaust mechanism rather than the dispersal of gases following expulsion. *See, e.g.*, MC ¶ 501.2 ("***Exhaust discharge***. The ***air*** removed by every mechanical ***exhaust*** system shall be ***discharged*** outdoors ..." (emphasis added)); MC ¶ 501.2.1.1 ("***Exhaust discharge***. ***Exhaust air*** shall not be ***directed onto*** walkways." (emphasis added)). The Space Heater flue visible in the video submitted by Owner is a vertical exhaust pipe that discharges ***upward*** (i.e., toward the sky), not sideways (i.e., toward the Building).

Another Fuel Gas Code provision identified by Collins presents a greater cause for concern. FGC ¶ 503.5.4(1), states, *inter alia*:

> Chimneys serving gas-fired equipment shall comply with ... the following requirements: 1. Chimneys serving appliances less than 600°F (316°C) ***shall extend at least 3 feet*** (914 mm) ***above the highest construction***, such as a roof ridge, parapet wall, or penthouse, ***within 10 feet*** (3048 mm) ***of the chimney outlet, whether the construction is on the same building as the chimney***

[8] Under FGC ¶ 501.1, the Fuel Gas Code "shall govern the installation, alteration, maintenance, design, minimum safety requirements, repair and approval of factory-built chimneys, chimney liners, vents and connectors, field-built chimneys and connectors and the utilization of masonry chimneys ***serving gas-fired appliances***. The requirements for the installation, maintenance, repair and approval of factory-built chimneys, chimney liners, vents and connectors serving ***appliances burning fuels other than fuel gas*** shall be regulated by the ***New York City Mechanical Code***." (emphasis added).

> or on another building. However, such constructions do not include other chimneys, vents, or open structural framing. ...

Collins attests that Owner's video shows that the Space Heater vent lacks the minimum height required by FGC ¶ 503.5.4(1). In lieu of a substantive response, Tenant argues (through Zinman's affidavit) that Owner fails to "refer to any actual evidence." Dkt. 143 ¶ 4. However, Tenant bears the burden of demonstrating its equitable entitlement to mandatory injunctive relief, which the court will not grant unless operation of the Space Heater is lawful. The hearing will address this issue.

Finally, Owner incorrectly asserts that this court lacks jurisdiction to order the requested preliminary injunctive relief for either motion. To the contrary, CPLR 6301 expressly contemplates such relief even when no injunctive relief is requested by the pleadings.[9] Owner's breach of its obligations under the Lease is the very subject of Tenant's counterclaims. Irreparable harm caused by a lack of heat would tend, even with respect to a later monetary award, to "render the judgment ineffectual."

C. The Boiler Motion (Seq. 002)

Tenant also seeks a preliminary injunction requiring Owner to approve its plans to install the Proposed Boiler in the Premises' basement. It asserts that Owner has no contractually permitted reason to withhold its consent under the Lease. Tenant argues that, as attested by its experts, the alternative heating methods proposed by Owner are impractical to install, inefficient to operate, more expensive, and time-consuming to install. Owner's experts acknowledge certain

[9] The cases cited by Owner do not stand for the proposition that injunctive relief must be ***requested by*** the pleadings for a party to obtain preliminary injunctive relief. Those cases stand for the proposition that a defendant's failure to assert ***any*** counterclaims will preclude injunctive relief. *See Wells Fargo Bank N.A. v Area Plumbing Supply, Inc.*, 150 AD3d 932, 935 (1st Dept 2017); *BSI, LLC v Toscano*, 70 AD3d 741, 741 (2nd Dept 2010); *Seebaugh v Borruso*, 220 AD2d 573, 574 (2nd Dept 1995).

increased costs, but claim that alternatives such as steam would be ***faster*** to implement and safer than the Proposed Boiler. Tenant's experts contend that any emissions would pose no danger to the Building's occupants. Owner's experts dispute these findings. Tenant highlights the broken water pipes in the delivery area as evidence of the Supermarket's immediate need for heat.[10] In sum, Tenant argues that Owner has failed to articulate a sufficient reason, under ¶ 4(A) of the Third Amendment to the Lease, to withhold its consent for the Proposed Boiler.

"[T]the interpretation of the provisions of a lease is governed by the same rules of construction applicable to other agreements." *Horwitz v 1025 Fifth Ave. Inc.*, 34 AD3d 248, 249. (1st Dept 2006). To support its interpretation of the contractual phrase "for any reason", Tenant highlights the decision of the Appellate Division, First Department in *Schwartz v Cilmi & Associates, PLCC*, 41 AD3d 317, 317-318 (1st Dept 2007). In *Schwartz*, a buyer argued that its contractual right to cancel a sale "for any reason" absolved the buyer of the requirement to have or state ***any reason at all***. *Id.* Rejecting the buyer's claim that the clause ***unambiguously*** provided such absolution, that court held that the "for any reason" phrase—juxtaposed with the buyer's time-limited right to inspect the purchase—could reasonably mean that the plaintiff must give some reason "***rationally related*** to his right of inspection" *Id.* (emphasis added). Likewise, Tenant argues, Owner must provide a reason "rationally related" to its determination that the renovations affect the Building's Systems—defined as "the Building's mechanical systems, its plumbing, heating or electrical systems, its structural components, its storefronts or the exterior

[10] The Boiler Motion was filed ten months following Owner's filing of the original complaint, which alleges that venting a gas-fueled boiler on the roof setback would be unsafe. *See, e.g.*, Dkt. 1 ¶¶ 61-62. To justify the perceived delay in filing its motion, Tenant notes its participation in a court-ordered mediation, the hope of convincing Owner without court intervention, and the time needed to engage RWDI to refute Owner's safety concerns following Tenant's receipt of the November Letter.

of the Building." Tenant contends that Owner has failed to do so.[11] Owner responds that it ***has*** articulated reasons that are "rationally related" to the Building's Systems—including the concern that the co-op lobby's fresh air intake, which is located on the setback roof near the flue for the Proposed Boiler, will take in noxious fumes.[12]

In the end, it matters not whether the Lease confers broad discretion absolving Owner of the requirement to be objectively reasonable with respect to changes that affect the Building's Systems, because the implied covenant of good faith and fair dealing prohibits Owner from acting irrationally or arbitrarily. *See Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 (1995) ("Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion."). The Lease expressly contemplates that Tenant may require or desire to install heat (a requisite in New York City), permitting such installation subject to Owner's approval. *See* Dkt. 113 (Original Lease) at 24 ("Tenant must install any ... additional heating ... which it may require or desire. Any such installation shall be subject to the terms of Paragraph 47 hereof.").[13]

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[11] Tenant presents, as evidence of Owner's bad faith, the November Letter's invocation of the co-op board's "business judgment"—which does not apply to the commercial Lease. *See, e.g., 147 Commercial, L.P. v. Thompson Apartment Corp.*, Index No. 651467/2011, 2012 WL 12918142 (Sup Ct NY Cty Mar. 23, 2012) (rejecting business judgment rule application to commercial lease). But the November Letter makes clear that Owner at least purports to set forth a rationale apart from "business judgment".

[12] Moreover, Tenant admits that "the Lease would allow Landlord to object to Tenant's proposed boiler installation only if Landlord could identify a ***rational and legitimate concern that the boiler would have a material adverse impact on the systems serving the residential occupants***." Dkt. 86 (Def.'s Opening Br.) at 18 (emphasis added).

[13] Tenant's argument that its affiliate's 1211 Madison Avenue store, which is heated by gas-fueled boilers, is the "level of finish" standard for the Supermarket renovations is a nonstarter. Varying the sources of heat (e.g., gas, steam, or electric), which are invisible to the consumer and equally effective, does not impact the level of finish.

Owner's submissions are not entirely reassuring on the purity of its intentions. Owner does not dispute that it has previously denied access to Tenant to inspect its steam connection without preconditions,[14] nor that it has denied access to the roof setback to Tenant's air quality expert.[15] While an understandable lack of trust exists between the parties given their history, the Lease does not permit Owner to withhold consent for no rational reason.

Further, Owner fails to propound any ***quantitative*** analysis[16] calling the safety of the Proposed Boiler into question, other than to suggest that the RWDI report does not account for the Proposed Boiler running at ***less*** than "full fire" during the remaining 16 hours a day during the heating season.[17]

Ultimately, the court denies Tenant's motion because granting it would provide "some form of the ultimate relief sought [by Tenant] as a final judgment"[18] that is ***not*** essential to

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[14] *See* Dkt. 149 (1/22/18 Hr'g Tr.) at 14-15. On February 5, 2018, the parties advised the court that, pursuant to this court's January 22, 2018 oral order, Tenant and Owner mutually arranged for Tenant's visual inspection of the Building's steam connection so Tenant may evaluate the feasibility of heating the Supermarket using steam. *Id.* at 16-17.

[15] *See* Dkt. 78 (11/9/17 Owner letter to Tenant) at 2 (denying Tenant's access to Supermarket roof setback "for the purpose of litigation"); Dkt. 147 (Tenant's Reply Br.) at 4 n.3 (noting that RWDI had been confined to a bucket truck to inspect the roof); *see also* Dkt. 105 (Perez Aff.) ¶ 15 (complaining that RWDI had not conducted "an actual oberservation [sic] of the circulating wind conditions on the Setback Roof").

[16] The court has no basis for accepting Owner's assertion that swirling snow can be used to predict dispersal of gas fumes from the proposed new flue location.

[17] The effect this asserted error would have on RWDI's conclusions is left to the court's imagination. One imagines that emissions from a pilot light, for example, would be negligible.

[18] I.e., an injunctive form of the monetary damages sought by Tenant for Owner's refusal to approve the gas boiler.

maintain the *status quo* pending trial. *See Second on Second*, 66 AD3d at 264.[19] The court nevertheless recognizes the importance of resolving the issue of adequately heating the Supermarket in advance of ***next*** winter.[20] Discovery and trial, therefore, shall be conducted on an expedited basis on the issue of whether Owner's blanket refusal to approve installation of a gas-fueled boiler violates the Lease. *See* Dkt. 150 (2/6/2018 status conference order).

D. Attorneys' Fees

Owner also requests attorneys' and other fees expended in connection with this motion, to which it is allegedly entitled under the Lease. The court will address the award of any litigation-related costs at the conclusion of the litigation. Accordingly, it is

ORDERED that the motion of defendant Emerald & White Holding LLC, d/b/a. Morton Williams Supermarkets for a preliminary injunction to require plaintiff 360 East 72nd Street Owners, Inc. to approve and cooperate with defendant's plans to install a gas-fueled boiler in the basement of the premises leased from plaintiff is denied (Seq. 002); and it is further

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[19] The court also has considerable substantive concerns with the Proposed Boiler. First, Owner contends that Tenant's professionals will self-certify the legality of the Boiler's installation to circumvent DOB approval. Tenant disputes this assertion. Second, the court detects a discrepancy in the placement of the proposed boiler flue between the plans analyzed by RWDI (Tenant's air quality expert) and the plans submitted by Tenant that are the subject of their motion. Specifically, the court cannot reconcile the 25-foot distance between the proposed flue and the lobby fresh air intake—which RWDI reportedly assumed in its modeling—with the plans submitted by Tenant, which show a smaller distance. Finally, Owner asserts that the plans violate Fuel Gas Code ¶ 503.5.4(1), which sets forth minimum requirements for the height of a chimney. Tenant's reply papers fail to address this provision, but admit that the Fuel Gas Code regulates the Proposed Boiler.

[20] Tenant has failed to respond to Owner's experts' attestations that the Proposed Boiler could not be legally operated until ***next*** winter. Nor has Tenant addressed Collins's expert testimony that steam heat could be DOB-approved and installed in as little as 60 days.

ORDERED that there will be a hearing on March 15, 2018 at 11:00 am to address the defendant's motion for a preliminary injunction to permit it to repair and operate the space heater (Seq. 003); and it is further

ORDERED that the TRO (Dkt. 21) issued on August 31, 2016 and reinstated on May 1, 2017 (Dkt. 187), is hereby extended pending the hearing.

Dated: February 14, 2018

ENTER:

J.S.C.