SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

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325 EAST 14TH STREET CORPORATION,

Plaintiffs,

- v -

MARIE FRANCE REALTY CORP. and MARIE PERUGINI,

Defendants.

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INDEX NO. 651074/2014

MOTION DATE _____

MOTION SEQ. NO. 005

DECISION AND ORDER

HON. MARCY S. FRIEDMAN:

The following e-filed documents, listed by NYSCEF document number (Motion Seq No 005) 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 206, 207, 208, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 246, 247, 248, 251 were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

In this action arising from a commercial lease for a bar and restaurant known as the Crocodile Lounge, Landlord Marie France Realty Corp. moves for an order vacating a Yellowstone Injunction granted to Tenant 325 East 14th Street Corporation, by order dated March 2, 2015, pursuant to a decision on the record on December 11, 2014, the transcript of which was so-ordered on March 2, 2015. Landlord also moves for an order permitting Landlord to draw against the full amount of the Bond previously posted by Tenant to secure compliance with the Yellowstone Injunction. Tenant cross-moves for an order extending its time to comply with the court's Judgment, Decision, and Order, dated February 3, 2018 (Judgment), rendered after a four day trial, which afforded Tenant the opportunity to cure specified illegal alterations to the premises. Tenant also seeks findings that Tenant is the prevailing party and is entitled to attorney's fees, and that Landlord is liable for all fines and penalties incurred since May 1, 2018.

This action was brought in response to a "Thirty (30) Days Notice of Cancellation of Lease," dated February 24, 2014 (Notice of Cancellation or Notice), which alleged violations of the Lease by Tenant. In its Judgment, the court held that while Tenant had made alterations to the premises that constituted a substantial violation of the Lease (Judgment, at 4-5, 19; see also id., at 6-18), the overwhelming evidence at trial established that Landlord had been complicit in permitting the illegal alterations and that Landlord had therefore waived the no-waiver and no-alteration provisions of the Lease. (Id., at 5, 19-24.) The court further held that, although Landlord had waived Tenant's violations of the Lease, Landlord could not effectively waive compliance with Department of Buildings (DOB) regulations enacted for the protection of the public. (Id., at 24-25.) As a result, Tenant was entitled to an opportunity to cure (i.e., legalize) the conditions identified in the Judgment. (Id., at 25-31.)

The Judgment ordered that the Yellowstone Injunction would remain in effect on condition that Tenant was in strict compliance with the repair obligations set forth in the Judgment, made requisite payments due under the Lease, and provided access to Landlord and any governmental agencies. (Id., 34.) As to the repairs, the Judgment provided:

> "III. . . . Tenant shall, within thirty (30) days after service of [the Judgment] with notice of entry upon it, submit to Landlord an application and detailed plan(s) by a licensed architect or engineer to legalize all of the work referred to in [the Judgment] . . . . This date is final.
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> V. . . .[A]fter Landlord approval of the initial application to the DOB and plans(s), Tenant shall proceed, on an expeditious basis, to undertake any further work, perform any necessary DOB or other governmental filings, and secure any necessary governmental approvals to legalize the work. . . ."

(Id., at 33-34.)

Conversely, Landlord was required to act in good faith and to not unreasonably withhold its approval to any required filings. The Judgment provided:

> "IV. . . . Landlord shall confer in good faith with Tenant regarding applications(s) to the Department of Buildings (DOB), plan(s), and any other requirements for legalization of illegal alterations; shall not unreasonably withhold consent to said application(s) and plan(s); and shall take any steps necessary to close any permits or applications which pre-date Tenant's tenancy.

(Id., at 33.)

Despite four appearances before the court,[1] the parties were unable to reach agreement on legalizing the alterations. Tenant and Landlord argued about, among other things, the level of detail Tenant was obligated to provide in its plans. As a result, a three day hearing was held on October 31, November 9, and November 19, 2018. At the hearing, the parties had the opportunity to present witnesses and evidence on the following issues: "Whether there has been compliance by the tenant with [the court's] orders, whether there are excuses for any noncompliance with [those] orders, and the bona fides of any disputes concerning plans and permits." (Sept. 25, 2018 Tr., 4.)

The court now holds that Tenant has failed to comply with this court's directives in the Judgment and subsequent orders by producing facially deficient and untimely plans. Tenant has also failed to provide a legally sufficient excuse for its noncompliance. While Landlord sought correction of certain work that was not within the scope of the Judgment, Tenant has failed to show that it maintains a willingness to cure the work that was within the scope. The court accordingly holds that Tenant is no longer entitled to a Yellowstone Injunction.

The parties agree that the date for Tenant's initial submission of plans to Landlord was no later than March 27, 2018. (Landlord's Memo. In Supp., at 6 [Mar. 27, 2018]; Aff. of John R.

[1] These appearances were held on May 31, July 30, September 13, 2018, and September 25, 2018.

McGillion [Pl.'s President] In Opp. [McGillion Aff.], ¶ 11 [Mar. 22, 2018].) In opposing Landlord's motion to vacate the Yellowstone Injunction, Tenant took the position that "the original order was not possible to comply with" because it would take 60-90 days to submit detailed plans, and because Tenant's architect, Emmanuel Kavrakis, had taken a vacation, fallen ill, and been out of the country between February 6, 2018 and March 10, 2018. (McGillion Aff., ¶¶ 9-10; May 31, 2018 Tr., at 10-11.) After Tenant's counsel represented that Tenant's architect would be prepared to submit plans to Landlord within a week of a May 31, 2018 appearance (May 31, 2018 Tr., at 3, 12), the court granted an extension, admonishing that if Mr. Kavrakis was unable to comply with the extension, Tenant would have to engage a new architect. (Id., at 13.)

It is undisputed that Tenant submitted plans to Landlord on June 11, 2018 (Tenant's Hearing Ex. 5; Landlord's Hearing Exs. F, AA), that Landlord's architect, Joseph Kleinmann, sent detailed comments on July 5 (Landlord's Hearing Ex. G), and that Tenant responded with comments dated July 27, 2018, but sent to Landlord on July 30, the same date as the court appearance. (July 30, 2018 Tr., at 3; Landlord's Hearing Ex. J.) Landlord claimed that Tenant had not provided sufficient detail concerning correction of mechanical and plumbing alternations, among others. Landlord, however, offered to meet and confer with its architect and counsel, and Tenant's architect and counsel, to discuss Tenant's plans and Landlord's comments. (July 30, 2018 Tr., at 3, 13-15.) Tenant informed the court that Mr. Kavrakis was going out of town for thirty days. (Id., at 3-4, 6-7.)

The court directed the parties to confer on August 13, 2018 and, again, admonished Tenant that if Mr. Kavrakis was unavailable due to his trip, Tenant would need to engage a new

architect. (Id., at 6-7, 16-18.) Tenant was directed to provide detailed plans in advance of the parties' meeting. (Id., at 18.) A further appearance was scheduled on September 13, 2018.

At the August 13 meeting, Tenant appeared with an expediter and Mr. Kavrakis telephoned into the meeting. (Sept. 13, 2018 Tr., at 15-16, 19-20, 23-24.) Tenant did not provide new plans concerning mechanical and plumbing. According to Landlord, and undisputed by Tenant, Tenant's architect did not address the plans previously provided by Tenant but, instead, presented "a whole new proposal," without any plans, about how to proceed with the legalization of the alterations. (Id., at 16-17; see Oct. 31, 2018 Tr., at 130-131.) This proposal was to demolish, rather than legalize, the entire rear space. (See Sept. 13, 2018 Tr., at 7-8, 16-17; Oct. 31 2018 Tr., at 133, 136.) New plans were not submitted to Landlord until September 11, 2018, "48 hours" before the September 13 appearance. (Sept. 13, 2018 Tr., at 17; Oct. 31, 2018 Tr., at 136-138.)

Tenant seeks a finding that Tenant's delay in complying with the Judgment was the result of Mr. Kavrakis' illness while on vacation, as well as Mr. Kleinmann's "unreasonable" June 28, 2018 comments. (Tenant's Proposed Findings of Fact & Conclusions of Law [Tenant's Proposed Findings], "Tenth" [J].) The court rejects this finding and holds that Tenant fails to offer a reasonable explanation for its failure to submit acceptable plans after the court granted Tenant an initial extension to do so. Tenant fails, among other things, to justify its noncompliance with this court's order that Tenant's architect meet and confer in person with Landlord's architect to address Landlord's architect's June 28, 2018 comments, and to explain its failure to retain a new architect given Mr. Kavrakis' unavailability. Tenant's decision to send an expediter to meet and confer was unacceptable given that the expediter, although experienced,

was unqualified to sign or revise plans. (Oct. 31, 2018 Tr., at 133, 135-137 [Kavrakis Testimony].)

More important, Tenant's final plans, submitted on September 11, 2018, did not correct significant deficiencies in the plans originally submitted on June 11, 2018. Tenant's "PW1: Plan/Work Application," validated on September 11, 2018 (Landlord's Hearing Ex. P) answers "No" to questions as to whether applicant is "[r]equesting legalization of work where no work without a permit violations have been issued," and whether "[s]tructural stability [is] affected by proposed work." (Id., at 2 [9D], [9L].) This court's Judgment, however, expressly directed Tenant to legalize alterations made without a permit (Judgment, at 32-33), and specifically found that alterations had been made at the premises involving structural walls. (Id., at 8 [walk-in cooler in cellar], 10 [hole in the staircase wall to make a window].)

The plans fail to provide even the most basic detail as to the alterations to be legalized. In both the June and September plans, certain conditions are marked as "new," rather than existing to be legalized. For example, the plans provide for a new walk-in cooler, but not for legalizing or removing the existing cooler (Nov. 19, 2019 Tr., at 11-12 [Kleinmann Testimony]); for a new pizza oven, but not for legalizing or removing the existing fire suppression system (id., at 13-15); for new bathrooms, but not for legalizing or removing the existing bathrooms (id., at 15-16; see Landlord's Exs. F [A-200.00]; P [A-200.00]).[2] Mr. Kavrakis did not persuasively dispute that the plans are so marked.

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[2] There are many areas of dispute between the parties' architects as to the required contents of the plans. These include the codes which govern the alterations; the forms which must be filed to legalize the work (Alt-1 or Alt-2); and the extent, if any, to which a change in occupancy may be required as a result of the repairs. (See Tenant's Proposed Findings, ¶ "Tenth" [A]; Landlord's Proposed Findings of Fact & Conclusions of Law, ¶¶ 3, 21.) The court need not reach these issues, given the other inadequacies in the plans.

The court notes, however, that at the hearing, Mr. Kavrakis testified that there were two separate items of ductwork – one for the pizza oven installed by Tenant and one, the Mushroom Exhaust, that he believed to have been installed in 1991, prior to the tenancy. (Oct. 31, 2019 Tr., at 42-43 [Kavrakis Testimony].) This testimony was

In view of these findings as to the untimeliness and inadequacy of the plans, the court holds that the Yellowstone Injunction must be vacated and that Landlord must accordingly undertake the work to legalize the alterations and correct the outstanding violations. Landlord's request to draw against the full amount of the "bond" will, however, be denied.[3]

The purpose of conditioning a Yellowstone Injunction upon the posting of an undertaking is to ensure that the Landlord will be protected against "potential damages in the event the injunction is found to have been unwarranted." (Medical Bldgs. Assocs., Inc. v Abner Props. Co., 103 AD3d 488, 488 [1st Dept 2013]; 3636 Greystone Owners, Inc. v Greystone Bldg., 4 AD3d 122, 123 [1st Dept 2004]; see generally Margolies v Encounter, Inc., 42 NY2d 475, 479-481 [1977] [discussing the purpose of an undertaking in the context of a preliminary injunction]; Daniel Finkelstein & Lucas Ferrara, Landlord & Tenant Prac In NY, § 16:210 [NY Prac Series 2019 Update].) Here, in vacating the Yellowstone Injunction, the court does not find that it was improperly granted. On the contrary, in granting the injunction, the court found that Landlord had waived any claim that Tenant had violated the Lease by making the alterations. That finding remains in effect. The injunction is vacated because Tenant did not ultimately comply with the court's directive to cure violations of DOB regulations that Landlord could not legally waive.

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contrary to the acknowledgment at the trial by John McGillion, Tenant's President, that "Tenant installed HVAC, refrigeration, and venting equipment on the roof of the extension, . . . without permits."[2] (See Judgment, at 12.) The Judgment directed Tenant to "legalize all work performed by Tenant in connection with . . . installation of HVAC, refrigeration, venting and electrical components." (Id., at 13-14.) Notwithstanding this directive, Tenant requested a proposed finding that the "Mushroom Exhaust" was not Tenant's responsibility. (Tenant's Proposed Findings, "Tenth" [I].)

[3] The March 2, 2015 order that directed the undertaking required that it be made by cash or surety bond. According to Landlord, and undisputed by Tenant, "Tenant actually deposited a $50,000.00 check in escrow in lieu of posting a bond." (Landlord's Memo. In Supp., at 9 n 1 [NYSCEF Doc. No. 195].) On this motion, Landlord does not claim to have made any request to the court for relief regarding the form of the undertaking.

Significantly also, although Tenant has failed to provide acceptable plans, Landlord has not reasonably cooperated with Tenant in reviewing the plans and in conferring with Tenant on the requirements for legalization. Instead, Landlord has imposed a number of unreasonable demands. For example, Landlord has applied a heightened standard of review to the plans. (See Nov. 9, 2019 Tr., at 89-90 [Mr. Kleinmann's testimony that he performed a "plan[ ] examination" and that he doubted that the DOB would do "as extensive" a review as the one he performed because the examiners have a limited amount of time to spend on an exam and because they are "overworked"]; see also Nov. 19, 2019 Tr., at 45.) Landlord has also sought correction of alterations which this court did not order Tenant to correct. For example, Landlord has taken the position that Tenant was obligated to remove or legalize a wall enclosing the rear yard. (Landlord's Proposed Findings of Fact & Conclusions of Law [Landlord's Proposed Findings], ¶¶ 15-19.) While Landlord made that claim in paragraph 8 (a) in the Notice of Cancellation which preceded this action (NYSCEF Doc. No. 3), Landlord did not seek a finding after trial that such cure was required, and no such finding was made. (Landlord's Proposed Post-Trial Findings of Fact & Conclusions of Law, ¶ 10 [c] [NYSCEF Doc. No. 127] [seeking only a finding that Tenant had created a new room]; Judgment, at 10, 12.)

Moreover, the Judgment required Landlord to "take any steps necessary to close any permits or applications which pre-date Tenant's tenancy." (Judgment, at 33.) As previously held, these open applications related to "natural gas plumbing work" and "fire suppression." (Id., at 26, n 11.) Mr. Kavrakis credibly testified, and Mr. Kleinmann did not dispute, that the closing of these permits was necessary to enable Tenant to proceed with the work that Tenant was directed by the Judgment to perform. (Oct. 31, 2019 Tr., at 54-59 [Kavrakis Testimony], see

Nov. 19, 2019 Tr., at 31 [Kleinmann testimony addressing closing permits].) Yet, Landlord produced no evidence that it has taken any action to close those permits.[4]

There are also two classes of outstanding violations (Tenant's Hearing Ex. 1; Oct. 31, 2018 Tr., at 60-61; Sept 13, 2018 Tr., at 2-5): One is for occupancy of the outdoor cafe and a violation regarding egress. (E.g., Summons No. 35250356K [Tenant's Hearing Ex. 17] ["Failure to maintain building in code compliant manner. Lack of required number of means of egress for every floor. Noted: At enclosed rear yard has been [sic] arranged for use as an out door [sic] cafe without required second means of egress"]; see Landlord's Proposed Findings, ¶ 22; Tenant's Proposed Findings, ¶ "Tenth" [C]-[D].) The second class of violations is for work without a permit. (E.g., 35250357M [Tenant's Hearing Ex. 1] ["Work w/o permit. Noted: At basement level altered partitions erected, electrical and plumbing work performed w/o a permit. At cellar level, altered electrical to install electrical walk-in cooler. . . ."].) It is undisputed that the DOB also issued a partial vacate order, dated April 18, 2018, for use the enclosed rear yard as an outdoor cafe "without a second means of egress." (Aff. of Philip T. Simpson [Landlord's Atty] In Supp. [NYSCEF Doc. No. 207], Ex. C; Landlord's Hearing Ex. R.) Tenant successfully removed the vacate order by filing proof of discontinuance of use of the rear yard. Yet, Landlord was unwilling to authorize Tenant to seek dismissal of the open occupancy/egress violations on the same basis, claiming that additional steps to legalize egress were required. (Nov. 9, 2018 Tr., at 109-115 [Kleinmann Testimony]; Nov. 19, 2018 Tr., at 70-71 [Kleinman Testimony]; Landlord's Proposed Findings, ¶ 22.) The court finds that the sufficiency of Tenant's steps to

[4] In fact, when asked on cross-examination whether Landlord had taken any steps to close any permits or applications pre-dating Tenant's tenancy, Mr. Kleinmann testified that he was "not asked to do that." (Nov. 19, 2019 Tr., at 46.) When further asked whether he knew if anyone was asked by Landlord to close permits, Mr. Kleinmann responded, "Not yet." (Id.)

legalize these violations should have been left for determination by the DOB. As to the removal of the violations for work without a permit, it is undisputed that these violations cannot be removed without plans. (See Oct. 31, 2018 Tr., at 60 [Kavrakis Testimony].) As held above, however, Landlord did not reasonably cooperate with Tenant in the plan review process.

Under these circumstances, the court concludes that the bond should be released to Tenant, not Landlord, and that Tenant should not be held liable for the penalties for failure to remove the violations. The court further rejects Tenant's request for a finding that is the prevailing party and is entitled to its reasonable legal fees, costs, and expenses of the hearing associated with this motion. (See Tenant's Proposed Findings, at 9.) As the court has held that the Yellowstone Injunction must be vacated, but that Landlord is not entitled to draw on the bond, neither party is the prevailing party. (See generally Nestor v McDowell, 81 NY2d 410, 415-416 [1993], rearg denied 82 NY2d 750; Matter of Wiederhorn v Merkin, 98 AD3d 859, 862-863 [1st Dept 2012], lv denied 20 NY3d 855; Board of Mgrs. of 55 Walker St. Condominium v Walker St., LLC, 6 AD3d 279, 280 [1st Dept 2004].)

Finally, this court previously held that Landlord was complicit in the alterations as Landlord's principals, Marie Madeline Perugini, and her daughter Marie France Perugini, both had full knowledge of Tenant's illegal alterations to the premises. (Judgment, at 5, 22-24.) The Judgment provided that Landlord should request a DOB inspection of the premises. (Id., at 34.) It appears that Landlord did so. It is undisputed that the violation for work without a permit, which the DOB issued in April 2018, included the work that the Judgment required be legalized. (Landlord's Hearing Ex. T; Nov. 9, 2019 Tr., at 101-106 [Kleinmann Testimony].) As held above, however, Landlord and Tenant have both continued to fail to take appropriate action to legalize the illegal alterations. In view of their continuing failure to correct the work, the court

deems it appropriate to refer the building to the DOB for a floor-to-ceiling inspection to ensure that no unsafe conditions exist.

It is accordingly hereby ORDERED that the motion of Landlord Marie France Realty Corp. is granted solely to the extent of vacating the Yellowstone Injunction granted by order dated March 2, 2015. Provided that: such vacatur will be held in abeyance for ten (10) days from the date of service upon Tenant of a copy of this decision and order with notice of entry; and is further

ORDERED that the cross-motion of Tenant 325 East 14th Street Corporation for an extension of time to comply with the court's decision, order, and judgment, dated February 3, 2018, is denied; and it is further

ORDERED that Tenant's request for attorney's fees is denied; and it is further

ORDERED that the parties shall confer with a view to reaching agreement on a proposed order providing for release of the undertaking to Tenant. In the event that they are unable to reach agreement, Tenant shall settle order within fifteen (15) days of the date of this order.

This constitutes the decision and order of the court. The court will issue a letter, which will be uploaded to NYSCEF, referring the subject building to the Department of Buildings for a floor-to-ceiling inspection.

4/28/2019
DATE

MARCY S. FRIEDMAN, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
APPLICATION:	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE