NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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CLEAN-RITE CENTERS-WESTCHESTER AVE., LLC,

Index No. **21792/2020E**

Plaintiff,

Hon. **FIDEL E. GOMEZ**
Justice

- against -

JOSEPH AND DOROTHY DONOVAN, J&D DONOVAN, LLC,

Defendants.

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The following papers numbered 1 and 2, read on this motion, noticed on 1/18/2022, and duly submitted as no. 2 on the Motion Calendar of 3/16/2022.

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits		
Notice of Cross-Motion - Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers-Order of Reference		
Memorandum of Law		

Defendants' motion is decided in accordance with the Decision and Order annexed hereto.

Dated: 3/24/2022

Hon.
FIDEL E. GOMEZ, A.J.S.C.

1. CHECK ONE..... ☐ CASE DISPOSED X NON-FINAL DISPOSITION

2. MOTION IS..... ☐ GRANTED X DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT
X NEXT APPEARANCE DATE: May 2, 2022 at 11:00 a.m.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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CLEAN-RITE CENTERS-WESTCHESTER AVE., LLC,

Plaintiff,

DECISION AND ORDER

- against -

Index No. **21792/2020E**

JOSEPH AND DOROTHY DONOVAN, J&D DONOVAN, LLC,

Defendants.

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Defendants Joseph and Dorothy Donovan, and J&D Donovan, LLC ("Defendants") move for summary judgment dismissing this action. Plaintiff Clean-Rite Centers-Westchester Ave., LLC ("Plaintiff") opposes, and seeks summary judgment in its favor.[1]

For the reasons which follow, Defendants' motion for summary judgment is denied. Plaintiff's request for summary judgment, is granted, in part.

BACKGROUND:

On February 5, 2020, Plaintiff commenced the instant action against Defendants by filing a summons and verified complaint, alleging causes of action for declaratory judgments and a permanent injunction. The complaint is verified by William Green, Plaintiff's Vice-President.

The complaint alleges that Plaintiff is the tenant at the premises located at 2463-2467 Westchester Ave., Bronx, NY (the "Premises") (Compl. ¶ 1). Plaintiff alleges that on or around February 25, 1998, it entered into a commercial lease agreement with Defendants Joseph and Dorothy Donovan (the "Donovans") for the Premises (the "Lease").

The complaint alleges that on or around June 16, 2000, the Donovans transferred their interest in the Premises to Defendant J&D Donovan, LLC ("J&D") by deed. Plaintiff alleges that since at least 2001, through the date of the complaint, Plaintiff has paid rent to J&D, which has accepted and cashed all rent payments (Compl. ¶ 7).

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[1] Plaintiff does not cross-move for summary judgment, but asks that the Court grant it this relief based upon a search of the record.

The complaint alleges that on or around August 14, 2008, Plaintiff assigned the Lease to KLM-Westchester Ave., LLC ("KLM"). Plaintiff alleges that in or around June 2015, KLM assigned the Lease back to Plaintiff (Compl. ¶ 8).

The complaint alleges that in or around June 2015, KLM sublet the Premises to J&J Laundry City, Inc. ("J&J Laundry"), which has been in physical possession of the Premises since that time. Plaintiff alleges that in or around October 2016, J&J Laundry placed its name on the awning (Compl. ¶ 10).

The complaint alleges that on or around January 21, 2020, the Donovans served a Notice of Default dated January 21, 2020 (the "Notice") on Plaintiff. Plaintiff alleges that it is not in default of the Lease, and that even if it is, that the alleged defaults can be cured (Compl. ¶ 21, 23-24, 27).

Attached as Exhibit A to the complaint is the Notice. The Notice states, in relevant part, that:

> Landlord hereby notifies Tenant that Tenant is currently in default of its obligations under the Lease. Pursuant to Section 17 of the Lease, Landlord is serving this written fifteen (15) Day Notice upon you as to the nature of the default to wit:
>
> 1. Tenant unlawfully sublet and/or assigned this Lease without Landlord's permission, knowledge or consent; . . .
> 5. Tenant and its illegal assignee/subtenant have not provided Landlord with evidence of the appropriate or adequate insurance pursuant to Section 48 of the Lease; and
> 6. Tenant and its illegal assignee/subtenant have not procured or maintained adequate insurance pursuant to the terms of the Lease.

The first cause of action of the complaint seeks a judgment declaring that the Notice is legally insufficient on its face, because it does not specify which provisions of the Lease have been violated and what specific acts or conditions were violations of such provisions (Compl. ¶ 34-35).

The second cause of action seeks a judgment declaring that the Notice is legally insufficient on its face, because it is signed by an attorney who is not named in the Lease and who lacks written authorization from J&D to send the Notice (Compl. ¶ 39).

The third cause of action seeks a judgment declaring that the Notice is null and void, because J&D accepted rent from Plaintiff during the term of the Lease, including after it served the Notice on Plaintiff, with knowledge of the alleged illegal subtenancy. As such, Plaintiff alleges that J&D waived the alleged default (Compl. ¶ 43).

The fourth cause of action seeks a judgment declaring that Defendants may not terminate the Lease upon the technical, non-material defaults set forth in the Notice (Compl. ¶ 46).

Finally, the fifth cause of action seeks two reliefs. First, it seeks a judgment declaring that Plaintiff has cured all of the defaults in the Notice or has shown the desire and ability to cure the defaults, and as such, that Defendants may not terminate the Lease based upon these alleged defaults (Compl. ¶ 50). Second, it seeks a judgment permanently enjoining and restraining Defendants from taking any action to terminate the Lease or to remove or evict Plaintiff from the Premises on the grounds set forth in the Notice. Plaintiff also seeks a reasonable amount of time to cure these defaults (Compl. ¶ 52).[2]

On February 6, 2020, Plaintiff filed an order to show cause seeking a Yellowstone injunction tolling or extending the time to cure the alleged defaults as stated in the Notice pending a final declaration on Plaintiff's claims and enjoining Defendants from taking any steps to terminate the Lease pending the trial of this action.

On or around October 8, 2020, the parties filed a stipulation, pursuant to which Defendants consented to the Court's granting of a Yellowstone injunction (the "Stipulation"). The Stipulation was so-ordered by the Court (Miles, J.) on October 14, 2020.

On December 20, 2021, Defendants filed the instant motion. On March 16, 2022, the motion was marked fully submitted.[3]

DISCUSSION:

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT:

Defendants move for summary judgment dismissing this action, arguing that Plaintiff has not and cannot cure the defaults under the Lease. Specifically, Defendants argue that Plaintiff has not demonstrated that it has maintained adequate insurance pursuant to paragraphs 8 and 48(b)(i)

[2] The Court notes that the wherefore clause of the complaint only mentions the request for a permanent injunction, not the request for a declaratory judgment.

[3] On March 9, 2022, the Court contacted the parties via email, advising them that one of Plaintiff's affidavits in opposition, Mr. Green's affidavit (NYSCEF Doc. 64), was incorrectly filed, as it was missing pages. The Court directed Plaintiff to re-file the affidavit on NYSCEF no later than March 16, 2022, if Defendants' counsel consented to the re-filing. On March 10, 2022, counsel for Plaintiff re-filed the affidavit (NYSCEF Doc. 74). The Court has not received any objection from Defendants. As such, the Court has considered the re-filed affidavit.

of the Lease or that it has the ability to cure its default based on its failure to obtain Defendants' consent prior to subletting the Premises.

In support of its motion, Defendants submitted, *inter alia*, the affidavit of Dorothy Donovan, a member of J&D; the pleadings, the Stipulation; the Lease; "certificates of liability insurance" dated December 1, 2015, November 17, 2016, November 28, 2017, November 20, 2018, November 19, 2019; and "evidence of commercial property insurance" dated January 28, 2020.

CPLR § 3212(b) provides, in relevant part, that:

> A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. . . . The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez* at 324). Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562).

CPLR 3001 provides, in relevant part, that: "The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds." "[G]ranting a declaratory judgment is left to the court's discretion" (*Morgenthau v Erlbaum*, 59 NY2d 143, 148 [1983]; *American News Co. v Avon Pub. Co.*, 283 AD 1041, 1042 [1st Dept 1954]).

"A declaratory judgment is intended 'to declare the respective legal rights of the parties based on a given set of facts, not to declare findings of fact'. The general purpose of a 'declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations'. Thus, a declaratory judgment requires a 'justiciable controversy,' in which not only does the plaintiff 'have an interest sufficient to constitute standing to maintain the action but also that the controversy involve present, rather than hypothetical, contingent or remote, prejudice to plaintiffs" (*Touro College v Novus University Corp.*, 146 AD3d 679, 679-680 [1st Dept 2017]). "[A] declaratory judgment should only be granted when it will have a direct and immediate effect upon the rights of the parties" (*Enlarged City School Dist. of Middletown v City of Middletown*, 96 AD3d 840, 841 [2d Dept 2012]). A "request for a declaratory judgment is premature 'if the future event is beyond the control of the parties and may never occur'" (*AB Oil Services, Ltd. v TCE Insurance Services, Inc.*, 188 AD3d 624, [2d Dept 2020]). Finally, "[d]eclaratory relief 'only provides a declaration of rights between parties' and 'cannot be executed upon so as to compel a party to perform an act" (*Trovato v Galaxy Sanitation Services of New York, Inc.*, 171 AD3d 832, 834 [2d Dept 2019]).

Proof of Insurance Coverage:

Defendants argue that although Plaintiff has provided certificates of insurance to demonstrate their compliance with the Lease, certificates of insurance are not sufficient proof of insurance coverage. Defendants assert that they have not received any insurance policies from Plaintiff (Affidavit of Dorothy Donovan, ¶ 12). Defendants argue that since Plaintiff has not established that it maintained insurance coverage as required by paragraphs 8 and 48(b)(i) of the Lease, the Court must find that no such coverage exists. Defendants argue that this failure is incurable.

Paragraph 8 of the Lease states, in relevant part, that:

> . . . Tenant agrees, at Tenant's sole cost and expense, to maintain general public liability insurance in standard form in favor of Owner and Tenant against claims for bodily injury or death or property damage occurring in or upon the demised premises, effective from the date Tenant enters into possession and during the term of this lease. *Such insurance shall be in an amount and with carriers acceptable to the Owner. Such policy or policies shall be delivered to the Owner*. On Tenant's default in obtaining or delivering any such policy or policies or failure to pay the charges thereof, Owner

> may secure or pay the charges for any such policy or policies and charge the Tenant as additional rent therefor (emphasis added).

Paragraph 48(b)(i) of the Lease states, in relevant part, that:

> Commencing on the Commencement Date, Tenant shall maintain with respect to the Building casualty insurance against loss or damage by fire and such other risks to the Building, including all alterations, rebuilding, replacements, changes, additions and improvements, as are included in so called extended coverage endorsements. Such insurance shall be for the full replacement value of all such structures and improvements, and without co-insurance, exclusive of the cost of foundations, excavations and footings. To the extent possible, such policy shall provide that same may not be cancelled or modified unless Tenant, and any other additional named insured, are given at least thirty (30) days' prior written notice of such cancellation or modification.

Here, Defendants do not specify which causes of action of the complaint they seek to dismiss. Presumably, Defendants seek summary judgment dismissing the fourth cause of action, which seeks a judgment declaring that Defendants may not terminate the Lease upon the defaults set forth in the Notice, and the portion of the fifth cause of action which seeks a judgment declaring that Plaintiff has cured all of the defaults in the Notice or has the ability to cure the defaults.[4]

Defendants have demonstrated their prima facie entitlement to judgment on the fourth cause of action for a declaration that they are entitled to terminate the Lease based upon Plaintiff's failure to demonstrate that it has procured and maintained the appropriate insurance pursuant to the terms of the Lease. Defendants have also demonstrated their prima facie entitlement to judgment on the fifth cause of action for a declaration that Plaintiff has not cured this default and that it does not have the ability to cure the default (*La Lanterna, Inc. v Fareri Enterprises, Inc.*, 37 AD3d 420, 422-423 [2d Dept 2007] ["when the plaintiff in an action for a declaratory judgment is not entitled to the declaration sought, the remedy is not dismissal of the complaint, but a declaration of the rights of the parties, whatever those rights may be"]). Defendants demonstrated that the

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[4] The first three causes of action seek declarations that the Notice is null and void. Defendants have not made any arguments addressing those causes of action.

Additionally, Defendants have not made any arguments addressing the portion of the fifth cause of action seeking a permanent injunction enjoining Defendants from taking any action to terminate the Lease based on the grounds set forth in the Notice.

As such, these causes of action were not considered on Defendants' motion.

certificates of insurance Plaintiff provided are not sufficient proof of insurance coverage (*Kermanshah Oriental Rugs, Inc. v Gollender*, 47 AD3d 438, 440 [1st Dept 2008] ["a 'certificate of insurance is only evidence of a carrier's intent to provide coverage but is not a contract to insure the designated party nor is it conclusive proof, standing alone, that such a contract exists'"]). Moreover, paragraph 8 of the Lease requires Plaintiff to deliver insurance policies to Defendants. As such, it is clear that delivery of certificates of insurance does not comply with the Lease. Defendants also demonstrated that Plaintiff's failure to provide proof of the requisite insurance is a proper basis upon which it may terminate the Lease. Furthermore, Defendants demonstrated that this failure is a material breach that cannot be cured by the purchase of prospective coverage (*117-119 Leasing Corp. v Reliable Wool Stock, LLC*, 139 AD3d 420, 421 [1st Dept 2016] ["The motion court correctly determined that the tenant's failure to obtain insurance was not curable"]; *455 Dumont Assoc., LLC v Rule Realty Corp.*, 180 AD3d 735, 737 [2d Dept 2020] ["The failure to obtain insurance was a material breach that was not cured by the purchase of prospective coverage"]).

However, in opposition, Plaintiff has demonstrated that it has procured and maintained proper insurance at all times. Plaintiff submitted the affidavit of William Green, Plaintiff's Vice-President, who asserts that Plaintiff has maintained insurance for the Premises as required by paragraph 48 of the Lease at all times. He asserts that this is evidenced by the certificates of insurance provided for the years 2015 through 2019 previously submitted to the Court, and the certificates of insurance for the years 2019 through 2021 submitted as exhibits to Sanford Morris' affidavit (Affidavit of William Green, ¶ 9).

Sanford Morris, Chief Marketing Officer of Rampart Insurance Services, Plaintiff's insurance broker for its commercial general liability insurance, states in his affidavit that certificates of insurance for the years 2018 through 2021 were issued pursuant to existing insurance policies naming Plaintiff as the named insured, and J&D as the additional insured (Affidavit of Sanford Morris, ¶ 8). Attached to his affidavit are the certificates of insurance for these years.[5]

Additionally, Plaintiff submitted copies of the insurance policies in effect for the years 2018 through 2021 (Plaintiff's Exhibits B, C and D). Although Plaintiff did not provide copies of the insurance policies for the years 2015 through 2017, the Notice does not specify the years for

[5] The Court notes that the certificate of insurance for the policy period 2019 to 2020 is missing. It appears that Plaintiff filed the certificate of insurance for the policy period 2018 to 2019 twice. The Court finds this to be of no import, as Plaintiff provided a copy of the insurance policy for this policy period.

which Defendants seek proof of insurance coverage. Additionally, Defendants do not object to the sufficiency of Plaintiff's evidence in demonstrating that the appropriate insurance was in place during the requisite periods of time.

Accordingly, Defendants' motion for summary judgment on the basis that Plaintiff failed to provide evidence of the appropriate insurance and/or failed to procure and maintain the requisite insurance is denied.

Consent to Sublet:

Defendants argue that Plaintiff defaulted on the Lease by subletting the Premises to J&J Laundry without obtaining their consent (Affidavit of Dorothy Donovan, ¶ 13), which is required by paragraph 54 of the Lease. Defendants argue that J&J Laundry's placing of an awning with its name at the Premises does not support a waiver of this default. Defendants argue that this is an incurable default.

Paragraph 54 of the Lease provides, in relevant part, that:

> (a) Tenant shall have the right, without Landlord's consent, to assign this Lease, or sublet less than 50% of the Demised Premises: . . .
> (c) Other than as described in subsections (a) and (b) of this Section 54, Tenant may assign this lease or sublet all or a portion of the Demised Premises, with Landlord's consent, which may not be unreasonably withheld or delayed. Any dispute or disputes which arise under this subsection (c) of Section 54 shall be resolved in each and every instance by binding arbitration in the City of New York, before the American Arbitration Association, under its then current rules for expedited adjudications.

Again, Defendants do not specify which causes of action of the complaint they seek to dismiss. Presumably, Defendants seek summary judgment dismissing the fourth cause of action, which seeks a judgment declaring that Defendants may not terminate the Lease upon the defaults set forth in the Notice, and the portion of the fifth cause of action which seeks a judgment declaring that Plaintiff has cured all of the defaults in the Notice or has the ability to cure the defaults.

Defendants have demonstrated their prima facie entitlement to judgment on the fourth cause of action for a declaration that they are entitled to terminate the Lease based upon Plaintiff's subletting of the Lease without their consent. Defendants have also demonstrated their prima facie entitlement to judgment on the fifth cause of action for a declaration that Plaintiff has not cured this default and that it does not have the ability to cure the default (*La Lanterna, Inc.*, 37 AD3d

420 at 422-423). Defendants have demonstrated that Plaintiff's subletting of the Premises without Defendants' consent is a proper basis upon which it may terminate the Lease. Defendants demonstrated that it did not provide the required consent. Defendants have also demonstrated that this failure is an incurable default, particularly where Plaintiff has not indicated that it can undo the sublet (*Zona, Inc. v Soho Centrale*, 270 AD2d 12, 14 [1st Dept 2000] [holding that the tenant's assignment of the lease without obtaining the landlord's prior written consent constituted an incurable default]; *see generally, Reade v Highpoint Associates IX, LLC*, 36 AD3d 496, 497 [1st Dept 2008] [finding that plaintiff cured the illegal subtenancy by terminating the subtenancy]).[6]

In opposition, Plaintiff argues that there is an issue of fact as to whether Defendants waived this default, as J&D unconditionally accepted rent from Plaintiff, with knowledge of the alleged lease defaults (Affidavit of William Green, ¶ 15-16, 18). In support, Plaintiff argues that the subtenant installed an awning with its name on or about 2016, and was thus openly and notoriously conducting business at the Premises (Affidavit of William Green, ¶ 6, 19). Plaintiff also argues that J&D signed a letter permitting Guang Qi Huang, the principal of J&J Laundry, to defend J&D at an Environmental Control Board hearing in 2017 (Affidavit of William Green, ¶ 5; Plaintiff's Exhibit A). As such, Plaintiff argues that Defendants were aware of the subtenancy since at least April 20, 2017. Plaintiff asserts that it has paid rent to J&D, without interruption, from 2015 (Affidavit of William Green, ¶ 7). Plaintiff also asserts that J&D accepted rent on January 28, 2020, after the Notice was served on January 21, 2020 (Affidavit of William Green, ¶ 8).

Plaintiff's argument that the Defendants' acceptance of the rent with knowledge of the alleged default on the Lease constituted a waiver of the default is without merit, as the Lease contains a non-waiver clause. Paragraph 24 of the Lease states, in relevant part, that:

> The failure of Owner to seek redress for violation of, or to insist upon the strict performance of any covenant or condition of this lease or of any of the Rules or Regulations set forth or hereafter adopted by Owner, shall not prevent a subsequent act which would have originally constituted a violation from having all the force and effect of an original violation. *The receipt by Owner of rent (and/or)*[7] *additional rent with knowledge of the breach of any covenant of this lease shall not be deemed a waiver of such breach and no provision of this lease shall be deemed to have been waived*

[6] The Court notes that Ms. Donovan, in her affidavit dated December 20, 2021, states that this default has not yet been cured (Affidavit of Dorothy Donovan, ¶ 15), even though a Yellowstone injunction has been in place since October 8, 2020.

[7] This/these word(s) is/are illegible in the copies of the Lease submitted to the Court.

> *by Owner unless such waiver be in writing signed by Owner*. (emphasis added).

Here, the terms of the Lease clearly states that Defendants' acceptance of rent, with knowledge of any breach, shall not be a waiver of the breach. Moreover, there is no dispute that Defendants did not provide a written waiver of the default. As such, Defendants' acceptance of the rent, even with notice of the alleged defaults, in and of itself, does not amount to a waiver of the default (*455 Dumont Associates, LLC*, 180 AD3d 735 at 737 ["The tenant contends that the landlord waived compliance with the insurance procurement provision because it accepted rent for years without objecting. However, the lease provided that the failure of the landlord to enforce a condition of the lease did not constitute a waiver. No affirmative conduct by the landlord effected a waiver of the ongoing obligation to procure insurance. A waiver is not created by negligence or oversight and cannot be inferred from mere silence"]; *VRA Family Limited Partnership v Salon Management USA, LLC*, 183 AD3d 614, 615 [2d Dept 2020] ["While waiver may be inferred from the acceptance of rent in some circumstances, it may not be inferred, and certainly not as a matter of law, to frustrate the reasonable expectations of the parties embodied in a lease when they have expressly agreed otherwise"]; *Excel Graphics Tech. v CFG.AGSCB 75 Ninth Ave.*, 1 AD3d 65, 70 [1st Dept 2003] ["Since each of plaintiff's factual arguments in support of its waiver claim is negated by the express language of the lease, the cross motion to dismiss based on documentary evidence should have been granted"]).

Moreover, Defendants' acceptance of the January 2020 rent after service of the Notice also fails to demonstrate a waiver. "Since the tenant is given until the end of the cure period before it may be declared in default, the landlord's acceptance of rent prior thereto does not constitute a waiver of its objections" (*Witkoff v Shopwell, Inc.*, 112 AD2d 295, 296 [2d Dept 1985]).

However, Plaintiff has raised an issue of fact by arguing that Defendants' affirmative conduct of authorizing Mr. Huang, J&J Laundry's principal, to represent J&D at the Environmental Control Board hearing on May 3, 2017, effected a waiver of the obligation to obtain prior written consent of the sublet. Plaintiff submitted a copy of the letter authorizing Mr. Huang to defend J&D at the hearing. The letter, dated April 20, 2017, addressed to the Environmental Control Board, is signed and sworn to by the president of J&D. The letter states, in relevant part:

> Please be advised that we authorize Guang Qi Huang (Brian) to represent J&D Donovan, LLC at the hearing for Summons Number: 0194316046 on May 3, 2017 at 9:30 AM. Guang Qi Huang (Brian) represents the tenant that occupies the space at 2463 Westchester

> Ave, and is responsible for correcting all violations pertaining to 2463 Westchester Ave.

As such, there is an issue of fact as to whether this affirmative conduct, in addition to Defendants' failure to enforce the provision requiring consent of the subtenancy from at least April 20, 2017, to the service of the Notice on January 21, 2020, constituted a waiver of the default. Although a waiver, "which is the voluntary and intentional relinquishment of a contract right, 'should not be lightly presumed' and must be based on 'a clear manifestation of intent' to relinquish a contractual protection (*Stassa v Stassa*, 123 AD3d 804, 805 [2d Dept 2014]), and " is not created by negligence or oversight and cannot be inferred from mere silence" (*455 Dumont Associates, LLC*, 180 AD3d 735 at 737; *Sunoce Properties, Inc. v Bally Total Fitness of Greater New York, Inc.*, 148 AD3d 751, 752 [2d Dept 2017]), a party may waive a "no-waiver" clause by taking affirmative action or active involvement, inconsistent with the express terms of the lease, sufficient to indicate "that the reasonable expectations of both parties under the original lease were supplanted by subsequent actions" (*Simon & Son Upholstery v 601 W. Assoc.*, 268 AD2d 359, 360 [1st Dept 2000]; *Paramount Leasehold, L.P. v 43rd Street Deli, Inc.*, 136 AD3d 563, 568 [1st Dept 2016]; *Kenyon & Kenyon v Logany, LLC*, 33 AD3d 538, 538-539 [1st Dept 2006]; *455 Dumont Associates, LLC*, 180 AD3d 735 at 737; *Stassa v Stassa*, 123 AD3d 804, 806 [2d Dept 2014] ["It [waiver] may be accomplished by affirmative conduct or failure to act so as to evince an intent not to claim the purported advantage"]; *Dice v Inwood Hills Condominium*, 237 AD2d 403, 404 [2d Dept 1997] ["Waiver 'may be accomplished by express agreement or by such conduct or failure to act as to evince an intent not to claim the purported advantage' and is generally a question of fact"]).

Accordingly, Defendants' motion for summary judgment on the basis that Plaintiff failed to obtain Defendants' consent for the sublet is denied.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT:

Plaintiff argues in its opposition that the Court should search the record and grant a summary judgment in its favor. Plaintiff does not cross-move for summary judgment. However, it is well settled that "[i]f it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion" (CPLR 3212[b]). It is important to note that the Court's power to do so is limited to those causes of action or issues that are the subject of the motion before the court (*Cerbone v Lauriano*, 170 AD3d 942, 943 [2d Dept 2019]; *New Hampshire Ins. Co. v MF Global, Inc.*, 108 AD3d 463, 467

[1st Dept 2013]; *Lima v NAB Const. Corp.*, 59 AD3d 395, 397 [2d Dept 2009]; *Frank v City of New York*, 211 AD2d 478, 479 [1st Dept 1995] ["A motion for summary judgment addressed to one claim or defense does not provide a basis for the court to search the record to grant summary judgment on an unrelated claim or defense"]). In light of the foregoing, only Plaintiff's request for summary judgment on the fifth cause of action may be considered. Since the Court only considered the portion of the fifth cause of action which seeks a judgment declaring that Plaintiff has cured the defaults in the Notice or has the ability to cure the defaults, the Court will only consider that portion of the cause of action on Plaintiff's request for summary judgment.[8] The Court notes that Plaintiff does not seek summary judgment on the fourth cause of action.

Proof of Insurance Coverage:

Plaintiff argues that it did not default in demonstrating that it has procured and maintained the appropriate insurance pursuant to the terms of the Lease, because it provided Defendants with certificates of insurance, which constitute evidence of insurance. Plaintiff argues that the Notice did not request insurance policies, but only evidence of insurance. Nevertheless, Plaintiff argues that even if the failure to provide copies of insurance policies is a default, it has cured the default by submitting copies of the insurance policies for the years 2018 through 2021, which demonstrate that insurance was in effect when the certificates of insurance were issued.

Plaintiff has demonstrated that it is entitled to a judgment declaring that it has cured this default. As explained above, Plaintiff demonstrated that it had procured and maintained the requisite insurance at all relevant times by submitting the affidavits of Mr. Green and Mr. Morris, as well as copies of the insurance policies for the years 2018 through 2021. Although Plaintiff did not submit copies of the insurance policies for the years 2015 through 2017, the Notice does not specify the years for which Defendants seek proof of such insurance coverage. Moreover, Defendants do not object to the sufficiency of Plaintiff's evidence in demonstrating that the appropriate insurance was in place during the requisite periods of time.

Accordingly, Plaintiff's request for summary judgment is granted to the extent that on its fifth cause of action, Plaintiff has demonstrated its entitlement to a judgment declaring that it has cured the defaults based on its alleged failure to provide evidence of appropriate insurance and its alleged failure to procure and maintain adequate insurance, as required by the terms of the Lease.

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[8] In any case, Plaintiff only seeks summary judgment on that portion of the fifth cause of action.

Consent to Sublet:

Plaintiff argues that it has the ability to cure the default based on its failure to obtain Defendants' consent for the subtenancy by assigning the Lease to the subtenant pursuant to paragraph 54 of the Lease, thereby creating a direct landlord-tenant relationship. Plaintiff argues that the Lease unconditionally allows Plaintiff to assign the lease, without the need to obtain Defendants' consent.

Plaintiff has not demonstrated that it is entitled to a declaratory judgment that it has cured this default or has the ability to cure this default. There is no dispute that Plaintiff has not yet cured this default. Moreover, although Plaintiff argues that it has the ability to cure the default by assigning the Lease to the subtenant, it is unclear how such an assignment would amount to a cure, as it would result in Plaintiff having to vacate the Premises (*Gap, Inc. v 44-45 Broadway Leasing Co., LLC*, 191 AD3d 549, 550 [1st Dept 2021] ["holding that a plaintiff demonstrates its entitlement to a Yellowstone injunction upon a showing that . . . (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises"]; *ERS Enterprises, Inc. v Empire Holdings, LLC*, 286 AD2d 206, 206-207 [1st Dept 2001]). An assignment of the Lease would result in a termination of the Lease as to Plaintiff (*New Amsterdam Casualty Co. v National Union Fire Ins. Co. of Pittsburg, Pa.*, 266 NY 254, 259-260 [1935] ["If the lessee transfers his entire interest in the real property covered by the lease or of part thereof to a third party who enters into possession, such transfer constitutes an assignment of the lease and the assignee becomes directly liable to the original landlord as the transfer creates a privity of estate between the landlord and the transferee of the lease or of a part thereof. In order to constitute an assignment, the transfer from the original lessee must convey the entire interest of the lessee"]; Robert L. Haig, 4G NYPrac., Com. Litig. in New York State Courts 148:24 [5th ed. 2021] ["An assignment is a transfer of the tenant's entire interest in the premises, both in space and time, with the tenant vacating the premises. An assignment creates a privity of estate between the assignee and the landlord to use and occupy the premises. Once the demised premises has been delivered to the assignee, privity of estate between the assignor/original tenant and the landlord is severed."]). Although it is true that "[a]n assignment of a lease by the lessee does not release the lessee of its obligations under the assigned lease absent an express agreement to that effect or one that can be implied from facts other than the lessor's mere consent to the assignment and its acceptance of rent from the assignee" (*City of New York v Evanston Ins. Co.*, 129 AD3d 760, 760 [2d Dept 2015]), here, paragraph 45(e) of the Lease releases Plaintiff from the Lease upon an

assignment of the Lease ("Tenant shall be deemed fully released from any and all obligations as Tenant arising on and after the effective date of the assignment or transfer.").

Moreover, Plaintiff has not even asserted that it has the ability to terminate the subtenancy, which would necessarily be the first step to take in curing the default and prior to assigning the Lease, if assignment were a proper cure of the default (*See generally, Reade*, 36 AD3d 496 at 497).

Accordingly, on this record, Plaintiff has not demonstrated that it is entitled to the declaration sought.

It is hereby

ADJUDGED AND DECLARED that Plaintiff has cured the defaults alleged in the Notice, which state that Plaintiff has not provided evidence of the appropriate insurance and that Plaintiff has not procured or maintained adequate insurance, as required by the terms of the Lease. As such, Defendants may not terminate the Lease based upon this default. It is further

ORDERED that the parties appear for a virtual settlement conference on **Monday, May 2, 2022, at 11:00 a.m.** It is further

ORDERED that Plaintiff serve a copy of this Decision and Order upon Defendants, with Notice of Entry, within thirty (30) days of the date hereof.

This constitutes the Decision and Order of this Court.

Dated: 3/24/2022

HON. **FIDEL E. GOMEZ, A.J.S.C.**