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

PRESENT: PAUL G. FEINMAN PART 7
Justice

406 LEXINGTON, L.L.C.

-V-

DUANE READE

-V-

IDI CONSTRUCTION COMPANY, INC.

INDEX NO. 404901/2001

MOTION DATE 2/19/2004

MOTION SEQ. NO. 004

The foilowlng papers, numbered 1 to 4A were read on this motion to/for S.J.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1
IDI Cross Motion—Affidavits— Exhibits	2
406 Lexington Cross Motion – Affidavits– Exhlblts-Memo	3, 3a
Reply Affidavits -Memo	4, 4a

Cross-Motions: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion by defendant Duane Reade for summary judgment, the cross motion by plaintiff 405 Lexington, LLC for summary judgment, and the cross motion to dismiss by IDI Construction are all denied in accordance the annexed memorandum decision and order.

FILED
JUN 01 2004
COUNTY CLERK'S OFFICE
NEW YORK

Dated: May 21, 2004

Paul G. Feinman
J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 7

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405 LEXINGTON, LLC,
Plaintiff,

against

DUANE READE, a Partnership,
Defendant and Thir(Party Plaintiff,

against

IDI CONSTRUCTION COMPANY, INC.,
Third-party Defendant.

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IDI CONSTRUCTION COMPANY, **INC.,**
Fourth-Party Plaintiff,

against

BERSON CONSULTING, LLC,
Fourth-Party Defendant.

----------X

Index Number 404901/2001
Oral Argument Date Feb. 19,2004
Motion Seq. No. 004

DECISION AND ORDER

For Plaintiff 405 Lexington:
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For Fourth-Party Defendant Rerson Consulting:[1]
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FILED
JUN 0 1 2004
COUNTY CLERK'S OFFICE

Papers considered in review of this motion for summary judgment, cross motion for summary judgment and cross motion for dismissal:

Papers	Numbered
Duane Reade's Notice of Motion **and** Affidavits Annexed	1
IDI Cross Motion	2
405 Lexington's Cross Motion & Memo of Law	3,3a
Duane Reade's Reply & Memo of **Law**	4,4a

'Berson Consulting LLC did not submit papers on the motions and cross motions.

PAUL *G.* FEINMAN, J.:

Defendant Duane Reade's motion for summary judgment and dismissal of the complaint is denied. Plaintiff 405 Lexington LLC's cross motion for summary judgment as to Duane Reade is denied. Third-party defendant IDI Construction Company's cross motion to dismiss the third-party complaint is denied.

Factual Background

Defendant/third-party plaintiff Duane Reade and plaintiff 405 Lexington LLC ("landlord"), are parties to a July **6,** 1998 lease agreement concerning commercial space in the Chrysler Building. At the time the lease was negotiated, the storefront in question had one exterior entrance. **As** part of its terms for leasing the space, Duane Reade negotiated the construction of an additional entrance to be built at the corner of the building, which entailed removal and replacement of the then existing corner windows (Not. of Mot., Cuti **Aff.** ¶ 2). The lease clearly indicates that because the Chrysler Building is a landmarked property, the architectural changes desired by Duane Reade required the approval of the Landmarks Preservation Commission ("Landmarks Commission"). Approximately three weeks after the lease was signed, the Landmarks Commission gave its approval to a general "master" plan proposed by the landlord for "future replacement of storefronts throughout the base of the building on the exterior." (Not. of Mot., **Ex.** L). Following this July 31, 1998 approval, the landlord's managing agent informed Duane Reade in writing that it could proceed with drafting the specific plans for the signage and door locations, working with the landlord's architects, Beyer Blinder Belle (Not. of Mot. Ex. G; Reply **Aff. Ex.** Q).

On July 30, 1998, a "job meeting" was held which included representatives from the

landlord's managing agent and Duane Reade, as well as from third-party defendant IDI Construction, and certain other individuals, and which was memorialized in a report prepared by Duane Reade's architectural firm on July 31, 1998 (Reply Aff. **Ex.** P). The report noted "[a]rchitectural plans and signage must be reworked to comply with recent Landmarks Guidelines as prepared by Richard Metsky of Beyer, Blinder, Belle." It noted that the changes included shifting the position of the doors, limiting the placement of signs, and replacing "[a]ll exterior windows and framing."

These new plans were subsequently submitted to the Landmarks Commission, and on January 13, 1999, the Commission approved the plan submitted by the landlord which was described as a replacement of a total of nine storefronts (Pl. Cross Mot. **Ex.** K). The Commission's approval was based on its review of drawings drafted by Dawson Doors, which had been approved by Beyer Blinder Belle,[2] and a drawing prepared by Duane Reade's architectural firm, David Mayerfeld Associates.

Apparently in about January 2000, Duane Reade undertook commencement of the storefronts, with David Mayerfeld Associates as the architect and IDI Construction Co., Inc. as the contractor. However, by letter dated July 13, 2000, the landlord informed Duane Reade that the construction had caused a "major problem" involving risks of water and other damage (Pl. Cross Mot. **Ex.** L). According to the engineer's report enclosed with the letter, the windows had

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[2]Rather confusingly, the Landmarks Commission's authorization states that Beyer Blinder Belle approved of the Dawson Doors drawings on January 12, 1998, which calls into question the actual time when the plan to renovate the building was commenced. If correct, this date would seem to comport with Duane Reade's claim that the landlord already had it in mind to renovate the exterior, even before their lease was signed. However, given the state of the record this remains a disputed question of fact.

been improperly anchored, rusting was occurring, and the windows needed to be removed and replaced, along with sills **and** water table stones. Ultimately, the landlord alleges it undertook the storefront restoration by hiring its own contractors to repair and restore the storefronts to their intended condition. It served a Notice of Default on December 13,2001, alleging violations of the lease, including failure to "fabricate, install and reconstruct, in accordance with plans approved by the Landlord, the storefronts (including display windows and surrounding stone fascia) at the Premises." (Pl. Not. of Cross Mot. **Ex.** N).

The landlord originally asserted the instant claim for breach of lease and declaratory relief as a Sixth Counterclaim in the already existing litigation, *Duane Reade* v *405 Lexington, LLC,* Index No. 110178/1999 **(Sup.** Ct., New **York** County [Gruner-Gans, J.]). Pursuant to Decision and Order of August 3, 2001, the "Sixth Counterclaim" was severed, along with Duane Reade's third-party indemnification action against IDI Construction and IDI's fourth-party action against Berson Consulting. The court directed that the counterclaim be brought as **a** new action under a new index number, with 405 Lexington designated as the plaintiff (Pl. Cross Mot. **Ex. A,** at 4), resulting in the instant action. 405 Lexington, Duane Reade and IDI Construction each now seeks summary judgment in its favor.

Analysis

1. Defendant Duane Reade's Motion for Summary Judgment

Duane Reade argues, in essence, that by the terms of the lease agreement, it was never responsible for the entire storefront restoration work, but only for the work that arose as **a** result of the construction of a new corner entrance door and signage (Not. of Mot., Cuti Aff. ¶¶ 4, 23). The lease agreement contains several relevant sections. Under Article 1, Commencement Date,

the lease distinguishes between the submission of renovation plans for initial approval by the Landmarks Commission, and the plans to change the exterior entrance door location and signage, which the landlord agreed to file and pursue jointly with Duane Reade in gaining approval from the Landmarks Commission (Not. of Cross Mot. Ex. B). This tends to show that Duane Reade at least knew the existence of a "master plan" for renovation, although perhaps not its scope. Section 5.1(e) states that the tenant must submit all applications to the landlord for prior approval and the landlord will submit them to the Landmarks Commission for its approval. Section 5.8 states that the landlord has no liability "in connection with [its] approval of any plans and specifications for any Alterations," and if the landlord is "required" by any governmental authority to make alterations or improvements to the building as a result of alterations made by or on behalf of the tenant, the tenant shall pay all costs and expenses incurred. It is the landlord's position, of course, that the Landmarks Commission required the storefronts to be renovated at the same time the entranceway was constructed, and that accordingly under the lease Duane Reade was responsible for the entire cost. As discussed below, the landlord fails to establish this claim.

Section 5.9(a) requires the tenant to make the initial installations at its own cost, and the initial installations are defined in section 5.9(b) as including the change of the building entrance doors and painting the entrance door to the lobby black, but not, however, the renovation of the storefronts. Section 5.9(f) states that Duane Reade's contracts and any resulting subcontracts are to expressly provide that those parties are to look solely to Duane Reade for payment and that the landlord is to have no responsibilities. Article 27, concerning notices, states that communications under the lease are to be writing. The merger clause is contained in section

37.5.

Duane Reade argues that pursuant to the merger clause, the landlord is barred from asserting that Duane Reade orally agreed during the lease negotiations to take on responsibility for the renovation of the storefront windows. It further contends that its position was clearly understood by the landlord and that Duane Reade's Chairman, CEO and President, Anthony J. Cuti, discussed this with the landlord's managing agent, Geoffrey Wharton, sometime after August 13, 1998. Cuti avers that he made the store's position clear that it had no obligation to pay for anything other than for the doorway and signage, and that Wharton understood and agreed to speak to his colleagues about working out "the payment issue" (Not. of Mot. Cuti Aff. ¶ 23). Cuti further avers that Wharton also understood that although Duane Reade agreed that its contractor, IDI Construction, would undertake the additional storefront restoration work following the plan by landlord's architect, the landlord was to be responsible for the increased cost (Not. of Mot. Cuti **Aff. ¶ 24).** This is disputed by the landlord and there appears to be nothing in writing to substantiate this allegation.[3]

Duane Reade argues that the lease provision concerning their joint pursuit of the approval from the Landmarks Commission for the proposed design plans to change the exterior entrance **door** was not made in good faith, because the landlord had already prepared a "master plan" to renovate the building's entire storefront area, including the area to be leased to Duane Reade. Duane Reade asserts, not entirely convincingly, that it was never informed of this "master plan"

[3]The representative from IDI Construction testified the company **had** no contractual relationship with any entity other than Duane Reade, and had no contract with the landlord to work on the storefronts (Cross Mot. **Ex.** W, Levey EBT 70).

prior to signing the lease (see Cuti Aff. ¶¶ 6, 17), although it is not entirely clear that it fully understood the scope of that plan. Duane Reade was certainly dissuaded from attending the July 28, 1998 public meeting before the Commission (Not. of Mot. **Ex.** F, July 27, 1998 letter from Jeff Winick to Geoffrey Wharton), **and** appears to allege that neither it nor its architect saw a copy of the Commissions' July 31, 1998 certificate of appropriateness, but rather relied on the statements of the landlord's representatives. It purports to have been "shocked" when Tishman-Speyer Properties, the landlord's managing agent, informed it that the Landmarks Commission required "the replacement of three window bays as a condition to the relocation of the doors" (see, Not. of Mot. **Ex.** H, Letter of Aug. 12, 1998, Jeffrey Leonard, **Esq.** to **Mark** Maltz, Esq.). **As** Duane Reade points out, the Commission's July 31, 1998 certificate of appropriateness neither states that in order to construct a corner entrance, all the window storefronts would have to be simultaneously restored, nor that it was Duane Reade's responsibility to undertake chis work. Rather, the certificate explicitly indicates that "any given commercial tenant" could apply for permission to implement "a portion of the work covered in the master plan." Duane Reade thus argues that it was misled by the landlord into believing that in order to undertake the "portion" of the work specifically involving the construction of the new doorway and adjoining window areas, it had to renovate all the storefront windows. It states that it amended its original plans for the entranceway to incorporate the storefronts only because it was notified by the managing agent that it had to do so.

To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in its favor *(GTF* ***Mtkg,*** *Inc.* v *Colonial Aluminum* ***Sales,*** *Inc.*, 66 NY2d 965,967 [1985]). Summary

judgment is appropriate only when there is no genuine issue as to any material fact and the disposition of the causes of action can be decided as a matter of law *(Security Pacific Bus. Credit, Inc. v Peat Marwick Main & Co.*, 79 NY2d 695, *rearg denied* 80 NY2d 918 [19921).

In response to Duane Reade's arguments concerning the lease, the landlord points to the terms of the lease which set forth the responsibilities of the landlord, none of which include paying for storefront renovations (Cross Mot., **Ex.** B, Lease at **Ex.** C). However, as noted above, the lease does not explicitly make Duane Reade responsible for the storefront renovations. Moreover, although the landlord and its managing agent argue that Duane Reade knew there was a master plan, they concede that the process of creating that plan went on "long before it [went] to **a** public hearing" (Cross Mot. **Ex.** D, Wharton EBT at 93). It is not in dispute that Duane Reade was informed that all plans had to be approved by the Commission, and the landlord avers it further informed Duane Reade that the Commission "might" require the store to replace the storefront windows if it requested the new corner entrance (Pl. Cross Mot. **Ex,** D, Wharton EBT **75-76** ["I said it would not surprise me based upon the fact that we were asked to submit a master plan and that his change was as significant as it was that once submitted to Landmarks, that they may require him to address all the windows"], 92, **93-94).** The landlord further states it "had very strong indications" from the Commission that, in order for the Duane Reade application to be approved, the Commission would require renovation of the storefronts as well (Cross Mot. **Ex.** D, Wharton EBT at **93-94).**

Although Duane Reade calls into question the landlord's portrayal of the Landmark Commission's ruling, and the landlord has not established the basis of its *belief* that the Commission would not allow the one project to be done without undertaking the other, **summary**

judgment is not appropriate. Given that the lease does not establish that Duane Reade was responsible for the storefront renovations, and that the parties sharply dispute whether or not Duane Reade knew of the contents of the master plan at the time of the signing of the lease, there are questions of fact that preclude summary judgment. Duane Reade has not sufficiently established that the parties agreed that the landlord would assume the costs for the storefront renovations, although there is testimony that the issue was repeatedly addressed.[4] Accordingly, Duane Reade's motion for summary judgment and dismissal of the complaint is denied.

2. Plaintiff 405 Lexington's Cross Motion for Summary Judgment

Plaintiff's cross motion for summary judgment in its favor must be denied for reasons similar to those defendant's motion was denied. Although the landlord argues that Duane Reade is bound by the Landmarks Commissions' certificates of appropriateness, Duane Reade raises questions of fact concerning the scope of the certificates of appropriateness and whether plaintiff misinformed Duane Reade as to their import. Nothing in either the July 31, 1998 or the January 13, 1999 certificates establish the exact parameters of Duane Reade's responsibility. Notably, the certificate of appropriateness issued on July 31, 1998 (Cross Mot. **Ex.** F), states that the Commission approved of the proposed work which consisted of "the establishment of a master

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[4]It is clear that the landlord and its managing agent knew that, after the lease was signed, Duane Reade was unwilling to bear the costs of the storefront renovations (Not. of Mot. **Ex.** J, Wharton EBT at 87 ["I don't think they wanted to change the storefronts"] and **82 ["I** don't think they had that desire"]). Duane Reade's contractor testified there were "numerous meetings where they went back and forth about the window issue and Duane Reade's determination to only **do** the doors and Tishman suggesting that if Duane Reade simply filed the movement of the doors [with the Commission], that Landmarks wasn't going to approve it." (Cross Mot. **Ex.** W, Levey EBT 65). The contractor also testified that at one point, the Tishman-Speyer representative indicated he would split **part** of the cost of renovating the storefronts with Duane Reade (Reply, **Ex.** R, Mayerfeld EBT 30-31). The landlord does not refute this testimony.

plan governing the future replacement of storefronts throughout the base of the building on the exterior, and in the designated interior lobby space." The Commission approved of "potential new storefronts under the master plan," which would be "in harmony" with the original building's materials and design. "This master plan sets a standard for all future storefront replacements and specifically identifies drawings which describe the approved plan in detail. *If a commercial tenant* ***wishes*** *to move* ***forward*** *with a portion of the* ***work covered*** *in the master plan,* they must submit a completed application form signed by an authorized representative of the building ownership identifying the specific location of the shopfront(s), accompanied by construction documents." (*Id.*, emphasis added).

Duane Reade argues that because it was misled as to the import of the initial certificate of appropriateness, it drew up plans for the entranceway and the storefronts in the belief that it had been directed to do so by the Landmarks Commission. The landlord contends that Duane Reade was always informed and aware of its responsibilities, and that because it wanted to build a new entranceway in its landmark building which affected certain of the windows, it might be required to renovate all the windows (Cross Mot. **Ex.** D, Wharton EBT 76). **As** discussed above, Duane Reade disputes this, and it is unclear what information was actually imparted to Duane Reade concerning its potential responsibility for renovations of the Chrysler Building, either before it entered into the lease agreement, or thereafter. It is also unclear whether the landlord improperly relied on the existence of its master plan to assert that Duane Reade was responsible for all the storefront renovations, and what was the basis to state that the Landmarks Commission would not entertain a more limited renovation plan. Duane Reade's architect designed the work project which included the storefront renovations, based on a letter from the landlord's managing agent

that said Duane Reade "had to change all the doors and windows to meet Landmarks approval" (Pl. Cross Mot. **Ex.** G, Mayerfeld EBT, 81, 82; **see** Reply Aff. **Ex.** Q, July 31, 1998 Aguggia Letter). Thus, although Duane Reade's architect developed plans which incorporated the totality of the work claimed to be necessary, this does not address whether there was an initial misrepresentation by the landlord as to the necessity for that work, or a misperception that any proposed lesser amount of work would not be approved by the **Landmarks** Commission.

The landlord misconstrues the issue by arguing that Duane Reade should have brought an Article 78 proceeding against the Landmarks Commission. Rather, the issue concerns the nature of the lease agreement and whether there was misrepresentation concerning the landlord's plans for the building's renovations and Duane Reade's role in those plans. Accordingly, the landlord's cross motion for summary judgment is denied.

3. Cross Motion for Dismissal by IDI Construction

IDI Construction cross moves, once again,[5] to dismiss the third- party complaint pursuant to CPLR 3211.[6] Given that Duane Reade's motion for summary judgment and dismissal of the complaint is herein denied, and that IDI proffers solely of a copy of the pleadings for both the earlier litigation and the instant litigation, a copy of its September 10,2003 letter addressed to the Hon. Louise Gruner Gans, and an affirmation by its counsel, the court finds no grounds upon which to grant the motion to dismiss the third-party complaint seeking indemnification ***(see,***

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[5]IDI Construction's previous motion to dismiss the third-party complaint was denied by another justice of this court in a decision and order dated September 18, 2002 (Pl. Cross. Mot. **Ex. O).**

[6]Its motion in the alternative for CPLR 3212 summary judgment is academic, given that Duane Reade's motion for summary judgment and dismissal has been denied, see ***supra.***

Facundo, S.A. v Pressman, 233 AD2d 117, 117 [1st Dept. 1996] [motion to dismiss denied where same motion was previously made and denied by another Justice of the Supreme Court, and no new evidence or citations to change in the law was proffered]).

4. Outstanding Discovery

Prior to the bringing of the instant motion and cross motions, the previously assigned justice had directed that EBTs were to be conducted for David Mayerfeld, Anthony J. Cuti, Richard Aggugia, Glenn R. Levey, Stephen Berson, Mr. Widrig from Dawson Doors, and a representative from LZA Technology (see Not. of Cross Mot. **Ex.** Q, Dec. & Order, Aug. 6,2003 [Gruner-Gans, J.]). The parties are now directed that these depositions are to be completed expeditiously and with preservation of the traditional priorities. **All** parties shall appear for a compliance conference on July 15,2004 in IA **Part** 7 at 11:00 a.m. It is the court's expectation that absent compelling circumstances, these depositions should be completed by that date.

It is therefore

ORDERED that defendant Duane Reade's motion for summary judgment and dismissal of the complaint is denied; and it is further

ORDERED that plaintiff 405 Lexington's cross motion for summary judgment as against Duane Reade is denied; and it is further

ORDERED that third-party defendant IDI Construction Co., Inc.'s cross motion to dismiss the third-party complaint is denied; and it is further

ORDERED that, absent compelling circumstances, the EBTs of David Mayerfeld, Anthony J. Cuti, Richard Aggugia, Glenn R. Levey, Stephen Berson, Mr. Widrig from Dawson Doors, and a representative from LZA Technology are to be completed on or before July 15,

2004; and it is further

ORDERED that all parties shall appear for a compliance conference on July 15, 2004 at 11 a.m. in **IA Part** 7.

This constitutes the decision and order of the court. The court has mailed courtesy copies of this decision to all parties.

Dated: May 21, 2004
New York, New York

Paul G. Feinman
J.S.C.

404901-2001—004