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

PRESENT: Kornreich Justice PART 54

Pier 59 Studios L.P.

-v-

Chelsea Piers, L.P.

INDEX NO. 601211/04

MOTION DATE 6/25/04

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Decision and Order.

FILED
NOV 16 2004
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: November 8, 2004

SHIRLEY WERNER KORNREICH J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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PIER 59 STUDIOS L.P.,

Index No.: 601211/04

Plaintiff,

DECISION and ORDER

-against-

CHELSEA PIERS, L.P.,

Defendant.

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KORNREICH, SHIRLEY WERNER, J.:

This action was originally brought by plaintiff Pier 59 Studios L.P. ("Pier 59" or the "Subtenant") against Chelsea Piers, L.P. ("Chelsea Piers" or the "Sublessor") pursuant to a sublease between the parties, executed on or about October 27, 1994 (the "Sublease"). See Compl. ¶ 5. Chelsea Piers leases space from the State of New York via the Commissioner of the Department of Transportation. In turn, Chelsea Piers then subleases portions of that space to subtenants, including, inter alia, Pier 59. Pier 59 moves for a Yellowstone injunction or, in the alternative, a preliminary injunction, enjoining defendant from taking any steps to terminate plaintiff's Sublease based on a letter dated June 8, 2004, the so-called "notice to cure." See Aff. of Morell I. Berkowitz at Ex. A. In support of its motion, plaintiff submits the affirmation of its attorney and the affidavits of Federico Pignatelli, its President, and David Belt, a consultant retained by plaintiff, as well as copies of: the summons and complaint; correspondence between the parties; correspondence between the parties' counsel: the First Amended Complaint; the "notice to cure" letter, dated June 8, 2004 ("Notice to Cure"); an amendment to the Sublease, dated November 19, 1996 (the "1996 Amendment"); various temporary place of assembly

permits ("TPAs") issued by the Department of Buildings ("DOB"); the Sublease, executed between plaintiff and defendant on or about October 27, 1994; the lease between the New York State Department of Transportation ("DOT") and Chelsea Piers, executed on or about June 24, 1994; and papers from the DOB. Defendant opposes, submitting its attorney's affirmation and copies of: a New York Post article regarding the subject premises; the Notice to Cure; correspondence between the parties' attorneys; portions of the Sublease; news articles; and web pages.

I. Background

In October 1994, plaintiff and defendant entered into a Sublease. Pursuant to the Sublease, and three amendments thereto, plaintiff subleased approximately 54,000 feet on the second floor of Pier 59, which it used as a fashion "photography studio, private dining facility, outside roof deck, and offices" (the "Studio" or "Premises"), paying a yearly rent of over $1.5 million. See Aff. of Federico Pignatelli at ¶¶ 3-5. Plaintiff avers that, as the original tenant and developer of the Premises, it has invested over $20 million therein. Id. at ¶¶ 4, 5. Under another sublease, plaintiff also occupies "premises for offices known as Suite 203 at Pier 62 at Chelsea Piers" ("Suite 203"). Id. at ¶ 5.

The "Use" clause of the Sublease provides that the "private dining facility" at the Premises "shall not exceed 3,000 square feet and shall be provided for the photography studios' clients, patrons and employees[.]" Sublease at Paragraph 7(A). The Use clause further provides that:

> [I]n no event shall such permitted uses be deemed to permit dance-type party events, events at which alcoholic beverages are sold or to which guests are permitted to bring such beverages or events providing entertainment and food or beverages for which

> admission is by payment at the door or for which tickets are sold or offered to members of the general public.

Id. Defendant contends that plaintiff has "flagrantly violated the Sublease by operating a 10,000 square-foot restaurant and lounge on the premises that is open to the general public." See Aff. of R. Scott Greathead at ¶ 7, Ex. G.

However, plaintiff contends that its use of the Premises is proper pursuant to a subsequent agreement between the parties. A letter agreement, dated November 19, 1996 (the "November 1996 Agreement"), allows plaintiff to:

> permit "non-fashion" corporate and special events on the premises, which use falls outside of the use provisions of the sublease. In consideration for the above, [plaintiff] agree[s] to pay Chelsea Piers 7.5% of the gross revenue generated to [plaintiff] by such events[.]

Aff. of Morrell I. Berkowitz at Ex. C., ¶ 2 "Re: Special Events." Defendant's Notice to Cure purports to revoke portions of the November 1996 Agreement including, inter alia, the "conditional agreement relating to [special] events" due to plaintiff's failure to accurately report said special events and revenues generated therefrom. See Notice to Cure at 4.

Upon receipt of the Notice to Cure, plaintiff brought this action. Plaintiff claims that the Notice to Cure was improperly served upon it. Plaintiff argues that defendant waived its right to claim that plaintiff has defaulted since defendant consented to activities that defendant now cites as breaches. See Berkowitz Aff. Plaintiff contends that a Yellowstone injunction is proper to prevent defendant from "entirely destroy[ing] and/or dismantl[ing] whatever the defendant believes is 'unauthorized', virtually eliminating whatever real and personal property rights Pier 59 has in . . . the subject premises." Berkowitz Aff. at ¶ 3. Plaintiff has stated that it is willing and able to cure any breaches, if the Court so requires. Id. at ¶ 5.

II. **Conclusions of Law**

"The purpose of a Yellowstone injunction is to maintain the status quo so that a commercial tenant may protect its valuable property interest in the lease while challenging the landlord's assessment of its rights." 225 E. 36th St. Garage Corp. v. 221 E. 36th Owners Corp., 211 A.D.2d 420 (1st Dept. 1995) citing Post v. 120 E. End Ave. Corp., 62 N.Y.2d 19 (1984). The remedy was developed as an alternative to the "all or nothing" nature of landlord-tenant disputes. See Post, supra, at 25.

The requirements for granting a Yellowstone injunction are "far less than the normal showing required for preliminary injunctive relief." Post, supra, at 25. However, the moving party must still demonstrate that: (1) it holds a commercial lease; (2) it received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease; (3) it requested injunctive relief prior to the termination of the lease; and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises. Garage, supra. In determining whether the proponent has the ability to cure, the Court is not limited to considering the proponent's financial or other resources, but may also consider whether the proponent has a genuine desire to cure the defect. See id. at 422 (plaintiffs' efforts to cure required desire and ability to cure).

Plaintiff here is entitled to injunctive relief because it has demonstrated: (1) that it holds a commercial sublease; (2) that it received a Notice to Cure from Chelsea Piers; (3) that it requested the instant Yellowstone injunction prior to termination of the Sublease; and (4) that it is willing and able to cure the default. Although defendant argues that it has "served no notice that it intends to terminate the Sublease," this argument is unavailing. Defendant's service upon

plaintiff of the Notice to Cure is sufficient to satisfy the second prong of the requirements for a Yellowstone Injunction. See Lee v. TT & PP Main St. Realty Corp., 286 A.D.2d 665, 666 (2nd Dept. 2001) (Yellowstone injunction properly granted to plaintiff that received "notice to cure" from landlord). Consequently, it is

ORDERED that plaintiff's application for a Yellowstone injunction is granted upon the condition that plaintiff abides by the terms of the Sublease and continues to pay rent under the Sublease and its subsequent amendments; and it is further

ORDERED that plaintiff is directed to post a preliminary injunction bond in an amount to be determined upon the serving and filing of a motion by plaintiff to fix the bond amount within fifteen days of the entry of this decision (CPLR 6312(b)); and it is further

ORDERED that defendant may submit its position on the appropriate amount of a bond by way of a cross-motion and/or opposition to plaintiff's motion to fix such bond amount; and it is further

ORDERED that defendant, its agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendant, are enjoined and restrained, during the pendency of this action, from taking any action to cancel or terminate plaintiff's sublease based on the Notice to Cure, for the premises of the Studio and Suite 203; and it is further

ORDERED that all parties are to appear before the Court for a preliminary conference on December 2, 2004, at 9:30 a.m. at 111 Centre Street, Room 1227, New York, N.Y.

The foregoing constitutes the Decision and Order of the Court.

Dated: November 8, 2004
New York, New York

SHIRLEY WERNER KORNREICH