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

PRESENT: LEHNER
EDWARD H. LEHNER Justice

PART 19

LASZLO N. TAUBER + ASSOC. I, LLC, ET AL.

- v -

ALLIANCE CAPITAL MANAGEMENT L.P.

INDEX NO. 118107/04

MOTION DATE

MOTION SEQ. NO. 2

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 ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

motion is decided in accordance with accompanying memorandum decision

FILED
JUL 05 2005
NEW YORK
COUNTY CLERK'S OFFICE

Dated: JUN 28 2005

J.S.C.

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 19

Application of LASZLO N. TAUBER & ASSOCIATES, I, LLC, 135 WEST 50TH OWNER LLC, 135 WEST 50 LLC and THE DURST ORGANIZATION, INC.,

Petitioners,

For an Order Pursuant to Article 75 of the CPLR Staying Arbitration of a Certain Controversy,

Index No. 118107/04

-against-

ALLIANCE CAPITAL MANAGEMENT L.P.,

Respondent.

EDWARD H. LEHNER:

Before the court is a motion by petitioners seeking reargument of this court's decision dated May 18, 2005 denying their petition to stay arbitration. The only issue raised on this application is whether the failure to send copies of the statement seeking escalation rent to the lawyers to whom notices were required to be sent prevented the running of the 120-day contractual limitation period.

In said decision, the general rules governing lease interpretation, as set forth in Vermont Teddy Bear Co., Inc. v. 538 Madison Realty Company, 1 NY3d 470, were quoted. While that case was not cited by petitioners on the original argument, they now maintain that this court is bound by the First Department decision in that case

(308 AD2d 33), the reversal of which by the Court of Appeals was on other grounds.

In that case the tenant sent a notice to the landlord that it would cancel the subject lease unless the premises, which had been damaged, were restored to usable condition within a year. Although the landlord cited several grounds under which the notice was defective under the lease notice provisions, including that it was not sent to the attorneys to whom notices were required to be mailed, the Appellate Division ruled that the landlord's "failure to object promptly to the form or manner of delivery of plaintiff's notice, and, indeed, its response to the substance of the notice, demonstrated a waiver of the defect" (p. 35)(emphasis supplied).

Although the issue as "to whom" the notice was sent was before the court, it is noted that in referring to the "form or manner" of delivery, that court did not specifically refer to the "to whom" aspect of the defect, and the only case cited, Rower v. West Chamson Corp., 210 AD2d 7, dealt only with the issue as to "how" the notice was mailed (certified in lieu of registered mail). The appealed decision of Justice Cahn also relied on Rower as well as Miller v. MMT Corporation, 182 Misc. 2d 670, which also dealt with service by certified instead of registered mail.

The essential argument by petitioners is that the response of respondent to the escalation notices by requesting an opportunity for an audit of the books constituted

a waiver of the lease requirement that notices be sent to respondent's "general counsel" and its outside counsel. See, Tr. p. 19, where petitioners' counsel is asked whether "getting (the notice) and not doing anything is a waiver," and replies "Yes. And that's what Vermont Teddy Bear says."; Tr. p. 14, where counsel answers similarly.

Aside from the fact that in the Vermont Teddy Bear case the Appellate Division did not specifically discuss the "to whom" aspect of the asserted defect, nor cite a case that dealt with that issue, in that action Justice Cahn, in a prior decision dated April 11, 2000 on a CPLR 3211 motion that was not appealed, stated that the disputed notice in that case "was concededly received by the landlord's principals, including the general counsel, who responded to it without raising the defects now identified" (emphasis supplied).

Thus, although petitioners' counsel states, in a letter to the undersigned dated June 22, 2005, that in the Vermont Teddy Bear case no "attorney employed by the landlord" was served with the notice, as noted above its general counsel did in fact receive the notice. No claim is made here that any attorney employed by respondent received the notice, although petitioners show that the notices with respect to 2002 and 2003 were sent to respondent's lease auditors within 120 days of the receipt thereof. However, no similar claim is made with respect to the notices for the years 2000 and 2001.

Clearly, as held in Rower, receipt without objection of a notice by a means other than that provided in a contract may constitute a waiver as no prejudice could normally be shown by a different form of delivery. Similarly, if a party's attorney does in fact receive a notice, although not sent to him or her in the manner provided for by contract, that also, unless objected to, would normally result in a waiver. However, since in the case at bar there is no showing that either attorney named in the lease nor any other attorney employed by respondent received the notice or even had knowledge of the receipt thereof, the facts herein are distinguishable from those in the Vermont Teddy Bear case.

Waiver is a "voluntary ... relinquishment of a known right" [Jefpaul Garage Corp. v. Presbyterian Hospital, 61 NY2d 442, 446]. Here, where respondent specifically negotiated in a rider to the lease a requirement that notices be sent to designated counsel, the court concludes that there was no waiver of the Article 62 provision as to whom notices are to be sent by the failure of the non-lawyers who may have received the notice (with respect to whom there is no proof that they were aware that no notice was sent to counsel) to promptly protest the lack of notice to the lawyers. Here the escalation clause is complicated, being set forth on over eight legal-size pages of single-spaced type, and it is thus understandable why a client would want to require that notices that relate thereto be sent to counsel.

In conclusion, since the lease requirement that notices be sent to two specified

attorneys, in addition to merely being sent to the premises as required by Article 28 (which is a portion of the printed standard form of office lease prepared by the Real Estate Board of New York), was not complied with by petitioners, they are not entitled to the benefit of the lease provision limiting the time in which respondent may challenge the escalation charges. Hence, the court grants petitioners' application for reargument, but adheres to its prior determination denying the motion to stay arbitration.

Accordingly, the parties are directed to proceed to arbitration as provided in the lease. This direction, however, is stayed until 5 p.m. on Friday, July 8, 2005.

This decision constitutes the order of the court.

Dated: June 28, 2005

J.S.C.