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

PRESENT: RICHARD B. LOWE III Justice

PART 54

Banc of America Securities LLC

- v -

Solow Building Company II LLC

INDEX NO. 600759/04

MOTION DATE 4/25/05

MOTION SEQ. NO. 003

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

FILED
JUL 29 2005
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 7/19/05

RICHARD B. LOWE III
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: IAS PART 56

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BANC OF AMERICA SECURITIES LLC,

Plaintiff,

Index No. 04/600759

-against-

SOLOW BUILDING COMPANY II, L.L.C.

Defendant.

BANK OF AMERICA CORPORATION,

Additional Defendant on Counterclaims.

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RICHARD B. LOWE, III, J.:

Defendant Solow Building Company II, L.L.C. ("Solow") moves for partial summary judgment dismissing the fourth cause of action of the amended complaint seeking monetary damages for breach of contract.

BACKGROUND

Plaintiff Banc of America Securities LLC ("BAS") currently leases twenty floors of commercial space in the building owned by Solow known as and located at 9 West 57th Street, New York, New York 10019 (the "building" or the "premises"). Both Solow and BAS are successors in interest to the Agreement of Lease dated April 16th, 1996, and have executed several amendments to the agreement between 1997 and 2003 (known collectively as the "lease") substantially increasing the size of BAS's leased space. The lease specifies, *inter alia*, that BAS must receive Solow's prior consent to any alterations made to the lease space by submitting plans and specifications for each proposed alteration to Solow for its review and

approval. Art. 3(A) of Lease, Complaint Ex. A. Solow must then approve or disapprove BAS's plans for alterations within ten business days after its receipt thereof. *Id.* Furthermore, the lease provides that "[u]pon Substantial Completion of any Alterations done by or on account of Tenant, Tenant shall pay to Landlord an amount equal to Landlord's actual out-of-pocket expenses reasonably incurred by Landlord in connection with such Alterations." Art. 3(B) of Lease, Complaint Ex. A.

This cause of action results from a protracted dispute between the parties concerning BAS's alterations to the premises. According to BAS, when Solow leased additional space in the building to BAS, Solow was always aware that BAS needed to make significant alterations in order for the building to adequately accommodate BAS's business. Initially, despite alleged difficulty and disagreement, BAS received Solow's approval for a number of proposed alterations. Beginning sometime in 2001, however, BAS claims that Solow stopped approving BAS's alteration requests and in fact refused to respond to such requests at all. To date, BAS alleges that a total of 14 alteration requests have been ignored.

During this time, Solow began making demands that BAS pay Solow a "review fee" of 3% of the total cost of all alterations made as well as proposed, equaling approximately $6 million, for expenses Solow incurred reviewing and redesigning BAS's alterations. Ex. A-F of Aff. of Daniel F. Schubert. In a November, 2003 letter, Solow stated "[w]e cannot expend any more money reviewing your plans without reimbursement." Ex. E of Aff. of Daniel F. Schubert. In response, BAS asserts that the lease fails to provide any basis for Solow's demand for a 3% review fee, claiming the 3% is an arbitrary sum grossly excessive of the reasonable "out-of-pocket expenses" the lease entitles Solow for reimbursement. Art. 3(B) of Lease, Complaint Ex. A. Moreover, BAS alleges that Solow, in breach of the lease, has essentially attempted to extort

the $6 million from BAS by intentionally refusing to grant its consent to BAS's proposed alterations. BAS's fourth cause of action requests monetary damages resulting from Solow's alleged refusal to review and approve any alteration requests in breach of its obligations under the lease.

In support of Solow's motion for partial summary judgment dismissing the fourth cause of action for monetary damages, Solow asserts that the exculpatory clause in the lease specifically precludes BAS from receiving monetary damages. Article 35(E) of the lease provides:

> Except as hereinafter provided in this paragraph, Tenant hereby waives any claim against Landlord which Tenant may have based upon any assertion that Landlord has unreasonably withheld or unreasonably delayed any consent requested by Tenant, and Tenant agrees that its sole remedy shall be an action or proceeding to enforce any related provision or for specific performance, injunction, or declaratory relief or an arbitration proceeding as and to the extent permitted by [Article 41] hereof. In the event of such determination, the requested consent shall be deemed to have been granted; however, *Landlord shall have no liability to Tenant for its refusal or failure to give such consent.*

Art. 35(E) of Lease, Complaint Ex. A. (emphasis added).

DISCUSSION

"To grant summary judgment it must clearly appear that no material and triable issue of fact is presented. This drastic remedy should not be granted where there is any doubt as to the existence of such issues, or where the issue is 'arguable'." *Sillman v Twentieth Century-Fox Film Corp*, 3 NY2d 395, 404 [1957] (citations omitted). Upon a motion for summary judgment, "the court is not authorized to try the issues but it must determine whether there is an issue to be tried. Issue-finding, rather than issue-determination, is the key to the procedure. If and when the court reaches the conclusion that a genuine and substantial issue of fact is presented, such determination requires the denial of the application for summary judgment." *Esteve v Abad*, 271 AD 725, 727 [1st Dept 1947]. The party seeking summary judgment "must establish its defense

or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law. The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests." *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]. However, "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to establish or refute a basis for granting summary judgment. *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].

Enforceability of the Exculpatory Clause

Solow claims that partial summary judgment dismissing BAS's cause of action for monetary damages is appropriate due to the exculpatory clause in the lease preventing Solow from incurring any liability resulting from its unreasonable refusals to grant its consent to BAS's alteration requests. While contractually negotiated exculpatory clauses are usually enforceable, "an exculpatory agreement, no matter how flat and unqualified its terms, will not exonerate a party from liability under all circumstances." *Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 384 [1983]; *see also Gross v Sweet*, 49 NY2d 102 [1979]. Specifically, "an exculpatory clause is unenforceable when, in contravention of acceptable notions of morality, the misconduct for which it would grant immunity smacks of intentional wrongdoing. This can be explicit, as when it is fraudulent, malicious or prompted by the sinister intention of one acting in bad faith. Or, when, as in gross negligence, it betokens a reckless indifference to the rights of others, it may be implicit." *Id.* This is a narrow exception, and clauses exculpating liability for conduct that is unreasonable, but not malicious or in bad faith, are valid and enforceable. *Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297, 312-13 [1986]. However, in limited circumstances an exculpatory clause, such as a "no-damage-for-delay" clause in a construction

contract, may be avoided when the delay is so great or unreasonable that it connotes an abandonment of the entire contract. *Id.* In terms of a "no-damage-for-delay" clause, the court in *Corinno Civetta* held that "[b]ecause the exculpatory clause is specifically designed to protect the contractee from claims for delay damages resulting from its failure of performance in ordinary, garden variety ways, delay damages may be recovered in a breach of contract action only for the breach of a fundamental, affirmative obligation the agreement expressly imposes on the contractee." *Id.* It is crucial to remember, however, that exculpatory clauses negotiated at arms length between sophisticated parties are ordinarily enforceable. The party seeking to avoid an exculpatory clause has the difficult burden of establishing conduct that "smacks of wrongdoing", is grossly negligent, or eviscerates the contract. *Kalisch-Jarcho,* 58 NY2d at 384.

Citing the aforementioned exceptions to the enforceability of exculpatory clauses, BAS claims that Solow's conduct renders the no damages clause in the lease inapplicable. Accordingly, BAS alleges that Solow's refusal to approve or even respond to any of BAS's alteration requests, beginning sometime in 2001, was intentionally malicious and in bad faith, or in the alternative, was grossly negligent evincing a reckless indifference to BAS's rights under the lease agreement. BAS also contends that Solow's repeated refusals were so unreasonable that they constitute an abandonment of the agreement. Furthermore, BAS alleges that Solow's failure to respond within ten business days of receiving BAS's alteration requests amounts to a breach of a fundamental obligation of the lease.

In order to grant Solow partial summary judgment dismissing BAS's claim for montetary damages, the court must be able to determine as a matter of law that the exculpatory clause in the lease insulates Solow from liability. This determination hinges on whether BAS has established sufficient evidence raising triable issues of fact as to whether Solow's refusal to grant consent to

BAS's alteration requests constitutes malicious conduct in bad faith, an abandonment of the lease, or a breach of a fundamental obligation under the lease.

In conjunction with mere allegations contained in affidavits, BAS has submitted documentary evidence that Solow has demanded a 3% "review fee" and refused to review any further alteration requests until receiving such payments. Solow argues that the review fee is a separate dispute, and because BAS has not provided any additional evidence that Solow acted maliciously or in bad faith, Solow is entitled to partial summary judgment. It is important to consider, however, that BAS's allegations arise in the context of a contentious and protracted dispute that upon further disclosure of the facts could reasonably evince wrongdoing by either party. In its first cause of action, BAS is seeking declaratory judgment as to whether Solow is entitled to evict BAS for allegedly breaching the lease in connection with construction work performed on previously approved tenant alterations. BAS has provided documentary evidence of this dispute through eviction threats and formal notices. *See* Aff. of F. William Miles Ex. A-E. In addition, BAS's first cause of action seeks declaratory judgment as to whether Solow is entitled to the review fee that it demands, but that issue is not included in Solow's motion for partial summary judgment and is therefore not under the court's review. Yet, the determination of whether the review fee is justified could be dispositive of whether Solow actually withheld its consent to BAS's alteration requests in order to extort undue payments. Significantly, no provision in the lease specifically entitles Solow to a "3% review fee". Furthermore, Solow has not produced any evidence illustrating that the $6 million demanded is an accurate calculation of Solow's "out-of-pocket expenses reasonably incurred" in connection with BAS's alterations. Art. 3(B) of Lease, Complaint Ex. A. If Solow cannot prove that the review fee is justified, the trier of fact could reasonably conclude that Solow's actions *were* extortionary. Accordingly,

until a determination on this issue is made, partial summary judgment is inappropriate.

Moreover, BAS has not yet had an opportunity to conduct the vast part of discovery. While requests for continued or additional discovery made with the mere hope or speculation that pertinent facts will be uncovered should be denied (*Mazzaferro v Barterama Corp.*, 218 AD2d 643 [2nd Dept 1995]), "[a] party should be permitted a reasonable opportunity for disclosure prior to the determination of a motion for summary judgment. When it appears that facts supporting the position of the party opposing summary judgment exist but cannot be stated, the court may deny the motion or order a continuance to permit disclosure to be had." *Urcan v Cocarelli*, 234 AD2d 537, 651 [1st Dept 1996]. Here, BAS has not had the opportunity to depose Mr. Solow (the owner) or any other Solow employee. Therefore, this motion for partial summary judgment is premature.

Still, Solow contends that there are no triable issues of fact, claiming that even if it refused to grant its consent to the alteration requests unless BAS paid an unwarranted review fee, these actions do not constitute malicious or bad faith conduct as a matter law. Relying on *Metropolitan Life Insurance Co. v Noble Lowndes International, Inc.*, 192 AD2d 83, 91 [1st Dept 1993]; *affd* 84 NY2d 430 [1994], Solow correctly asserts that a party's deliberate abandonment of a contract in pursuit of its pecuniary interest fails to rise to the level of malicious or bad faith conduct necessary to avoid an otherwise applicable exculpatory clause. However, only after a full trial uncovering all the facts did the Appellate Division in *Metropolitan Life Ins.* conclude that the conduct in question was not intentionally malicious or in bad faith as a matter of law. *Id.* The Appellate Division stated, "[t]his Court is mindful of the earlier ruling [denying] defendant's motion to dismiss all claims for compensatory damages in which the Supreme Court opined that defendant's willfulness *is a question of fact*. This determination does no more than

sustain the legal sufficiency of the pleadings so as to permit the claim to be submitted to a jury." *Id.* at 87 (emphasis added). Courts have repeatedly held that whether a party's conduct was malicious, grossly negligent, or in bad faith is a question for the trier of fact. *See Spearin, Preston & Burrows, Inc v City of New York*, 160 AD2d 163 [1st Dept 1990]; *Castagna & Son, Inc. v The Board of Education of the City of New York*, 173 AD2d 405 [1st Dept 1991]. In this case, BAS has established sufficient evidence to raise triable issues of fact as to whether Solow's actions were intentionally malicious, in bad faith, or in the alternative, were grossly negligent evincing a reckless indifference to BAS's rights under the lease.

At this juncture, this court also cannot rule as a matter of law that Solow's conduct does not amount to an abandonment of the lease, or a breach of a fundamental obligation of the lease. Even though the lease does not impose an express obligation that the landlord grant any tenant alterations, under New York law the covenant of good faith and fair dealing implied in all contracts requires that "where one has an apparently unlimited right under a contract, that right may not be exercised solely for personal gain in such a way as to deprive the other party of the fruits of the contract." *Richbell Information Services, Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 302 [1st Dept 2003]; *Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 (holding that "although the letter agreement did not contain a provision requiring [the landlord] to act reasonably in approving or rejecting proposed relocation sites, [the landlord] had an implied obligation to exercise good faith in reaching its determination."). BAS claims that Solow was always aware of BAS's need to make alterations to the building, and that Solow's continued refusal to approve further alteration requests has frustrated the purpose of the lease by leaving BAS with a building that does not conform to its business needs. These allegations present triable issues of fact as to whether Solow acted in bad faith in depriving BAS of its ability to

enjoy the benefits of the lease.

BAS also believes that Solow's failure to approve or disapprove any alteration requests within ten business days, as required by the lease, constitutes a breach of a fundamental obligation of the lease. In *Corinno Civetta*, the court explained that a breach of a fundamental contractual obligation, such as a contractor's failure to obtain title to a work site, renders a "no-damage-for-delay" clause in a construction contract unenforceable. *Corinno Civetta*, 67 NY2d at 313. However, in light of the other outstanding issues of triable fact precluding partial summary judgment, this court need not determine at this time whether the provision in the lease requiring the landlord to approve or disapprove tenant alteration requests within ten business days rises to the level of a fundamental, affirmative obligation of the agreement.

Sufficiency of the Pleadings

In the amended complaint, BAS states its fourth cause of action for monetary damages based on "Solow's breaches and refusals to approve plans and proposals of Tenant Alterations in a *timely and reasonable fashion*." Amended Complaint ¶ 106 (emphasis added). Solow maintains that BAS cannot now in opposition to partial summary judgment allege new theories of malicious, bad faith, or grossly negligent conduct when these words connoting more egregious behavior were not used in the amended complaint. While it is true that a party cannot assert a new theory of liability for the first time in opposition to summary judgment (*see*, *Alvarez v. Lindsay Park Housing Corp.*, 175 AD2d 225 [2nd Dept 1991]), BAS just heightened the severity of its allegations and does not assert a "new theory" of liability. When this exact issue was presented in *Metropolitan Life Ins.*, the Appellate Division stated that a "plaintiff's failure to use the term 'willful' in its complaint 'does not preclude a factual finding that defendant's conduct was willful, which finding would permit an ultimate award of consequential damages'."

Metropolitan Life Ins., 192 AD2d at 86. Accordingly, BAS's failure to use the words "malicious" or "bad faith" does not preclude BAS from making such allegations in opposition to partial summary judgment.

Arbitration

In support of its motion for partial summary judgment, Solow also asserts that BAS is precluded from seeking damages in court due to the arbitration provision in the lease. *See*, Art. 41 of Lease, Complaint Ex. A. At this stage of the proceedings, however, even if BAS *was* initially obligated to submit all claims to arbitration, Solow cannot compel arbitration. It is well settled that "contesting the merits through the judicial process is an affirmative acceptance of the judicial forum and waives any right to a later stay of the action." *De Sapio v Kohlmeyer*, 35 NY2d 402, 405 [1974]. Whereas Solow did not initially object to the judicial forum, and instead conducted discovery and made a motion for partial summary judgment, Solow relinquished its right to now demand the arbitral forum.

CONCLUSION

Accordingly, it is hereby

ORDERDED that Defandant's motion to dismiss the fourth cause of action for monetary damages is denied pursuant CPLR 3212(f).

Date: July 19, 2005.

Enter:

RICHARD B. LOWE III